COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 8
MA 24/2020 (Arising in SCA28/2020)

In the matter between
VIJAY CONSTRUCTION (PTY) LTD Applicant
(rep. by Mr Bernard Georges)

And

EASTERN EUROPEAN ENGINEERING LIMITED Respondent
(rep. by Miss Alexandra Madeleine)

And in the matter between
VIJAY CONSTRUCTION (PTY) LTD Applicant
(rep. by Mr Bernard Georges)

And

EASTERN EUROPEAN ENGINEERING LIMITED Respondent
(rep. by Miss Alexandra Madeleine)

Neutral Citation: Vijay Construction (Pty) Ltd v Eastern European Engineering Limited And Vijay Construction (Pty) Ltd v Eastern European Engineering (SCA MA 24/2020) [2022] SCCA 8 21 March 2022

Summary: Courts - setting aside of judgments- Supreme Court - jurisdiction - Article 125 of the Constitution - Courts Act - superior court of unlimited jurisdiction - substantive inherent jurisdiction at Common Law - jurisdiction conferred by Courts Act as transposed to the Court of Appeal by force of Constitutional provisions - all courts are invested with inherent powers to give effect to the whole of their jurisdiction - Court of Appeal - inherent power - procedural inherent jurisdiction - authority to reopen a judgment and rehear a matter - if the criteria for setting aside have been met - abuse of the process of the Court of Appeal. The Judgment is declared null. Hearing of the appeal is set aside. No order as to the costs.

Heard: 30 September 2021 & 1 October 2021

Delivered: 21 March 2022

ORDERS

1. The Judgment is declared null.
2. The hearing of the appeal is set aside.
3. The Court of Appeal is directed to fix a date for the de novo hearing as early as may be convenient to the Court of Appeal and to VIJAY and EEEL.
4. The interim order of the 9 March 2021 SCA MA24/2020 [2021] SCCA 4 is vacated.
5. There will be no order as to costs.

JUDGMENT

ROBINSON JA (ANDRE J concurring)

1. This is the majority judgment of the Court of Appeal, to which the panel as a whole has contributed. Dodin J has prepared a minority judgment, which we have had the opportunity to read in draft.

THE RESPECTIVE CLAIMS OF VIJAY AND EEEL

2. The Applicant is Vijay Construction (Proprietary) Limited, hereinafter referred to as *"VIJAY"*. VIJAY's motion supported by an affidavit sworn to by Mr Kaushalkumar Patel of Fairview, La Misere, Mahe, a director of VIJAY, is asking the Court of Appeal *inter alia* to set aside its judgment of 2 October 2020, in SCA28/2020. The judgment of 2 October 2020, in SCA28/2020, is hereinafter referred to as *"The Judgment"*.

3. In parenthesis, we state that the Court of Appeal, which heard the appeal, consisted of three Justices of Appeal under rule 4 of the Seychelles Court of Appeal Rules, 2005, as amended. The Seychelles Court of Appeal Rules, 2005, as amended, is hereinafter referred to as the *"Court of Appeal Rules"*.

4. The Respondent is Eastern European Engineering Limited, hereinafter referred to as *"EEEL"*.

5. VIJAY and EEEL fundamentally disagree about what is at stake in this motion. Each party relied upon affidavit evidence before the Court of Appeal. The relevant background facts to the appeal are stated briefly in the judgment of Dingake JA (majority judgment).

6. VIJAY's motion is based on the fact that two Justices of Appeal who ruled against it had refused to participate in a request by Fernando President to enlighten the Court of Appeal on issues of alleged non-adherence to the procedure in the Supreme Court, which had not been the subject of the appeal, and their refusal to consider in their majority judgment the submissions made by Counsel for VIJAY on the request.

7. VIJAY claimed that this amounted to a procedural irregularity that deprived it of a fair hearing.

8. Counsel for VIJAY has advanced two alternative grounds for stating that the Court of Appeal has the authority to set aside its judgment. The two grounds are that —

   (a) there is inherent jurisdiction conferred by the Courts Act, as transposed to the Court of Appeal by force of the Constitution of the Republic of Seychelles (hereinafter referred to as the ″Constitution″);
   (b) the Court of Appeal has an inherent power to set aside its judgment.

9. We have only reproduced the material evidence of Mr Patel supporting VIJAY's claims —

> *"21. On 30 June 2020, the Supreme Court ruled that the two Orders of the High Court in London could be executed in Seychelles. I exhibit a copy of the judgment as KP4.*
>
> *22. Against this judgment, Vijay appealed to the Seychelles Court of Appeal. I exhibit a copy of the notice and memorandum of appeal as KP5.*
>
> *23. I am informed by Vijay's lawyers and verily believe that, after the hearing of the appeal and before judgment was delivered, the President of the Court of Appeal reconvened the Court to enlighten the Court on some issues pertaining to*

the regularity or otherwise of the procedure adopted by the Respondent in filing the application. These matters had not been live at the hearing. I exhibit the notice issued by the Court as KP6.

