

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable/ Redact
[2020] SCSC 996
MC 109/2019

In the matter between:

ROSITA PARCOU

Executrix of the late Kaven Julien Parcou
(*rep. by Serge Rouillon*)

Petitioner

and

JILL LAPORTE

(*rep. by Bernard Georges*)

Respondent

Neutral Citation: *Parcou v Laporte* (MC 109/2019) [2020] SCSC 996 (15th December 2020).

Before: E. Carolus J

Summary: Petition for new trial – section 194(b) & (c) of the Seychelles Code of Civil Procedure

Delivered: 15th December 2020

ORDER

The requirements for a new trial under section 194(b) and (c) of the Seychelles Code of Civil Procedure have not been met. The petition for new trial is dismissed with costs awarded to the respondent.

RULING

CAROLUS J

Background

[1] The Petitioner is seeking to have the judgment of the Supreme Court in CS128 of 2018 delivered on 11 November 2019 in favour of the Respondent set aside, and for a new trial on the merits to be ordered.

- [2] The Petitioner Rosita Parcou, the widow of the late Kaven Julien Parcou (“the Deceased”) and the Respondent Jill Laporte were Defendant and Plaintiff respectively in CS128 of 2018. The Respondent (then plaintiff) had brought an action simultaneously *en recherche de paternité* and *en desaveu de paternité* claiming that she was the biological daughter of Julien Kaven Parcou who passed away on 20 October 2017, although at the time of her birth her mother was married to Donald Laporte and she bears the name Laporte. The Respondent averred that she had known the Deceased from a very early age and visited him regularly at his business office. Two witnesses, who used to work for the Deceased corroborated the Respondent’s evidence stating that the Deceased had introduced the Respondent to them as his daughter. The Respondent’s mother also corroborated her evidence.
- [3] The Petitioner (then Defendant) denied the Respondent’s averments, stating that she had never heard of the Respondent from the Deceased and never met her until the Supreme Court case. As the executrix of the Deceased’s estate she had gone through his papers and had not seen anything relating to the Respondent. The Petitioner also averred that the Deceased was unable to father any children. The Respondent was born in 1973 and the Petitioner met the Deceased much later during his life and they married in 1999.
- [4] One of the Deceased’s friends testified on behalf of the Petitioner stating that he knew the Deceased for 46 years as they were both freemasons and that the Deceased spoke and wrote English well and would not make grammatical mistakes. He stated that he was one of the Deceased’s best friends and that he had never heard of the Respondent. In cross examination he admitted that he did not know the Deceased’s or his wife’s parent’s names. He also admitted that Deceased was a bit reserved but stated that he was like a brother to him.
- [5] The then Chief Justice, M. Twomey gave judgment for the plaintiff (Respondent in the present proceedings) declaring her as the child of Julien Kaven Parcou, and ordering her birth certificate to be amended reflecting the same.
- [6] The Petitioner is now petitioning this Court under section 194 of the Seychelles Code of Civil Procedure (SCCP) for the said judgment to be set aside and for a new trial on the merits to be ordered on the basis of new evidence just discovered by the petitioner; in the interest of justice; and that the said judgment is generally unsafe and unsatisfactory, with costs.

- [7] The Respondent filed an answer to the petition essentially stating that save for the averments regarding new evidence, namely the similarity of skin colour of the Respondent and Donald Laporte, no other averment made in the petition is relevant to the application for a new trial. She averred that the averments in the petition may be relevant to an appeal against the decision of the Supreme Court but not to an application for a new trial. She further averred that insofar as the aforementioned averments are concerned, had the petitioner been diligent in preparing her case before the Supreme Court she would have been able to seek, obtain and lead evidence of the alleged difference in skin colour and physiognomy between the Respondent and the late Kaven Parcou. She avers that at the very least such evidence could have been sought and obtained through a request for further particulars of the plaint. The Respondent prayed for dismissal of the petition with costs.
- [8] Counsel for the Petitioner relied on his written submissions while counsel for the Respondent opted to make oral submissions.

The Law

- [9] The circumstances in which a new trial may be granted are provided for under section 194 of the SCCP. This and other relevant provisions are reproduced below:

New Trial

When a new trial may be granted

194. A new trial may be granted on the application of either party to the suit –

(a) where fraud or violence has been employed or documents subsequently discovered to be forged have been made use of by the opposite party;

(b) when new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the hearing of the suit, has since been discovered or become available;

(c) when it appears to the court to be necessary for the ends of justice.

