

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 20 13 May 2021

SCA 61/2018

(Appeal from CS 19/2018)

In the matter between

HOUSING FINANCE COMPANY LIMITED

(rep. by Mr S. Rajasundaram)

Appellant

And

MARCEL SANTACHE

(rep. by Miss E. Wong)

Respondent

Neutral Citation: Housing Finance Company Limited v Santache (SCA 61/2018) [2021] SCCA 20 13 May 2021

Before: Fernando President, Twomey, Robinson JJA

Summary: Disposal of proceedings without trial – Appellant absent when case called on – Practice Directions No. 3 of 2017 and Form CV1 – Judgment in default of defence – Application to vacate judgment in default of defence – Practice Directions No. 3 of 2017 and Form CV1, including any other "Form" approved by the Chief Justice for the Practice Directions No. 3 of 2017 declared illegal: *Meme v The Land Registrar & Anor (SCA 53/2018) [2021] SCCA 15* – Appeal allowed – Supreme Court orders are null and quashed in their entirety. No order as to costs.

Heard: 7 April 2021

Delivered: 13 May 2021

ORDER

- (1) The Appeal is allowed.
 - (2) The Supreme Court orders are null and quashed in their entirety.
 - (3) The case is remitted to the Supreme Court before the same learned Judge to be heard under the law.
 - (4) No order as to costs.
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JUDGMENT

ROBINSON JA (FERNANDO PCA concurring)

1. This is an appeal against an order on motion of a learned Judge of the Supreme Court, dated 17 October 2018, dismissing an application by motion to set aside an order/judgment entered in default of defence on the 18 May 2018, under the Supreme Court Practice Directions No. 3 of 2017¹ and a document titled, "*DIRECTIONS FOR CASE MANAGEMENT (FORM CV1)*"². Form CV1 was made for the Practice Directions.
2. The order of the learned Judge, dated 18 May 2018, hereinafter referred to as the "Order", reads —

"[1] Noting that summon has been served on the 24th February on the Secretary of the HFC. Directions letter, being CV1, was sent out 21st February 2018. We are today 18th of May 2018, submission time has been given for defence to be filed, and in fact on CV1, it is clearly stated that should the defendant not file his defence Judgment can be entered, and I see no reason given then the fact we do have the report that Mr Raja is in another country, from the 18th this month 28th. However, I do not find that sufficient reason for him not to have filed his defence. Accordingly, judgment is entered in favour of the Plaintiff on his plaint, on the initial claim, as opposed to the alternative and the Court orders as follows, the agreement between the Plaintiffs and the defendant is void for mistake.

1. *The Defendant is ordered to pay the Plaintiffs a sum of eighty thousand rupees.*
2. *The Defendant shall pay the Plaintiff a sum of Seychelles Rupees One Thousand for every month from the date of filing until today.*
3. *The Loan on the property being J456 is extinguished and the Land Registrar, is directed to act accordingly.*
4. *We make no order for the Defendant to pay interest and cost to the Plaintiff."* (verbatim)

BACKGROUND TO THE APPEAL

3. By a plaint, Civil Side No. 19/2018, filed by the Respondent (the plaintiff then) the Respondent sought the following reliefs: (i) the agreement between the Respondent and the Appellant (the defendant then) be made void for mistake; (ii) payment of SCR 80,000

¹ The Supreme Court Practice Directions No. 3 of 2017 is hereinafter referred to as the "*Practice Directions*".

² The *DIRECTIONS FOR CASE MANAGEMENT (FORM CV1)* is hereinafter referred to as "*Form CV1*".

due to the Respondent; (iii) alternatively to the prayer (ii), payment of SCR 64,617.73; (iv) payment of SCR 1000 "for every month from the date of filing until the date of judgment"; (v) an order that the loan against immovable property is extinguished and the Land Registrar is directed to act accordingly; (vi) with interests and costs.

