IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 54 (25 August 2023)
SCA MA 36/2023
(Arising in consolidated appeals SCA 19 of 2021 and SCA 21 of 2021)

In the matter Between

Thony Clement Adeline acting through
His Curator Sydna Lavigne **Applicant**
(rep. by Mr. Kieran Shah)

And

Alwyn Talma **Respondent**

(rep by Mr. Frank Elizabeth)

Neutral Citation:	*Adeline v Talma* (SCA MA 36/2023) [2023] SCCA 54 (25 August 2023) (Arising in SCA 19 of 2021 and SCA 21 of 2021)
Before:	Dr. M. Twomey-Woods, Robinson, Andre JJA
Summary:	Rectification of judgment – Rule 13 (2) of the Court of Appeal Rules 2005 (as amended) – the slip rule - interest on unpaid debt.
Heard:	11 August 2023
Delivered:	25 August 2023

ORDER

The Court makes the following Orders:

(1) The Judgement in *Adeline v Talma* (Consolidated Civil Appeal SCA 19/2021 and SCA 21/2021) of the 26th April 2023 be amended in terms Rule 13 (2) of the Court of Appeal Rules at paragraphs [45] and [46] (iii), and should read as follows:

> [45] …We find that a total amount of SCR 377,485.87 is owed together with interest on the full purchase price of SCR 1 million at the legal rate from the day the agreement was signed, that is on 20 June 2013.

[46] …

(iii) Talma is ordered to pay SCR377, 485.87 together with legal interest on the full purchase price of SCR 1 million from the date of the agreement, within one month from the date of this judgment upon which Parcel PR 957 shall be transferred into his name, failing which the total sum of SCR 622,514.13 shall be reimbursed to him by Adeline.

(2) We make no order as to costs.

RULING

ANDRE, JA

INTRODUCTION AND BACKGROUND

[1] This Ruling arises out of a Notice of Motion filed on 27 July 2023 by the Applicant, Thony Clement Adeline (herein after to be referred to as 'Adeline') acting through his curator, Mrs Sydna Lavigne. The Respondent is Alwyn Talma (hereinafter to be referred to as 'Talma') who resist the Application and raises some preliminary objections. The crux of the Application is that this Court is being asked to rectify its judgment given in the consolidated appeals of SCA 19/21 and SCA 21/21 (hereinafter referred to as 'the Judgment').

[2] The Application is supported by an affidavit from Mrs Lavigne. In it, the following is averred: That at paragraph [44] of this Court's judgment handed down on 26 April 2013, it was held that there was a valid contract of sale between Adeline and Talma for the sum of SCR 1 million payable on or before 20 June 2013, that at paragraph [42] of its judgment

the Court stated that "interest ought to have accrued on the balance of the purchase price", that since Mr Talma did not pay the full purchase price on the date the sale deed was executed, interest must accrue from 20 June 2013 on the reducing balance with every monthly payment of SCR 5,000, instead of the capital outstanding of SCR 377,485.87 on the date of this Court's Judgment on 26 April 2023.

[3] Mrs Lavigne also avers that a Court of Appeal judgment can be rectified to correct the issue of interest payable. She prays that this Court rectifies its judgment on interest, to make the same payable from 20 June 2013 on the reducing balance outstanding for each payment.

[4] Learned Counsel for Mr. Talma, Mr Frank Elizabeth, raised a plea in limine litis stating that the Court of Appeal is *functus officio* and has no jurisdiction to re-open a case after final judgment. He has tendered written submissions in this regard, filed on 27 August 2023. He has referred this Court to the case of *Bristol v Rosenbauer* (SCA MA 28/2021) [2022] SCCA 23 (29 April 2022), where the Applicant in that matter sought that the court reconsider the costs awarded in its decision which was already delivered. He submits that the court in *Bristol v Rosenbauer* dismissed the application to reconsider the costs awarded and held that the Applicant failed to show any procedural irregularity to justify re-opening the earlier decision. He further submits that the Court in *Bristol v Rosenbauer* held that it had no jurisdiction to vary its earlier decision in the matter especially in face of the doctrine of *functus officio*.