24. Two members of the Court disputed the power of the President of the Court to reconvene it for the purpose of enlightening the Court on issues which had arisen post-hearing. At the reconvened hearing, they did not participate in the argument, save to express their opposition to the procedure and to seek the views of Counsel for the parties on the procedure adopted by the President of the Court.

25. As a consequence of the position taken by the two justices, the President of the Court issued a notice to the parties' Counsel raising a number of matters on which the President sought to be enlightened and requiring the submissions in writing of the parties to the matters. I exhibit the notice issued by the President as KP7.

26. Both parties made written submissions to the President. I exhibit these collectively as KP8.

27. By a majority judgment on 2 October 2020, the Court dismissed Vijay's appeal. The President of the Court allowed the appeal on grounds of procedural and substantive irregularity in the commencement of the matter in CS23/2019, based on the issues he had raised. The other two justices of appeal (one simply concurring with the other) dismissed the appeal on the substantive grounds raised and argued in the appeal. In their judgments, the other justices of appeal took issue with the President of the Court for his reconvening of the Court but did not otherwise address the matters he had raised. I exhibit a copy of the judgments of the Court as KP9.

28. I am informed by Vijay's lawyers, and verily believe that, in opposing the reconvening of the Court by the President of the Court, in not participating in discussions on the issues raised by the President, in not hearing the Applicant's Advocate on these issues, and in not considering them in their judgments, the majority of the Court of Appeal, and hence the Court itself, contravened the right of Vijay to a fair hearing as provided for in article 19 (7) of the Constitution.

29. I am informed by Vijay's lawyers, and verily believe that, in opposing the reconvening of the Court by the President of the Court, in not participating in discussions on the issues raised by the President, in not hearing the Applicant's Advocate on these issues, and in not considering them in their judgments, the majority of the Court of Appeal, and hence the Court itself, effectively deprived Vijay of the opportunity to have the Supreme Court judgment in CS23/2019 set aside for procedural irregularity, and consequently contravened the right of Vijay to a fair hearing as provided for in article 19(7) of the Constitution.

10. VIJAY accordingly seek orders that the Court of Appeal should set aside[1] The Judgment and set the appeal down for a rehearing by the Court of Appeal.

11. Mr Vadim Zaslonov, a director of EEEL, of Beau Belle, Beau Vallon, Mahe swore to EEEL's affidavit in response, which in strong terms denied the claims of VIJAY. EEEL claimed in essence that the outcome of the appeal in SCA28/2020 was final, and the Court of Appeal was *functus officio.* EEEL also contended that the Court of Appeal does not have any authority to set aside its judgment. Next, EEEL submitted that if which it did not agree, the Court of Appeal had jurisdiction or power to set aside its judgment, it was a jurisdiction or power only to be exercised in exceptional circumstances. EEEL also claimed that VIJAY'S motion was an abuse of the process of the Court of Appeal and was frivolous, vexatious and spurious.

12. We have reproduced the material evidence of Mr Zaslanov supporting EEEL's claims —

> *"25. I am advised by EEEL's Attorney and verily believe the same to be true that by the notice dated 15 September 2020 produced as KP6 under paragraph 23 of KP's Affidavit, the President of the Court of Appeal sought for clarifications from the parties to the appeal in SCA28/2020 after the hearing of the said appeal on 3 September 2020 and after the said appeal had been reserved for Judgment. In the said notice dated 15 September 2020, the President of the Court of Appeal stated that he had decided to mention the case for the purpose of the clarifications under the powers given to him by the rules 3(1), 6(2), 11(1)(b) and 18(9) of the Seychelles Court of Appeal Rules.*
>
> *26. I state further that the matters upon which the President of the Court of Appeal sought for clarifications in the notice of 15 September had not been raised as grounds of appeal by Vijay nor raised proprio motu by the Court of Appeal at the hearing of the appeal on 3 September 2020. In that respect, I repeat the statements contained in paragraph 21 of the affidavit. I am advised by EEEL's Counsel and verily believe the same to be true that if Vijay was minded to, Vijay could and should have objected the regularity of the proceedings in XP188/2018 in its defence to the plaint and submissions in CS23/2019 and in its ground of*

