

**IN THE SEYCHELLES COURT OF APPEAL**

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**Reportable**

[2020] SCCA ...

SCA 28 /2020/

In the matter between

**Vijay Construction (Pty) Ltd**

*(rep. by Bernard Georges appearing together with Ms Nisha Alleear)*

Appellant

and

**Eastern European Engineering Limited**

*(rep. by Alexandra Madeleine)*

Respondent

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**Neutral Citation:** *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*  
(SCA28/2020) [2020] SCCA 2 October 2020

**Before:** Fernando PCA (dissenting), Twomey JA and Dingake JA

**Summary:**

**Heard:** 3 September 2020

**Delivered:** 2 October 2020

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**ORDER**

The appeal is dismissed with costs.

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**JUDGMENT**

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**DINGAKE JA**

[1] This is an appeal from a decision of the Supreme Court delivered on the 30th of June 2020 in terms of which two Orders of the High Court in the United Kingdom, by Justice Cooke dated 18th August 2015 and of Mrs Justice Cockerill dated the 11th October 2018, rendering enforceable in the United Kingdom an arbitral award given against the Appellant in Paris, France, were held to be enforceable in Seychelles.

[2] I will refer to these Orders jointly as UK Orders in the course of this judgment.

- [3] The Appellant being aggrieved by the decision of the Supreme Court has appealed to this Court. The Notice of Appeal raises nine grounds of appeal, but the Appellant subsequently abandoned grounds 4 and 9. On the basis of the remainder of the grounds of appeal the Appellant prays that the appeal be allowed and the judgment of the Trial Court dated the 30th of June 2020 ordering the registration of the Orders earlier referred to, in paragraph one (1) above, be set aside, thereby effectively dismissing the Plaint brought by the Respondent in CS 23/2019, with costs.
- [4] We heard the appeal on the 3rd of September 2020 and reserved judgement to be delivered on the 2nd of October 2020 consistent with Rule 30 (5) of the Court of Appeal Rules that provides, inter alia, that after arguments have been made the Court may reserve judgment until later date.
- [5] Before delving into the merits of the appeal certain preliminary issues have arisen that require this Court to determine, relating to the propriety of a notice dated the 15th of September 2020 issued by the President of the Court of Appeal, (PCA), reconvening the Court, for the purposes of dealing with the questions he had formulated in his capacity as such. In the notice that was issued to the Parties, PCA cited a number of sections in the Rules of the Court of Appeal that entitled him to reconvene the Court in his capacity as the President of the Court of Appeal.
- [6] It bears stating by way of broad context that the questions formulated by the PCA were not raised in the grounds of appeal nor by the Court at the hearing of the appeal at its sitting on the 3rd September 2020 or at any stage.
- [7] Pursuant to the said notice the Court sat on the 18th of September 2020 to consider whether, among other things, the Court was properly reconvened, as the threshold issue before dealing with the questions formulated by the PCA, in the event it was properly convened.
- [8] The notice by the PCA relies on Rules 3(1), 6(2), 11(1) (b) and 18(9) of the Seychelles Court of Appeal Rules.
- [9] Both counsels addressed us on the question whether having regard to the notice the Court was properly reconvened. We are grateful to both counsels for their assistance, the

professionalism and grace with which they made their submissions. Both of them seemed to agree that only the Court can decide to reconvene and not the PCA, although Mr Georges for the Appellant on occasions seemed to faintly suggest that it may be possible for the PCA to reconvene the Court in terms of Rule 6 (2) and or 11 (b) of the Rules

[10] I turn now to deal systematically with the sections invoked by the PCA. The notice says the PCA exercised powers in terms of the Rules mentioned above. However, it is plain beyond doubt that Rules 3 (1) and 18 (9) confer power on the Court as defined and not the PCA. Section 2. (1) of the Seychelles Court of Appeal Rules makes it clear that “Court” means the Seychelles Court of Appeal. It follows therefore that the PCA, in his capacity as such, cannot exercise any power under the above sections to reconvene the Court.

[11] What then of Rule 6 (2) invoked in the notice? Rule 6 (2) merely provides that the PCA shall specify matters to be disposed of at a sitting of the Court. This is an administrative power consistent with the powers conferred on the PCA as the administrative head of the Court. This leaves only rule 11(1) (b) which empowers the Court or PCA to give directions on procedure, practice and disposal of appeal. This cannot be an authority to reconvene the Court unilaterally in his capacity as PCA following the conclusion of an appeal hearing.

[12] Once a panel is constituted no member of the Court has more power than the other in the exercise of judicial functions; and none can exercise any powers conferred on the Court unilaterally in the course of considering an appeal – for to do so would strike at the heart of the very essence of the judiciary, how it is supposed to function and decisional independence of judges. Under the Constitution of Seychelles, it is not permissible for a justice of the appellate Court to have a veto or higher judicial power on any aspect of appeal, argued before it, than others.

[13] The law directs that the justices of appeal sit as a panel of at least three members and take decisions as a Court. The rationale for three-judge panel system is easy to appreciate. The underlying rationale is that cases should be resolved by a collective judicial judgment so that appeals are more than substituting the decision of a single trial judge with that of a single appellate judge. The three- judge panel also avoids a stalemate that would be occasioned by an evenly divided Court.

- [14] In my considered and respectful view, unless otherwise provided by any law, directions are ordinarily, if not exclusively, given upon application for directions by a party and may not be brought up by the President or the Court. This rule does not empower the President to reconvene the Court, unilaterally, after it has sat, heard full arguments from both parties and reserved judgment on the matter.
- [15] In my considered and respectful view, section 4 of the Court of Appeal Rules is unequivocal and admits of no ambiguity. It says that in respect of any appeal, the Court shall consist of those judges, not being less than three, whom the PCA shall select to sit for the purposes of hearing that appeal.
- [16] Section 18 (9) provides that the Court in deciding the appeal shall not be confined to the ground set forth by the appellant.
- [17] The proviso to section 18(9) provides that the Court shall not, if it allows the appeal, rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground. All the above sections place emphasis on the Court and do not make reference to the PCA. These sections cannot be the legitimate basis for the PCA to reconvene the Court unilaterally.
- [18] Speaking for myself I was loathe to agree to the reconvening of the Court to hear additional arguments because in an adversarial system, where parties are represented by lawyers it is better to leave the determination of the issues to the parties themselves save in exceptional circumstance. This approach is one that many courts embrace.
- [19] Courts in other jurisdictions have dealt with similar provisions as section 18 (9) above. In Malawi, the Court in the case of *Kumalakwaanthu t/a Accurate Tiles and Building Centre v Manica Malawi Ltd* (Civil Appeal No. 57 of 2014) (2015) MWSC had to deal among other issues with whether the Court of Appeal could deal with an issue not raised on appeal. The majority found that despite being empowered to deal with the issue under the rules, the correct approach was one of restraint, particularly when the issues are not raised by the parties.

[20] The Court not only stated how undesirable such a position is but went on to state that in that particular case, it was one of the judges who had raised the issue and not any of the parties, thus further justifying restraint. The minority judgment was of the opinion that the Court should have considered the issues not raised. It made a distinction between raising an issue or ground not raised on the one hand and addressing a point of law not raised by the parties on the other. The minority judgment pointed out that there is an obligation on the former for the parties to address the Court and no such obligation on the latter.

[21] Lastly, in the United States, the matter arose in the *United States v Sineneng-Smith* (590 U.S. (2020) where the Respondent was charged for multiple violations of 8 U. S. C Art 1324(a)(1)(A)(iv) and (B)(i) which make it a federal felony to encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law. She was convicted in the District Court and she appealed to the Ninth Circuit. Instead of adjudicating the case presented by the parties, the Court named three amici and invited them to brief and argue issues framed by the panel including on a question that *Sineneng-Smith* never raised: whether the Statute is overbroad under the First Amendment. Relying on the amici's, the Ninth Circuit held that Article 1324(a)(1)(A)(iv) was unconstitutionally overbroad.

[22] The Supreme Court held that such a position was a drastic departure from the principle of 'party presentation' and constituted an abuse of discretion. In the course of its judgment the Court pithily observed:

*"In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in Greenlaw v United States, 554 U.S. 237 (2008), "in both civil and criminal cases...we rely on the parties to frame the issues for the decision and assign to Courts the role of neutral arbiter of matters the parties present... In criminal cases, departures from party presentation principle have usually occurred "to protect a pro se litigant's rights. ... But as a general rule, our system "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing facts and argument entitling them to relief." (page 3-4)*

[23] The Court continued to state that:

*“Courts are essentially passive instruments of government” and ... they “do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, Courts] normally decide only questions presented by the parties.” (page 4)*

- [24] In summation it seems to me that the general trend from the above authorities seem to be that save in exceptional circumstances, a role of a judge is akin to that of an impartial umpire in a game, who is very careful not to be seen to be unduly aiding another side at the expense of the other. It is our solemn duty to keep the ring and not to enter the fight of the parties.
- [25] In my respectful opinion a restrained approach accords with procedural fairness. It works on the assumption that a fair process in which the pleadings drive the issues to be determined is the best way to get to the truth of the controversy between the parties. A Court that interferes with the process by stepping out of the role of an umpire and into the role of an adversarial participant by becoming involved in the framing of the questions to be argued by the parties may risk upsetting the scales of procedural fairness.
- [26] In my considered and respectful view formulating questions to be answered and then proceeding to answer them, even after the court has heard from the parties concerned, after reserving judgment and hearing full arguments, unless absolutely compelling, is better avoided as it risks casting the Court as the judge, jury and the executioner.
- [27] Having regard to all the above I hold that the PCA has no power under the rules to unilaterally reconvene a Court after it has heard full argument from the parties and reserved judgement, but that the Court may do so under exceptional circumstances. It follows therefore that we could not hear the parties on the questions formulated by the President for that reason.
- [28] Subsequent to the sitting of the 18th of September 2020, I received another notice by the President to the parties entitled “Questions to Counsel for the Appellant and Respondent on the basis of clarifications sought by way of notice dated 15 September 2020”. The said notice that seems to have been issued on the 21st of September 2020, asks further questions

in order to clarify the questions contained in the notice of the 15th of September 2020. The notice is about three pages long.

[29] The said notice and questions contained therein, as the notice itself make clear, were not sanctioned by the Court and I have found no legal basis for same.

[30] I turn now to the merits of the appeal.

[31] The relevant background facts to this litigation bears stating briefly. Both parties herein are companies incorporated in Seychelles. It is common cause that in 2011, Eastern European Engineering Ltd (“EEEL”) and Vijay Construction (Proprietary) Ltd (“Vijay”) entered into six contracts to carry out construction work for a hotel called ‘Savoy Resort and Spa’ in Seychelles.

[32] The parties agreed that in the event of any dispute arising under or from the contracts as aforesaid, such dispute or disagreement should be settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”) in Paris, France.

[33] The arbitration determined the dispute largely, but not entirely, in favour of the Respondent.

[34] In a nutshell and on the main the award declared that EEEL had validly terminated the six contracts and ordered Vijay to pay, EEEL, inter alia, the sum of Euros 15,963,858.90, being the arbitral award and legal costs in the amount of Euros 640,811.53.

[35] The Appellant unsuccessfully applied for the award to be set aside by the French Courts, namely Court d’ Appel and the Court de Cassation.

[36] Subsequently, the Respondent successfully initiated proceedings before the Supreme Court of Seychelles to have the arbitral award handed down in Paris, France recognized and enforced in Seychelles.

[37] Aggrieved by the above decision Vijay appealed to the Court of Appeal on a number of grounds, including that the Supreme Court had no power to enforce the award under statute or common law. The Court of Appeal held that the arbitral award was not enforceable in

Seychelles because Seychelles was not a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and did not deal with the merits of the matter.

[38] In the interim the Respondent successfully filed an application before the High Court of England and Wales pursuant to the UK Arbitration Act 1996, seeking leave to enforce the arbitral award and judgement in terms of the award made in Paris. This is the application that birthed the Orders of Justices Cooke and Cockerill referred to earlier.

[39] The Cooke Order granted the Respondent: (a) leave to enforce the arbitration award and such leave to include leave to enforce post-award interest, (b) entered judgement against the Appellant in terms of the award, (c) dismissed the Appellant’s counter claim in the arbitration, (d) awarded costs of the application to the Respondent, and (e) gave the Appellant 14 days after service of the Order to apply to set aside the said Order.

[40] The Appellant subsequently applied under section 103 of the UK Arbitration Act 1996 for the Cooke Order to be set aside before Justice Cockerill, who refused the application, with costs. Justice Cockerill also refused the Appellant’s application to cross examine two persons who had made statements on behalf of the Respondent.

[41] Armed with the two Orders of Justices Cooke and Cockerill the Respondent successfully approached the Supreme Court to have the two Orders declared enforceable in Seychelles and registered in terms of section 3 (1) of the Reciprocal Enforcement of the British Judgements Act(REBJA).

[42] The present appeal is a result of the above decision.

[43] The Appellant has raised nine grounds of appeal. As indicated earlier grounds 4 and 9 were later abandoned, and need not concern us. I will deal with these grounds, in accordance with the chronology followed by the Appellant in its heads of arguments.

[44] The Appellant’s first ground of appeal challenges the judgement of the Trial Court on the basis that the Plaint for registration and recognition of the two UK Orders were brought under the wrong legal provision being section 3 (1) of REBJA. According to the Appellant

the Plaintiff should have been brought under section 9 (1) of the Foreign Judgement Reciprocal Enforcement Act (FJREA), and as a consequence, was bad in law and should have been summarily dismissed by the Trial Court.

[45] The Appellant contends that section 3 (1) referred to above was replaced by the Order of the 12th August 1965 made under section 9 (1) of the Foreign Judgement Reciprocal Enforcement Act, extending the application of that Act to the Commonwealth countries, with the result that section 3 (1) of the Reciprocal Enforcement of the British Judgements Act ceased being operational.

[46] The Appellant has sought to persuade us that the issue of coming to Court on a wrong legal basis is more than just a procedural matter as it is an issue the thread of which runs through the whole concept of rendering a jurisdiction's judgement executory in another.

[47] I have considered this ground. I find it to be without merit. Firstly, this Court ought not to entertain argument on this ground on the basis that it was not raised in the lower Court. The case of *Barclays Bank v Moustache* (1993 -1994) SCAR 134 is the authority for the proposition that an appellate Court, would as a general rule, not allow a party to canvass an issue on appeal that it didn't canvass in the Court below.

[48] As a matter of principle, a party that seeks to argue an issue it did not canvass in the lower Court must seek leave of the Court to do so and in order to succeed it must establish exceptional circumstances that include demonstrable prejudice if such leave is refused. This is sufficient to put this issue to rest.

[49] However even if the Appellant was not precluded from canvassing this ground of appeal as indicated above, its argument that the Plaintiff of the Respondent in the lower Court should have been brought under section 9 (1) of the Foreign Judgment Reciprocal Enforcement Act is without merit. We are an apex Court more interested in justice than tackling procedural matters that have not been shown to be prejudicial to the Appellant in anyway.

[50] I am of the considered view that both the Reciprocal British Judgements Act and the Foreign Judgements Act have similar provisions designed to achieve similar results.

[51] It appears clear to me that REBJA was not repealed. Admittedly, the definitions of what amounts to “judgment” differ, slightly, but not in any fundamental manner that advances the case of the Appellant as I shall demonstrate below.

[52] In terms of section 2 of REBJA under which the Respondent prays the Court to register and render executory the UK Orders, “judgment” is defined as follows:

*““The expression "judgment" means any judgment or Order given or made by a Court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place;”*

[53] The definition refers to money judgment. The Appellant argues that both Orders are not money judgments as they are Orders made on the basis of the award and it is the award, which made sums payable, not the Orders. It is further argued that the intention of the definition is that the judgment must be one where at the end of the proceedings a sum of money is made payable and not simply granting leave to enforce an award made elsewhere.

[54] In the case of *Dhanjee v Dhanjee* (CS 65/2000) [2000] SCSC 9 (03 July 2000) and in the matter of *BMIC Limited* (XP 97/2014) [2014] SCSC 302 (06 August 2014), the Court extended the definition of judgment provided in the REBJA to include non-monetary judgments. The Court looked at the definition provided by section 2 of the Foreign Judgments (Reciprocal Enforcement) Act, 1961 (the “FJREA”) which provides that:

*"judgment" means a judgment or Order given or made by a Court in any civil proceedings, or a judgment or Order given or made by a Court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party;”* (emphasis added)

[55] In my considered view it is plain from the above that judgment need not necessarily be for a sum of money, it can be judgment made in civil proceeding or judgment for payment. Potentially, both acts can cover the definition of the judgment in relation to UK Orders as the REBJA specifically applies to the United Kingdom and the FJREA applies to

Commonwealth, of which UK is Member State. It seems to me that although, in both cases the Petitioner and Applicant did not rely on the REBJA as in this case, the comparison is quite instructive and useful.

