

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 23 (29 April 2022)
SCA MA 28/2021
(Arising in SCA 71/2018)
(Out of CS 118/2012)

ANDRE BRISTOL

Appellant

(rep. by Mr. Wilby Lucas)

and

ELLEN ROSENBAUER

Respondent

(rep. by Mr. Guy Ferley)

Neutral Citation: *Bristol v Rosenbauer* (SCA MA 28/2021) [2022] SCCA 23 (29 April 2022)
(Arising in SCA 71/2018) (Out of CS 118/2012)

Before: Fernando, President, Twomey-Woods, Tibatemwa-Ekirikubinza, JJA

Summary: Application to reconsider costs awarded in decision already delivered- Court of appeal- inherent jurisdiction- inherent power

Heard: 12 April 2022

Delivered: 29 April 2022

ORDER

The application is dismissed.

JUDGMENT

TWOMEY JA

Background

[1] In *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*¹ (for the purpose of this judgment hereafter referred to as *Vijay 2020*), Dingake JA cited the

¹ SCA MA 21/2020) [2020] SCCA - 13 November 2020

Kenyan Court of Appeal in the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* ² as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[2] On 7 September 2021, this Court made a monetary award against Mr. Bristol and ordered that he pay commercial interest on the award together with costs. By the present application, Mr. Bristol seeks a reopening of the appeal case to allow the court to "consider" varying the order relating to interests it made as in his estimation the "delay of six years of the hearing of the case before the Supreme Court was not entirely at the instance or due to the fault of the Applicant."

[3] He has supported his application by an affidavit in which he depones namely that:

"The plaint was filed on 23 August 2012 and the judgment delivered on 2nd November 2018, 6 years later. The Supreme Court gave judgment in favour of the Plaintiff and warded the Plaintiff cost and interest and dismissed my counterclaim. I lodged an appeal with the Seychelles Court of Appeal on the 6th December 2018 whereby my appeal was heard during the August session of 2021 almost 3 years latter

- 1 *I loss my appeal and the Court awarded SR 448,560.75 to the Respondent with interest at the commercial rate from the date of filing the plaint.*
- 2 *When I do a calculation, the interest at commercial rate for 9 years it give me a figure of SR 403,704 which bring (sic) the total of (sic) of SR 852,264.75 that I have to pay the judgment creditor and I don't have the means financially" [Sic]*

[4] The Applicant, in what he then terms 'mitigation,' lists the various adjournments before hearings and adjournments of the delivery of the judgment.

² [1989] eKLR, hereafter known as the "Lillian S" case.

[5] Mr. Elizabeth, Counsel for Ellen Rosenbauer, the Respondent in this application, has submitted that the court is *functus officio* and has prayed for the application to be dismissed.

The issue before this Court

[6] The threshold issue that arises to be determined is whether this Court may hear an application to unsettle its own earlier decision.

[7] The issue concerns circumstances when the court may act after it has delivered judgment in a case.

The submissions of Counsel

[8] Mr. Lucas for the Applicant conceded that the application he now makes was not made in the appeal. He submitted however that section 6 of the Courts Act (which grants equitable powers of the court) permits the Court to vary its earlier decisions. When addressed by the court on the fact that the Court of Appeal has only appellate powers under the Constitution, he submitted that the case of *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited And Vijay Construction (Pty) Ltd v Eastern European Engineering*³ (hereafter *Vijay 2022*) established circumstances in which the Court can exercise its inherent jurisdiction. He submitted that the type of “injustice” suffered by his client in the present case permits the court to reopen a matter in which it has already given a decision and to consider varying its previous orders.

[9] Mr. Elizabeth in his submissions has contended that *Vijay 2022* opened a Pandora’s box for litigants who feel an unfairness or serious procedural irregularity has occurred. He submitted that the case was a challenge to the principle of finality of proceedings but that it nevertheless qualified circumstances where such cases might be entertained. In this regard, it was his submission that the court found a serious procedural irregularity in *Vijay 2022*, which distinguished it from the present case where none was apparent. In Counsel’s view, the Applicant in the present application was not able to show that anything irregular had happened to justify reopening the case.