[1] In the motion VIJAY is asking the Court to (i) suspend its judgment of 2 October 2020 in SCA28/2020; (ii) stay the execution of the Supreme Court judgment of 30 June 2020 in CS23/2019; and (3) hear this motion of the Applicant to set aside its judgment of 2 October 2020 in SCA28/2020 on the ground that two members of the Court did not participate in the arguments raised by the President of the Court as regards the non-adherence by the Respondent to the procedure set out in the law in case CS23/2019, did not hear the Applicant on these issues, and did not rule on them.

appeal against the Judgment of 30 June 2020 in the appeal SCA/2020. The said matters not having been raised by Vijay in the lower Court not in its grounds of appeal and not raised proprio motu by the Court of Appeal at the hearing of the said appeal at its sitting of 3 September 2020, the sitting of the 18 September 2020 reconvened by the President of the Court of Appeal was rightly objected to by EEEL. I refer in that respect to the respondent's written position on the request for clarifications dated 13 September 2020 now shown to me, produced and exhibited herewith as V27.

27. Under paragraph 24 of the KP's Affidavit, I state that I am advised by EEEL's Counsel and verily believe the same to be true that at the sitting of the Court of Appeal on 18 September 2020, the issue of jurisdiction to reconvene fell to be determined. The other two justices of appeal could not, and rightly so, did not consider the merits of the points raised by the President of the Court of Appeal in the notice of 15 September 2020. It is now shown to me, produced and exhibited herewith the transcript of the proceedings of the Seychelles Court of Appeal on the 18 September 2020 produced and exhibited herewith as VZ8.
28. Under paragraph 25 of KP's Affidavit, I state that I am advised by EEEL's Counsel and verily believe the same to be true that Counsel of Vijay and Counsel of EEEL, agreed as friends to the Court to provide the clarifications sought by the President of the Court of Appeal not solely because of the position of the other justices of appeal but because the jurisdiction of the President of the Court of Appeal was in issue.

29. I admit paragraph 26 of KP's Affidavit and produce a copy of EEEL's Counsel's written response to further clarifications sought by the President of the Court of Appeal on 21 September 2020 as VZ9.

30. Under paragraph 27 of KP's Affidavit, I admit that on 2 October 2020, by the majority decision of the Court of appeal in SCA28/2020Vijay's appeal was dismissed and the President of Court of Appeal in a dissenting Judgment allowed the appeal. I state that the minority decision of the Court of Appeal per the President of the Court allowed the appeal on grounds not raised by Vijay in its grounds of appeal nor raised by the Court proprio motu at the hearing of the said appeal on 3rd September 2020 when it reserved judgment for 2nd October 2020. I am advised by EEEL's Counsel and verily believe the same to be true that, the other two justices of appeal addressed the very issue of jurisdiction that arose for determination at the sitting of 18th September 2020, and I refer in that respect to the transcript of proceedings of 18 September 2020 produced therein and to the judgments of the other two justices of appeal of 2nd October 2020 produced as exhibits KP9 under the said paragraph 27 of KP's Affidavit.

31. I am advised by EEEL's Attorney and verily believe the same to be true that the declarations made under paragraph 28 of KP's affidavit are incorrect, have no legal basis, constitute an abuse of the Court's process and harassment to EEEL. The said declarations are also frivolous and spurious and should be

dismissed by the Court. I therefore deny paragraph 28 of KP's affidavit on the basis of legal advise and state that —

(1) EEEL objected to the sitting of 18th September 2020 after the appeal had been heard and reserved for judgment. I refer in this respect to the Written Response filed by EEEL's Counsel on 15 September 2020 and on 24th September 2020;

(2) the powers relied upon by the President of the Court of Appeal to reconvene the sitting of 18th September 2020 rests with the Court of Appeal;

(3) therefore the question of jurisdiction had to be determined in the first place, and the said issue was heard and determined by the other two justices of appeal both at the sitting of 18th September 2020 and in their judgments. I refer in this respect to the transcript of proceedings of 18 September 2020 produced herein and to the judgments of the other two justices of appeal produced in KP's Affidavit.

(4) Vijay was not denied the right to fair hearing in the appeal in relation to the points raised by the President of the Court of Appeal. Vijay never objected to the regularity of the proceedings in the Supreme Court under the reciprocal Enforcement of British Judgments Act neither in its defence nor in its submissions to the Supreme Court in CS23/2019. Further Vijay never raised the regularity of the proceedings in its grounds of appeal or amended grounds of appeal. The regularity of the procedure was never raised proprio motu by the Court of Appeal at the hearing of the 3rd September 2020. The sitting of 18 September 2020 was not reconvened by the Court of Appeal and the clarifications sought after judgment had been reserved was not being sought for by the Court;

(5) at any rate, the issues raised herein have been fully and finally determined by the Court of Appeal in its judgments in SCA28/2020, and the Court is now functus officio.