[56] In the case of *Dhanjee* (supra), the application was to render a foreign judgment in relation to custody delivered by the High Court in the United Kingdom executory in Seychelles. The Court rendered sound analysis of why section 227 of the Seychelles Code of Civil Procedure extends jurisdiction to foreign custody judgments and further reviewed whether definition of judgment provided in the REBJA limits the operation of section 227 to the British judgments. In the above case the Court stated:

*“The next determination is whether the Reciprocal Enforcement of British Judgments Act (Cap 199) by virtue of its definition of judgment in the Act as “any judgment or Order given or made by a Court in any civil proceedings whereby any sum of money is made payable...” limits the operation of section 227 as far as U.K. judgments are concerned. The Reciprocal Enforcement of British Judgments Act 1922 (Cap 199) has to be read with section 9(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1961 (Cap 85) Under section 4(1) of the latter Act a foreign judgment may be registered and, if not set aside under section 7, shall for the purposes of execution be of the same force and effect as a local judgment of the registering Court. Under section 4(1) the President may by Order direct that part I of the Act extend to a foreign country.*

*Under Statutory Instrument 56 of 1985 an Order was made for part I of the Foreign Judgments (Reciprocal Enforcement) Act to apply to “the Commonwealth and to judgments obtained in the Commonwealth...”. Section 9(2) of the Foreign Judgments (Reciprocal Enforcement) Act enacts that where an Order is made extending part I to any part of the Commonwealth to which the Reciprocal Enforcement of British Judgments Act applies, the Reciprocal Enforcement of British Judgments Act shall cease to have effect in relation to that part of the Commonwealth. Accordingly, the definition of “judgment” under the Reciprocal Enforcement of British Judgments Act is replaced by the definition of “judgment” under the Foreign Judgments (Reciprocal Enforcement) Act which includes “as a judgment or Order given or made by a Court in any civil proceedings...” This definition does not restrict the application of exequatur in respect of the United Kingdom Judgments.” (emphasis added)*

*“In the matter of BMIC (supra) the petition was to register a foreign judgment, obtained from the High Court of England under the FJREA and the Court stated:*

*“First of all, on points of law, I quite agree with Mr. Georges in that the said Foreign Judgment being a British Judgment the registration of which is primarily governed by the Reciprocal Enforcement of British Judgments Act Cap199. Although the petitioner could apply for registration of this Judgment invoking Section 3 (1) of the Reciprocal Enforcement of British Judgments Act, Section 9 of the Foreign Judgments (Reciprocal Enforcement) Act supersedes Section 3(1) of the Reciprocal Enforcement of British Judgments Act since the United Kingdom is also one among the Commonwealth countries, and as such its Judgment may be registered under Section 4(1) read with Section 9 of the Foreign Judgments (Reciprocal Enforcement) Act, which applies to the judgments of all Commonwealth countries.*

*I uphold the interpretation given by Mr. Georges to the relevant provisions of law under both Acts hereinabove mentioned and accordingly, find the instant petitioner is entitled to apply for registration of the said foreign judgment under Section 4 (1) and read with Section 9 of the Foreign Judgment Reciprocal Enforcement Act.”*  
*(emphasis added)*

[57] As is apparent from the comparison above, and the case of *Dhanjee* the main difference between the definitions of “judgment” is that under the REBJA it is “any judgment ... whereby any sum of money is made payable” and seem to be only for money judgments. Whereas, the definition under the FJREA provides that judgment need not necessarily to be for a sum of money it can be judgment made in civil proceedings or judgment for payment.

[58] In my respectful view the argument of the Appellant that the Respondent brought the Plaint under the wrong legal provision does not advance the case of the Appellant in any significant manner in the sense that even if it is accepted that the operative definition of “judgment” is the one under the Foreign Judgments (Reciprocal Enforcement Act), the UK Orders meet that definition too.

[59] The Appellant has argued before the Trial Court and this Court that the UK Orders are not money judgments as they are Orders made on the basis of the award and it is the award, which made sums payable, not the Orders; and the intention of the definition is that the judgment must be one where at the end of the proceedings a sum of money is made payable and not simply granting leave to enforce an award made elsewhere.

[60] In my view the UK Orders are for a definitive sum of money. That is plain ex-facie the Orders of Justice Cooke. The Order of Cooke does not only grant leave to enforce the arbitration award, it also orders Vijay to pay EEEL ascertained sums of money. The Cooke Order also grants post-award interest.

[61] The Trial Judge discusses the monetary issue in full at paragraphs [60-61] of her judgment and states that:

*“[60] . . . The effect of the recognition of the French arbitral award under section 101 of the UK Arbitration Act is to render it enforceable in the same manner as a judgment or Order of the British Court. Clearly therefore, a sum of money, namely the award made by the arbitral tribunal is payable under the UK Orders.*

*[61] An enforcement Order is a necessary step in the process for a judgment creditor to be able to obtain money owed to him or her in terms of a judgment, without which he or she would not be able to obtain payment of the same, the end result of which is that such Orders do make sums of money payable. I note further that the Cooke Order also granted leave to enforce post award interest in the sums stated in that order.”*

[62] I am of the view that the learned Trial Judge cannot be faulted for her remarks above, which were perfectly apposite.

[63] I am also of the considered view that neither REBJA nor FRJEA impose any duty on the Court to evaluate whether judgment is ‘superficial’ or ‘substantive’. The required factors to consider are listed in section 3(2)(a) -(f) of the REBJA and *Privatbanken Aktieselskab v Bantele* (1978) SLR 226.

[64] The Trial Judge having found that all the requisites required as above were met cannot be faulted.

[65] It is a matter of record that before Justice Cockerill the set aside application and application to cross-examine deponents were heard in a three-day hearing at the end of which the application to set aside and to cross examine were refused. In my view, given the above, it cannot be credibly argued that the UK Orders, viewed in totality were generated mechanically in the absolute sense.

- [66] The above should put paid to the argument that the UK Orders were not a “judgment”. In any event it appears to me that on a holistic view of the matter the Appellant is asking us, in essence to privilege form over substance. Speaking for myself, I am not persuaded by the argument that suggests that we must rest our decision on procedure or formalism in a matter as important as the present one. To paraphrase Justice Cardozo, that luminary of the US Supreme Court in his seminal treatise on the: “Nature of the Judicial Process”, Yale University Press (1967) we must resist the temptation to be carried away by formalism when it tempts the intellect with the lure of scientific reasoning.
- [67] The second ground of appeal has caused me much anxiety and requires some careful consideration. This ground relates to the question whether it was just and convenient for the Supreme Court to enforce the UK Orders in the face of the decision of this Court in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* (Civil Appeal SCA 15 and 18/2017 SCCA 41 (13 December 2017)), holding that the award was not enforceable in Seychelles because Seychelles was not a party to the 1958 New York Convention.
- [68] In interrogating this question I am fully alive to the fact that the issue before this Court in the above case concerned the enforceability or otherwise of the award and not the enforceability of the foreign judgement as is the case in the present appeal as per the framing of the issues in the Trial Court.
- [69] The difference between an award and a judgement are subtle, yet important. Conceptually and theoretically there is a fundamental difference between an award and a judgment. The former may be rendered by an individual or a private arbitral body, often pursuant to a private arrangement to that effect. A judgment on the other hand is rendered by a Court, which represents the sovereignty of the state. The requirements to be taken into account in assessing enforcement of each are also different.
- [70] The Appellant contends that it was not just or convenient to register the judgment as that would be tantamount to trying to enter through the back door after this Court closed the front door when it held that the award was not enforceable in Seychelles.

[71] It is my considered opinion that this ground is without merit. The Court of Appeal in its 2017 decision was considering an enforcement of an award not a judgment as is sought to be done in the present case. As shown earlier the two concepts are fundamentally different and import different considerations. For instance, a Court seized with an enforcement of an award would be keen to ensure that the award is not tainted with procedural defects, such as non-compliance with the Arbitration Agreement. However, when considering enforcement of a foreign judgment, the Court may have to grapple with issues concerning the extra-territorial application of a foreign judgment and the notion of comity of nations.

[72] The doctrine of comity is the legal principle which demands that a jurisdiction recognize and give effect to judicial decisions rendered in other jurisdictions unless to do so would offend public policy or other prohibited grounds. The doctrine of comity facilitates the achievement of the primary purpose of law – the orderly, consistent, predictable resolution of disputes. Although the doctrine is not a matter of absolute obligation, it does require the Courts, as part of the state, to have regard both to the international duty of the state and to the rights of its own citizens or of other persons/entities who are under the protection of its laws.

[73] Having regard to all the above, it seems plain to me that this Court is seized with a fundamentally different issue to the one that this Court dealt with in 2017. It can therefore not be credibly argued that it would offend public policy, or that it would be unjust or inconvenient for this Court to deal with this present appeal arising out of a totally different cause of action from the one that ended up in this Court in 2017.

[74] During the course of arguments on the “back door” ground we wondered aloud as to whether it could be said that this present appeal is *res judicata*.

[75] In *Gomme v Maurel & Anor* (SCA 06 of 2010) [2012] SCCA 28 (07 December 2012), the Court of Appeal explained that “the rationale behind the rule of *res judicata* principle is founded on a public policy requirement: that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case.” The aim is to ensure that a litigant is not rehashing the same issues in multifarious forms. It is to prevent parties from re-litigating an issue which the Court has already decided and ensure

that a defendant is not ‘oppressed by successive suits when one would do’ (*Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260).

[76] Article 1351 of the Seychelles Civil Code however cautions that the authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the judgment relate to the same subject matter: that it relate to the same class: that it be between the same parties and that it be brought by them or against them in the same capacities.” (italics added). This was simplified by Sir Georges Souyave CJ in *Hoareau v Hemrick* [1973] SLR 272 at 273 where he explained that for res judicata to apply, there are three identities which must be the same in the current case and the case that is argued to have dealt with the matter: identity of subject matter, identity of cause and identity of parties. (See also *Ramesh Pillay v S. Rajasundaram and another* (Civil Suit No. 340 of 2010) [2012] SCSC 36 (24 September 2012).

[77] In the case of *Hercule Barbe v. Ginette Esparon* [2020] SCSC 559, plaintiff and defendant had unresolved claims to a property. They had appeared before the Rent Board for an order of eviction and before the Supreme Court for a writ of habere facias possessionem, both of which were decided for the defendant. Both orders also related to the same property. The Court, relying on *Hoareau v Hemrick* (supra), *Nourrice v Assary* [1991] SLR 80, and *Attorney General v Marzorocchi* SCA 8/1996, LC 312, held that the case before it had the same object and parties as the case that had come before the Rent Board and the Supreme Court. The Court was however able to exercise its jurisdiction on the ground that the cause of action in the previous case before the Supreme Court and the present one was not the same. The plea of res judicata, therefore, failed.

[78] In the case under consideration, it seems to me that the parties and the subject matter are the same. However, that is not enough, as the cause of action must also be the same. The Court of Appeal had dealt with the current parties and subject matter in 2017. The cause of action then related to the enforcement of the Paris Award. The Court decided that the Award was unenforceable in the Seychelles since the country was not a party to the New York Convention. The current case is similar to the first in many respects. However, the cause of action in this instance is not the same as it was in the 2017 suit.

- [79] In this case it is the judgment from the High Court of England and Wales, an executory order, that the plaintiff seeks to enforce. The plaintiff had sought the enforcement of the Paris Award before the UK courts which held that the award was enforceable, and the plaintiffs now seek an enforcement of the UK courts' decision in Seychelles. While the subject matter remains the same, the cause of action is different. The plaintiff now seeks to enforce a foreign enforcement order rather than an arbitral award. This is so even though the parties and subject matter to be affected by either suit are the same.
- [80] In the result it is my considered opinion that the principle of res judicata is not applicable to this case. The parties are the same, the subject matter is the same, but the cause of action is not the same. While the cause of action in the first case was the enforcement of an arbitral award, the cause of action in the current case is the enforcement of a foreign enforcement judgment. An arbitral award is not the same as a foreign judgment, and the Paris Award is not the same as the judgment of the UK High Courts granting the plaintiff a domestic executory order.
- [81] The third ground of appeal faults the Trial Court for finding that the UK Orders were judgments within the meaning of REBJA.
- [82] I have already discussed the definition of "judgment" under REBJA and FJREA and would not revisit same to extent that such definition may apply to this ground.
- [83] The Appellant has argued under this ground that it is important to make a distinction between the superficial definition and substantive definition of the term "judgment". It concedes that looked at superficially the UK Orders satisfied the definition "judgment", but that if one considers that the merits of the matter were not canvassed before the Orders were given, the UK Orders do not satisfy the meaning of "judgment"
- [84] The Appellant contends that the UK Courts adopted a mechanistic approach, and that the Courts acceded to the request to enforce the award simply on the ground that the UK is a party to the New York Convention and the award was made in France, which is also a party.

[85] The Appellant further concedes that in terms of section 101(3) of the UK Arbitration Act of 1996 the UK Orders were judgments, but only in the superficial sense.

[86] It must be borne in mind that the Cooke Order was made pursuant to an application (exparte) made in terms of section 101 of the above Act, and section 101(3) provides that:

*“Where leave is so given, the judgement may be entered in terms of the award.”*

[87] Learned Counsel for the Appellant Mr Georges sought to persuade us that we should not lose sight of the fact that at the end of the day it is the arbitral award that the Respondent seeks to enforce although clothed in the garment of UK Orders.

[88] A cursory survey of the literature and jurisprudence of many countries of both legal systems; common law or civil and or hybrid systems suggests that many courts refrain or are not required to review the merits or findings of arbitral tribunals. (Guide to the Enforcement of Foreign Judgments and Arbitral Awards in Africa: Lex Africa – [www.lexafrica.com](http://www.lexafrica.com))

[89] The position stated above resonates with the remarks of Lord Collins in the case of *Dallah v Pakistan* (2011)1 AC 763 when he stated that:

*“...the trend, both nationally and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law.”*

[90] I therefore hold that the Appellant’s argument that the UK Orders are not “judgments” because the Orders were made through a mechanistic process that did not consider the merits of the case is without merit. It also offends, as learned Counsel for the Respondent, Ms Madeleine, submitted, the very basis of the law of international arbitration, and the international and national regime for recognition and enforcement of international arbitral awards.

[91] As indicated at the beginning of this judgment in terms of the Order of Justice Cooke leave was granted under section 101 (1) of the UK Arbitration Act 1996 for the Respondent to enforce the arbitral award, including the post award interest. Justice Cooke also entered judgment in terms of the said award against the Appellant pursuant to section 101(3) of the UK Arbitration Act. It is plain and requires no interpretation, that having regard to section

101(3) aforesaid, by entering judgment in terms of the award, the said award was converted into a UK judgment.

[92] It follows in my view that the UK Orders qualify as a judgment in terms of section 101(3) of the Arbitration Act and section 2 of REBJA and are capable of both recognition and enforcement in Seychelles in accordance with the applicable law, namely, REBJA and or FJREA.

[93] This ground of appeal is without merit and it is dismissed.

[94] I turn now to ground five of appeal. Under this ground, the Appellant argues that the Court below erred in not being persuaded by the authority of *Rosseel N.V v Oriental Commercial Shipping (UK) LTD and others* 1 WLR 2 November 1990, which is the authority for the proposition that the English Courts are wary of issuing judgements with extra-territorial effect based on the determination of the foreign Court.

[95] The question of the moment under this head is whether the Supreme Court erred in not following the case of *Rosseel*?

[96] The brief facts of the case were that an arbitral award had been obtained in New York against the defendants. Plaintiffs applied to the English courts for leave to enforce the arbitral award in England, and for worldwide and local injunctions restraining the defendants from dealing with their assets. The Court granted injunctive relief in respect of the assets held within the jurisdiction of the English Court, but refused to extend such relief beyond the jurisdiction on the ground that the appropriate Court for such an application would be either in New York or the foreign Court where assets were found.