³ (MA 24/2020 (Arising in SCA28/2020)) [2022] SCCA 5 (21 March 2022).

[10] He further submitted that the reopening of the present case would offend the principle of *functus officio* and that the court has neither jurisdiction nor power to reopen a case to review its own judgment. He contended that the principle was primarily introduced to prevent continuous and repeated litigation without an end in sight. He relied on the cases of *Libyan Peoples Bureau v Fouhan Enterprises (Pty) Ltd*⁴, and *Alcindor v Alcindor*⁵ in which the Court of Appeal stated:

“The authorities are clear on functus officio in relation to an amendment after entry of a judgment or order. As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action, or matter or in a fresh action brought to review the judgment or order. The objection of the rule is to bring litigation to finality. Halsbury Laws of England, Vol 26 4th Edition Paragraph 556;

This is also borne out in Attorney General v Marzorchi & Others (1996) SCAR 8, and SDC v. Government of Seychelles (2007) SCAR 3.”

The jurisdiction or power of the court to rehear a case in which it has already delivered a decision

[11] In *Vijay 2020*,⁶ Dingake JA cited *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*⁷ to provide a useful definition of jurisdiction:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. ... [w]here the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of

⁴ (214 of 2010) [2010] SCSC 20 (04 August 2010).

⁵ (SCA 33 of 2010) [2012] SCCA 4(12 PRIL 2012).

⁶ *Supra* fn 1.

⁷ [2012] eKLR.

law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”⁸
(Emphasis added.)

[12] The *Lillian ‘S’*⁹ case emphasised that jurisdiction flows from the law and the recipient-court is to apply the same, with any statutory limitations embodied therein. Hence, a court may not assume jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of the Legislature, where the wording of the legislation is clear and there is no ambiguity.¹⁰

[13] In Seychelles, the jurisdiction of the courts is established in the Constitution and the Courts Act. Section 120 of the Constitution, plainly provides

*120. (1) There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine **appeals** from a judgement, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.”* (Emphasis added.)

[14] Similarly, section 12(1) of the Courts Act, provides as follows:

*12. (1) Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine **appeals** from any judgement or order of the Supreme Court given or made in its original or appellate jurisdiction.”* (emphasis added).

[15] The jurisdiction of the Court of Appeal is expressly provided in those provisions - it is a court that hears appeals.

[16] Unlike the express provisions relating to the Supreme Court, neither the Constitution nor the Courts Act confers upon the Court of Appeal a primary “inherent jurisdiction” as it has been submitted it has. In any case, it appears that the phrase “inherent jurisdiction” is loosely used by Counsel or the Court when there is no provision of the law to fall back on to provide a remedy not catered for. In most cases, the use of the term is inappropriate as

⁸ Ibid, para 68.

⁹ Supra fn 2

¹⁰ Ibid.

it seems not to refer to jurisdiction but to residual powers of common law courts, notably that of England. Counsel frequently urge the court to utilise its inherent jurisdiction in response to failures of procedural justice. In the absence of a specific statutory jurisdiction, the concept is also often invoked by judges to give efficacy to judicial proceedings. But when a court is called to exercise its inherent jurisdiction, so that it can properly regulate its own proceedings, it is essentially called to exercise a function that it already has or has already been clothed with, or to exercise a power in order to allow its orders to be effective. As has been pointed out, few concepts in the common law are so invoked and yet remain so nebulous.¹¹ Sir Jack Jacob¹² defines the concept as:

*“[...] residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.”*¹³

[17] This definition has been approved by courts in different jurisdictions including New Zealand¹⁴, Canada¹⁵ and the United Kingdom¹⁶. Jacob states that this inherent jurisdiction of residual powers can be classified into three categories;

- *control over process (eg punishing for contempt);*
- *control over persons (eg, a court’s judicial review jurisdiction); and*
- *control over inferior courts and tribunals (eg punishing for contempt of those fora)*¹⁷