(6) Vijay cannot claim that its right to fair hearing has been deprived in circumstances where Vijay never challenged the regularity of the procedure before the lower nor in its grounds of appeal to the Court of Appeal and the Court of Appeal never raised the regularity of the procedure at the hearing of the appeal proprio motu.

(7) the application is being sought purely and simply to delay execution of the SC Judgment so as to deny EEEL the fruits of the Judgments and I refer in that respect to the different applications made by Vijay to stay the

execution of the said judgments and there is currently in force a stay order by the Supreme Court of Seychelles in XP130/2020;

(8) this is not the first application filed by Vijay in the Seychelles Court of Appeal, to stay the execution of the SC Judgment, and I refer in this respect to SCAMA21/2020 and SCA25/2020 on different grounds now shown to me produced and exhibited herewith as VZ10;

(9) this clearly shows that Vijay is abusing the Court's process and I personally know of no other cases where such a course of action has been permitted by the Court;

32. I am advised by EEEL's Attorney and verily believe the same to be true that the declarations made under paragraph 29 of KP's affidavit are incorrect, have no legal basis, constitute an abuse of the Court's process and harassment to EEEL. The said declarations are also frivolous, vexatious and spurious and should be dismissed by the Court. I therefore deny paragraph 29 of KP's affidavit on the basis of legal advise and repeat the statements contained in paragraph 31 of this Affidavit.

33. I deny paragraph 30 of KP's Affidavit and state that I am advised by EEEL's Counsel and verily believe the same to be true that there is no matter to be redressed as declared by KP. The appeal in SCA28/2020 has been fully and finally determined and this Court is functus officio. Vijay's application is also frivolous, vexatious and spurious and should be dismissed with costs."

13. Hence, EEEL asked the Court of Appeal to dismiss VIJAYS's motion with costs.

THE QUESTION AT ISSUE FOR THE DETERMINATION OF THE COURT OF APPEAL

14. Based on the respective claims of VIJAY and EEEL, the question at issue for the determination of the Court of Appeal is whether or not it has the jurisdiction and/or the power to set aside The Judgment and to order a de novo hearing (the jurisdiction issue).

15. Firstly, given that VIJAY has contended that there is an inherent jurisdiction conferred by the Courts Act, as transposed to the Court of Appeal by force of the Constitution, the question involves considering whether or not the Supreme Court has an inherent

jurisdiction to set aside its judgment.

16. Secondly, the question involves considering whether or not the Court of Appeal has an inherent power to set aside its judgment.

17. Thirdly, the determination of both questions will underlie the following material issue. If we were to conclude that the Court of Appeal has an inherent jurisdiction and/or inherent power to set aside The Judgment, in that case, we have to determine if the criteria for setting aside have been met in this motion.

18. Fourthly, we consider whether or not VIJAYS's motion is an abuse of the process of the Court of Appeal and is frivolous, vexatious and spurious.

THE ANALYSIS OF VIJAY'S AND EEEL'S RESPECTIVE CLAIMS

19. We are very thankful for the coherent and comprehensive written submissions offered on behalf of VIJAY and EEEL and the assistance of both Counsel concerning the hearing of this motion.

20. We have considered the evidence supporting the claims of VIJAY and EEEL, including the record of proceedings of the Court of Appeal concerning the hearing of the appeal in SCA28/2020 and the written and oral submissions offered on behalf of VIJAY and EEEL, including academic writings and numerous authorities.

21. Careful consideration of the issue has led us to conclude that it is a vast topic in itself. We have given the issue our best consideration.

Whether or not the Court of Appeal has the jurisdiction and/or the power to set aside The Judgment

1. The Jurisdiction issue

22. We determine whether or not the Court of Appeal has jurisdiction to set aside The Judgment. In light of the respective claims of VIJAY and EEEL, it makes sense that the starting point in dealing with this issue is to determine whether or not the Supreme Court has an inherent jurisdiction.

23. We turn to the submissions of VIJAY and EEEL. *Attorney-General v Marzorcchi Civ App 8/1996*[2] and *Christianne Belmont & Anor v Karine Belmont* MA19/2020[3]. Counsel for VIJAY referred us to the cases of Attorney-General v Marzorcchi [supra] and Belmont & Anor [supra], which raised a question of some difficulty: does the Court of Appeal have an inherent jurisdiction?

24. In Attorney-General v Marzorcchi [supra] the Court of Appeal relying on paragraph 556 of Halsbury's Laws of England 4th ed. Vol. 26 held that it has an inherent jurisdiction to set aside the judgment after it had been entered on account of a *"serious procedural irregularity"*. Attorney-General v Marzorcchi [supra] did not *inter alia* explain the provenance of the inherent jurisdiction of the Court of Appeal.