[97] The plaintiffs appealed against the judge's refusal to grant injunctive relief worldwide, inter alia, on the ground that the judge erred in principle in considering that, merely because the arbitration award was obtained in New York, it was inappropriate for him as an English judge to make the orders sought and that New York was the appropriate forum for any application for such orders. In dismissing the appeal, the Court of Appeal stated:

*“... there is all the difference in the world between proceedings in this country, whether by litigation or by arbitration, to determine rights of parties on the one hand, and proceedings in this country to enforce rights which have been determined by some other court or arbitral tribunal outside the jurisdiction.*

*Where this Court is concerned to determine rights then it will, in an appropriate case, and certainly should, enforce its own judgment by exercising what should be described as a long arm jurisdiction. But, where it is merely being asked under a convention or an Act of Parliament to enforce in support of another jurisdiction, whether in arbitration or litigation, it seems to me that, save in an exceptional case, it should stop short of making orders which extend beyond its own territorial jurisdiction.*

*I say that because, if you take a hypothetical case of rights being determined in state A and assets being found in states B to M, you would find a very large number of subsidiary jurisdictions – in the sense that they were merely being asked to enforce the rights determined by another jurisdiction – making criss-crossing long arm jurisdictional orders with a high degree of probability that there would be confusion and, indeed, resentment by the nations concerned at interference in their jurisdictions.*

*It seems to me that, apart from the very exceptional case, the proper attitude of the English Courts – and, I may add, courts in other jurisdictions, is to confine themselves to their own territorial area, save in cases in which they are the court or tribunal which determines the rights of the parties. So long as they are merely being used as enforcement agencies they should stick to their own....”*

[98] In my considered opinion the instant case is distinguishable, in that in *Rosseel*, the parties sought extra-territorial injunctive orders. In the case under consideration, the Respondent only sought to enforce the orders under the REBJA. The *Rosseel* guideline has been established as good law for the English courts as a basis to refuse to grant worldwide injunctive orders.

[99] Based on the foregoing, the *Rosseel* guideline applies where the English courts are called upon to exercise worldwide jurisdiction. As such, the court did not err in finding that the case did not apply in the current circumstances as the current case is distinguishable from the *Rosseel* case and therefore not applicable.

[100] This ground of appeal has no merit and it is dismissed.

- [101] Grounds 6 and 7 canvass in essence whether the Trial Court was correct to have regard to the New York Convention in the manner it did. I have the greatest sympathy for the arguments of the Appellant with respect to the approach of the Trial Court to the New York Convention, more particularly its applicability and relevance, given that it was ratified after the matter had been argued in the Supreme Court and judgment awaited and also on the aspect of a fair hearing. However, I consider that it is not necessary to decide the grounds bearing on the New York Convention on account of the view I take that the remarks of the learned judge with respect to the New York Convention were obiter.
- [102] I have perused the record and found that the New York Convention although it came for discussion and debate in the Trial Court was not part of the pleaded case of the parties and there was no way it could have been a live issue that determined the matter. It is trite learning that pleadings drive the evidence and ultimately dictate the material issues that fall for determination.
- [103] In my view, reading the judgement as a whole, not just few paragraphs of the judgment that deal with the New York Convention, it seems that the remarks of the learned Trial judge were obiter, and were not the basis of the conclusions she reached. The basis or ratio of the judgement as I understand it is that the UK Orders were capable of enforcement in Seychelles as they satisfied the conditions of section 3 (2)(a) to (f) of REBJA and those stated in the case of *Privatbanken Aktieselskar v Bantele* (1978) SLR 226.
- [104] I turn now to ground eight that has caused me much reflection and anxiety than any other ground; and I confess to being undecided on it for the longest time. Under this ground the Appellant contends that the Court below erred in allowing the recognition and enforcement in Seychelles of the UK Orders, notwithstanding that they may have been “judgments” within the meaning of section 2 of REBJA – executory Orders only and were not able to be further rendered executory in Seychelles.
- [105] As a basic premise of departure in considering this ground I agree with the Appellant that in deciding the applicability of the principle of *exequatur sur exequatur ne vaut* to the present matter, the Court should be guided, where guidance is necessary, by the French

jurisprudence on the matter given the parentage of section 227 of the Civil Code, which is the foundational enforcement article of our law.

- [106] The Appellant has placed reliance on Dicey, Morris and Collins on the Conflict of Laws (15th ed.) and a few cases including the case of *Reading and Bates Construction Co. v Baker Energy Resources Corp* (1998) to persuade us to hold that on account of the exequatur principle the Respondent is ill-suited to pursue this matter before us as an execution order upon another is incompetent.
- [107] The thrust of the Appellant's argument both in the Court below and this Court seems to be that the UK Orders being procedural enforcement Orders and having been granted without canvassing the merits of the claim are in the nature of exequatur Orders on the arbitral award and that accordingly on the basis of the maxim *exequatur sur exequatur ne vaut*, it would be impermissible to have an executory decision of another executory decision.
- [108] It seems to me on the basis of the preponderance of the authorities that I have read that a number of civil law countries adopt the non-merger theory that provides that a foreign judgment on an arbitral award does not merge with the arbitral award. (Albert Jan Van De Berg, "The New York Convention of 1958 towards a Uniform Judicial Interpretation (1981) p346)). In effect, the foreign judgment on the arbitral award is an enforcement order that should only have territorial effect in the issuing jurisdiction. Thus, the arbitral award is left intact for enforcement in a different jurisdiction.
- [109] In the case of *Comptoir Agricole du Pays Bas Normand v. Societe Neerlandaise Central Bureau*, (Judgment of the 22 October 1959, Cour d'Appel, Caen, Fr., 1961 JD Int.142) the Court of Appeal of Caen ruled that an award made in the Netherlands must be presented for enforcement anew before a French Trial Court, notwithstanding the fact that an execution order had previously been issued in the Netherlands. The French Court determined that the award had acquired executory force in the Netherlands, but that the execution order did not change its nature as an award. Therefore, the Court concluded that the award could not amount to a judgment for which enforcement could be provided.

- [110] In *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, (France/ 29 June 2007) the Cour de Cassation was faced with enforcement of an award that had initially been set aside in Britain. The Court noted that an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. The court confirmed France's position that only the arbitral award that may be relied upon in recognition and enforcement proceedings in France, not a foreign enforcement judgment or order on the same.
- [111] In Germany it has been held that 'a foreign enforcement judgment [. . .], like any enforcement judgment, merely aims at having a territorially limited effect, i.e. for the territory of the state in which it is rendered' and adding that therefore it is 'as per its subject matter incapable of being enforced elsewhere.') (2 July 2009, BGH, (2009) *Schieds VZ* 285, 287)
- [112] This position has also been taken in a judgment of 13 July 2005, *OLG Frankfurt am Main*, [2006] NJOZ 4360 (Frankfurt am Main Court of Appeal) where it was held that a Romanian judgment refusing to enforce an arbitral award was incapable of being recognized in Germany since it only determined that the award had effect in that forum, ie in Romania.
- [113] In my considered opinion, the legislative framework in Seychelles through REBJA and FJREA appears to have tilted the Seychelles position towards the common law position and away from the civil law position discussed above.
- [114] Other common law countries like the UK adopt the merger/parallel theory. The merger theory provides that when a judgment is given enforcing the arbitral award, the arbitral award is merged into the judgment and ceases to exist as an arbitral award but now operates as a foreign judgment. In my mind this is what the relevant provisions of REBJA and FJREA seem to have achieved.
- [115] The learned authors, Liberman and Scherer note in this regard that:

*“The parallel doctrine allows the award creditor, having obtained a foreign confirmation judgment, to seek recognition and enforcement of that judgment, in lieu and in place of the award. In other words, the enforcing court grants effect to the foreign confirmation judgment, applying the forum’s foreign judgment principles.” (Linda Silberman and Maxi Scherer, “Forum Shopping and Post – Award Judgments” (2014) 2 PKU Transnational Law Review 115 -156)*

[116] The learned authors note that this approach is prevalent in the U.S as supported by case law and The U.S. Restatement on International Commercial Arbitration, which states:

*“[o]nce an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both” (Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration: 4-3(d) (Tentative Draft No. 2, 2012).*

[117] The above exposition represents the position of other common law countries like Australia, India and Israel. The Israeli Supreme Court has held, in *Pickholz v. Sohachesky*, (CA 10854/07(17.3.2010), tak-Supreme 2010(1), 9957) that judgments on arbitral awards are entitled to recognition and enforcement.

[118] A quick survey of case law and relevant literature shows that the parallel doctrine often leads to the pitfalls of forum shopping. For example, in *Commission Import Export S. S. v. The Republic of the Congo*, 916 F.Supp.2d 48 (D.D.C. Jan. 8, 2013), the award creditor had obtained a judgment from the English High Court recognizing a foreign award in the U.K. He sought enforcement of this English judgment in the U.S. at a moment in time when an action to enforce the award was already time-barred. The District Court of the District of Columbia dismissed the action, taking issue with the award creditor’s “manoeuvre” trying to profit from the longer limitations period applying to foreign judgment enforcement actions, instead of the shorter limitations period applying to foreign awards.

[119] In my considered view, notwithstanding the trend discussed in some detail in some civil law countries above, the material difference with Seychelles, which difference, must carry the day, and put paid the Appellant’s otherwise weighty submissions on the maxim *exequatur sur exequatur ne vaut*, is that a strict reading of the definitions of “judgment” in both REBJA and FJREA compels the conclusion that the UK Orders are “judgment” that

could be registered and enforced in Seychelles as the Trial Court held. I have also read section 3 (1) and (2) of REBJA that sets out the requirements for registration of judgment under the Act (REBJA) with extreme care and I find that the requirements contended for by the Appellant are not prescribed by REBJA or FJREA, and cannot be sustained as that would amount to the Court legislating.

[120] It is our primary duty to give effect to the requirements set out in legislation, unless for some compelling reason we should refrain from doing so. In the premises, I agree with the reasoning of Carolus J that the maxim *exequatur sur exequatur ne vaut* is not applicable for the reasons she gives.

[121] In this case there seem to be no reason in principle and based on any authority given the definition of “judgment” in REBJA why the Appellant should not enjoy the fruits of the UK Orders which have been correctly recognized as judgment and enforceable in Seychelles. The exequatur principle as defined above, in the context of the governing legislation in Seychelles as discussed earlier does not seem to present a bar to the Respondent enjoying the fruits of the UK judgment as recognized in Seychelles.

[122] In this case it is clear to me that the Respondent is not engaged in any forum shopping or in any “manoeuvre” that this Court should frown upon. There is also nothing to suggest that the Respondent is duplicating the proceedings or trying to obtain money from the award and then the judgment. There is also nothing to suggest that the manner in which the Respondent pursued its claim is confusing or likely to cause any credible resentment. The Respondent, not having been able to enforce the award through the direct route of registering the award directly is exercising an alternative route of obtaining judgment confirming the award and registering that judgment.

[123] The academic literature that has been brought to our attention by the Appellant has been helpful in understanding the purpose of the exequatur principle generally and other theories bearing on same but are not directly relevant to the practical problem this Court has to decide having regard to the governing legislation in Seychelles. However, the useful lesson I could extract from the literature cited to us is that the rationale behind the principles seem to be to ensure that parties do not abuse the judicial system.

[124] There is nothing before us to suggest that the Respondent is attempting to abuse or exploit the judicial system, other than simply trying to obtain a remedy granted to it by the award and confirmed by several judgments.

[125] At the risk of repetition, I emphasise that the Cooke Order having been converted into a judgment in terms of the UK Arbitration Act strengthens my conclusion that there is no legally sanctioned bar to register and enforce the UK Orders in Seychelles as held by the Trial Court.

[126] I am fortified in saying the above by the remarks of Potter J in the case of *Far Eastern Shipping Co v AKP SOVCOMFLOT* (1995) 1 Lloyd's Rep 1994, at page 9, on a similar point.

[127] The learned judge expressed himself in the following terms:

*“It seems to me that, having elected to convert an award into an English judgment, the Plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments.... Taken separately or together, there is nothing in the text of either of those sections to suggest that, once judgment has been entered in terms of the award, it shall for the purposes of enforcement be treated in any different manner from other judgment or Order...”*

[128] The upshot of this discourse is that in my considered opinion the Trial Court was correct in holding that the Order of Mr. Justice Cooke dated the 18th of August 2015 be registered in terms of section 3(1) of the Reciprocal Enforcement of British Judgments Act.

[129] In conclusion it remains for me to thank both counsels who argued this matter before us for their very able and professional manner in which they have researched and presented their positions. I am certain I speak for my brother and sister if I say that their painstaking and thorough research made our task much easier, despite the complexity of the matter.

[130] I will therefore issue the following Order:

[131] The Appeal is dismissed with costs.

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Dingake JA

I concur

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Twomey JA

**IN THE SEYCHELLES COURT OF APPEAL**

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**Reportable**  
[2020] SCCA ...  
SCA 28 /2020/

In the matter between

**VIJAY CONSTRUCTION (PTY) LTD**

*(rep. by Bernard Georges appearing together with Ms Nisha Alleear)*

Appellant

and

**EASTERN EUROPEAN ENGINEERING LIMITED**

*(rep. by Alexandra Madeleine)*

Respondent

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**Neutral Citation:** *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*  
(SCA28/2020) [2020] SCCA 2 October 2020

**Before:** Fernando PCA (dissenting), Twomey JA and Dingake JA

**Summary:**

**Heard:** 3 September 2020

**Delivered:** 2 October 2020

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**ORDER**

The appeal is dismissed with costs.

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**JUDGMENT**

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**TWOMEY JA (CONCURRING)**

- [1] I have had the opportunity to read the decision of my brother, Dingkake JA. I concur with his judgment, his reasoning and order.
- [2] I wish however to write a separate concurring opinion for the purposes of engaging in a discussion relating to the invocation, by the President of the Court of Appeal (PCA), of Rule 18(9) of the Court of Appeal Rules (the Rules) read with sections 3(1), 6(2), 11(1) (b).
- [3] For the first time in the Court’s history, the PCA, in his individual capacity and relying on powers conferred on the PCA under the Rules, reconvened the Court and called for submissions, after the Court reserved judgment. Acting *sua sponte*, the PCA raised issues that were not argued in the Supreme Court or the appellant’s grounds of appeal. At the hearing, counsel for both parties were asked whether the Court, or the PCA, had the power to reconvene the Court in exercising its power under Rule 18(9).
- [4] This is therefore the first time that this Court has been called on to consider the interpretation and application of the Court of Appeal Rules in this context. How the Court applies these rules, and exercises the powers conferred thereunder, is a matter of fundamental importance that goes to the heart of access to justice, fairness and the purpose and rationale of the constitutionally created court hierarchy. It also requires this Court to determine the scope of the powers conferred on the President of the Court of Appeal, individual Justices of Appeal and the Court, as defined in the Rules. These are important questions, and clarity and certainty in their application will ensure consistency in the Court’s processes going forward.

- [5] My Learned Brother, Dingake JA, concludes that the general rule, and the practice in the majority of jurisdictions around the world, is that the Court of Appeal is bound by the pleadings before it. Recognising the exception conferred under Rule 18(9) the Court can step outside the bounds of the pleadings, but this must be done infrequently and in “exceptional circumstances”. In doing so the Court must also afford all parties to the proceedings the opportunity to engage with and respond to the issue or ground that the Court seeks to rely on.
- [6] The majority decision then goes on to hold that in determining the existence of exceptional circumstances, an individual Justice of Appeal, regardless of his seniority on the Bench, does not have the power invoke Rule 18(9). The exercise of this discretion must be exercised by the Court as defined in the Rules. The rationale behind this is succinctly explained, and I fully agree with my Brother Justice Dingake’s reasoning that this interpretation ensures that a single Justice of Appeal does not control the decision making of the Bench. The interpretation of the Rules, and the limits to Court and presidential power, adopted by Dingake JA cannot be faulted.
- [7] The Rules referred to therefore make a clear distinction between the ambit of the powers and function of the Court, a single judge and the PCA. While the PCA has significant administrative powers in so far as case management and speedy resolution of appeals is concerned, those powers are however restricted where matters have been heard by a bench, primarily because once seized with a case, the power being exercised is no longer an administrative power, but is an adjudicative power. In this latter instance, the role of the PCA is no longer singular: he now forms part of the Court. And Court is defined very clearly in the Rules and relevant Acts. Rule 18(8) and (9) clearly speak of Court, and not judge or President.
- [8] The fact that the Seychelles Court of Appeal has not been called to adjudicate on the application of Rule 18(9), and the absence of case law on this Rule, is indicative of Seychelles’ adherence to the position described by my learned colleague.