[18] Hence, inherent jurisdiction is generally understood as referring to the array of implied powers that are exercisable by judges to regulate curial processes. It is my belief however that these powers described by Sir Jack Jacob, apply to countries without written Constitutions like the UK and New Zealand and which have through their Civil Procedure Rules regulated the exercise of these powers within strict limits¹⁸. Such

¹¹ M Rodriguez Ferrere, ‘Inherent jurisdiction and its limits -Otago Law Review, (2013) Vol 13 No 1, 107

¹² I H Jacob “The Court’s Inherent Jurisdiction” (1970) 23 CLP 23

¹³ Ibid, 23

¹⁴ *Taylor v Attorney General* [1975] 2 NZLR 675, 680 (NZCA) and *Siemer v Solicitor-General* [2010] 3 NZLR 767 at [29] (SCNZ)

¹⁵ *R v Caron* [2011] 1 SCR 78 at [24] (SCC)

¹⁶ *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 at 3037

¹⁷ Supra fn 12, 32-49.

¹⁸ See for example the UK Court’s power to vary or revoke orders under CPR 3.1(7.)

jurisdiction or powers as described by Jacob do not apply to countries like Seychelles with a written Constitution and attendant laws in which are spelt out the jurisdiction and powers of the court.

[19] As has been pointed out, inherent jurisdiction implies some residual powers that the courts may have to regulate their own process in certain circumstances. Jacob points out that superior courts possess inherent jurisdiction “to render assistance to inferior courts to enable them to administer justice fully and effectively”¹⁹ In this regard, superior courts have such jurisdiction or incidental powers to correct errors and ensure the efficacy of judgments. But as was pointed out by Dingake JA in the majority decision of *Vijay 2022*²⁰ the concept of inherent jurisdiction:

*“cannot be an elastic band that may be stretched in whatever direction the court wishes to stretch it because the court cannot stand the instruction by the constitution that it has no power to do certain things. In every situation where the court is inclined to invoke its inherent jurisdiction it must do it in a manner that accords with the requirements of the constitution and as far as possible with the procedure ordinarily followed by this Court in similar cases. Under no circumstances should the power be used to ignore or circumvent legislation that confers jurisdiction on the court.”*²¹

[20] More importantly, it is vitally important to distinguish between the powers and jurisdictions of superior courts from appellate courts in terms of limits to their jurisdiction. As Goh Yihan explains in relation to the courts of Singapore:

*“[S]uperior courts – strictly defined as those without a statutory foundation – possess an inherent jurisdiction, giving them a particular authority to hear and decide matters. Some courts are deemed by statute as superior courts, but this is only an indicator of their place on the judicial hierarchy: it does not grant them an inherent jurisdiction, which depends on a non-statutory origin.”*²²

[21] After a comparison of courts’ approaches to inherent powers and jurisdictions in several common law countries, Goh concludes:

¹⁹ Supra fn 12, 48.

²⁰ Supra fn 1.

²¹ Ibid at paragraph 27.

²² G Yihan “The Inherent Jurisdiction and Inherent Powers of the Singapore Courts” (2011) Sing JLS 178, 188.

“Once the exercise of the inherent jurisdiction by various common law systems is examined, however, common denominators arise that provide it with definable substance. That substance takes the form of a set of three principles, namely that the inherent jurisdiction: (a) is exercised where necessary; (b) has the aim of avoiding injustice; and (c) exists in the absence of explicit statutory regulation, but is not easily wrested away from the courts by legislative action. The principles are an acknowledgement, among other things, that the inherent jurisdiction is far from the “joker in a pack”: there are constraints on its exercise....”

[22] With this backdrop, it is clear that Dingake JA correctly found that both *Karunakaran v Attorney General*²³ and *Attorney General v Mazorchi and Another*²⁴ were wrongly decided. Both cases, with the former relying on the latter, cited Halsbury's Laws of England, Vol.26, 4th Edition, for the proposition that

“where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside.”