25. In his written submissions, Counsel for VIJAY has relied on Attorney-General v Marzorcchi [supra] in support of his submission that if the Court of Appeal has inherent jurisdiction to set aside its judgment on account of a serious procedural irregularity, this opens the door to the contention that the Court of Appeal has inherent jurisdiction to set aside The Judgment. Counsel for VIJAY had the formidable task of explaining the provenance of the inherent jurisdiction of the Court of Appeal.

26. As regards the Constitutional provisions, Counsel for VIJAY referred *inter alia* to Article 120 (3), which grants the Court of Appeal when exercising its appellate jurisdiction, all the authority, jurisdiction and power of the Court from which the appeal is brought and **such other authority, jurisdiction and power as may be conferred upon it by or under an Act**. [Emphasis supplied]

[2] (delivered on the 9 April 1998)
[3] arising in SCA06/2018 (delivered on the 18 December 2020)

27. Article 120 (3) stipulates —

> *"(3) The Court of Appeal shall when exercising its appellate jurisdiction, have all the authority. Jurisdiction and power of the court from which the appeal is brought*
>
> *and such other authority, jurisdiction and power as may be conferred upon it by or under an Act."*

28. Counsel for VIJAY claimed that section 12 (3) of the Courts Act is another source of jurisdiction and power for the Court of Appeal. The said section stipulates —

> *"12 (3) For all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the powers, authority, and jurisdiction of the Supreme Court of Seychelles and of the Court of Appeal in England".*

29. Counsel for VIJAY, basing himself on Article 120 (3) of the Constitution and section 12 (3) of the Courts Act, submitted that it is incorrect to state that the Court of Appeal is vested with jurisdiction simply to hear appeals from the Supreme Court. He added that Article 120 (3) vests the Court of Appeal with jurisdiction and powers *(i)* of the court from which the appeal emanates, or *(ii)* conferred upon it by or under an Act. Counsel for VIJAY submitted that the use of the word jurisdiction coupled with the word power in Article 120 (3) can only mean that, in an appeal, the Court of Appeal is granted, in addition to the jurisdiction and power given to it under Article 120 (1), any jurisdiction and power which the Court from which it is hearing an appeal possesses and any further jurisdiction and power which may be given to it by an Act.

30. Counsel for EEEL submitted that the Court of Appeal has neither inherent jurisdiction nor inherent power to set aside The Judgment. In support of that proposition, EEEL claimed that the Court of Appeal is a creature of statute and is hence only seized of the jurisdiction that is conferred upon it by Article 120 of the Constitution. EEEL added that the Court of Appeal only has the power after the judgment has been entered under section 12 (3) of the Courts Act to suspend, vary and correct its judgments for clerical mistakes.

31. We observe that EEEL felt some hesitation in making such propositions. Its written submissions proceeded to state that if we were to find that the Court of Appeal has inherent jurisdiction or inherent power to set aside its judgment, this jurisdiction or power should be exceptionally used.

32. Having considered the written submissions of VIJAY and EEEL prudently on this issue, it appears that they make a distinction between whether or not the Court of Appeal as an appellate court has jurisdiction and how it exercises the jurisdiction. In the former sense, we consider whether or not the Court of Appeal has an inherent jurisdiction. We have yet to consider whether or not it has an inherent power or inherent jurisdiction arising from the fact that it is an appellate court.

33. We state at the outset that the terms jurisdiction and inherent jurisdiction are not interchangeable. The term jurisdiction has, on different occasions, been used in different senses. This definition of jurisdiction taken from *Halsbury's Laws of England*[4], which has been quoted with approval by the Court of Appeal[5], applies to this motion —

> *"*[j]*urisdiction is the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the Court is constituted.*
>
> *If no restriction or limit is imposed the jurisdiction is said to be unlimited…".*

34. The primary source of the jurisdiction of a court is found in the Constitution or statute constituting that court and investing it with authority to decide matters. That authority may be unlimited or limited. Numerous texts and authorities have suggested that only courts of unlimited original jurisdiction possess inherent jurisdiction.

35. Joseph[6] states — *"Statutory courts, including superior appellate courts, do not possess inherent jurisdiction because their jurisdiction is conferred and limited by statute."* And,

[4] Halsbury's Laws of England/Courts and Tribunals (Volume 24A (2019))/2. Courts/(2) The Jurisdiction of Courts/(i) In General/23. Meaning of 'jurisdiction'.
[5] Francis Ernesta & Anors v The Republic SCA7/2017
[6] Inherent Jurisdiction and Inherent Powers in New Zealand by Rosara Joseph [2005] Canterbury Law Review, 220

"[a] *statutory court of limited jurisdiction has no inherent jurisdiction"*. Joseph[7], speaking of the New Zealand High Court, adds — *"The High Court has inherent jurisdiction as a superior court of general jurisdiction."* He also states — *"*[o]*nly the High Court* [of New Zealand], *as a court of general jurisdiction, exercises the inherent jurisdiction that was inherited from the superior courts in England." In Taylor v Lawrence [2002] 2 All ER 353,* the English Court of Appeal stated that it did not have inherent jurisdiction, but that it had implicit, residual or implied authority.