- [9] I believe however that it is also necessary to explain why an appellate court should only step outside of the pleadings in exceptional circumstances, and when doing so should always be guided by considerations and limitations grounded in the Seychelles Constitution. This position, as our jurisprudence demonstrates, is not novel or foreign to Seychelles and finds ample support.
- [10] Following the practice of courts around the world, Seychellois law provides procedures for a litigant to amend and adjust his or her proceedings at different stages. However, amendments and adjustments, are only permissible to a point, and there comes a time in proceedings where no further changes will be permitted. This is not because the courts are pedantic, or not accommodating of unforeseen circumstances, but because it is in the interests of justice to ensure cases proceed in an expedient manner. It also ensures fairness between parties. Once pleadings have been submitted, and oral argument presented, a judge must make a decision based on the law and evidence provided. The full ventilation of the case before the court of first instance must therefore be assumed, and this is why the jurisdiction of appellate courts are limited in law, and under the Constitution. However, even in the Court of Appeal Rules, Rule 18 (8) does provide an opportunity to an appellant to rely on grounds not in their appeal, subject to the permission of the Court.
- [11] The rationale for adhering to the general rule as discussed above has been stated on numerous times in our jurisprudence. In *Lesperance v Larue* (SCA15/2015) for example the Court of Appeal held that:

*“The object and purpose of pleadings is to ensure that the litigants come to trial with all the issues clearly defined and to prevent cases being expanded or grounds being shifted during trial or judgment. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ‘Any Other Business’ in the sense that points other than those specified may be raised without notice.”*  
(emphasis added)

[12] Fernando JA (as he then was), writing for the Court, cited with approval the following:

*In his book “The Present Importance of Pleadings” by Sir Jack Jacob, (1960) Current Legal Problems, 176; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated: “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....” (emphasis added)*

[13] In civil cases, the courts in Seychelles in this regard, continue to apply the principles that a court may not formulate a case for a party after listening to the evidence or grant relief not sought in the pleadings, nor may a judge adjudicate on issues that have not been raised in the pleadings (See *Vel v Knowles* (1998-1999) SCAR 157; *Tex Charlie v Marguerite Francoise* Civil Appeal No. 12 of 1994 (unreported), *Marie-Claire Lesperance v Jeffrey Larue* (Civil Appeal SCA15/2015) [2017] SCCA 46 (07 December 2017).

[14] However, as the guardians of the Constitution and charged with ensuring the interests of justice are ensured at all time, the Courts must, when required, intervene to avoid a miscarriage of justice, and when doing so must have due regard for due process and fair trial rights of all parties. This is the rationale and motivation behind Rule 18 (9).

[15] In the case of *R v Mian* [2014] 2 SCR 689, the Canadian Supreme Court attempted to strike a balance between the competing roles for the appellate court, that of neutral arbiter and of justice-doer. The Court recognised that if the court intervenes, in the very limited cases where it is permitted to do so, it must remain unbiased and refrain from “*descend[ing] from*

*the bench and becom[ing] a spectre at the accused's counsel table, placing himself 'in the impossible position of being both advocate and impartial arbiter'".*

[16] The adherence to this principle, and rationale, as evidenced by international and Seychellois jurisprudence should therefore be the norm. The Court of Appeal regularly overturns judgments, and denies the admission of new grounds, on the basis of the general rule described above. The scrutiny we apply to litigants and lower courts which go beyond the pleadings must therefore be applied with equal measure to the Court of Appeal in its exercise of the discretion when acting under Rule 18 (9).

[17] What then is the threshold for departure from the accepted practice? There is no set test, or criteria. Each case must be assessed on a case by case basis. My Brother Dingkake JA has referred to the presence of "exceptional circumstances". I am loathe, like many courts, to attempt to define a list of scenarios that would be considered exceptional, as I am mindful not to restrain the Court. However, the Court must be guided by what it considers to be in the interests of justice, which in turn should be guided by the Constitution. Other terminology used in Seychelles and elsewhere to justify a departure includes "miscarriage of justice" or where "findings of the trial judge are found to be perverse". If the Court of Appeal, is allowed to intervene in proceedings, without conducting a thorough balancing exercise, the Court of Appeal risks setting a dangerous precedent that could have constitutional implications.

[18] In South Africa, the Constitutional Court, in *Liesching and Others v The State* [2018] ZACC 25, in discussing exceptional circumstances in the context of the Superior Court's Act said the following:

*"[51] What then is the meaning that should be ascribed to the phrase "exceptional circumstances" in section 17(2)(f) of the Superior Courts Act? Construed strictly, I consider the words "rare", "extraordinary", "unique", "novel", "atypical", "unprecedented", and "markedly unusual" to more fittingly exemplify the meaning of the phrase contemplated by section 17(2)(f) of the Superior Courts Act. What we must remain mindful of though, is that what is exceptional must be determined on the merits of each case. It is a factual inquiry.*

*[52] The court must look at substance, not form. It must consider all relevant factors and determine whether “individually or cumulatively” they constitute exceptional circumstances. An “ordinary circumstance that is present to an exceptional degree” may also constitute an exceptional circumstance. So too may the conflation of a number of unusual circumstances.”*

[19] The threshold requires something distinctive or unprecedented. However exceptional circumstances, in and of themselves, should still not be the sole determinant, when departing from the general rule.

[20] Of relevance to the present matter are my findings in *Ernesta & Ors v R* (SCA 27/2018 (appeal from CR 22/2016) [2019] SCCA 39 (17 December 2019)). In this matter I endorsed the arguments, and authorities relied on of the European Commission for Democracy Through Law’s (The Venice Commission) Amicus Curiae Brief which concluded that courts may intervene *suo sponte*, but “*such an intervention must be exercised sparingly and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles.*” (emphasis added)

[21] Therefore, the failure to depart must risk a serious injustice. However, given the fair trial implications, the Court must be mindful how it raises new issues.

[22] In *Opportunity International General Trading v Krishnamart (Pty) Co. Ltd* (SCA 14/2013) [2015] SCCA 50, Domah JA, highlighted the risk of overinvolved judging, and found that:

*The learned Judge simply mistook his role as a judge and assumed the role of counsel. He was under no obligation to watch the interests of the defendant company under the guise of the interest of justice. The company had its own counsel present in court to do so. By taking such a measure, the learned judge left the unmistakable perception in the eyes of a hypothetical observer, all the more so of OIGT, that OIGT was not having a fair hearing before an impartial and independent court for the determination of its civil rights as guaranteed by Article 19(7) of the Constitution.*” (emphasis added)

[23] The Court of Appeal, must therefore consider the constitutional ramifications when exercising its powers, even when it provides litigants with the opportunity to address the Court on new grounds.

- [24] If the Court of Appeal considers questions of law or fact for the first time, it effectively sits as a Court of first instance, but its findings are not appealable. This risks offending the Court structure and jurisdiction established by the Constitution. If the Court of Appeal lays a foundation for this practice and makes final decisions on matters not capable of appeal, this has serious fair trial and due process concerns and renders the right to appeal nugatory.
- [25] The case before us has been the subject of extensive and lengthy litigation before the Courts. The parties are represented by experienced lawyers, and at no point did Counsel request the Court to consider other grounds in the Supreme Court, or before the Court of Appeal.
- [26] Given the constitutional concerns raised, the decision to depart must be a decision of the Court as defined, namely three or more judges. This will inevitably lead to disagreement between judges sitting on an appeal, but that is the nature of adjudication; it is why not all decisions are unanimous and it is why judges on a panel are entitled to write a dissent.

Signed, dated and delivered at Ile du Port on 2 October 2020

Twomey JA

## **IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: A. Fernando (President) , M. Twomey (J.A), O. Dingake (J.A)]**

**Civil Appeal SCA 28/2020**

**(Appeal from Supreme Court Decision CS 23/2019)**

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Vijay Construction (Pty) Ltd

Appellant

Versus

Eastern European Engineering Limited

Respondent

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Heard: 03 and 18 September 2020

Counsel: Mr. B. Georges for the Appellant, appearing with Ms. Nisha Alleear

Ms. A. Madeleine for the Respondent

Delivered: 02 October 2020

## JUDGMENT

### A. Fernando (President)

#### The manner the appeal proceeded

1. The manner this appeal proceeded is something to be commented about. I sincerely hope that this will be the first and the last time that what happened in this case on 18 September 2020, happens. The appeal was argued on the 3rd of September 2020 and fixed for judgment on the 2nd of October. This was a case that was taken up for hearing outside the session and soon after the August session because of the necessity to have an early conclusion of this appeal due to its urgency at the instance of both parties. After the hearing and while in the process of deciding the appeal, I, as the President of the Court of Appeal realized that there were some fundamental issues that have been overlooked by Counsel for both parties at the trial and appeal stages and by the Trial Court. They were also overlooked by this Court when the case came to be argued on 03 September 2020. I was firmly of the view that I will not be able to come to a decision in this case unless I have submissions of Counsel on the said matters. I tried to obtain the consensus of the other two Justices on 14 September 2020, to reconvene the Court to seek clarifications on the matters that I was concerned of, placing reliance on rule 18(9) of the Seychelles Court of Appeal Rules 2005 which states that “*the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.*” Since we were still at the stage of ‘deciding the appeal’ and there was nothing in the Rules of the Seychelles Court of Appeal that prevents this Court to reconvene the Court and call back the counsel appearing for the parties to seek clarification on matters that concerns the Court and as the justice of the case requires; I was of the view that my colleagues would agree to my request. Rule 18(9) does not in any way

restrict the time before which Counsel can be called for clarifications. It can be done any time before delivery of judgment. For that matter the date set for delivery of judgment may be postponed if there is a need to seek clarifications in the interests of justice. The only limitation in this regard under rule 18(9) is “*the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.*” Rule 18(9) does not speak of a need to have ‘exceptional circumstances’ to exercise the Court’s power under rule 18(9). The only criteria being in the ‘interests of justice’. Since my colleagues were in disagreement to my suggestion to reconvene, I as the President of the Court of Appeal invoking the powers given to me by rules 3(1), 6(2), 11(1)(b) of the Seychelles Court of Appeal Rules decided to reconvene the Court on 18 September 2020 by way of a Notice dated 15 September 2020.

2. Notice dated 15 September 2020 seeking clarifications that was sent out to Counsel for both parties is set out below:

“15 September 2020

**As President of the Court of Appeal**, I have decided under the powers given to me by **rules 3(1), 6(2), 11(1)(b) and 18(9) of the Seychelles Court of Appeal Rules** to have the case of Vijay Construction (Pty) Ltd vs Civil Appeal SCA 28 of 2020, which was argued on the 3<sup>rd</sup> September 2020 and now fixed for judgment on 2<sup>nd</sup> October 2020, mentioned on Friday the 18<sup>th</sup> of September 2020 at 10 am, to have the following matters clarified in the interests of justice:

1. Whether leave to have the judgments of Justice Cooke and Justice Cockerill registered in the Supreme Court had been granted by the Supreme Court before the filing of the Plaint on 31 January 2019, in accordance with the Practice and Procedure Rules made under section 3(4) of the Reciprocal Enforcement of British Judgments Act? If it had not been obtained what consequences flow from it?
2. Whether the Judgment Creditor had applied to the Supreme Court to have the judgments of Justice Cooke and Justice Cockerill registered within the time specified in section 3(1) of the Reciprocal Enforcement of British Judgments Act?
3. Whether duly authenticated or certified copies of the judgments of Justice Cooke and Justice Cockerill have been filed by the Judgment Creditor before the Supreme Court in accordance with the Practice and Procedure Rules made under section 3(4) of the Reciprocal Enforcement of British Judgments Act?
4. What consequences flow if there has been non-compliance with the said provisions?

These matters appear to have been overlooked by Counsel for both parties at the trial and appeal stages and by the Trial Court. They were also overlooked by this Court when the case came to be argued on the 3<sup>rd</sup> September 2020 due to the urgent nature of this case. I will not be able to come to a decision unless I have the submissions of Counsel on the above matters. I therefore rely on **rule 18(9) of the Seychelles Court of Appeal Rules** which provides:

*“Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.*

*Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.”*

We are still at the stage of ‘deciding the appeal’ and therefore I have decided to call back the Counsel appearing for the parties to seek clarification on matters that concern the Court and as the justice of the case requires.

One of the Justices of Appeal have expressed the view that I as the President, have no right under the law to call back Counsel for clarifications after the conclusion of the arguments on 03 September 2020. According to the said Justice of Appeal, “the appeal has been heard and there is nothing left to be heard as all the points canvassed have been heard”. The said Justice of Appeal had stated: “I will not sit on a further appeal”. I would therefore wish both Counsel to address me on this issue also.

Sgd.

President

Court of Appeal” (verbatim)

3. Counsel for the Respondent by her e-mail of 15 September 2020 informed this Court that leave had been obtained to have the judgments of Justice Cooke and Justice Cockerill registered in the Supreme Court by the Order of Carolus J dated 25 January 2019 and attached a copy of the said Order.

4. **Rules 3(1), 6(2), and 11(1)(b) of the Seychelles Court of Appeal** referred to in the said Notice is set out below:

*“Rule 3(1) The procedure and practice of the Court shall be as prescribed in these Rules, but the Court may direct a departure from these Rules at any time when this is required in the interest of justice.”*

*Rule 6(2) The sittings of the Court and the matters to be disposed of at such sittings shall be notified in such manner as the President may direct.*

*Rule 11(1)(b) The President or the Court may give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matter as the President or the Court may consider just and expedient.” (emphasis added)*

5. At the hearing on 18 September 2020, the two other Justices of Appeal, having agreed to come on the bench after a meeting in my Chambers on 17 September 2020, refused to associate themselves with the proceedings on the basis that the President of the Court of Appeal had no authority to unilaterally convene the Court without their consensus after the hearing has been concluded on 03 September 2020, to hear submissions on the clarifications I had sought. To them ‘Court’ means all three Justices of Appeal empaneled to hear an appeal and no member of the Court has more power than the others in the exercise of judicial functions. The absurdity of this is revealed if to ask any question during an appeal hearing by one Justice of Appeal the consensus of the others also have to be obtained. It was their position that so far as they are concerned, they were not prepared to consider any fresh issues after the conclusion of hearing on 03 September 2020 as all points canvassed in the appeal have been heard and thus there is nothing left to be heard. They placed reliance on **rule 30(5) of the Seychelles Court of Appeal Rules** which states: *“After all the arguments have been concluded, the Court may give judgment immediately or may reserve judgment until a later date”*. I am at a difficulty to understand how this rule can override rule 18(9) referred to at paragraph 2 above. An appeal meant to be argued by Counsel on both sides turned out to be an unfortunate debate amongst the three Justices. It was most unfortunate that one of the Justices of Appeal went to the extent of questioning the propriety and lawfulness of my decision to convene the Court to seek clarifications. The two Justices of Appeal, firmly stated that the submissions on clarifications would lead to a decision being made against a party and that party would have no recourse to a right of appeal and to them this was not to be in the ‘interests of Justice’. I am yet to come to terms with this argument as this would necessarily mean that the said Justices of Appeal were already confirmed in their minds that a party had to necessarily lose if the submissions on clarification were given. I cannot comprehend how they could have come to this conclusion even without hearing submissions and not knowing what their views and my views would be. Further in doing so the two Justices of Appeal failed to realize that they were in the majority and was able to decide the matter in the way they believe that serves the ‘interests of Justice’ once the clarifications were given. I believe the said Justices of Appeal in making this statement had not taken into consideration the injustice to the other party and embarrassment that could be caused to our entire judicial system. This also shows

that the said Justices of Appeal were willing to tip the scales of Justice in favour of a party, merely because the points had not been raised in the grounds of appeal, nor argued at the hearing and even if the decision of the Trial Court was fundamentally wrong. I am yet of the view that I am entitled to convene the Court any time before judgment if a Justice of Appeal needs a clarification from Counsel in accordance with rules 3(1), 6(2), and 11(1)(b) of the Seychelles Court of Appeal Rules and that certainly is not a judicial decision for which there must be consensus from all three Justices, as stated by one of the Justices of Appeal at the convened hearing. It is against the Judicial Oath We Justices and Judges take and against all norms of collegiality to prevent another Justice or Judge from seeking clarifications he/she needs. If any Justice of Appeal feels that such clarifications are unwarranted all that he/she can do is to come on the bench and disassociate him/her from the Justice of Appeal who needs the clarifications. As stated earlier I sincerely believe that this is the last time that this would happen in this Court during my tenure of office.