[23] Both cases failed to put the laws of England into the Seychellois context, an independent republic with a written Constitution and statute providing and curtailing the Court's jurisdiction. In so doing the Courts in both *Karunakaran*²⁵ and *Mazorchi*²⁶ ignored the Constitution of Seychelles and instead borrowed from the concept of inherent jurisdiction of the superior courts of the UK. As stated by Dingake JA in *Vijay*,²⁷ the courts of Seychelles' inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice, does not extend to the assumption of jurisdiction not conferred upon it by statute.

[24] In a related context, *R v Esparon and others*²⁸ is a useful judgment to draw from to copper-fasten the Constitutional and legislative intent of the jurisdiction and powers of the Court of Appeal of this country. There, the Court of Appeal had to grapple with the extent of its jurisdiction to determine whether it had the power to hear an appeal from a

²³ (CP18/2019) [2020] SCCC 5 (12 May 2020).

²⁴ SCA Civil Appeal 6 of 1996.

²⁵ Supra fn 17.

²⁶ Supra fn 18.

²⁷ Supra fn 1.

²⁸ (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014).

refusal of the Supreme Court to grant bail to a party who was appearing before that Court, in circumstances where section 342(6) of the Criminal Procedure Code appeared to restrict the jurisdiction of the Court of Appeal.

[25] The majority decision (Domah and Twomey JJA) determined that the Court of Appeal did have jurisdiction to determine appeals for refusals to grant bail by the Supreme Court. The court took the view that bail was an autonomous proceeding, and as such section 342(6) did not find application. Importantly, the court noted that there would result an unconstitutional void in criminal proceedings if it was not possible to appeal a refusal for bail.

[26] At first glance, it may appear that the Court of Appeal had exercised its inherent jurisdiction in clothing itself with jurisdiction or power to determine bail appeals in circumstances where the legislation appeared to restrict this. But, the Court of Appeal was in fact invoking its original appellate jurisdiction contained in the Constitution – which is broad jurisdiction to hear appeals from the Supreme Court. This becomes clear if one has regard to the qualifying words to section 342:

“342 (1) Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal . . .” (emphasis added)

[27] That provision specifically deals with persons convicted. Those persons are constrained to appeal only on the basis provided for in that provision. Persons who do not fall within this category, such as those accused awaiting trial, have recourse to the general provisions under section 120 of the Constitution and the Courts Act. As a result, the Court of Appeal in *Esparon* exercised its original appellate jurisdiction and not inherent jurisdiction. *Esparon* is vitally important as it fortifies the fact that the Court of Appeal has appellate jurisdiction, sourced from the Constitution.

[28] In *Vijay 2022*, the Court refused to commit itself to a view on whether or not the Court of Appeal has inherent jurisdiction – it stated:

“(52) We ask whether or not the reference to the English Court of Appeal under Article 120 (3) of the Constitution is stable. In this judgment, we don't have to deal with this issue.

(53) In light of the above, it is not clear whether or not the Constitutional provisions and the Courts Act assist in creating the jurisdiction or inherent jurisdiction. We state no more about this ground. “

[29] It did so even after citing the journal article of Rosara Joseph²⁹ which clearly concluded as follows:

“*Inherent jurisdiction denotes the substantive, non-statutory authority to take matters and determine them. Only the High Court, as a court of general jurisdiction, exercises the inherent jurisdiction that was inherited from the superior courts in England. Statutory courts, including superior appellate courts, do not possess inherent jurisdiction because their jurisdiction is conferred and limited by statute.*”³⁰(emphasis added).

[30] Having not made a decision on inherent *jurisdiction* it proceeded instead to find that the Court of Appeal had inherent *powers* with regard to procedure. For this proposition, it relied heavily on the cases of *Taylor v Lawrence*³¹, *R v Smith*³² and *R v Nakhla*³³ and *Zaoui v Attorney-General*³⁴.