36. In *R v Forbes; Ex parte Bevan [1972] HCA 34,* the High Court of Australia stated — *"5 …Courts of unlimited jurisdiction have inherent* jurisdiction*"*.

37. Inherent jurisdiction has been described as a creature of the English common law. According to textbooks and cases, the common law has, piecemeal and incrementally over time, defined specific jurisdiction, which was added to that already existing to create an additional series of authority under the label inherent jurisdiction.

38. Joseph, *op cit*, describes inherent jurisdiction as follows —

> *"The phrase the inherent jurisdiction of the High Court is often used in ways which suggest that the inherent jurisdiction is an amorphous, single source of jurisdiction. However, the inherent jurisdiction of the High Court is better understood as being comprised of a number of separate jurisdictions, which have developed piecemeal and mostly in isolation".*

39. The subsequent analysis, based on the constitutional and statutory structure of the Supreme Court, concludes that the Supreme Court is a court of unlimited jurisdiction[8]

[7] Op. Cit.

[8] We have also set out examples of the constitutional and statutory structure of superior courts of unlimited jurisdiction from England, New Zealand, and Ireland, referred to us by Counsel for VIJAY, to further understand the constitutional and statutory structure of those superior courts of unlimited jurisdiction. Part II of the English Supreme Court Act 1981 establishes the general jurisdiction of the High Court —
"(1)The High Court shall be a superior court of record.
(2)Subject to the provisions of this Act, there shall be exercisable by the High Court —
(a) all such jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a Judge of the High Court by any statutory provision).*"*
Section 16 of the New Zealand Judicature Act 1908 (now repealed) stated that the High Court of New Zealand had *"all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand".*
In Ireland, Article 34.3.1 of the Constitution invests the High Court with *"full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."*

and possesses inherent jurisdiction [*DF Properties (Proprietary) Ltd and Fregate Island Private Limited SCA56/2018* and *SCA63/2018*[9], *Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited, Civil Appeal SCA 15 & 18/2017*.

40. Sauzier J., in *Privatbanken v Aktieselskab Privatbanken [1978] SLR 226* stated — *"…the Supreme Court came into existence in 1903 by the Seychelles Judicature Order in Council 1903 when Seychelles became a separate entity from Mauritius. It was the successor of a district court or a court of limited jurisdiction set up during the British administration of Mauritius. In 1903 the Supreme Court of Seychelles became a court of unlimited jurisdiction and given all the powers, privileges, authority and jurisdiction of the High Court of Justice in England".*

41. Section 125 (1) of the Constitution stipulates the categories of jurisdiction with which it invests the Supreme Court —

> *"(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;*
>
> *(b) original jurisdiction in civil and criminal matters;*
>
> *(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and*
>
> *(d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.".*

42. The Courts Act confers jurisdiction on the Supreme Court in terms of the Constitution. Section 4[10] of the Courts Act invests the Supreme Court with the powers and authorities and jurisdiction of the High Court in England. Section 5[11] of the Courts Act stipulates a

[9] Judgment delivered on 20 July 2021

[10] *"4. The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England."*

[11] *"5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency,*

list of specific civil jurisdiction and, in exercising such jurisdiction, the Supreme Court has and is invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England. The Courts Act also invests it with equitable and admiralty jurisdiction under sections 6[12] and 7, respectively. Under sections 8 and 9[13] of the Courts Act, the Supreme Court is conferred with control over legal officers and criminal jurisdiction, respectively. It is invested with appellate jurisdiction under section 10 of the Courts Act.

43. Having considered the submissions of Counsel for VIJAY prudently, we accept his submission that the combination of Article 125 of the Constitution and sections 4 to 10 of the Courts Act undisputedly grants the Supreme Court unlimited original jurisdiction. For instance, the phrase in section 5 of the Courts Act — *"The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles "*, in section 6 — *"The Supreme Court shall continue to be a Court of Equity"*, and in section 9 — *"The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction, to hear, try, determine, pass sentence and make orders in all prosecutions for offences of whatever nature and in exercising such criminal jurisdiction the Supreme Court"*.