Procedure to obtain new trial

195. Application for a new trial shall be made by petition supported by an affidavit of the facts, and shall be served on the opposite party in the same manner and subject to the same rules as to time for appearance as in the case of plaints.

Application, when to be made

196. Application for a new trial must be made –

(a) if judgment was given against the defendant in default, within three months from the date when execution of the judgment was effected or from the earliest date on which anything was paid or done in satisfaction of the judgment;

(b) in all other cases, within three months from the date of the judgment.

Forgery, fraud or new evidence

197. Where a new trial is applied for on the grounds of forgery, fraud or new evidence, the period of three months mentioned in section 196 shall only run from the day on which the forgery or fraud shall have been known or the new evidence discovered, provided that in the last two cases there is written proof of the day on which such fraud or new evidence shall have been discovered.

[...]

What issues may be raised at new trial

201. It shall not be competent for the applicant to raise any other issues at the new trial except those alleged in his application for such new trial.

Analysis

New Matter or Evidence

[10] I will first address the granting of a new trial on the ground of discovery of new and important matter or evidence under section 194(b) SCCP. It is clear from the wording of that provision that mere discovery of new matter or evidence is not sufficient for a new trial to be granted. Such matter or evidence must also be important. In addition they must not have been within the knowledge of the applicant or could not be produced by the applicant at the hearing of the suit, after the exercise of due diligence. Therefore evidence which could have been obtained by exercising due diligence but was not, is not sufficient to justify the granting of a new trial.

[11] It was held in Joubert v Pool (1995) SLR 103 that a petitioner who bases his application for a new trial on the ground of new evidence that has been discovered is obliged to satisfy the Court that the new evidence discovered was not within the knowledge of the applicant or could not have been produced at the hearing in spite of the exercise of due diligence.

[12] Further, Jacques v Chang (1964) SLR 129 is authority that an application for new trial should be refused if there is nothing in the fresh evidence that would oblige the court to find that the result must necessarily or even probably have been different had the new evidence been adduced at the original hearing.

[13] Kenyan and Indian case law is also relevant to this issue although they relate to new evidence in applications for review of judgements and not to new trials *per se*. The wording of the Kenyan provision providing for review of judgements on the basis of new evidence is similar to our section 194(b) SCCP as shown by the Kenyan case *Khalif Sheikh Adan v Attorney General [2019] eKLR* in which the Court pointed out the limited grounds for review of a decision as follows:

- (a) *Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made;*
- (b) *On account of some mistake or error apparent on the face of the record; or*
- (c) *For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay. Emphasis added*

[14] The Court in *Khalif Sheikh Adan* (supra) cited the Supreme Court of India in the case of *Afit Kumar Rath v State of Orisa & Others [2 November, 1999]*, as follows:

The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.” Emphasis added

[15] In the Indian case of *Ms Prem Builders vs Union of India through the Deputy Chief Engineer (Construction), East Central Railway, Dhanbad [29 January 2016]* the Court quoted the following observations made by Chinnappa Reddy, J in *Aribam Tuleshwar Sharma vs Aribam Pishak Sharma and Ors [25 January, 1979]*:

It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of

review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court. Emphasis added

[16] This passage emphasises the difference between review based on discovery of new evidence and appeal and points out that power to review may not be exercised on the ground that a decision was erroneous on the merits, which should be left to the appellate court.

[17] In *Ms Prem Builders vs Union of India* (supra) the Court further had regard to the following observations of the Court in *State of West Bengal & Ors vs Kamal Sengupta & Anr* [16 June 2008] as follows:

21. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

22. The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. Emphasis added

[18] As is the position in Seychelles with regards to new trials as reflected in our case law, the above passage not only clearly shows that to justify the review of a judgement new evidence must be relevant and capable of altering the decision if it was produced during the suit, but also highlights the need of the party applying for a new trial to have exercised due diligence. If the

new evidence could have been discovered or produced at the original hearing with the exercise of due diligence, a new trial should not be granted. The passage further emphasises that a judgment cannot be corrected by way of review where a different view could have been taken on a point of fact or law. Such determination should be left to the court of appeal.

[19] In summary, for a new trial to be granted under section 194(b), new matter or evidence should be relevant and important. They must not have been capable of being discovered or produced by the applicant at the time of the original hearing of the suit, after the exercise of due diligence and they must be of such character that if produced during the suit the resulting decision might have been different. Furthermore counsels should take care in an application for a new trial to address matters relevant to such procedure as set out above, and not matters relevant to an appeal. The procedure for a new trial is not an appeal and any challenge of the merits of a decision should be left for the determination of the court of appeal.