6. I am very much conscious of the fact that the non-ultra petita rule enjoins the court to review a case within the limits of the questions of law and fact which have been raised by the parties to a dispute. I am aware of judgments of this Court, mainly in civil cases that have applied this principle and I myself have done so in the case of **Lesperance v Larue (SCA 15/2015)**. **The European Commission for Democracy Through Law (The Venice Commission)** in an Amicus Curiae Brief for Georgia on this issue reported in Strasbourg on 29 June 2015 in its conclusions emphasizing on the need to adhere to the non-ultra petita rule but stated that “*courts may intervene suo sponte, but such an intervention must be exercised sparingly and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles.*” The American Supreme Court has power to intervene for what it termed “*plain error*” if the errors are “*obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings*” (**United States v. Atkinson, 297 U.S. 157, 160 (1936)**). The Supreme Court of Canada recognized in **R v Mian SCC 54, [2014] 2 S.C.R. 689 (following R v Phillips [2003] ABCA 4)** that the court may intervene in cases where (1) the issue is a new issue (2) failing to raise the new issue would risk an injustice; and (3) the procedure followed by the court in raising the issue must be fair. The Court stated: “*...Courts also have the role of ensuring that justice is done. As Lord Denning explained in the context of trial judges in the United Kingdom: “. . . a judge is not a mere umpire to answer the question ‘How’s that?’ His object above all is to find out the truth, and to do justice according to law . . .*” (**Jones v. National Coal Board, [1957] 2 All E.R. 155 (C.A.), at p. 159 (emphasis added)**). This proposition is no less true of appellate judges. Meaningful appellate review assesses the correctness of a lower court decision, both on errors of law and palpable overriding errors of fact (see R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 25 and 28; and Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 1 and 4). I accept the submission of the intervener the Attorney General of Alberta that “for ‘justice in fact to be done,’ judges must sometimes ‘intervene in the adversarial debate’” (I.F., at para. 16, citing Brouillard, at p. 44).” In **Mian** the Court went on to state “*However, attempting to precisely define the situations which “would risk an injustice” would unduly limit the ability of appellate courts to intervene to ensure that justice is in fact done. Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of*

*injustice warrants the court of appeal's intervention.*” The case of *Tex Charlie v Marguerite Francoise Civ Appeal No 12 of 1994* cited by the Respondent’s Counsel in her Response to Further Clarifications sought by the President of the Court of Appeal has no application to this case. This is not a case of formulating a case for any party after listening to the evidence and granting relief not sought by that party. It is not a case about the failure of the Defence in drawing up its pleadings. It is a more fundamental question as to whether the Respondent who had brought the case under REBJA, had complied with section 3 of REBJA and the Practice and Procedure Rules made under section 3(4) of REBJA in filing suit, as it was its obligation to do so and in accordance with the principle that he who asserts must prove. Surely a Court cannot close its eyes to fundamental errors made by the Trial Court in entertaining a suit and granting relief, simply because they have not been pleaded or raised in the grounds of appeal. I am firmly of the view that be it the Trial Court or the Court of Appeal, the first question to be determined by the Trial Court and now by this Court is whether there has been compliance with the REBJA and the Practice and Procedure Rules made thereunder. That is not taking any one party’s side.

7. I must stress that this is a unique case in view of the documentation that has been filed and certainly not the normal rung of civil cases that come up often before our courts. This is a case which is rare, extraordinary, and uncommon to this jurisdiction. This is a case where Orders and a Judgment of courts in the United Kingdom, which we are not familiar with as to the format, are sought to be registered and enforced in the Seychelles under the Reciprocal Enforcement of British Judgments Act (REBJA). According to section 3(1) of REBJA once the Orders are registered shall “*as from the date of registration be of the same force and effect, and proceedings may be taken, as if it had been a judgment originally obtained or entered up on the date of registration in the court.*”. According to the said section of REBJA judgments and orders of UK courts shall be registered in Seychelles “*if in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles*”. Once the judgment or order is registered the successful party can seek to have it enforced. Thus, the fundamental duty of the Supreme Court should have been and this Court on appeal is to consider whether we are satisfied that the documents produced are in fact a judgment or Orders of a UK Court that is sought to be registered in the Seychelles in terms of REBJA and whether the Practice and Procedure Rules made under section 3(4) of REBJA have been complied with. I do not believe that every document that is claimed to be a judgment or order of the UK courts that is not an original or bears no valid certification or authentication on the face of it as required by law that is brought before our courts has to be registered without any form of scrutiny. Our Courts are not there to rubber stamp as authentic any documents claiming to be emanating from a British Court, even though the two parties accept them in the Agreed Facts Statement and without raising any objection to them. That would be an insult to our Judicial system. The duty is always on the Court to ensure compliance. The Supreme Court and this Court have to be extremely careful in dealing with applications for registration of British judgments as we are no more a British colony and it is our bounden duty under the Constitution to safeguard our sovereignty and the territorial integrity of Seychelles in complying with the provisions of REBJA, remembering always that according to **article 1 of the Constitution** that: “*Seychelles is a sovereign democratic Republic*”.

8. Since it was embarrassing to continue with the sitting, I decided in view of the impasse the Court had unfortunately reached, to inform Counsel on both sides that I would then forward the questions and request Counsel to submit to me, their responses within 3 days of the dispatch of the Questions. Counsel for the Appellant and the Respondent agreed to comply with the request of the President of the Court of Appeal and agreed that the responses to the said questions would be submitted within 3 days of the receipt of the questions, for the consideration of the President of the Court of Appeal. I set out below the Questionnaire:
9. “Notice of 21 September 2020 pertaining to the Questions to Counsel for the Appellant and Respondent for their responses:

QUESTIONS TO COUNSEL FOR THE APPELLANT AND RESPONDENT ON THE BASIS OF CLARIFICATIONS SOUGHT BY WAY OF NOTICE DATED 15 SEPTEMBER 2020:

At the sitting of the convened hearing of the Court of Appeal on the afternoon of 18 September 2020, by way of Notice dated 15 September 2020, by the President of the Court of Appeal and at the sole instance of the President of the Court of Appeal; the other two Justices of the panel refused to associate themselves with the proceedings on the basis that the President of the Court of Appeal had no authority to unilaterally convene the Court without their consensus, after the hearing has been concluded on 03 September 2020. It was their position that so far as they are concerned, they were not prepared to consider any fresh issues after the conclusion of hearing on 03 September 2020 as all the points canvassed in the appeal have been heard and thus there is nothing left to be heard.

The President of the Court of Appeal clearly stated that he was unable to come to a determination of the case without seeking clarifications on the issues that he considers relevant and material and which had been forwarded to Counsel representing the Appellant and the Respondent by way of Notice dated 15 September 2020. In view of the stalemate, the President of the Court of Appeal informed Counsel on both sides that he would then forward the questions based on the issues referred to in the Notice dated 15 September, and ask Counsel to submit to the President of the Court of Appeal, their responses within 3 days of the dispatch of the Questions. It was the position of the President of the Court of Appeal, that had these clarifications been sought during the hearing, despite the fact that they related to matters not raised in the grounds of appeal, Counsel could not refuse to answer questions from Court although emanating from a single Judge and despite the other two Justices of Appeal, refusing to associate themselves with the questions pertaining to clarifications on the ground that they were not raised by the Appellant. Counsel for the Appellant and the Respondent agreed to comply with the request of the President of the Court of Appeal. It was agreed by both Counsel that the responses to the said questions would be submitted within 3 days of the receipt of the questions, for the consideration of the President of the Court of Appeal. The President orders the parties to submit the responses before 25 September 2020, so that he could consider them in making a determination in the case and in view of the fact that the judgment in the case is scheduled to be delivered on 02 October 2020. **Please take note that on the failure of any Counsel to submit to any of the**

**questions** it would be taken as they have no submissions to make; and the President will come to a determination of the case on the basis of the proceedings and documents on record in the Supreme Court briefs in relation to the ex-parte application and the trial of the case and the applicable law.

The said questions are being asked after the President of the Court of Appeal has personally perused the Supreme Court records pertaining to the ex-parte application by way of Petition and the suit filed in this case by way of Plaint and the President of the Court of Appeal having obtained photo-copies of the relevant petitions, the affidavits, the Order of 14 August 2015 of the High Court of Justice, QBD, Commercial Court and the Judgment and Order of Mrs. Justice Cockerill of 11 October 2018 from Mrs. V. Vadivelo, Assistant Registrar of the Court of Appeal.

Questions in relation to Clarification 2 sought by way of Notice dated 15/09/ 2020:

1. Was the application to have the Order of 18 August 2015 registered under section 3 of Reciprocal Enforcement of British Judgments Act (hereinafter referred to as, REBJA), made “*within 12 months after the date of the judgment i.e. before 18 August 2016 or such longer period as may be allowed by the Court*”.
2. Did the Ex-Parte Petition filed on 16 November 2018, seek orders according to the prayer under section 4(5) of Foreign Judgments (Reciprocal Enforcement) Act?
3. Did or did not the Amended Petition that was filed on 04 December 2018, convert the 16 November 2018 petition, to one under section 3(1) of REBJA? Is it the prayer seeking relief or the caption that is decisive of the nature of an action? Did or did not the Amended Petition of 04 December 2018, convert the pleadings to one of another character? Did this offend section 146 of the Seychelles Code of Civil Procedure?
4. Could the Supreme Court have allowed the amendment to the Petition?
5. Was the Respondent conscious of the fact that the registration of the Order of 18 August 2015 before the Supreme Court was out of time in view of the averments in paragraph 2 of the Affidavit of Daniel Terrence Burbeary dated 15 November 2018?
6. Can it be said that the Judgment and Order of Justice Cockerill dated 11 October 2018, kept alive the Order of 18 August 2015 from running out its time limit for registration as required by section 3 of REBJA, in view of the orders made therein?

7. Was the affidavit of D. T. Burbeary dated 15 November 2018, attached to the application under REBJA? If not, could the Supreme Court have made use of the Affidavit of D. T. Burbeary dated 15 November 2018 in relation to the application under REBJA?

Assuming it was attached and could be made use of:

- i. Is it sufficient for D. T. Burbeary, to simply aver that “as a matter of English law EEEL was unable to take any steps to enforce the Cooke Order pending the final determination of the Set-Aside Application”?
  - ii. What is the reference to the English law? Where is it to be found? Is it necessary to plead and prove foreign law?
8. If there was a failure to prove foreign law, should not S. 230 of the Seychelles Code of Civil Procedure apply?
  9. If the limitation imposed by S.3 of REBJA had not been complied with, could the Supreme Court have entertained the suit?

Questions in relation to Clarification 3 sought by way of Notice dated 15/09/ 2020:

1. Do the copies of the Order of 18 August 2015, Cockerill Judgment and Order, filed and produced at the trial under rule 3 of the Practice and Procedure Rules bear any certification?
2. Have the requirements in section 3 of REBJA and rules 2 and 3 of the Practice and Procedure Rules been complied with?
3. Is there a requirement to file the original orders and judgment along with the plaint in accordance with rule 3 of the Practice and Procedure Rules?
4. Is there a difference in filing Orders and Judgment at the Leave stage (rule 2 of the Practice and Procedure Rules), which is a threshold stage; and the Trial stage (rule 3 of the Practice and Procedure Rules)? Was the original of the Orders and Judgment produced at the Trial stage? Is there a necessity to prove the Orders and Judgment at the trial according to section 3 of REBJA and rules 2 and 3 of the Practice and Procedure Rules?
5. Does the Order of 18 August 2015 satisfy the requirements of rule 3 of REBJA Rules?
  - i. Was the original order of 18 August 2015 produced?

- ii. Does the Order of 18 August 2015 bear the name of Justice Cooke? What do the initials which is to be found at the end of page 2 of the Order stand for?
  - iii. Is there a verified or certified or otherwise duly authenticated copy of the 18 August 2015 Order from a Competent Authority of UK?
  - iv. Could Ms. Lucie A. Pool, Notary Public of Seychelles, have certified the Order of 18 August 2015?
6. Is the certification by Solicitor Elizabeth Edmonds, of Mrs. Justice Cockerill’s Judgment and Order, in compliance with section 28(2) of the Evidence Act? Is Solicitor E. Edmonds, a Competent Authority designated by UK to issue a certificate in accordance with The Hague Convention on Abolishing the Requirements for Foreign Public documents 1961?

Questions in relation Clarification 1 sought by way Notice dated 15/09/ 2020:

1. If the answers to the above show that there have been deficiencies, was the granting of leave by the Supreme Court under rule 2 of the Practice and Procedure Rules to have the Orders and judgments registered, valid? In the circumstances of this case are the proceedings before the Supreme Court from its inception, namely from the filing of the ex-parte Petition valid? In the event that there are deficiencies can they be overlooked? Are these matters that go to the very root of the regularity of the proceedings and also a matter which questions the jurisdiction of the Court and the sovereignty of Seychelles?

Sgd.  
 President  
 Court of Appeal” (verbatim)

Copies of the Questionnaire were forwarded to the other two Justices on the panel on 22 September 2020 by the Assistant Registrar of the Court of Appeal by e-mail. Both the Appellant’s and Respondent’s Counsel submitted their responses to questions by the President of the Court of Appeal on the 25<sup>th</sup> of September as ordered to the Court. I have been informed that the other two Justices have also been served with the responses. The Respondent’s counsel had however stated that although she was submitting as a friend of the Court, the clarifications sought are “new grounds of appeal, that were never raised, never argued and they were not raised by the Court at the hearing on 03 September 2020”. It is the Respondent’s position “raising new grounds after the close of arguments in this appeal are unfair, unjust and onerous for the Respondent.” I have dealt with this matter at paragraph 6 above. However, I find from the Respondent’s response to the questions; the authenticity and admissibility of the documents that had been filed had been a concern of the Trial Court. In fact, Counsel for the Respondent quotes a question from the Trial Judge at the hearing of the ex-parte petition, namely: “So I take it all the documents which have been filed up to now there are no questions about authenticity or admissibility?” and the Appellant’s Counsel’s response had been: “There are none we agree that the documents are those which

are sought to be registered.” The question and answer shows that both Counsel and the Court took everything for granted without a proper scrutiny of the documents which have been filed, as could be seen from the paragraphs below.

Nature of the Appeal:

10. The Appellant (Defendant, before the Supreme Court) has appealed against the Orders made by the Supreme Court in its judgment dated 30 June 2020, namely “that the Order of Mr. Justice Cooke dated 18 August 2015 and the Order of Mrs. Justice Cockerill dated 11 October 2018, be registered in terms of section 3(1) of the Reciprocal Enforcement of British Judgments Act; that the Appellant pays the Respondent (Plaintiff, before the Supreme Court) a total sum of Euros 16,730,671.43, in terms of the Order of Mr. Justice Cooke dated 18 August 2015 which is the arbitral award in favour of the Respondent against the Appellant; pays the Respondent Respondent’s legal and other costs of arbitration, and Respondent’s costs to the ICC. The Court had also ordered that the costs in relation to the application for leave to enforce the arbitral award and to enter judgment in terms of the award, including the costs of entering judgment, to be summarily assessed if not agreed. It had also ordered as post award interest in respect of damages and breach of confidentiality provisions under contracts 1-6, a total sum of Euros 3,569, 960.14 and accrued interests of Euros 131.61, 2,818.01 and 32.88 in respect of the said contracts. It had also ordered that the Appellant pay the Respondent costs of the Appellant’s application to set aside the Order of Mr. Justice Cooke dated 18 August 2015 and its application to cross-examine witnesses and an interim payment on account of the said costs in the sum of GBP 245,315.90. The Supreme Court had also ordered in accordance with section 3(3) (c) of REBJA that the reasonable costs of and incidental to the registration of the Orders and of the application for registration before the Supreme Court shall be borne by the Appellant”.

18 August 2015 Order:

11. The 18 August 2015 Order stated: “Upon reading the Claimant’s (Respondent herein) application dated 14 August 2015 and the witness statement of Sohail Ali dated 14 August 2015 it is ordered that:
  - (1) Pursuant to section 101(2) of the Arbitration Act 1996, the Claimant do have leave to enforce the arbitration award dated 14 November 2014 made pursuant to an arbitration agreement contained in the contracts of sale” 1 – 6 and such leave to include leave to enforce post-award interest in the amounts of Euros 145,498.25 in respect of damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61, Euros 3,385,261.64 in respect of damages under contract 6 and accruing hereafter at the daily rate of Euros 2,818.01, and Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.
  - (2) “Pursuant to section 101(3) of the Arbitration Act 1996, judgment be entered against the Defendant (Appellant herein) in the terms of the said award, namely” the Defendant shall pay the Claimant a total sum of Euros 16730670.43, inclusive of the Claimant’s legal costs of the arbitration and Claimant’s costs to the ICC.