[5] Mr Elizabeth has also referred this Court to the cases of *Antoine Alcindor v Christina Alcindor* (SCA 33 of 2010) [2012] SCCA 4 (12 April 2012) and *Seychelles Development Co. Ltd v Government of Seychelles and Anor* (30 of 2007) [2007] SCCA 8 (13 December 2007). He submits that based on these authorities, the Court of Appeal is *functus officio* and has no jurisdiction to re-open its own judgment to review its own decision.

[6] Mr Elizabeth further submits that there should be finality to proceedings and the successful party should not be made to incur further legal costs and expenses defending a matter where the court has given a judgment. He adds that the calculations made by the accountant to arrive at the interest rate and amounts due to Mr Adeline cannot be faulted. With the above, the Respondent prays that this honourable Court dismisses the application with costs.

[7] Learned counsel for Mr Adeline, Mr Kieran Shah, also filed written submissions on the point of law raised. He submits that the Court is not actually *functus officio* as the order is not yet perfected. Counsel has referred this Court to the cases of *Sans-Soucis v VRL* [2012] UKPC 6 (Priviy Counsel appeal from Jamaica); *Re L-B Children* [2013] UKSC 8 (appeal from Belize); *Lee v Ashers Banking Company Ltd* [2018] UKSC 49. Counsel has also relied on learned author Anna Wong in a peer-reviewed academic article, 'Doctrine of Functus Officio: The Changing Face of Finality's Old Guard' *Canadian Bar Review* Vol. 98 (2020). He has referred this court to page 552 where it reads:

> *Finality in the context of functus officio has two aspects to it, a substantive one and a formal one. Substantively, a decision is final when the decision-maker has completely fulfilled her task in disposing of issues raised in the proceeding, and has not reserved the right to exercise any of her powers at a later time. Formality wise, final means there is nothing more to be done to perfect the decision so as to render it effective and capable of execution. For court decisions, a decision becomes final when a formal judgment or order is drawn up, issued and entered.*

[8] Counsel has further submitted that the procedure of perfecting orders in Seychelles is provided for by Rule 32 of the Court of Appeal Rules which reads as follows:

> **32. Formal order of the Court**
>
> (1) Every judgment of the Court shall be embodied in a formal order prepared by the Registrar after consultation with the parties to the appeal.
>
> (2) If the parties do not agree upon the form of the order, the draft thereof shall be settled by the President or by such Judge as the President may designate and the parties shall be entitled to be heard thereon if they so desire.
>
> (3) The Registrar shall send a sealed or certified copy of the order to the Registrar of the Supreme Court.

[9] Mr. Shah submits that until a sealed or certified copy of the order is sent to the Registrar of the Supreme Court, the order is not perfected and therefore the Court is not *functus*

officio. He adds that assuming that this has not been done, there is no bar to the present motion and the plea in limine should be dismissed.

[10] Further to the above, he submits that even if the order is perfected the Court is not *functus officio* because of non-compliance with Rule 32 (1) of the Court of Appeal Rules. He submits that the parties were not consulted on the formal order and not given the opportunity to make representations. He further submits that the consequence of failing to comply with this Rule 32 (1) results in the Court not being *functus officio* because Rule 32 (1) is a condition precedent to Rule 32 (3), and failure to comply means the final sealing and sending of the formal order is a nullity. In the circumstances, there is no obstacle to hear the motion and the plea in limine has no merits.

[11] Mr Shah has further submitted that even if this Court is *functus officio*, what is sought in the present motion is a matter that falls within the well-established exceptions to it.

[12] He submits that recent Court of Appeal and Constitutional Court cases have established that the Court of Appeal does have the power to re-open its own proceedings. Counsel has referred to the cases of *Belmont & Anor v Belmont* [2020] SCAA 44; *Vijay Construction (Pty) Ltd v Eastern European Engineering Limite*d And *Vijay Construction (Pty) Ltd v Eastern European Engineering* (SCA MA 24/2020) [2022] SCCA 8 21 March 2022; *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited*) SCA MA 35/2022 [2022] SCCA 56 (Arising in SCA MA 24/2020) Out of SCA 28/2020 / CC23/2019 (21 October 2022); *Liane & Ors v Supreme Court & Ors* and *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (EEEL)* SCA MA 23/2020 (Arising out of SCA 28/2020, CS 23/2019 and SCA 15 & 18/2017) - SCA MA 44/2022 (Arising out of SCA MA 23/2020, SCA 28/2020 and CS 23/2019) and SCA MA 09/2023 (Arising out of SCA 28/2020 and CS 23/2019) [2023] SCCA 17 (26 April 2023). He submits that *Bristol v Rosenbauer* is the only clink in the armour and thus, not the controlling precedent.