[20] The Petitioner's submissions on the grounds on which she seeks a new trial are extensive and sometimes repetitive, and may be summarised as follows: alleged difference in colour and no physiological resemblance between the Respondent and the Deceased, alleged perjury by the Respondent; fax and letter from the Deceased to the Respondent containing grammatical mistakes whereas the Deceased was a well-read man; sperm count of the Deceased which renders it unlikely that he had fathered a child; credibility of the respondent's witnesses; lack of DNA testing; what is termed 'dubious judgements' in paternity cases; 'entourage' at the Court of Appeal staff area; and the defective answer to the petition for new trial and supporting affidavit.

[21] However this Court will confine itself to the consideration of only new evidence averred by petitioner's counsel to have been discovered after conclusion of the matter before the Supreme Court. These are specified at paragraph 7.1(b)(iv) and 7.1(f) of the Amended Petition for a new trial and in the Written Submissions on behalf of the Petitioner at paragraph f. Conclusion (b), respectively which are reproduced below:

Amended Petition for New Trial

- 7.1 *but the most serious factual issue was how dark the Respondent was and of the same skin colour tone, the Petitioner is only now advised, as the deceased original father Donald Laporte on the birth certificate of the Respondent being dark malbar colour;*
- a. *both the deceased Kaven Parcou and the mother of the Respondent are of a light creole colour almost white like several of her children namely Fiona (presently Robinson Seychelles Court of Appeal judge); Wendy (presently Pierre Registrar General); Philip Zialor;*
 - b. *the two paragraphs above reveal sufficient new evidence for the purposes of the law to qualify for a new trial since the Respondent;*
 - i. *only came to court for the hearing of the case; and*
 - ii. *was never seen before by the Petitioner or any of her witnesses; and*
 - iii. *no photographs of the Respondent were available or produced pre-trial or at trial*
 - iv. *The physiological and family traits of the deceased Donald Laporte only came into the picture when the Petitioner was advised by a third party after the case of how Donald Laporte looked and the similarity of the Respondent to him and dissimilarity in skin colour of the Respondent to her siblings in terms of colour where the latter have a father of lighter colour named, as the Petitioner has just been advised, one Sanders.*

[...]

- f. *The Respondent in this case has perjured herself by saying in her testimony three times that a potential key witness to her case one Alderic Tirant also known as Derick Tirant had passed away when she testified on 29th July 2019 when in fact Mr Tirant has only now passed away on 1st July 2020 . . .*

Written Submissions on behalf of the Petitioner

f. Conclusion

The Petitioner submits that on her uncontradicted averments in her Petition and of Affidavit of facts there is sufficient substance in the Petition and Affidavit of facts for it to qualify in law for a new trial under sections 194(b) and (c) of the Seychelles Code of Civil Procedure on the basis of:

[...]

- b. *fresh evidence of colour resemblance to deceased Donald Laporte and the perjury of the Respondent which, inter alia, has only come to the Petitioners' knowledge post trial which could not have been ascertained prior to trial with due diligence especially for*

such a weak case for the Respondent; also, the bad faith and perjury of the Respondent in her own case;

[22] The Court will first consider the evidence pertaining to the similarity of physiognomy and colour of the Respondent to Donald Laporte. Although this piece of evidence might be new, the line of argument is not. Petitioner's counsel himself admits that he had unsuccessfully tried to pursue this line of argument at the hearing of the suit (paragraph (c)7 of Petitioner's Written Submissions).

[23] I also note that counsel for the Petitioner averred in the Amended Petition that some of the current paternity decisions are dangerous and dubious involving purely subjective interpretation of the law, but at the same time he is also inviting the court to base its decision on an equally subjective (not expert) view of whether the Respondent looks like her father or not. In my view, for the Court to determine the paternity of the Respondent on the basis of whether she looks like the Deceased or Donald Laporte could very well prove to be even more dangerous given that genetics is a complex science. It is not unheard of for example, for a redhead child to be born in a family of brunettes.