44. Having concluded that the Supreme Court is possessed of inherent jurisdiction, we consider what grants it inherent jurisdiction. Fernando JA, as he then was, in Francis Ernesta & Anors [supra] stated — *"In countries like Seychelles where we have a written Constitution founded on the principle of separation of powers and with the legislative power vested in the National Assembly under article 85 of the Constitution, the concept*

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bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England".

[12] *"6. The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles."*

[13] *"9. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction, to hear, try, determine, pass sentence and make orders in all prosecutions for offences of whatever nature and in exercising such criminal jurisdiction the Supreme Court shall have and exercise all the powers and shall enjoy all the privileges vested in the High Court of Justice in England".*

of a court possessing "inherent jurisdiction" becomes amorphous". He added that — *"* [t]*hus the idea of an auxiliary stream of jurisdiction existing in parallel to constitutionally authorised sources of jurisdiction seems to cut across the parameter of Article 85 of the Constitution of the Republic of Seychelles".*

45. We observe that the Court of Appeal in DF Properties (Proprietary) Ltd [supra] found that the words of section 4 of the Courts Act investing the Supreme Court with the *"powers and authorities and jurisdiction of the High Court in England"* invest the Supreme Court *inter alia* with inherent jurisdiction. This approach of the Court of Appeal appears to be consistent with the tradition that inherent jurisdiction is a common law construct and, therefore, arises without the need for statutory assistance.

46. Counsel for VIJAY referred to the case of *Finesse v Banane [1981] SLR 103, 108/9,* which considers section 4 of the Courts Act (then section 3A), which is couched in similar terms as section 12 of the Courts Act, but deals with the powers of the Supreme Court. Sauzier J in *Finesse and Banane* [supra] found that the Supreme Court is invested with the inherent powers and jurisdiction of the English High Court stemming from the Common Law. The position of Sauzier J., in Finesse [supra], has been confirmed by the Court of Appeal in DF Properties (Proprietary) Ltd [supra].

47. We have noted the approach taken by the Australian High Court in *R v Forbes; Ex Parte Bevan [1972] HCA 34,* in which Menzies J stated —

> *"…Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction".* [Emphasis is ours]

48. We have also noted the approach of the New Zealand Supreme Court in Zaoui[14] [supra]. Zaoui [supra] stated —

> *[34] …The common law jurisdiction became part of New Zealand law in 1840: English Laws Act 1858. The powers of the English superior courts have devolved*

[14] Zaoui v Attorney General & Ors, SC CIV 13/2004 (New Zealand) para [35]

> *in New Zealand on the High Court: s 16 of the Judicature Act 1908, preceded by the Supreme Court Ordinances of 1841 and 1844 and the Supreme Court Acts of 1860 and 1882.) The power inheres in the court itself as an independent common law jurisdiction, rather than as an incidental power ancillary to other jurisdiction (as are many procedural powers described as 'inherent' or 'implied'). (See R v Gage 3 Vin Ab 518 per Holt CJ, Re Nottingham Corporation [1897] 2 QB 502 at 509 per Pollock B, R v Spilsbury [1898] 2 QB 615 at 620 per Lord Russell of Killowen CJ and see RJ Sharpe The Law of Habeas Corpus (2nd edn, 1989), pp 141–142.)".*

49. In light of the above, VIJAY and EEEL are not wrong in their proposition that the jurisdiction exercisable at common law which the Supreme Court, a court of unlimited jurisdiction, is vested with, denotes a kind of inherent substantive jurisdiction: see, for example, DF Properties (Proprietary) Ltd [supra], *Department of Social Welfare v. Stewart (1990) 1 NZLR 697, 701* and Zaoui [supra][15]. Donelly[16], in her conclusion, reiterates — *"*[i]*nherent jurisdiction denotes the substantive, non-statutory authority to take matters and determine them.*

50. In Zaoui [supra], the Supreme Court of New Zealand stated —

> *[35] Some confusion may arise because the term 'inherent jurisdiction' is applied both to substantive and procedural powers.* ***The ancillary inherent powers of courts to regulate their own procedure arise equally in relation to their statutory and common law substantive jurisdictions. Courts which do not possess an inherent substantive jurisdiction (as is the case where their substantive powers are entirely statutory) nevertheless have inherent or implied procedural powers necessary to enable them to give effect to their statutory substantive jurisdiction.*** *(See Department of Social Welfare v Stewart [1990] 1 NZLR 697 at 701.)*
>
> *[36] Both the substantive and procedural inherent jurisdiction can be displaced by legislation…".* [Emphasis supplied]

51. It is undisputed that section 12 (3) of the Courts Act is an additional source of jurisdiction and powers for the Court of Appeal. The final words *"or under an Act"* in Article 120 (1) and 120 (3) of the Constitution give to the Court of Appeal to hear and determine an appeal, all the jurisdiction and powers of the Seychelles Supreme Court and the English

[15] *Department of Social Welfare v. Stewart (1990) 1 NZLR 697, 701*; Zaoui [supra]
[16] Joan Donelly [2009] Judicial Studies Institute Journal 122..