- (3) “The costs of the application dated 14 August 2015 including the costs of entering judgment, be paid by the Defendant, such costs to be summarily assessed if not agreed.”
- (4) “Within 14 days after service of the order, the Defendant may apply to set aside the order. The award must not be enforced until after the end of that period, or until any application made by the Defendant within that period has been finally disposed of.”

Judgment and Order of Mrs. Justice Cockerill dated 11 October 2018

Mrs. Justice Cockerill had by her Order of 11 October 2018 dismissed the application of the Appellant to set aside the Order of 18 August 2015 by dismissing the grounds raised by the Appellant, namely, that the Tribunal lacked jurisdiction; that the Arbitrator had denied the Appellant an opportunity to present its case, and that the enforcement of the award would be contrary to public policy. She had dismissed the Appellant’s application to cross-examine Mr. Zaslonov and Mr. Andriuskin. Mrs. Justice Cockerill had ordered that the Appellant to pay the Respondent’s costs of the application for setting aside the Order of 18 August 2015, the cross-examination application on the indemnity basis, which is to be assessed if not agreed and to make an interim payment before 25 October 2018 of a sum of GBP 245,315.90 on account of the costs in relation to the application to set aside the Order of 18 August 2015 and the cross-examination application.

12. I set out below the Appellant’s grounds of appeal which I consider as relevant in determining this appeal:
  - (1) “The Learned Trial judge erred [at paragraphs 90 and 154] in finding that a back-door entry to enforce an unenforceable award was just and convenient in a situation where the attempt was a clear flouting of a judgment of the Court of Appeal.
  - (2) The Learned Trial Judge erred in her finding [at paragraphs 55-56] that the Cooke and Cockerill Orders were judgments within the definition of the word in the Recognition and Enforcement of British Judgments Act.
  - (3) The Learned Trial Judge erred, having accepted that the British Orders were in the form of executory orders, in dismissing the submission *exequatur sur exequatur ne vault* or similar arguments regarding double *exequatur*.

By way of relief, the Appellant had sought an order allowing the appeal and reversing the orders made by the Trial Judge effectively dismissing the plaint of the Respondent seeking the enforcement of the Cooke and Cockerill Orders in Seychelles.” (verbatim)

Background to the appeal:

13. (a) The Appellant and the Respondent are companies incorporated in the Seychelles. In 2011, the Respondent hired the Appellant to carry out construction work for a hotel called ‘Savoy Resort and Spa’ (hereinafter referred to as ‘Savoy’) through six contracts.
- (b) It is to be observed that each contract included similar arbitration clauses, which provided that:
- (i) any dispute, disagreement or claim arising under or from the contracts, including disputes on breach, termination and validity of the contracts shall be finally settled by arbitration under the rules of Arbitration of the International Chamber of Commerce (ICC);
  - (ii) the arbitral tribunal would consist of a sole arbitrator; and
  - (iii) the place of arbitration would be in Paris.
- (c) Disputes arose between the parties resulting in the termination by the Respondent of all six contracts and the Respondent filed a Request for Arbitration on 10 September 2012 before the International Chamber of Commerce (‘ICC’) in Paris, France. The sole Arbitrator was Andrew Lotbiniere McDougall, who delivered an award dated 14 November 2014 generally in favour of the Respondent (hereinafter referred to as ‘Award’).
- (d) In summary, the Award declared that the Respondent had validly terminated the Six Contracts and ordered the Appellant to pay the Respondent a total sum of €14,374,431.89 at an interest rate of 8% per annum, for damages, over payments to complete the Savoy, and provision of reinforcement steel, for breaching the confidentiality provisions in respect of Contract 6 and for damages for delays and provision of reinforcement steel in respect of Contracts 1-5 and the Respondent’s costs for the arbitration and costs to the ICC.
- (e) Additionally, the Award ordered the Respondent to pay the Appellant a total sum of €1,155,849.00 at an interest rate of 8% per annum for the value of work performed by the Appellant and the acceleration fee for the timely completion of work under Contract 4 and damages resulting from the Respondent’s occupation of the Appellant’s temporary building.
- (f) Subsequently, the Respondent initiated proceedings in the Supreme Court of the Seychelles in case number CC 33 of 2015 on 09 June 2015 to have the Award recognized and enforced. The Appellant in response challenged the enforcement of the Award on the ground that the Supreme Court had no power to enforce the Award under statute or common law.
- (g) The Supreme Court by its judgment of 18 April 2017 held that the Arbitration Award of 14 November 2014 in favour of the Respondent was enforceable in the Seychelles

under section 4 of the Courts Act and Articles 146 to 150 of the Commercial Code of Seychelles.

- (h) The Appellant appealed against the judgment of the Supreme Court to the Court of Appeal of Seychelles and the Court of Appeal by its judgment of 13 December 2017 allowed the appeal of the Appellant and held that the Arbitration Award of 14 November 2014 was not enforceable in the Seychelles. The Court of Appeal held that “the New York Convention is not applicable to the Seychelles and accordingly Articles 146 to 150 of the Commercial Code have no legal effect.” The Court also held that “the Learned Trial Judge erred in finding that provisions of section 4 of the Courts Act applied in Seychelles to enable the powers, authorities and jurisdiction of the High Court in England to be exercised by the Supreme Court of Seychelles in addition to (but not in the absence of) the jurisdiction of the Supreme Court.”
- (i) The Respondent had also in the meantime had made application on 14 August 2015 to the High Court of Justice, Queens Bench Division, Commercial Court seeking leave to enforce the arbitration award dated 14 November 2014. The High Court by its Order of 18 August 2015 had ordered that the Respondent do have leave to enforce the arbitration award dated 14 November 2014 pursuant to section 101(2) of the Arbitration Act 1996 and that such leave to include leave to enforce post-award interest and had further in terms of the Award entered judgment in a total sum of Euros 16,730,671.43 against the Appellant pursuant to section 101(3) of the Arbitration Act 1996.
- (j) The Appellant had made application under section 103 of the Arbitration Act 1996 to the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (QBD) on 23 October 2015, to set aside the Cooke Order of 18 August 2015. The said application had been stayed since the Appellant had brought proceedings in France and was defending a civil suit in Seychelles to set aside the Award on grounds similar to those raised in in the application of 23 October 2015. The Cour d’ Appel at Paris had dismissed the Appellant’s appeal and the Appellant had not pursued the further appeal to the Court of Cassation and had therefore been terminated. As stated at paragraph 3(h) above the Court of Appeal of Seychelles had allowed the Appellant’s appeal. It was therefore only in October 2018, after a gap of nearly three years, that the Appellant’s application to set aside the Order of 18 August 2015 came to be considered by Mrs. Justice Cockerill. Mrs. Justice Cockerill had by her Order of 11 October 2018 dismissed the application of the Appellant to set aside the Order of 18 August 2015 by dismissing the grounds raised by the Appellant, namely, that the Tribunal lacked jurisdiction; that the Arbitrator had denied the Appellant an opportunity to present its case, and that the enforcement of the award would be contrary to public policy. Mrs. Justice Cockerill had also ordered that the Appellant to pay the Respondent’s costs of the application for setting aside the Order of 18 August 2015 and to make an interim payment before 25 October 2018 of a sum of GBP 245,315.90.

- (k) The Respondent had filed an ex-parte Petition dated 16 November 2018 and thereafter an Amended Petition dated 04 December 2018 seeking leave of the Supreme Court to have the two British Orders and judgment registered and leave had been granted by the Supreme Court by its Order of 25 January 2019. On 31 January 2019 the Respondent had filed Plaintiff before the Supreme Court of Seychelles and had prayed for by way of relief “to register and render executory the Order of Mr. Justice Cooke made on 18 August 2015 and the Order of Mrs. Justice Cockerill made on 11 October 2018 executory in Seychelles under section 3(1) Reciprocal Enforcement of British Judgments Act.”
- (l) The Supreme Court by its judgment of 30 June 2020 had given judgment in favour of the Respondent and granted the relief as prayed for in the Plaintiff as referred to at paragraph 10 above. It is against the said judgment that the Appellant has appealed and now before us.

Basis on which the Plaintiff was filed:

14. “Paragraph 10: The Plaintiff filed an application before the High Court in England and Wales pursuant to section 101 of the (UK) Arbitration Act 1996 for permission to enforce the Award and judgment in the terms of the Award, which was granted by an Order made on 18 August 2015 by Mr. Justice Cooke. The Defendant has failed to comply with the Order of Mr. Justice Cooke.

Paragraph 11: That the Defendant then filed an application pursuant to section 103 of the (UK) Arbitration Act on 23 October 2015 seeking to the Order of Mr. Justice Cooke of 18 August 2015 be set aside, which application was dismissed by an Order of Mrs. Justice Cockerill made on 11 October 2018. The Order of Mrs. Justice Cockerill also ordered the Defendant to pay the Plaintiff’s costs of defending the Defendant’s set-aside application, such costs to be assessed if not agreed, and to make an interim payment on account of those costs of £245,315.90 by 4 pm (London time) on 25 October 2018. That the Defendant has failed to make the interim costs payment (or any part of it) as ordered.

Paragraph 12: That the High Court of England and Wales had jurisdiction to entertain the applications of the Plaintiff and that of the Defendant.

Paragraph 16: That the Order of Mr. Justice Cooke made on 18 August 2015 and the interim costs payment ordered by the Order of Mrs. Justice Cockerill made on 11 October 2018 are capable of being enforced in England and Wales.

Paragraph 17: The Plaintiff is desirous of rendering the Order of Mr. Justice Cooke made on 18 August 2015 and the Order of Mrs. Justice Cockerill made on 11 October 2018 executory in Seychelles.” (emphasis added)

There is no averment in the Plaintiff that the Orders referred to in paragraph 17 of the Plaintiff are 'capable of being enforced' in the Seychelles as they are capable of enforcement in England and Wales. The Plaintiff is only desirous that they be rendered executory in Seychelles.

15. The Law - Reciprocal Enforcement of British Judgments Act (Cap 199) and the Subsidiary Legislation made under section 3(4) of the said Act in relation to Practice and Procedure:

“CHAPTER 199

RECIPROCAL ENFORCEMENT OF BRITISH JUDGMENTS ACT

*Short title*

1. *This Act may be cited as the Reciprocal Enforcement of British Judgments Act.*

*Definitions*

2. *In this Act unless otherwise specified*

*"the court" shall mean the Supreme Court;*

*The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place;*

*the expression "original court" in relation to any judgment means the court by which the judgment was given;*

*the expression "judgment creditor" means the person by whom the judgment was obtained, and includes the successors and assigns of that person;*

*the expression "judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the place where it was given.*

*Registration of judgment obtained in the United Kingdom*

3. (1) *Where a judgment has been obtained in the High Court of England or of Northern Ireland or in the Court of Session in Scotland, the judgment creditor may apply to the court at any time within twelve months after the date of the judgment,*

*or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles, and subject to the provisions of this section, order the judgment to be registered accordingly.*

*2) No judgment shall be ordered to be registered under this section if*

*(a) original court acted without jurisdiction; or*

*(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or*

*(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or*

*(d) the judgment was obtained by fraud; or*

*(e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or*

*(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.*

*Registered judgment to be of same effect as though obtained in Seychelles\**

*(3) Where a judgment is registered under this section*

*(a) the judgment shall, as from the date of registration be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the court;*

*(b) the court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section;*

*(c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment.*

*Rules of court to provide for procedure\**

*(4) The Chief Justice shall have power to make rules of court to provide*

*(a) for service on the judgment debtor of notice of the intention to register a judgment under this section; and*

*(b) for enabling the court on an application by the judgment debtor to set aside the registration of a judgment under this section on such terms as the court thinks fit; and*

*(c) for suspending the execution of a judgment registered under this section until the expiration of the period during which the judgment debtor may apply to have the registration set aside; and*

*(d) for regulating practice and procedure (including scales of fees and evidence) where the Chief Justice shall consider the same as necessary in respect of proceedings under this Act.*

*Plaintiff's costs when recoverable\**

*(5) In any action brought before the court on any judgment which might be ordered to be registered under this section the plaintiff shall not be entitled to recover any costs of the action unless an application to register the judgment under this section has previously been refused, or unless the court otherwise orders.*

*Note: The Act as gazetted contains headings for subsections (3), (4) and (5) of section 3, which have been reproduced here for ease of reference.*

*Certified copy of judgment to be granted*

*4. Where a judgment has been obtained in Seychelles against any person, the court shall, on an application made by the judgment creditor and on proof that the judgment debtor is resident in the United Kingdom, issue to the judgment creditor a certified copy of the judgment.*

*Extension of Act*

*5. (1) Where the President is satisfied that reciprocal provisions have been made by the legislature of any part of Her Majesty's dominions outside the United Kingdom for the enforcement within that part of Her Majesty's dominions of judgments obtained in the Supreme Court, the President may by proclamation declare that this Act shall extend to judgments obtained in a superior court in that part of Her Majesty's dominions in the like manner as it extends to judgments obtained in a superior court in the United Kingdom, and on the issue of any such proclamation this Act shall extend accordingly.*

*(2) For the purposes of this section the expression "part of Her Majesty's dominions outside the United Kingdom" shall be deemed to include any territory which is under Her Majesty's protection or in respect of which a trusteeship agreement on behalf of the United Nations has been accepted by Her Majesty.*

*(3) A proclamation issued under this section may be varied or revoked by a subsequent proclamation."*

## CHAPTER 199

### RECIPROCAL ENFORCEMENT OF BRITISH JUDGMENTS ACT

#### SUBSIDIARY LEGISLATION: SECTION 3(4): PRACTICE AND PROCEDURE RULES

GN 27/1923

#### *Application for registration of judgment*

- 1. Any application under section 3(1) of the Act, for leave to have a judgment obtained in the High Court of England or of Ireland, or in the Court of Sessions in Scotland or in a Superior Court in any part of Her Majesty's Dominions outside the United Kingdom to which the said Act applies, registered in the Supreme Court shall be made ex parte by way of a petition to a Judge in chambers.*

#### *Petition with affidavit*

- 2. The petition shall be supported by an affidavit of the facts exhibiting the judgment or a verified or certified or otherwise duly authenticated copy thereof and stating to the best of the information and belief of the deponent the amount remaining due under the judgment and that the judgment creditor is entitled to enforce the judgment, and that the judgment does not fall within any of the cases in which under section 3(2) of the Act a judgment cannot properly be ordered to be registered. The affidavit must also, so far as the deponent can, give the full name, title, trade or business and usual or last known place of abode or business of the judgment creditor and judgment debtor respectively.*

#### *Judge may authorise plaint*

- 3. On receipt of the petition and affidavit the Registrar of the Supreme Court shall submit the same to a Judge who upon being satisfied that the petition is bona fide shall authorise the filing of a plaint in the Supreme Court in terms of the*

*petition and of the judgment sought to be registered; and the Judge shall order the Registrar to enter the said plaint when filed in the register of civil and commercial suits and to issue a summons to the judgment debtor calling upon him to appear in the Supreme Court at a date and time therein stated to answer to the said plaint. Thereafter the procedure and practice to be followed by the parties shall be such as is provided by the Seychelles Code of Civil Procedure.*

#### *Judge's order*

4. *If after the hearing the court is satisfied that the case comes within one of the cases in which under section 3(2) of the said Act no judgment can be ordered to be registered or that is not just or convenient that the judgment should be enforced in Seychelles or for other sufficient reasons the court shall make an order accordingly in favour of the judgment debtor. Otherwise the court shall make an order in favour of the judgment creditor in terms of the original judgment or subject to such modifications as the court shall consider just and expedient having regard to the facts disclosed from the pleadings and at the hearing of the matter.*

#### *Final order*

5. *The final order of the court shall have the same force and effect as a judgment of the Supreme Court and shall be entered by the Registrar in the register of civil and commercial suits, against the original entry of the plaint.*

#### *Execution*

6. *Execution shall not issue until after the final order of the court in favour of the judgment creditor has been made and registered as provided by rules 4 and 5 above. But provisional seizure and attachment may be issued at any time after the plaint has been entered in accordance with the provisions of sections 280 and 287 of the Seychelles Code of Civil Procedure.*

#### *Application for certified copy of judgment*

7. *Any application under section 4 of the Act for a certified copy of a judgment obtained in the Supreme Court shall be made ex parte to the Registrar of the Supreme Court on an affidavit made by the judgment creditor, or his agent or attorney and showing that the judgment debtor is resident in England or Ireland or Scotland or in some (stating what) part of Her Majesty's Dominions*

to which the Act extends and stating to the best of his information and belief the title, trade, business or occupation of the judgment creditor and judgment debtor respectively, and their respective usual or last known places of abode or residence.