[13] He has further submitted that wider Commonwealth authorities such as the one by the Court of Appeal of Jamaica in *Advantage General v Marilyn Hamilton* [2021] JMCA App 25 is illustrative of this point. He submits that the Court in *Advantage General* was

persuaded by the South African case of *Blue Cell (Pty) Ltd (in liquidation) v Blue Financial Services Limited and others* (unreported) Case No: 8456/07 where Matojane J said:

> *"Once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. There are, however, a few exceptions to that rule. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following case: (1) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant. (2) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order. (3) The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. (4) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order. The above list is not exhaustive: the question whether the court has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs, raised but not decided. On the assumption that the court has a discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest reipublicae ut sit finis litium."*

[14] He submits that paragraph [42] of *Bristol v Rosenbauer* is inconsistent with the above position. He further submits that the same paragraph in *Bristol v Rosenbauer* is inconsistent the position taken by the Privy Council in *Sans-Soucis v VLR* [2012] UKPC 6 at paragraph [23].

[15] Mr. Shah also submitted on inherent jurisdiction and power, which I will not necessarily repeat hereunder in order not to conflate the issues in the present Motion. This is because in this Court's view, the legal questions in this Motion do not touch and concern the inherent jurisdiction or power of the Court to re-open cases. Be that as it may, we have read the submissions with great interest.

COURT'S VIEW ON THE POINT OF LAW

[16] It is not lost on this Court that when a Court makes a determination, the principle of *functus officio* seals the same in order to avoid endless legal proceedings and battles between parties. There must be finality to issues decided before our Courts and we would agree with learned counsel Mr Elizabeth that a successful party must not incur further costs to defend a case that has already been decided.

[17] However, our understanding of the present Application is that Mr Adeline seeks rectification of the judgment in respect of the interest payable on the judgment award. The specific paragraphs relied on and referred to in the affidavit in support are paragraphs [42] and [45] which read as follows:

> *[42] However, the unpaid balance under the contract is subject to interest. We therefore partially agree with ground 2 (b) of Adeline's appeal on the point that interest <u>ought to have accrued on the balance of the purchase price</u>.*
>
> ...
>
> *[45] We also find that the learned Judge erred in her appreciation of the amounts that had been paid both by cheque and in cash. We find that a total amount*

of SCR 377,485.87 is owed <u>together with interest at the legal rate from the day the agreement was signed, that is on 20 June 2013</u>. [own emphasis]

[18] The question that comes to mind is therefore, are we empowered to correct errors in a judgment? Counsel for the Applicant answers in the affirmative, while Counsel for the Respondent holds the view that we do not have any such power by virtue of being *functus officio*.

[19] A court being *functus officio*, in its strictest sense, means three things: that it cannot rehear, review or vary its own judgment or order, except for when it is on appeal.

[20] In respect of rehearing, suffice it to say that this Court in *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited)* SCA MA 35/2022 [2022] SCCA 56 (Arising in SCA MA 24/2020) Out of SCA 28/2020 / CC23/2019 (21 October 2022) did find that as an apex court, we do have the power to re-open and rehear a matter albeit in very limited circumstances, and that any such power must be exercised judiciously: vide paragraphs [59] – [63] of Anderson JA judgment. At any rate, the present proceedings do not seek to rehear the issues of the appeal, but instead, to rectify a 'mistake' on the question of interest.

[21] Where review is concerned, we understand this to mean to look into something with a view to changing it. This too is not what this Court is being asked to do. Nothing is changing with regards to the interest payable. In the Judgment, we were clear that interest accrues from the date of the signing of the deed on 20 June 2013.