[31] It is my considered view that such reliance was misguided. Those cases all involved Courts of Appeal of the UK and New Zealand reopening appeals where fresh evidence emerged, evidence not available at the hearing of the appeals: in *Taylor*, the fresh evidence was that the judge who had heard the case had his will drawn up by the plaintiff's solicitors in the days before the hearing, and had not been billed; in *Smith*, the fresh evidence concerned the fact that a case (*Taito v R*³⁵ before the Privy Council had determined that twelve appeals of criminal convictions at the end of an *ex parte*

²⁹ Rosara Joseph, "Inherent jurisdiction and inherent powers in New Zealand" [2005] CanterLawRw 10; (2005) 11 Canterbury Law Review 220.

³⁰ Ibid, at P. 225.

³¹ [2002] EWCA Civ 90 (04 February 2002.)

³² [2003]3 NZLR 617.

³³ (No. 2) [1974] 1 NZLR 453].

³⁴ [2004] NZCA 228; [2005] 1 NZLR 577 (CA); [2005] 1 NZLR 666 (SC).

³⁵ (2002) 6 HRNZ 539, [2002] UKPC 15.

procedure did not meet fair trial principles) but this had not included *Smith* whose appeal against conviction and sentence for several charges, including murder, had also been dismissed after a similar ex parte hearing; in *Nahkla* as a result of an administrative error, the judgment read out omitted a key passage resulting in the accused's imprisonment; in *Zaoui*, an asylum seeker in prolonged and continued detention on national security grounds was granted bail by the Supreme Court as a last resort.

[32] In the above cases, the court made it explicit that recourse to inherent/ residual powers was reserved for those cases where there are fundamental errors of procedure which would have affected the outcome of the case. This arrogation of inherent power by the court has been heavily criticised as untenable absent legislative intent. It is important to cite Joseph fully:

*“Inherent jurisdiction denotes the substantive, non-statutory authority to take matters and determine them. Only the High Court, as a court of general jurisdiction, exercises the inherent jurisdiction that was inherited from the superior courts in England. Statutory courts, including superior appellate courts, do not possess inherent jurisdiction because their jurisdiction is conferred and limited by statute. But this fundamental tenet is sometimes obscured in the intricacies of judicial reasoning. The Court of Appeal in *Smith* wrongly assumed inherent jurisdiction to set aside the impugned decisions on appeal, and the Supreme Court in *Zaoui* wrongly assumed inherent jurisdiction to grant bail on direct application. Both Courts fudged the distinction between inherent jurisdiction and inherent powers. All courts - superior and inferior - possess inherent powers. Inherent powers arise incidentally to the exercise of jurisdiction and enable courts to function and protect their character as courts of justice. Their exercise is entirely parasitic and cannot found jurisdiction where there is none. The decisions in *Smith* and *Zaoui* leave unsettling and unanswered questions. It is unsatisfactory that our superior appellate courts must usurp jurisdiction to correct injustices. Any lacuna in the jurisdiction of either court ought to be squarely confronted. Careful amendment to the Supreme Court Act 2004 and the Judicature Act 1908 should be made to authorise these courts to set aside their 'null' decisions and to correct injustices.”³⁶*

[33] In Seychelles, the exercise of inherent powers by the Court of Appeal, similarly to the exercise of its jurisdiction, is circumscribed by statutes and rules of court. Section 147 of

³⁶ *Supra*,fn 28, 238.

the Seychelles Code of Civil Procedure Code, for example, allows the Court to correct mistakes in judgments or orders, or errors arising therein from any accidental slip or omission and section 150 further allows the alter, vary or suspend its judgment or order, during the sitting of the Court at which such judgment or order has been given.

- [34] With regard to powers of the Court of Appeal, Rule 31 of the Seychelles Court of Appeal Rules in relevant part provides:

Power of the Court on appeal

31. (1) Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner.

...

(5) In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised...

- [35] The intent of the Rules is clear. The powers of the Court of Appeal are incidental and attendant to the exercise of its jurisdiction to enable the Court to consider matters on appeal from the trial court.