*Form of certified copy*

8. *The certified copy of the judgment shall be an office copy, and shall be sealed with the seal of the Supreme Court and shall be certified by the Registrar as follows-*

*"I certify that the above copy judgment is a true copy of a judgment obtained in the Supreme Court of Seychelles and this copy is issued in accordance with section 4 of the Reciprocal Enforcement of British Judgments Act."*

*Fees*

9. *The fees on any proceedings or matter under the Act and under these rules shall be the same as those payable under the several tariffs of fees of the Supreme Court in force for the time being or by analogy to such tariffs.*

**SECTION 5(1)**

*The provisions of the Act have been extended to the following territories*

<i>Territory</i>	<i>Authority</i>
<i>Tanganyika Territory</i>	<i>Proc. 3 of 1924</i>
<i>Nyasaland Protectorate</i>	<i>Proc. 5 of 1924</i>
<i>British India</i>	<i>Proc. 6 of 1924</i>
<i>Mauritius</i>	<i>Proc. 7 of 1924</i>
<i>Uganda Protectorate</i>	<i>Proc. 8 of 1924</i>
<i>New South Wales</i>	<i>Proc. 6 of 1925</i>
<i>Commonwealth of Australia</i>	<i>Proc. 16 of 1929</i>

16. The REBJA necessarily applies, as its title states for the enforcement of **British judgments**, in the Supreme Court of Seychelles (section 3 of REBJA) and judgments of

the Seychelles Supreme Court in the United Kingdom (section 4 of REBJA). The Act also applies to judgments obtained in a superior court in those territories to which the provisions of the Act have been extended under section 5(1) of the Act. That is where the President is satisfied that reciprocal provisions had been made for the enforcement of judgments obtained in the Supreme Court of Seychelles in the said territories. The basis for enforcement as seen from the provisions of the Act is one of reciprocity. There is no reference to French Judgments or orders or French Arbitral Awards; or Judgments, orders or awards from any other country in the Act. There is nothing in the law to indicate that judgments of the Supreme Court of Seychelles can be enforced in France or any other country or that French judgments or judgments of any other country can be enforced in the Seychelles. REBJA speaks of only two courts, namely the original court that renders the judgment and the court in which the judgment is sought to be registered and enforced, that could be in the UK, Seychelles or Her Majesty's dominions. This becomes clear from the reference to 'original court' in section 3(2)(a)(b) and (c). According to REBJA the expression "original court" in relation to any judgment means the court by which the judgment was given. There is no reference to a second or subsequent court.

17. **Maxi Scherer, in his article on 'Effects of Foreign Judgments Relating to International Arbitral Awards' Journal of International Dispute Settlement, Vol 4, No.3 (2013) pp 287-628 states at p 608** states:

As regards 'judgments upon judgments', it is commonly accepted that it is only the original judgment, and not the ancillary 'judgment upon judgment', that can be recognized or enforced elsewhere under foreign judgment principles. This idea has sometimes been described in civil-law jurisdictions with the French adage '*exequatur sur exequatur ne vaut*'. There is no doubt that the same principle applies in common-law jurisdictions. The learned Trial Judge appears to have been troubled by this when she states at paragraph 95 of the judgment: "This Court agrees that the Cooke and Cockerill Orders were made without hearing the merits of the dispute between the parties. Consequently, the Orders are in the nature of an exequatur and the maxim '*exequatur sur exequatur ne vaut*' appears to present difficulties in registering them internationally." As Lord Collins has noted, '*it is generally understood that a foreign judgment which recognises the judgment of a third country does not become a judgment for the purposes of recognition and enforcement in England*'. Similarly, concerning award judgments, some authorities state that award judgments recognizing or enforcing a foreign award have necessarily or per se only a territorial scope and that they are incapable of producing extra-territorial effects, ie effects outside the country in which they were rendered. According to this view, foreign award judgments 'do not produce international effects because they concern a specific sovereign State on the territory of which they produce effects'.

18. There must be a judgment to be enforced if REBJA is to apply. There is a difference between a 'judgment' or 'award' rendered after a trial or proceedings held between parties to a suit and merely making of an order to 'enforce' an arbitration award. A judgment according to **Black's Law Dictionary** is "*the official and authentic decision of a court of*

*justice upon the respective rights and claims of the parties to an action or suit therein litigated and sub- mitted to its determination.”* It is clear that the 18 August 2015 Order referred to at paragraph 11 above certainly does not meet the said requirement as there is nothing to indicate that it was a determination litigated upon the respective rights and claims of the parties to an action or suit. It only amounted to an enforcement of the arbitration award dated 14 November 2014 in France, pursuant to section 101 of the Arbitration Act 1996 of UK. It is clear from the 18 August 2015 Order that there has been no consideration of the merits of the arbitration proceedings, and it was merely an enforcement order. The High Court had made its Order four days from the date of the application. It is also clear from Justice Cockerill’s Order of 11 October 2018, referred to at paragraph 11 above, that there had been no examination of the merits of the Arbitral Award but only an examination as to the procedural correctness of that award. The English Court had merely enforced the French Arbitration award because England and France are parties to the New York Convention.

19. There should be, for REBJA to apply, a judgment or order given or made by a court in civil proceedings in the High Court of England or of Northern Ireland or in the Court of session in Scotland or an award made in proceedings on an arbitration in England or Northern Ireland or Scotland which is enforceable in the High Court of England or of Northern Ireland or in the Court of session in Scotland. This becomes clear from the wording in the definition of judgment in section 2 of REBJA read with the first line of section 3(1) of REBJA referred to at paragraph 15 above. Section 2 states namely “*...and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.*” The ‘**place**’ in my view necessarily means a place in UK. The first line of section 3 states: “*Where a judgment has been obtained in the High Court of England or of Northern Ireland or in the Court of Session in Scotland...*” It is my view that whether it is a judgment, order or arbitration award that is sought to be enforced under REBJA, it should be one solely given or made in England or Northern Ireland or in Scotland or as stated below in any part of Her Majesty’s dominions outside the United Kingdom. In other words, it should be a UK judgment, UK order or a UK arbitration award; or a judgment, order or an arbitration award in any part of Her Majesty’s dominions outside the United Kingdom, where the President has by proclamation declared that REBJA shall extend; and not of any other country. This becomes clear when you read section 5 of REBJA referred to at paragraph 15 above, which makes provision for the extension of the application of REBJA outside the UK and that too where there is reciprocity. For ease of convenience section 5 (1)(2) is repeated herein:

*“Extension of Act*

5. (1) *Where the President is satisfied that **reciprocal provisions** have been made by the legislature of any part of Her Majesty’s dominions outside the United Kingdom for the enforcement within that part of Her Majesty’s dominions of judgments obtained in the Supreme Court, the President may by proclamation declare that this Act shall extend to judgments obtained in a superior court in that part of Her Majesty’s dominions in the like manner as it extends to **judgments obtained in a***

*superior court in the United Kingdom, and on the issue of any such proclamation this Act shall extend accordingly.*

*(2) For the purposes of this section the expression "part of Her Majesty's dominions outside the United Kingdom" shall be deemed to include any territory which is under Her Majesty's protection or in respect of which a trusteeship agreement on behalf of the United Nations has been accepted by Her Majesty.*

20. This is essentially a question pertaining to the jurisdiction of the court. It is my view that the Supreme Court of Seychelles had no jurisdiction to entertain the Petition or the Plaint since it was not a wholly British judgment that was sought to be enforced under REBJA. The Appellant had not been a party in relation to the proceedings pertaining to the 18 August 2015 Order according to the said Order, nor does the Plaint state that. The fact that the Appellant had sought to set-aside the August 2015 Order which was capable of enforcement in UK cannot be said to be the Appellant's acceptance of the August 2015 Order or Justice Cockerill's Order of 11 October 2018 as being capable of enforcement in the Seychelles. Whether the said Orders are capable of being enforced in the Seychelles can only be determined in accordance with the Seychelles law, namely the provisions of REBJA. Parties to litigation cannot give jurisdiction to a Court which it does not have. The Appellant would have participated in the said proceedings to protect its interests in the UK.
21. Rule 1 of the Practice and Procedure Rules referred to at paragraph 15 above which deals with application for registration of judgments makes this further clear by making reference only to "*a judgment obtained in the High Court of England or of Ireland, or in the Court of Sessions in Scotland or in a Superior Court in any part of Her Majesty's Dominions outside the United Kingdom to which the said Act applies...*" as that could be registered in the Supreme Court of Seychelles. The Act does not speak of enforcement of an award in proceedings on an arbitration in France or any other country that has been garbed in a judgment given by the High Court of England or of Northern Ireland or in the Court of Session in Scotland and sought to be enforced as a British judgment in the Seychelles. If it is to be interpreted otherwise an arbitration award made in any part of the world that could be enforced in the UK, will also be sought to be enforced in Seychelles being garbed with a UK judgment and this would be contrary to REBJA. UK laws for enforcement of foreign judgments and Seychelles REBJA for enforcement of British judgments are different. Laws of the UK in relation to enforcement of foreign judgments cannot and should not have application in the Seychelles as we are a Sovereign State. The REBJA does not provide for this and I do not think that the Legislature ever intended this. This would lead to uncertainty and Legislatures do not legislate in that way. Also, as a matter of sovereignty, it is for the Seychelles Government to determine whether a French arbitration award should be enforced here and not for a British Court to determine the effect it should give to a French judgment or a French Arbitration Award that is sought to be enforced in the Seychelles. If not, it would mean that 'one is not the master in one's own home anymore and rather is 'at the mercy' of another country's determination. It was held by the Supreme Court of Germany in **BGH, [2009] Schields VZ 285** that "*the question whether enforcement in Germany is possible is under principles of public*

*international law, to be decided only by German courts.”* At paragraph 16 of the Plaintiff referred to at paragraph 14 above there is an averment that the orders of 18 August 2015 and 11 October are capable of being enforced in England and Wales but there is no specific averment in the Plaintiff that such orders are capable of being enforced in the Seychelles.

22. As seen from paragraphs 13 (g) and (h) above the Respondent having failed in its attempt to have the ‘Paris Arbitration award’ enforced under section 4 of the Courts Act of Seychelles and Articles 146 to 150 of the Commercial Code of Seychelles in view of the Seychelles Court of Appeal judgment of 13 December 2017 is now seeking to have the same arbitration award clothed under two orders and a judgment from the UK courts to be enforced under REBJA. This in my view leads to a duplication of the causes of action. This parallel entitlement approach which allows the Respondent to seek enforcement of both the Paris Arbitration Award and the British Award Judgments in subsequent actions can be viewed as a judicial harassment of the Appellant. Supported by the large majority of commentators, the **Bundesgerichtshof**, Supreme Court of Germany, in 2009, departing from its previous line of case law that had allowed a parallel entitlement approach, explained that a parallel entitlement approach was not compatible with the legitimate interests of the award debtor, noting that the protection of the debtor commands that he/she is not confronted with more than one enforcement proceeding in one and the same forum. According to **Maxi Scherer, in his article on ‘Effects of Foreign Judgments Relating to International Arbitral Awards’ Journal of International Dispute Settlement, Vol 4, No.3 (2013) pp 287-628 states at p 612** *“There is no reason why the award creditor should be allowed to get two bites at the apple in the same forum.”* This is similar to article **1370 (2) of the Civil Code of Seychelles Act** which states: *“When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue... A plaintiff shall not be allowed to pursue both causes of action consecutively.”*
23. The Appellant in answer to the question 1 relating to clarification 2 referred to at paragraph 9 above submits that ex-parte application was out of time and the Supreme Court should not have granted leave since there was no application for an extension of time by the Respondent. The Respondent disagrees with this view. REBJA sets out a specific time limit for the Judgment Creditor to apply to the Supreme Court of Seychelles to have the judgment registered in the Supreme Court of Seychelles before it can be sought to be enforced, namely ‘12 months after the date of the judgment, or such longer period as may be allowed by the court’. It is only if the Judgment Creditor comes for registration within the said time limit or only if the Court gives an extension of time, that the Supreme Court is vested with the jurisdiction to entertain the application for registration. This provision of REBJA cannot be ignored or overridden by anyone or authority and is a sine qua non before a registration could be ordered by the Supreme Court. Certainly the arbitration award dated 14 November 2014; made enforceable by the Order of 18 August 2015 of the High Court of Justice, Queens Bench Division, Commercial Court; which was sought to be registered in the Supreme Court; along with the Order of Mrs. Justice Cockerill dated 11 October 2018, refusing to set-aside the Order of Justice Cooke; by making an ex-parte Petition on 16 November 2018 and the filing of a Plaintiff on 31 January 2019 by the

Respondent falls completely outside the period specified in section 3(1) of REBJA for registration. The Respondent had not moved the Supreme Court seeking an extension of time. Unfortunately, this matter had been overlooked by the Respondent, the Appellant and the Trial Court itself and cannot be ignored by this Court in view of section 3(2)(f) of REBJA. I am of the view that Mrs. Justice Cockerill's Order of 11 October 2018 could not be said to have kept alive the Order of 18 August 2015 which had for purposes of registration under REBJA run its time. Further Mrs. Justice Cockerill's Orders were that (1) the set aside application of the Appellant is dismissed, (2) that the Appellant's Cross-examination application is dismissed (3) the Appellant shall pay the Respondent's costs of the set aside application and the cross-examination application and that (4) the Appellant shall make an interim payment on account of the costs awarded. It is my view that the refusal to set aside the Order of 18 August 2015 does not automatically equal confirmation of the award dated 14 November 2014. It was incumbent in my view for the Respondent to have moved the Supreme Court of Seychelles for the registration of the Order of 18 August 2015 within the time specified in REBJA, namely on or before 18 August 2016, rather than wait for the outcome of the challenges the Appellant had made to the award in France and in respect of the application of the Respondent for the enforcement of the award in case number CC 33 of 2015 in Seychelles. If application for registration had been made by the Respondent on time, it was then left to the Supreme Court of Seychelles to defer if necessary, the registration of the 18 August 2015 Order, provided it considered it valid, until such time the other challenges to it were over. This is like moving for execution of a judgment pending appeal and the Supreme Court at its discretion granting a Stay of execution of the judgment if necessary, to the party that has appealed the judgment pending appeal. According to **section 3(2)(e) of REBJA** the judgment debtor may "*satisfy the Court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment*" and move for a deferral of registration of a judgment. This makes it clear that it is only the Judgment Debtor who is entitled under the law to move for a deferral of registration of a judgment and not the Judgment Creditor.

24. The Respondent has failed to plead and prove that "As a consequence of Vijay issuing the Set-Aside Application, as a matter of English law EEEL was unable to take any steps to enforce the Cooke Order pending the final determination of the Set-Aside Application" as averred at paragraph 2 of the Affidavit of Daniel Terrence Burbearly dated 15 November 2018. There is no reference to what the English law on the matter is and where it can be found. At **paragraph 18/84 of the Supreme Court Practice 1979** it is stated that: "*Where foreign law is pleaded in support of, or as a defence to, an action, certain particulars should be given. Foreign law must be adequately pleaded...*" It was held by this Court in the case of **La Serenissima V Boldrini [2000-2001] p 225 at p 234-235** that "*The judge should have applied the established principle of the law of Seychelles that foreign law must be pleaded and proved by evidence and that unless there is proof to the contrary, foreign law is presumed to be the same as the law of the country concerned (see **Green v Green (1973) SLR 295 at p 300 and Privatabaken Aktieselshab v Bantlee (1978) SLR 226 at p 239**. The principles which guide courts in this jurisdiction, in this regard, are the same as in England, a clear statement of which is contained in **Halsbury's laws of England (4<sup>th</sup> ed, vol 8 (1) para 1093**, thus – Subject to certain exceptions, foreign law is a question of fact which must be especially pleaded by the party relying upon it, and must*

*be proved to the court. The English court cannot generally take judicial notice of foreign law, and it presumes that this is the same as English law unless the contrary is proved. Thus, the onus of proof of foreign law lies on the party relying on it...The English court will not, in general, make its own researches into foreign law. Foreign law must be proved by properly qualified witnesses.”* In the case of **Intelvision Network Limited v Multichoice Africa Limited Civil Appeal SCA 31/2014** this Court citing **Pillay v Pillay (1973) SLR 307**, **Betisma v Dingjan (No 1) (1974) SLR 292** and **La Serenissima V Boldrini** confirmed that foreign law must be proved. It was stated in **La Serenissima V Boldrini** that in the absence of proof of foreign law the law of Seychelles applies. I agree with the submission of the Appellant on this point, which was in relation to question 5 under clarification 2 where he answers the question as “Yes, indubitably” and goes on to submit “The statement of Mr. Burbeary could only underline that enforcement in the UK was not possible until the set aside application filed by the Appellant was determined. It could not have extended that opinion to Seychelles, since Mr. Burbeary did not purport to be an expert on Seychelles law. As to whether the set aside application in the UK delayed the prescriptive period for the bringing of the application in Seychelles, is a matter for Seychelles, and not English law. The application first instituted under FJREA was within time as the period for such action is 6 years, but as soon as it was amended to bring it under REBJA, it fell outside the 12-month period, and was stillborn”. Mr. Burbeary does not claim in his affidavit to be an expert in UK law but merely states that he is a solicitor qualified and admitted to practice in England and Wales and a member of the Law Society of England and Wales and a partner and member of a law firm CYK.