[24] Further while DNA evidence could indeed have been helpful in determining paternity of the respondent, it was not compulsory at the time the matter was heard. In addition proper procedures and rules must also be established to ensure a proper and conclusive result from DNA testing. For instance, for DNA evidence to be conclusive if tests are carried out with samples from the Respondent and the Deceased's niece, it must be certain that the niece is biologically related to the Deceased. It must therefore be proved that the person alleged to be the Deceased's brother and the Deceased are actually biologically related, and that the niece is the biological daughter of the brother. It is therefore not completely unfounded for the Respondent to refuse DNA testing conducted with samples from the niece and herself without being certain that the niece is biologically related to the Deceased.

[25] Counsel for Respondent stated the following in his oral submissions with regard to the issue of resemblance of the Respondent to Donald Laporte:

"... on this nebulous concept of the colour of the Respondent's skin, my learned friend said with absolutely no supporting evidence whatsoever that the Respondent ... did not share the same skin colour as her father the deceased Parcou and therefore

he [ought] to have been able to adduce some evidence to show that the two of them simply did not look alike, I cannot understand ... how my learned friend could not have ascertained that prior to trial he could have requested by further [and] better particulars or for any reason whatsoever information as to the skin colour of the Respondent, then Plaintiff. In any event as I say there is no evidence to support his allegation and in fact there is absolutely - because I know those people and I saw them as in fact did the Chief Justice who heard the case - absolutely no difference in skin colour from the two people ... It is no ground for him to now come and say but I saw this person for the first time at the hearing, he knew she was coming ... if he had wanted discovery of documents as to skin colour this is something that he had the opportunity to ascertain before and it can avail him not at all for him to now ... come before the court and say well this matter has now a reason and in need to bring evidence as to it

[26] Regarding the resemblance of the respondent to Donald Laporte it is my view that, since the issue of the Respondent's skin colour was unsuccessfully pursued before the Supreme Court, such evidence cannot be considered to be material. If apart from skin colour the resemblance between the respondent and Donald Laporte were so strong as to give credence to the respondent being biologically related to him as averred by the Petitioner, this could be considered as material evidence. However I note regarding this last point that while great emphasis is laid on the issue and details given, of the similarity of the Respondent's skin colour to that of Donald Laporte in the pleadings, only passing reference is made to similarity of the Respondent to the said Donald Laporte with no details. Secondly and again because the arguments regarding the skin colour of the Respondent were already pursued before the Supreme Court, it is doubtful that if this piece of evidence was presented at the hearing, the judgement would have been different. Thirdly and most importantly, this piece of evidence could have been discovered prior to trial of the suit if the Petitioner had exercised due diligence especially given that the Respondent's action was also one *en contestation de paternité* and the plaintiff was aware that the Respondent had been declared as the child of Donald Laporte. Resemblance to the said Donald Laporte is one of the most obvious defences which should have come to mind in the circumstances. It is my view therefore that the evidence regarding the skin colour of the Respondent does not justify a new trial being granted.

[27] With regard to alleged perjury of the respondent, section 102 of the Penal code provides:

102. (1) Any person who, in any judicial proceeding, or for the purpose of instructing any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury. Emphasis added

[28] A reading of this provision shows that merely giving a false statement is not enough, the respondent must have *knowingly* given a false statement regarding Mr Tirant's passing and this statement must have related to a material matter.

[29] Respondent's counsel addressed the Respondent's alleged perjury in his oral submissions (See Court proceedings of 6th October 2020) as follows:

“ . . . this is not something that will have any bearing with respect on the case, if my learned friend had wanted to summon Mr Tirant to come and give evidence . . . he would perfectly entitled to do that, he cannot force us to call a witness who he without any diligence whatsoever had ignored . . . so this is not a witness [the Respondent] who is trying to hide a possible eye witness by saying he has passed, this is actually somebody who regrets that this person cannot come to give evidence because he has passed in her mind, she lives in England . . . the [tenor] of the evidence will show was not trying to obfuscate and hide the fact that there was a material witness by saying he had passed, which would be perjury, though somebody was saying these are people who know including Mr Tirant who had passed . . . doesn't detract from the fact my Lady that this was somebody who my learned friends could very easily have called if he had done his research properly as a witness for his own case, instead of today alleging that there had been obfuscation and perjury by my client as a result off which he needs a new trial.”

[30] The exact reasons for the Respondent testifying that Mr Tirant had passed away (See page 8 and 24 of the 29th July 2019 proceedings at 9.34) are unknown but I take into account that the Respondent resides in the UK and not in Seychelles.