- [36] In essence, inherent powers are utilised to give effect to the inherent jurisdiction conferred to the court by law.³⁷ It is logical to assume that where there is no jurisdiction, there is no power. Inherent power, according to Joseph, is power which is incidental or ancillary to their substantive jurisdiction. As such, it is exercisable in matters of procedure.³⁸

³⁷ Siyuan C 'Is the invocation of inherent jurisdiction the same as the exercise of inherent powers? Re Nalpon Zero Geraldo Mario' 17 (2013) *International Journal of Evidence and Proof* 367-373.

³⁸ Joseph R 'Inherent jurisdiction and inherent powers in New Zealand' 10 (2005) *Canterbury Law Review* 220.

[37] In Singapore, the relationship between inherent jurisdiction and inherent power is explained in the case of *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo*³⁹ to indicate that inherent jurisdiction is a precondition of the lawful exercise of a particular power – the former refers to *authority* to hear a matter, while the latter refers to the *power* to hear a matter.⁴⁰

[38] The decision of Fernando, JA, as he then was, in *Ernesta & Ors v R*⁴¹, inasmuch as it recognises the absence of power where the court has no jurisdiction is in agreement with this proposition. Fernando JA cites *Attorney General v Tan Boon Pou*⁴² for the postulation that the Court of Appeal as a creature of statute, has no jurisdiction beyond that which is conferred on it by statute and goes on to state:

“19. There lies a distinction between “inherent jurisdiction” and “inherent powers” of a court. The two concepts are quite distinct. Inherent jurisdiction refers to a jurisdiction granted by law to a court to hear and determine a matter. By contrast, inherent powers have arisen to consummate imperfectly constituted judicial power.”

[39] He cites in support *Axiom Rolle PRP Valuation Services Ltd v Rahul Ramesh Kapadia and others*⁴³, in which inherent power is defined as:

“an entitlement in law to use a procedural tool to hear and decide a cause of action in the Court within jurisdiction. An inherent power is exercisable by all courts. It is a power which is incidental and ancillary to the primary jurisdiction. A court invokes its inherent power in order to fulfil its constitutionally-ordained function as a court of law. Inherent powers attach where a court has already been granted jurisdiction.

³⁹ (1996) 2 S.L.R. (R) 80 (CA).

⁴⁰ Ibid.

⁴¹ (2017) SLR Part 2 379.

⁴² (1 of 2005) (1 of 2005) [2005] SCCA 21 (24 November 2005).

⁴³ NZAC, 43/06 The point missed by the learned Justice of Appeal is explained at paragraph 24 of this judgment with regard to *Esparon* where the same issue was raised - as this was an appeal of a decision of an inferior court, whether or not the jurisdiction or power of the court regarding appeals had been circumscribed by statute was immaterial as the court was constitutionally mandated to hear appeals. In considering an appeal against a refusal to grant bail the Court of Appeal was exercising its appellate jurisdiction and not inherent jurisdiction or inherent power. The guarantee of at least one level of appeal is fundamental for the protection of the rule of law. The law limiting this fundamental principle should have been declared unconstitutional.

(1 of 2005) (1 of 2005) [2005] SCCA 21 (24 November 2005).

Inherent powers necessarily accrue to a court by virtue of the very nature of its judicial function or its constitutional role in the administration of justice. Thus, inherent powers are part of a court's resources; they are a necessary addition to the judicial function, facilitating the proper functioning of courts within the framework of jurisdiction granted to it by statute. Thus, whilst inherent jurisdiction is substantive, inherent powers are procedural". (Emphasis added)

[40] It was therefore inappropriate for the Court in *Vijay 2022*, to clothe itself with inherent powers to amend its own orders when it had already found that it had no inherent jurisdiction to hear the matter. *Vijay 2022* was therefore decided *per incuriam* and must not be relied on.

[41] Moreover, *Vijay 2022* raised the issue of a breach of a fair hearing – although it masked itself as a procedural irregularity.⁴⁴ Indeed all procedural irregularities if severe would in any case amount to breaches of one's fair trial rights. The proper forum for the determination of breaches for human rights is the Constitutional Court. This is so even if the issue of fair hearing arises in the Court of Appeal. The distinction is that in those circumstances, the application for redress constitutes a fresh case. It is not the same case that has already been heard and determined. That was the approach adopted in *Mellie v Government of Seychelles & Anor*⁴⁵ and *d'Offay v Louise*.⁴⁶ But even then, as was pointed out in *d'Offay*, the right to a fair hearing must be balanced with the need for finality of judgement.