25. In answer to question 6, both the Appellant and Respondent had submitted that the 18 August 2015 Order was kept alive by the set aside proceedings. However, the Appellant has submitted that “the set aside proceedings were limited to matters raised by the Appellant and did not revisit the 2015 Order. In particular, the 2018 Order did not give judgment in terms of the 2015 Order, but merely dismissed the set aside application and the application to cross examine witnesses, and made costs orders. It did not include the 2015 Order, which was separate and independent.” I would have agreed with both the Appellant’s and Respondent’s submission that had the original copy of the 18 August 2015 Order was produced at the trial, it could be said that the October 2018 Order kept the 18 August 2015 Order alive; in view of the provisions of section 230 of the Seychelles Code of Civil Procedure and in view of what is stated at paragraph 4 of the 18 August 2015 Order. The Respondent should however have sought an extension of time from the Supreme Court under section 3(1) of REBJA on the basis of what had been stated at paragraph 4 of the 18 August 2015 Order. A British Court cannot give an extension of time to the Judgment Creditor under section 3(1) of REBJA. I agree with the Appellant’s submissions on the effect of the 2018 Order as referred to above.
26. Both the Appellant’s Counsel and the Respondent’s Counsel have argued in their Responses to Further Clarifications sought by the President of the Court of Appeal, that there is no requirement per se in Rule 3 of the Practice and Procedure Rules for the original orders and judgment to be filed. At 2.5.13, of the Respondent’s, Response to Further Clarifications sought by the President of the Court of Appeal, the Respondent’s Counsel has admitted: “It is clear that the original order was not produced”. In making this

statement Counsel does not give any reasons for the non-production of the original Orders and Judgment. It is my view that the original Judgment should be produced by the Judgment Creditor when making an application under section 3(1) of REBJA in accordance with rule 3 of the Practice and Procedure Rules made under section 3(4) of REBJA. The said Rules make a distinction between what needs to be produced when making an ex-parte Petition to seek leave to file a Plaintiff and what needs to be produced when filing the Plaintiff. **Rule 2 of the Practice and Procedure Rules** which applies to the leave stage, states that *“The petition shall be supported by an affidavit of the facts exhibiting the judgment or a verified or certified or otherwise duly authenticated copy thereof”*. **Rule 3 of the Practice and Procedure Rules** states: *“On receipt of the petition and affidavit the Registrar of the Supreme Court shall submit the same to a Judge who upon being satisfied that the petition is bona fide shall authorize the filing of a plaintiff in the Supreme Court in terms of the petition and of the judgment sought to be registered...”* Rule 3 makes no mention of a verified or certified or otherwise duly authenticated copy. After all it is to be noted that once the judgment is registered it has the same force and effect as a judgment of the Supreme Court and execution can issue and in my view, for that reason, it is a must to produce the original judgment. This is an instance where the maxim **‘Expressio Unius Est Exclusio Alterius’** applies, namely the express mention of one thing implies the exclusion of another. I am confirmed in my view that the original Judgment should be produced by the Judgment Creditor when making an application under section 3(1) of REBJA in view of the wording in **rule 4 of the Practice and Procedure Rules** which states: *“the court shall make an order in favour of the judgment creditor in terms of the original judgment...”* It is my view that rule 4 of the Practice and Procedure Rules made under section 3(4) of REBJA overrides **section 28(2) of the Evidence Act** in this instance on the basis of the maxim **‘Generalia Specialibus Non Derogant’** since there is no express terms to the REBJA in section 28(2) nor is there an inconsistency between rules 3 and 4 of the Practice and Procedure Rules of REBJA and the Evidence Act. REBJA in my view is a specific and particular law pertaining to reciprocal enforcement of British judgments. Undoubtedly at the leave stage, which is the threshold stage the original judgment itself can be produced if available but even a verified or certified or otherwise duly authenticated copy thereof suffices. But with the Plaintiff the original judgment has necessarily got to be produced. It is discretionary on the part of the Supreme Court to order the judgment to be registered *“if in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles”*. Such discretion must be exercised judiciously and cannot ignore the specific provisions of the REBJA law. One of the important requirements the Court needs to be satisfied at the trial stage, in view of the above provision is to ensure that the original judgment is produced. This is because the Supreme Court cannot be expected to order execution on the basis of a document which is claimed to be that of a copy of a British judgment which has not been even properly and validly authenticated.

27. The Order of 18 August 2015 of the High Court filed by the Respondent is not the original Order and only a photo copy with an indistinct seal of the Court and does not bear the name of the judge who made the Order, save for the indistinct initials which appears to look like ‘OC or JC’. The name of Cooke J does not appear anywhere in the Order of 18 August 2015. It is only in Mrs. Justice Cockerill’s Order of 11 October 2018 that the name

of Mr. Justice Cooke J appears in relation to the Order of 18 August 2015. There is nothing in the certificate issued under section 10(1)(b) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, found in the Court of Appeal brief at E1-E2, F1-F2, H19-H20 and H23-24 which are one and the same document; or the Supreme Court records, to state that it certifies to the authenticity of the copies of the judgments of Justice Cooke and Justice Cockerill produced before the Supreme Court. It only certifies to the to the various steps the Respondent had taken since the making of the Award, the actions of the Appellant in response to them and to the amounts the Appellant has been ordered to pay to the Respondent under the Orders of Justice Cooke and Justice Cockerill “as appears from the office copy of the judgment sealed of the Senior Courts to which this certificate is annexed”. This clearly shows that there is a judgment of the Senior Court, which the Respondent has not filed in the Supreme Court.

28. I am surprised that the Supreme Court had thought it fit to register the said Order without looking into its authenticity. A judgment according to **Black’s Law Dictionary** is “*the official and authentic decision of a court of justice...*” Having examined the Order of 18 August 2015 that had been submitted to Court by the Respondent and filed of record and as exhibited in the Supreme Court Record, I am not inclined to place any reliance on that. I am of the view that the fact that the Appellant had not objected to the document containing the Order of 18 August 2015 does not amount to the Appellant having acquiesced to its validity. A party to litigation cannot be said to be estopped by acquiescence when it is the Court that has made the mistake and when the obligation was on the part of the Respondent and the Court to ensure compliance with REBJA.
29. I also agree with the submission of the Appellant that there has been non-compliance with **section 74 of the Seychelles Code of Civil Procedure** as the Respondent had failed to annex to the plaint the two orders and judgment on which the suit was based upon. As correctly stated by the Appellant the said orders and judgment had to be proved at the trial stage and not at the leave stage. Section 74 reads as follows:

*“If the plaintiff sues upon a document other than a document transcribed in the Mortgage Office of Seychelles, he shall annex a copy thereof to his plaint. If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.”*

30. At the leave stage, namely when making an application ex-parte by way of petition to a Judge in chambers seeking authorization to filing a plaint it is possible as stated earlier, to file “*a verified or certified or otherwise duly authenticated copy of the judgment*” where the original judgment is not available. The verification, certification or authentication however should be in accordance with **section 28 of the Evidence Act** which reads as follows:

*“28(2) When any public document executed in the territory of a Convention State is produced before any court in Seychelles purporting to bear on it or on an allonge a certificate issued by the Competent Authority of the Convention State in which the document is executed, such document shall be admitted in evidence without proof of the seal or signature of the person executing it and the court shall presume that such seal or signature is genuine and the person signing it held at the time it was signed the official character which the person claims and the document shall be admissible for the same purpose for which it would be admissible in accordance with the law of evidence for the time being.*

(3) *In this section -*

*“Competent Authority” means a person designated by a Convention State as a Competent Authority to issue the certificate in accordance with Article 4 of the Convention and referred to in subsection (2);*

*“Convention” means the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents signed at the Hague on 5th October, 1961;*

*“public document” means -*

*(a) document emanating from an authority or an official connected with the courts or tribunals of a Convention State, including those emanating from a public prosecutor, a clerk of a court or a process server;*

*(b) administrative documents;*

*(c) notarial acts;*

*(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificate recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures;*

*but does not include*

*(e) documents executed by diplomatic or consular agents; and*

*(f) administrative documents dealing directly with commercial or customs operations.” (emphasis added)*

This makes clear that it is only a Competent Authority of UK who can certify a judgment or order of the UK courts. The copy of the Order 18 August 2015 has the following certification on the first page of it: “Certified True Copy of the Original. Dated this 13<sup>th</sup> day of November 2018”. It bears on it the seal Lucie A. Pool, Notary Public, Mahe Seychelles” and a signature purporting to be of “Ms. L.A. Pool, Notary Public” There is

nothing to indicate that Ms. L.A.Pool is a competent authority for the purposes of section 28(2) of the Evidence Act. The Court takes judicial notice of the fact that Ms. Pool is a practicing lawyer in the Seychelles. The copy of the judgment and Order of Mrs. Justice Cockerill has the following certification on the first page: “We certify this to to be a true copy of the original electronic document as made available by the commercial court” Both documents bear the seal ‘Stafford Young Jones, candlewick House, 120 Cannon Street, London EC4N 6AS’ and has been signed by E, Edmonds, Solicitor. According to the Apostille attached to both documents the signature of E. Edmonds has been certified to be his. The Apostilles attached to both documents state that “This Apostille...only confirms the authenticity of the signature, seal or stamp on the attached public document. It does not confirm the authenticity of the underlying document. Apostilles attached to documents that have been photocopied and certified in the UK confirm the signature of the UK official who conducted the certification only. It does not authenticate either the signature on the original document or the contents of the original document in any way.” There is nothing to indicate that E. Edmonds is a competent authority for the purposes of section 28(2) of the Evidence Act.

31. In **Privatanken Aktieselskab v Bantele (1978) SLR 226 at 232 Sauzier J**, repeating what he had said in **Green v Green (1973) SLR 295** said “*...if the document sought to be proved be a judgment, decree, order or other judicial proceedings of a foreign court or an affidavit, pleading or other legal document filed or deposited in such court, the authenticated copy to be admissible must purport to be sealed with the seal of the foreign court to which the original document belongs with proof of the seal.*” It was held by this Court in the case of **La Serenissima V Boldrini [2000-2001] p 225 at pages 231 & 232** that the “*...law still remains that if the judgment produced and sought to be proved is a foreign judgment its copy must be authenticated by a certificate issued by a competent authority of the state concerned*” despite “s 28(2) of the Evidence Act, the effect of which is to dispense with the need to prove the seal”.
  
32. Under **section 102 of the Arbitration Act 1996 of UK** a party seeking the recognition or enforcement of a New York Convention award must produce the duly authenticated original award or a duly certified copy of it. The fact that **section 3(3)(c) of REBJA** makes provision for the recovery of “*reasonable costs of... obtaining a certified copy... from the original court... as if they were sums payable under the judgment*” shows that this is also requirement under REBJA. According to **section 4 of REBJA** when one seeks registration of a judgment of the Supreme Court of Seychelles in the UK the Judgment Creditor has to obtain a certified copy of the judgment. The REBJA sets out the form a certified copy should be in **rule 8 of the Practice and Procedure Rules**, thus: “*The certified copy of the judgment shall be an office copy, and shall be sealed with the seal of the Supreme Court and shall be certified by the Registrar as follows – ‘I certify that the above judgment is a true copy of a judgment obtained in the Supreme Court of Seychelles and this copy is issued in accordance with section 4 of the Reciprocal Enforcement of British Judgments Act’.*” I do not think that our courts should be willing to settle down to a lesser standard as regards the form a certified copy of a British judgment sought to be registered in the Supreme Court

of Seychelles should take. I am therefore of the view that it was incumbent on the part of the Court to check as to the authenticity of the document prior to registering it under section 3(1) of REBJA, since prior to the Supreme Court making its Order for registration of the judgment, it should satisfy itself *“that in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles.”*

33. I am of the view that the proceedings in this case from its very inception, namely from the stage of filing the ex-parte petition seeking leave to file and the granting of leave to file plaintiff was faulty and irregular. The original petition filed by the Respondent on 16 November 2018 although in the caption stated that it was under REBJA, sought orders to register and render executory the Order of 18 August 2015 and Mrs. Justice Cockerill’s Order of 11 October 2018; under section 4(5) of Foreign Judgments (Reciprocal Enforcement) Act in its prayer. Thereafter the Respondent filed an Amended Petition on 04 December 2018 seeking orders to register and render executory the Order of 18 August 2015 and Mrs. Justice Cockerill’s Order of 11 October 2018 under REBJA. Although the caption in both the original petition and the amended petition stated that they were under REBJA, the prayers in each of them were different. I do not agree with the Respondent’s submission that the caption and the prayer must be read with the rest of the pleadings and thus did not convert the 16 November 2018 to a suit of another different character. I am of the view that it is the relief sought in the prayer that determines the nature of the action and not the caption. The amended petition of 04 December 2018 converted the original petition of 16 November 2018 to a suit of another substantially different character and should not have been permitted by Court in view of the provisions of section 146 of the Seychelles Code of Civil Procedure which prohibits amendment of pleadings, so as to convert a suit of one character into a suit of another and substantially different character. Section 146 of the Seychelles Code of Civil Procedure states as follows:

*“146. The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

*Provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and substantially different character.”*

34. The case of **Casamar v Aristotle [25 July 2002]** cited by Counsel for the Respondent confirms the position that an amendment will not be granted if it alters the nature of the suit. It is my view that the proviso to section 146 of the Seychelles Code of Civil Procedure applies to both plaints and petitions since some cases are determined on the basis of a plaint and others on the basis of a petition and both types of cases whether originating by plaint or petition are based on pleadings. The proper procedure was to have filed a fresh petition seeking relief under REBJA. I agree with the Appellant’s submission

in answer to my 3<sup>rd</sup> and 4<sup>th</sup> questions under clarification 2 at paragraph 9 above “If the original application was filed seeking relief under FJREA, then an application under REBJA required a fresh pleading and not merely the amendment of an existing one”, because “Under REBJA the burden of proving the conditions in section 3(2) rests with the Plaintiff while the procedure under FJREA is that registration is mechanistic and subject to set-aside proceedings brought by the judgment debtor.” The difficulty in this case for the Respondent arises because the affidavit of D. T. Burbeary was not attached to the amended petition of 04 December 2018 and could not be made use of in any way leaving aside the fact foreign law has not been pleaded in the plaint nor proved.

35. What is stated in the preceding paragraphs show that that the proceedings in this case from its very inception, namely from the stage of filing the ex-parte petition seeking leave to file Plaint and the granting of leave to file plaint; was faulty and irregular as a result of the non-compliance with the various provisions of REBJA and its Practice and Procedure Rules, both individually and cumulatively. The proceedings in this case in my view were void ab initio. It is true that the Appellant up to the stage of my questioner had not raised any objection to the erroneous procedure adopted by the Trial Court. But these are errors of law made by the Trial Court which infringe fundamental principles of sovereignty, public policy and which seriously affect and undermine the fairness, and the public reputation of the manner judicial proceedings are conducted in our courts. I am not willing to enforce in Seychelles, judgments or orders of UK courts or the courts of her dominions unless there has been strict compliance by the Judgment Creditor with the requirements of REBJA. It would be an insult to our Judiciary to accept without question documents that are purported to be from British courts.

36. I therefore have no hesitation in allowing the appeal, reversing the orders made by the Trial Judge and dismissing the Plaint of the Respondent seeking enforcement of the 18 August 2015 Order and the Order of Mrs. Justice Cockerill dated 18 October 2018.

37. I make no order as to costs.

**A. Fernando (President)**

Signed, dated and delivered at Palais de Justice, Ile du Port on 02 October 2020