[31] It is also unclear why the Respondent would knowingly make a false statement regarding Mr Tirant's passing when it appears from her testimony and that of her mother's, that Mr. Tirant's testimony would have helped the respondent's case. The respondent testified that Mr Tirant was one of the persons with whom the Deceased used to leave money for the her (page 8 of the 29th July 2019 proceedings), that the Deceased introduced the respondent to Mr Tirant as his daughter (page 24 of the 29th July 2019 proceedings) and, as per Respondent's mother's testimony, Mr Tirant used to bring them food, pampers and wipes from the Deceased (pages 46-47 of the 29th July 2019 proceedings).

- [32] In any event, even if the respondent had known that Mr Tirant was alive, she could have chosen not to call him as a witness as pointed out by her counsel. Further Mr Tirant was not the only employee of the Deceased who could have confirmed that he was aware that the Respondent is the daughter of the Deceased. The Respondent called two other employees who corroborated that.
- [33] The Petitioner states that Mr Tirant was a potential key witness, but does not explain why. If he was potential key witness to the Petitioner's case, the Petitioner could and indeed should have done the due diligence, inquired about Mr Tirant's whereabouts and called him as a witness. I am alive to the fact that if Mr Tirant had appeared in court, it is possible that he could have corroborated the testimony of the Respondent and her mother, thereby strengthening the Respondent's case making it highly unlikely that this piece of evidence would have changed the outcome of the case in which case the alleged perjury of the Respondent would not justify the granting of a new trial.
- [34] Further the petitioner's averments that the alleged perjury shows bad faith of the Respondent can only stand if the Petitioner had proven that the Respondent made the statement knowing it to be false, which she has not done.
- [35] It is therefore not entirely clear how this new piece of evidence would support the Petitioner's case. For the reasons cited above I find that new evidence regarding alleged perjury of the respondent does not justify granting of a new trial.

Necessary for the Ends of Justice

- [36] Since the remaining submissions of counsel for the Petitioner do not deal with the issue of new evidence, they will be considered in terms of section 194(c) in terms of which a new trial may be granted "*when it appears to the court to be necessary for the ends of justice*". It is established law that a new trial under 194(c) ought not to be granted except in very special circumstances (Vide *Naiken v Pillay (1968) SLR 101*; *Morel v Hoareau (1972) SLR 127*; *Pierre-Louis v Vel (MA 97/2015 (arising in CS 120/2008)) [2016] SCSC 14 (20 January 2016)*).

- [37] In *Joanneau and others vs Government Seychelles and another (Civil Side No 12 of 2005) [2013] SCSC 60 (27 March 2013)* very special circumstances were considered to be, for example, where the applicant had failed to exercise a right of appeal that was open to him. In that case, the petitioners having successfully exercised their right of appeal and obtained final judgment in their favour, the Court declined to order a new trial.
- [38] In the present case the petitioner is seeking a new trial of CS128/ 2018 but has also appealed to the Court of Appeal against the judgment rendered in the same case. The grounds of appeal as they appear in the Notice of Appeal are essentially the same grounds on which a new trial before this Court is sought.
- [39] Further several issues that the petitioner has raised in support of her case for a new trial have been already been argued before and expressly dealt with by the trial judge, the then Chief Justice. For instance, the issue regarding the faxed letter and allegedly impossible grammatical mistakes therein on the ground that the Deceased was a freemason and such mistakes are “*not becoming of a freemason who is supposed to memorise long tracts from the bible during the rituals of freemasonry...*” is addressed at paragraphs [24]-[26] where the Learned Chief Justice concludes:
4. ... *The Deceased’s writing has not been disproved ...*
 5. ... *I beg to disagree and the proof is in the letter of 2011 itself which contains several grammatical mistakes including the spelling of the word inpack as opposed to impact.*
- [40] Another issue expressly dealt with by the trial judge concerns the sperm count of the Deceased and the report which the Petitioner relies heavily upon in support of her case. The then Chief Justice addresses this at paragraph [27] of her judgment as follows:
- “I note that a low sperm count in 2002 when the Deceased was 61 years does not in any way counter the evidence of the Plaintiff that she was conceived through his sexual relationship with her mother in 1972 when he was only 31 years old.”*
- [41] The judgment rendered in CS128/ 2018 is mainly based on the application of Articles 321 and 340 of the Civil Code. In my view, the findings of the learned Chief Justice based on the applicable law in light of the evidence adduced are reasonable. Nevertheless, the Petitioner is

entitled to raise these issues on appeal and whether the Learned Judge erred in law or fact should be determined by the Court of Appeal and not by way of a petition for new trial. I note that the Court of Appeal also has a power to order re-trial under section 31 of the Court of Appeal Rules, if that is found to be necessary for whatever reason. I further note that the Petitioner avers that the Court of Appeal is handicapped in deciding the matter but has not explained why. In that respect counsel for the Respondent stated in his oral submissions