[22] Finally, varying a judgment or order is prohibited by the principle of *functus officio*. To vary is to change something, usually following a review or rehearing. To state what we have already stated in the paragraphs above, we are not being asked to change anything but rather to clarify the issue of interest which is otherwise not clear in the Judgment.

[23] We note that in the additional submissions tendered by Mr Shah, he has referred this Court to its powers to correct its judgment under the slip rule, and that such powers derive from the Seychelles Code of Civil Procedure, Rule 32 (2) of the Court of Appeal Rules; section

12 (3) of the Courts Act which gives this Court similar powers to that of the English Court of Appeal.

[24] While we have given great thought to the assertions of Mr Shah, we take the view that at the filing of the Motion, it should clearly indicate that the Motion is made in terms of Rule 13 (2) of the Court of Appeal Rules. The provision states:

> (2) The Court may of its own motion or on application correct any slip or accidental error arising in its proceedings, so as to give effect to the manifest intention of the Court, notwithstanding that the proceedings have terminated and the Court is otherwise functus officio in respect thereof.

[25] The Court can correct any slip *to give effect to its manifest intention*, whether upon the application of a party or of its own motion. The Court in *Chetty & Ors v Chetty & Anor* [2014] SCAMA15/13 (Judgment delivered on 11 April, 2014) at paragraph [6] explained this power by stating that:

> *[6] The clarification and or correction of any slip or accidental error, if at all, has to be apparent from the record of an operative paragraph and not depend upon a construction given by the parties to any particular paragraph which is not the operative paragraph of a judgment…*

[26] On consideration of the above, and on an understanding of what the present Motion seeks, this Court, although *functus officio* by virtue of having delivered the final judgment of the matter between the parties, can correct any errors that arise in order to give its manifest intention. This Court is also guided by the authority in *Chetty* which we have quoted above.

[27] The plea in limine litis therefore, fails. We proceed to consider the Motion on its merits.

MERITS OF THE MOTION

[28] Mr. Shah submits that the Court of Appeal in allowing Mr. Adeline's appeal on interest, correctly ordered that interest be paid from the date of the sale, namely June 2013 and that the fundamental principle of payment of interest in respect of a sale is that interest is payable on an unpaid debt. In the present case, the debt in June 2013 stood at SCR 955,000.

[29] Mr Shah further submits that the debt was progressively reduced and that in keeping with the order that interest runs from the date of sale, the reasonable inference is that interest should be calculated from the sum outstanding in June 2013, namely SCR 955,000 and continuing on a reducing balance as and when payment is made. He submits that on the date of the Judgment, delivered ten years after the sale, the sum outstanding was SCR 377,485.87 which was the sum on which the Court ordered interest to be calculated. The consequence is that Mr Adeline has not been compensated for the interest for ten years due on 63% of the sale price but instead has only been compensated on 37% of the sale price.

[30] Mr Elizabeth has submitted in reply that there is nothing erroneous about the Judgment. He contends that Mr Adeline is trying to get through the back door what he could not get through the front door. He further submits that the Court was correct to award interest from the date of the judgment on the award.

[31] He also submits that there was never an agreement on interest between the parties and that what Mr Adeline seeks to do is to have this Court vary its judgment and impute a condition or term into the contract that was never present. He further submits that Mr. Adeline never sought payment of interest on the reducing balance, nor was such interest ever a live issue before the Court of Appeal. He adds that any issue of interest is now a new issue in a 'parallel appeal' which is not only wrong in law, but also scandalous and preposterous.

[32] We note the following matters as live issues in the appeal: The case was concerned with the validity of a contract of sale of land between the parties and what was due to be paid by Mr, Talma, the purchaser. Three main points arose for consideration: (i) Was there a valid contract of sale of land entered into between the parties?;(ii) If there was a valid contract of sale, should it have been rescinded by the Court a quo? (iii) If the contract need not be rescinded, what was due to be paid?.

[34] In respect of validity of the contract of sale, we had found that the learned Judge did not err in her findings in this regard. On the facts and evidence, there was mistake so as to vitiate consent: vide paragraphs [24] of the Judgment.