[42] The present matter also raises a substantive issue - costs - a matter that was neither raised with the trial court nor the Court of Appeal. The failure to argue or raise a discussion regarding costs during the appeal is not a matter that permits the Court of Appeal to reopen the hearing to hear arguments about which costs should apply – this clearly does not fall within the powers of the Court of Appeal even if it did have jurisdiction.

⁴⁴ Even if it was a procedural irregularity it was not an irregularity as described in the cited jurisprudence meriting the setting aside of the court's own previous order.

⁴⁵ (CP 04/2018) [2019] SCCC 05 (24 June 2019) and (SCA CP 03/2019 (appeal from CS 04/2018)) [2019] SCCA 40 (17 December 2019).

⁴⁶ SCAR (2008-2009) 123.

[43] The court is *functus officio*. It has neither jurisdiction nor power to vary its own previous order. For these reasons the application is refused.

Dr. M. Twomey-Woods, JA.

I concur

Dr. L. Tibatemwa-Ekirikubinza

Signed, dated and delivered at Ile du Port on 29 April 2022.

FERNANDO, PRESIDENT

1. This was an application by the Applicant/Judgment Debtor, for this Court “to consider the waiver of interest accrued on the judgment debt from the date of the Plaint on the 23rd of August 2012 to 7th September 2021 when judgment was delivered 9 years.” “The delay of six years for the hearing of the case before the Supreme Court...” according to the Applicant, “was not entirely at the instance or due to the fault of the Applicant.”
2. The background to this case is that the Trial Judge who heard the case before the Supreme Court had entered judgment in favour of the Respondent /Judgment Creditor and awarded her a total sum_of SR 520,498.75 as well as interest at the commercial rate from the date of the Plaint.

3. The Applicant/Judgment Debtor, being dissatisfied with the judgment of the Supreme Court appealed to this Court in SCA 71/2018 and his first ground of appeal was “The learned Trial Judge erred in awarding the total sum of 520,498.75 Rupees with interest to the Plaintiff, an award which is not supported by the evidence on record.”
4. Despite making the award of interest by the Supreme Court on the total sum, his first ground of appeal, the Applicant/Judgment Debtor admitted before us at the hearing, that he had not argued the waiver of interest on the judgment debt on the basis of the delay, before this Court on appeal or even before the Supreme Court.
5. This Court in its judgment dated 07 September 2021, having deducted a certain sum for the cost of repairing the roof from the sum claimed, awarded the Respondent /Judgment Creditor damages for breach of contract in the sum of SR 448,560.75 as well as interest at the commercial rate from the date of filing the plaint. It is in relation to this judgment that the application referred to in paragraph one above was filed.
6. Counsel for the Applicant/Judgment Debtor at the hearing before us stated that he is not challenging the judgment of the Court of Appeal but only asking for the Court to consider reviewing a variation of the order pertaining to interest under section 150 of the Seychelles Code of Civil Procedure. It was then pointed out to him by this Court that the ‘Slip Rule’ referred to therein applies only where there has been a slip or a mistake and should have been raised in the sitting when judgment was delivered.
7. Having not succeeded with his argument on the ‘Slip Rule’ Counsel for the Applicant/Judgment Debtor, relied on the inherent jurisdiction of the Court based on section 6 of the Courts Act and article 120(3) of the Constitution and tried to rely on the recent Court of Appeal judgment delivered on 21 March 2022 in the case of Vijay V EEEL MA 24/2020 (Arising in SCA 28/2020), referred to by Justice Twomey in her judgment as Vijay 2022. When questioned by Court as to whether the circumstances in the Vijay case was similar to the instant case, Counsel for the Applicant/Judgment Debtor categorically admitted that they are not as the “Vijay case was based on procedural

irregularities”. When questioned by Court “So what leg are you standing now?” he left the matter to Court.