“all of these matters that are brought up in the amended petition are matters that he can take up on appeal . . . rules of the Court of Appeal even allow him to make an application to court evidence before the Court of Appeal so all these remedies that he seeks in a new trial are available to him today . . . he raises save for those two that I have singled out are matters that can be canvassed on appeal . . . not only they can be, there are matters that should be canvassed on appeal . . . ”

[42] Counsel for the Petitioner is essentially making arguments similar to those made before the trial Court anew. In Hedgeintro International LTD v Hedge Funds Investment Management (Civil Appeal SCA MA05/2017) [2017] SCCA 32 (28 August 2017) the Court stated:

*“A new trial is entirely new proceedings and **not an occasion for improving on an abortive trial or rectifying defects in the old proceedings.** The proper approach to a new trial is to regard it as if it had been a first trial. **When a trial court relies in the new trial on the entire evidence in the old trial to which some addition had been made, it cannot be said that a proper approach has been made to the new trial.**”*
Emphasis added.

[43] As stated earlier, it is the Court of Appeal which should determine whether the trial Judge erred in law or the facts. Should a new trial be granted pursuant to the present application, it appears that the petitioner will rely on the entire evidence from the *old* trial with some additions in terms of purportedly *new evidence*, by essentially attempting to pursue arguments regarding alleged similarity of physiognomy and skin colour of the Respondent to Mr. Laporte. Such alleged similarity could have been discovered at the time of the *old trial* and it appears that the Petitioner is attempting to rectify defects in the old proceedings.

[44] The Court in Joanneau (supra) further observed with regard to section 194(c):

“In fact, the scope of the Section 194 (c) is frequently misunderstood and various applications are being made before our Courts under this section which does not fall within its purview. It is truism that the inherent powers of the Court are very wide. They are not in any way controlled by the provisions of the Code. They are in addition

to the powers specifically conferred on the Court by the Procedure Code. The Courts are free to exercise them. The only limitation put on the exercise of the inherent power is that when exercised they are not in conflict or inconsistent with what has been expressly provided for in the Code or where specific provision does not meet the necessities of the case. In any event, the inherent powers of the Court cannot be invoked in order to cut across the powers of the Appellate Court, which has given its final judgment in this matter. This power can be invoked only to supplement the provisions of the Code and not to override or render the judgment of the Court of Appeal ineffective or to formulate a new case for a party, who omitted to make out his case at the Court of first instance.

As a man of the world, I share the concern of Mr. Derjacques that interest of the minor children may be jeopardized if a new trial is not ordered due to legal technicality in this matter; however, as a judge I have to state that in the long run the “Rule of Law” would be jeopardized still more, if our Courts make laws for themselves in the name of equity or justice using those fancy phrases such as “in the interest of justice” or “for the ends of justice” and the like.” Emphasis added

- [45] In my view therefore, there are no exceptional circumstances that justify the granting of a new trial in this case. A substantial part of the Petitioner’s arguments relate to issues already argued before and addressed by the trial court and as previously stated, the merits of a judgment should be addressed by the Court of Appeal and not by way of application for a new trial. In fact the Petitioner in its petition for new trial rehashes the same arguments as on appeal and appears to be simply attempting to make use of all potentially available avenues at once.
- [46] As to the other issues raised by the petitioner regarding alleged breach of the Constitution, DNA testing, outdated legislation, ‘dubious judgements’, and several paternity cases being appealed against on the ground of subjective interpretation of the law, in my view, these are not issues to be determined in the present proceedings: the judgment in CS128/2018 was based on the applicable law which was the law in existence at the commencement of those proceedings.
- [47] Finally, it is important to add that it is irrelevant that the answer to the petition for a new trial by the respondent was unsupported by an affidavit of facts given that the objections raised concerned points of law and matters arising at the original hearing as opposed to factual matters in the personal knowledge of the Respondent.

Decision

[48] For the reasons given above, I find that the requirements for a new trial under section 194(b) and (c) have not been met. The petition for new trial is dismissed with costs.

Signed, dated and delivered at Ile du Port on 15th December 2020

E. Carolus J