4. On the 21 February 2018, the Registrar of the Supreme Court issued summons to the Appellant to appear on the 18 May 2018 and answer the claim, along with Form CV1. On the 24 February 2018, the Appellant was served with the summons and Form CV1.
5. On the 18 May 2018, when the case was called on, the Respondent appeared by Counsel, but the Appellant neither appeared in person nor by Counsel. The Appellant had not filed a defence. After due proof of service of the summons, the learned Judge, without receiving evidence, by order of 18 May 2018, gave judgment according to the pleadings alone in the absence of the Appellant.
6. On hearing the plaint for judgment in default of defence, the learned Judge noted that Mr Rajasundaram was out of the country. She stated that she had received a report which confirmed he would be away from 18 to 28 May. She found that Mr Rajasundaram's absence from the country was not an excuse for his failure to file a defence. Therefore, she applied the sanction contained in Form CV1 for failure to file a defence under the Practice Directions.

Motion to set aside the judgment entered in default of defence

7. On the 4 June 2018, the Appellant filed an application in the Supreme Court, Civil Side MA 140/2018, to set aside the judgment and accept the defence to be filed. The Respondent by Counsel did not oppose the application.
8. In the Appellant's affidavit in support of the application, the Appellant's Chief Executive Officer explained Mr Rajasundaram's absence. He stated that Mr Rajasundaram had emailed the Registrar of the Supreme Court to inform her that he [Mr Rajasundaram] would not be able to come to court because he would not be in the country; that the email

was not brought to the attention of the learned Judge on the 18 May 2018; that the secretary of Mr Rajasundaram, who was present in court informed the learned Judge of Mr Rajasundaram's absence, but inadvertently forgot to mention that the Appellant's defence was ready to be filed. He averred that the Appellant's failure to file a defence within the stipulated time was a mistake. He contended that the Appellant had a good defence to the plaint.

9. In her order on motion of 17 October 2018, the learned Judge dismissed the application. The learned Judge found that the sanction contained under the Practice Directions No. 3 of 2017 and Form CV1 for failure to file a defence was also found in section 128 of the Seychelles Code of Civil Procedure. Following this line of reasoning, the learned Judge found that section 69 of the Seychelles Code of Civil Procedure does not apply in this case.

THE APPEAL

10. The Appellant has filed five grounds of appeal against the order on motion of 17 October 2018.
11. Principally, this case raises the question of whether or not the learned Judge was correct to apply the Practice Directions and Form CV1 to this case, *i.e.*, whether or not they are legal. The Appellant pointed out that the learned Judge was wrong to apply the Practice Directions. He contended that the Seychelles Code of Civil Procedure applies to this case in his additional written submissions. Counsel for the Respondent submitted that the Practice Directions and section 128 of the Seychelles Code of Civil Procedure apply.
12. In *Meme v The Land Registrar & Anor SCA 53/2018 [2021] SCCA 15* (delivered on the 30 April 2021), the majority opinion considered *proprio motu* the question of whether or not the Practice Directions No. 3 of 2017 and Form CV1 are legal, *i.e.*, whether or not the Seychelles Code of Civil Procedure and the Courts Act enable them. **Meme** contains the detailed reasoning and conclusions of the majority with respect to the said question.

13. For the purposes of this judgment, I reproduce the conclusions of the majority —

"47. *The above analysis has led me to conclude that the Chief Justice has not acted within the law. Consequently, the Practice Directions No. 3 of 2017 and Form CV1 attached to them, including any other "Form" approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017, are illegal. For this reason, I accept the submission of Counsel for the Appellant. It follows that whether or not the Practice Directions No. 3 of 2017 and Form CV1 attached to them are inconsistent with the Seychelles Code of Civil Procedure does not arise for consideration...*

48. *Hence, I declare the Practice Directions No. 3 of 2017 and Form CV1 attached to them, including any other "Form" approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017, to be illegal. I allow the appeal for that reason."*

14. **Meme** declared the Practice Directions No. 3 of 2017 and Form CV1, including any other "Form" approved by the Chief Justice for the Practice Directions No. 3 of 2017, to be illegal. I consider this appeal in light of the majority opinion in **Meme**³.