[35] With the contract being held to be valid, rescission in the court a quo and before us was a live issue. We found that there was no need to rescind the contract: vide paragraph [35] of the Judgment.

[36] In terms of the balance to be paid on the purchase price we found SCR 377, 485.87 was due: vide paragraph [41] of the Judgement.

[37] We also went further to make findings on interest. It was a live issue before us based on Ground 2 (b) of Mr. Adeline's grounds of appeal. In our view, interest ought to have accrued: vide paragraph [42], as read together with paragraph [45] of the Judgment, particularly in respect of paragraph [45], we stated that:

> *"…We find that a total amount of SCR 377,485.87 is owed together with interest at the legal rate from the day the agreement was signed, that is on 20 June 2013."*[Emphasis added]

[38] As we expressed in our judgment, vide paragraph [33], the statement in the agreement: '***In consideration of one million rupees (1,000,000SR) (which sum the Vendor hereby acknowledges having received'*** triggered a new obligation and condition to be met by Mr Talma on the date of the agreement, that is on 20 June 2013. Whatever the initial agreement between the parties, it changed by virtue of this new condition and obligation. We further observed that since Mr. Talma did not pay the full purchase price, Mr. Adeline was correct to have approached the Courts for an order to rescind the contract.

[39] With the above understanding, we wish to make our intention manifest. It stands to reason, that if money is owed by a debtor on particular date and not paid, interest accrues. We refer to the case of *Samy v Chetty* (1984) SLR 72, where it was held that if there is an obligation which involves the payment of a sum of money, delayed payment gives rise only to interest fixed by law or by commercial practice, in the absence of any agreement fixing the rate of interest. We disagree with the arguments advanced by Mr Elizabeth that the parties had not agreed to any interest on unpaid sums. Parties do not need to agree on interest for interest to accrue when a debt is unpaid

[40] At any rate, and bearing in mind that interest accrues on delayed payment, we entertained Ground 2 (b) of Mr Adeline's appeal with regard to interest, and found that it succeeded: vide paragraph [43] of the Judgment. The question of interest was indeed a live issue in the appeal proceedings. In this respect we disagree Mr Elizabeth's submission that this is a new issue that is being brought in a 'parallel appeal'.

[41] It was a slip on our part to have omitted the words 'on the full purchase price'. Ordinarily, paragraphs [45] and [46] (iii) should have read:

> *"[45] …We find that a total amount of SCR 377,485.87 is owed together with interest <u>on the full purchase price of SCR 1 million</u> at the legal rate from the day the agreement was signed, that is on 20 June 2013.* [Emphasis added, underlined words added].
>
> *[46] …*
>
> *(iii) Talma is ordered to pay SCR377, 485.87 together with legal interest <u>on the full purchase price of SCR 1 million</u> from the date of the agreement, within one month from the date of this judgment upon which Parcel PR 957 shall be transferred into his name, failing which the total sum of SCR 622,514.13 shall be reimbursed to him by Adeline."* [Emphasis added, underlined words added].

[42] Our manifest intention was that since Mr. Talma was a debtor to Mr. Adeline for the sum of SCR 1 million as of 20 June 2013, and that such delayed payment attracts interest on the full purchase price instead of interest on only the balance of SCR377, 485.87.

[43] The Motion therefore succeeds.

ORDERS

[44] It is ordered that the judgment be amended in terms Rule 13 (2) of the Court of Appeal Rules at paragraphs [45] and [46] (iii), and should read as follows:

[45] ...We find that a total amount of SCR 377,485.87 is owed together with interest on the full purchase price of SCR 1 million at the legal rate from the day the agreement was signed, that is on 20 June 2013.

[46] ...

(iii) Talma is ordered to pay SCR377, 485.87 together with legal interest on the full purchase price of SCR 1 million from the date of the agreement, within one month from the date of this judgment upon which Parcel PR 957 shall be transferred into his name, failing which the total sum of SCR 622,514.13 shall be reimbursed to him by Mr. Adeline.

[45] We make no order as to costs.

Andre, JA

I concur

Dr. M. Twomey-Woods

I concur

F. Robinson, JA

Signed, dated and delivered at Ile du Port on 25 August 2023.