8. Counsel for the Respondent /Judgment Creditor submitted that people should not be permitted after the Court of Appeal has given a judgment to come back and ask the Court to reopen the case, as there needs to be finality to proceedings. When questioned by Court as to whether he admits “that there is a difference between this case and that of Vijay 2022?”, Counsel for the Respondent /Judgment Creditor stated: “Absolutely, your Lordship. Mr. Lucas’s argument is fairness. Vijay’s argument was, serious procedural irregularity” and that in limited circumstances the Court has inherent or residual jurisdiction to reopen or rehear the case. Counsel for the Respondent /Judgment Creditor then citing authority stated: “It shall be made clear that the House will not reopen an appeal save in circumstances where through no fault of a party he or she has been subjected to an unfair procedure” and went on to state that the Applicant/Judgment Debtor at no point in time had complained of an unfair procedure.
9. Counsel for the Respondent /Judgment Creditor went on to state that the Applicant/Judgment Debtor has not asked this Court to reopen or rehear the case but only asked this Court to ‘consider the waiver’ of interest made by its previous order. There is no application to set aside that part of the judgment pertaining to interest.
10. In the case of Vijay 2022 this Court by its majority had ordered that the earlier judgment of this Court is null and the hearing of that appeal be set aside and had ordered that the appeal be heard de novo. The Court at paragraph 124 of its judgment had held: *“With all due respect to the two learned Justices of Appeal, we conclude that the procedural irregularities caused by their position were of sufficient importance to critically undermine the whole appeal and require that the judgment be set aside.”*
11. I have read the judgment of my sister Justice Twomey-Woods in this case. I do not agree with those parts of her judgment, where reference is made to the Vijay 2022 case, as in my view Vijay 2022 has no relevance whatsoever to the facts of this case. In Vijay V

EEEL SCA 28/2020, two of the Justices of Appeal who heard the appeal, refused to consider certain issues raised by the third Justice of Appeal who heard the case, and to which both parties to the appeal had submitted, on the basis that the said issues had been raised by the third Justice of Appeal, after the hearing on 03 September 2020. Vijay V EEEL SCA 28/2020 was first argued on 03 September 2020 and fixed for judgment on 02 October 2020. One of the Justices needed clarification on certain issues as he was of the view that they were necessary for the determination of the case. The matters were argued and submissions were made by both parties in respect of the said issues on 18 September 2020 and that before the date fixed for delivery of judgment. It was submissions on these issues that the other two Justices of Appeal who heard the appeal, refused to consider in their judgment of 02 October 2020. It was for this reason that in Vijay 2022 V this Court by its majority had ordered that the earlier judgment of this Court, namely in SCA 28/2020, is null and the hearing of that appeal be set aside and had ordered that the appeal be heard de novo, for the reason set out in paragraph 10 above.

12. The facts and circumstances in relation to this application are entirely different. In this case the Trial Judge who heard the case before the Supreme Court had entered judgment in favour of the Respondent /Judgment Creditor with interest at the commercial rate from the date of the Plaintiff. The Applicant/Judgment Debtor, being dissatisfied with the judgment had appealed to this Court against the award of interest. Despite appealing against the award of interest the Applicant/Judgment Debtor had not before this Court argued the waiver of interest on the judgment debt on the basis of the delay. He had also not argued the matter before the Supreme Court. This Court in its judgment dated 07 September 2021, had awarded the Respondent /Judgment Creditor damages for breach of contract with interest at the commercial rate from the date of filing the plaintiff. Counsel for the Applicant/Judgment Debtor at the hearing before us stated that he is not challenging the judgment of the Court of Appeal but only asking for the Court to consider reviewing a variation of the order pertaining to interest.
13. I am of the view that the Court is 'functus officio' in view of the facts and circumstances of this case. I agree with paragraph 42 of the judgment of Justice Twomey-Woods.

14. I therefore refuse the application. I make no order as to costs.

Fernando, President

Signed, dated and delivered at Ile du Port on 29 April 2022.