15. Before I consider the fate of this appeal, I examine some points made by my brother Dingake JA, in his dissenting opinion in **Meme**, concerning the reasons why he disagreed with the "*approach, reasoning and conclusion of the majority*". I can do no better than to reproduce what Dingake JA stated in Meme —

[1] *I have had the benefit of reading the majority judgment written by my sister Robinson JA. I do not agree with the approach, reasoning and conclusion of the majority for the reasons that the ground upon which the Practice Directive No 3 of 2017 was declared illegal (the question of legality) was **raised by the court proprio motu, as it is not part of the Grounds of Appeal by the Appellant and no relief to declare Practice Directions No 3 of 2017 and Form CV1 was explicitly sought. In my respectful view even if it was appropriate to proceed in the manner the majority has done, justice requires that the parties ought to have been***

³ The terms "Gazette", "statutory instrument" and "subsidiary legislation" (Interpretation and General Provisions Act) have been amended by the Digitization and Publication of Gazette Act, 2020 (Act 23 of 2020). Also the term "People's Assembly" wherever it appears in the Interpretation and General Provisions Act has been repealed and substituted therefor by the words "National Assembly". The said Act came into operation on the 31 December 2020 by way of notice published in the Gazette (S.I. 162 of 2020. This judgment takes judicial notice of the amendments made to the Interpretation and General Provisions Act by the Digitization and Publication of Gazette Act, 2020 (Act 23 of 2020). The said amendments and repeal do not affect at all the reasoning, findings and decision of the majority in **Meme**.

afforded adequate time than they were given to deal with the new ground introduced by the court and that finally determined the fate of the appeal.

[2] *As a matter of general approach I am of the deep conviction that in an adversarial system where parties are represented by lawyers it is better, and in keeping with the neutrality and impartiality of the court, to leave the framing of the issues to the parties themselves.*

[3] *This is because in an adversarial system we rely on the parties to frame the issues for the decision and leave it to the courts as neutral arbiters of the matters the parties present, and the court should only depart from this approach in exceptional circumstances which do not exist in this case.*

[4] *My dissenting opinion is therefore based solely on the Grounds of Appeal advanced by the Appellant."* Emphasis is mine

16. I mention that I had the benefit of reading in draft the judgment of Dingake JA. However, I was not afforded the opportunity to view paragraphs [1], [2], [3] and [4], of his minority opinion, referred to in paragraph 15 hereof.
17. Dingake JA stated in paragraph [1] of his dissenting opinion, referred to in paragraph 15 hereof, that the majority's approach was appropriate in **Meme**. However, he was concerned that the Court of Appeal had not given the parties enough time to deal with the "*new ground*" introduced by it. I note that Dingake JA did not voice his concern at the appeal. In **Meme**, both Counsel were apprised of and invited to address the Court of Appeal with respect to whether or not the Practice Directions No. 3 of 2017 and Form CV1 are legal. Both Counsel were familiar with the issue and answered questions put to them by the Court of Appeal.
18. Further, I note that Dingake JA, in his dissenting opinion, has used the term "**rule**" and "**practice directions**" interchangeably. With all due respect, if Dingake JA had wanted to seek any clarifications with respect to the question at issue, he could have invoked the proviso to rule 30(5) of the Seychelles Court of Appeal Rules, 2005, as amended, which stipulates —

"30(5) [...]:

Provided that the President may suo moto decide or any one of the Judges who heard the appeal may request the President, in the interest of justice, to reconvene the Court before the date fixed for judgment to seek any clarifications pertaining to the appeal, and in the latter instance the President may give such direction as the President deems just and expedient". ((S. I. 158 of 2020 - Seychelles Court of Appeal (Amendment) Rules, 2020).

19. In the present appeal and after having raised the issue of whether or not the Practice Directions and Form CV1 are legal, *proprio motu*, we gave the parties enough time to deal with it in the interest of justice as we believed that they were not familiar with the issue. The Court of Appeal has received additional written submissions from both parties concerning the question at issue.
20. I turn to paragraph [3] of the dissenting opinion of my brother Dingake JA, referred to in paragraph 15 hereof. With all due respect to Dingake JA, I state that the approach adopted by the majority is authorised by Rule 18(9) of the Seychelles Court of Appeal Rules, 2005, as amended, which stipulates —

"18(9) Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the ground 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 on that ground."

21. Moreover, it is perplexing that Dingake JA believes that there do not exist any exceptional circumstances in **Meme**. Indeed, I state that exceptional circumstances existed in **Meme**. Blatantly, the appellant – **Meme** suffered the deprivation of his rights as a result of the learned Judge acting in accordance with the Practice Directions and Form CV1, which are illegal. I reproduce this extract from Halsbury's Laws of England⁴, which explains the objectives of procedural law (quoted in paragraph 45 of the majority opinion) —

"[...] The civil process not only exists for the resolution of individual disputes but also for the protection of rights, for the enforcement of rights, and for remedying

⁴ [Paragraph 6] - "CIVIL PROCEDURE (VOLUME 11 (2015), PARAS 1-503; Volume 12 (2015), Paras 504-1218; Volume 12A (2015) PARAS 1219-1775. Consultant Editor Adrian Zuckerman Emeritus Professor of Civil Procedure, University of Oxford, University College, Oxford".

breaches [...]. Civil procedural law has been categorised according to the character which it assumes as the indispensable instrument for the attainment of justice, namely: (1) its complementary character; (2) its protective character; and (3) its remedial or practical character. [...]. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of the law. In this sense, the protective character of procedural law has the effect of sustaining and safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation of his rights except in accordance with the accepted rules of procedure. In its remedial or practical character [...] it deals with the actual litigation process. What the practitioners seek for their clients when they resort to the courts is to use the machinery of justice to obtain a just result, and what the clients seek, in addition to vindicating their rights, is to avoid unnecessary expense, delay, and excessive technicality in the process of attaining that result [...]."

22. I now deal with this appeal. I have considered the orders of 18 May 2018 and 17 October 2018 with care. I find that the learned Judge did not consider sections 65⁵ and 69⁶ of the Seychelles Code of Civil Procedure when she made the orders. She entered a judgment in default of defence strictly in accordance with the Practice Directions and Form CV1. Obviously, section 128 of the Seychelles Code of Civil Procedure does not apply to the facts of this case.

THE DECISION

23. I allow the appeal on the basis that the Practice Directions and Form CV1 applied by the learned Judge, in this case, are null. Hence, I hold that the learned Judge's order of 18 May 2018 entering judgment in default of defence based on the Practice Directions and Form CV1 and the order of 17 October 2018 MA 140/2018 arising in CS19/2018 are null. For the avoidance of doubt, I quash all the orders made by the learned Judge in this case and remit

⁵ "65. ***If on the day so fixed in the summons when the case is called on the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give Judgment in the absence of the defendant, or may adjourn the hearing of the suit ex parte.***"

⁶ "69. ***If in any case where one party does not appear on the day fixed in the summons, Judgment has been given by the court, the party against whom Judgment has been given may apply to the court to set it aside by motion made within one month after the date of the Judgment if the case has been dismissed, or within one month after execution has been effected if Judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the Judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.***" Emphasis is mine

CS19/2018 to the Supreme Court to be heard by the same learned Judge under the law.

24. I make no order as to costs.

Robinson JA

FERNANDO President

25. I agree with the judgment and reasoning of Robinson JA that Practice Directions No. 3 of 2017 issued by the Chief Justice and any other Forms, including Form CV1 attached to them are illegal. However, I wish to add that the Chief Justice may give directions and issue guidelines pertaining to the management and affairs of the Supreme Court for its proper and effective functioning, so long as they do not impinge on any existing laws or rules or take away or restrict the rights of litigants.

Fernando President

Signed, dated and delivered at Ile du Port on 13 May 2021