Court of Appeal. This authority is not simply *"incidental to the hearing of an appeal"*, but it is to hear and determine it.

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.

2. Whether or not the Court of Appeal has the inherent power to set aside its judgment

54. The next question concerning whether or not the Court of Appeal has the authority to hear the motion requires an analysis of whether or not it has an inherent power to do so. As stated above, the position of EEEL is that the Court of Appeal does not have an inherent jurisdiction and/or inherent power to set aside The Judgment. EEEL did not refer us to any statement of principles that authoritatively determine that the Court of Appeal has no inherent jurisdiction and/or inherent power to reopen an appeal once it has been finally determined. Nonetheless, EEEL accepted that the Court of Appeal has an implied or inherent power to regulate its procedure.

55. We read from Halsbury's laws of England/Courts and Tribunals (Volume 24A (2019)) 1. Introduction/(2) Definition and Creation of Courts and Tribunals/8. Procedure —

> *"8. Procedure.*
>
> *A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage. This inherent power may be used to prevent the court being used to achieve injustice [See Bremer Vulcan Schiffbau and Maschinenfabrik v South India Shipping Corpn Ltd [1981] 1 All ER 289 at 295, HL, per Lord Diplock, followed in Taylor v Lawrence [2002] EWCA*

Civ 90. [2003] QB 528, [2002] 2 All ER 353 (in exceptional circumstances, the Court of Appeal has power to reopen an appeal already determined)].

56. EEEL referred us to the case of *Axiom Rolle PRP Valuation Services Ltd v Rahul Ramesh Kapadia and others NZAC, 43/06*[17], which stated the following on inherent power —

> *"an inherent power is 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. 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".*

57. The Australian case of *DJL v Central Authority [2000] HCA 17 201 CLR 226* postulates that inherent powers are implied from the court's jurisdiction - because a court is defined by its own jurisdiction, so too must its powers be defined by its jurisdiction.

58. In the case of *Paul Chen-Young & Anors v Eagle Merchant Bank Jamaica Limited & Anors and the Attorney General of Jamaica - Interested Party [2018] JMCA App 7,* the Court of Appeal of Jamaica stated —

> *"[40] But it is necessary to distinguish between questions which relate to the jurisdiction of the court as an appellate court and questions which relate to how that jurisdiction may, or is to be, exercised. In this regard, as with all superior courts of record, this court enjoys a residual jurisdiction, described variously as an inherent, implicit or implied jurisdiction, or an inherent power within its jurisdiction, to do such acts as it must have power to do, in order to maintain its character as a court of justice and to enhance public confidence in the administration of justice. It is this jurisdiction which among other things, empowers the court to regulate its own proceedings in a way that secures convenience, expeditiousness and efficiency."*

[17] Axiom Rolle PRP Valuation Services Ltd [supra] was quoted with approval in Francis Ernesta & Anors [supra].

59. The learned editors of Halsbury's Laws of England Volume 11 (2015), paragraph 23, describe the inherent jurisdiction of a court as an undefined source of civil procedural law —

> *"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the 'inherent jurisdiction of the court'. In the ordinary way, the Supreme Court, Court of Appeal, and the High Court, are superior courts and as such no matter is deemed to be beyond their jurisdiction (including the general administration of justice within their territorial limits, and powers in all matters of substantive law) unless it is expressly shown to be so. The County Court, although an inferior court, also has an inherent jurisdiction to regulate its own procedures, provided that the exercise of his power is not inconsistent with statute or statutory rules.*
>
> ***The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its role as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law;*** […]
>
> ***In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a 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."*** [Emphasis supplied]

60. Much of this extract from Halsbury's Laws of England explicitly derives from an article written by Sir Jack Jacob, QC, The Inherent Jurisdiction of the Court, which continues to be treated as the authoritative exposition on the subject. Sir Jack Jacob, QC, made an important point on terminology —

> *"To understand the nature of inherent jurisdiction of the court, it is necessary to distinguish it first from the general jurisdiction of the court, and next from its statutory jurisdiction.*
>
> *The term inherent jurisdiction of the court does not mean the same thing as the "jurisdiction of the court" used without qualification or description; the two terms are not interchangeable, for the "inherent jurisdiction of the court is only a part or an aspect of its general jurisdiction".*

61. *Baron Alderson in Cocker v Tempest (1840-1841) 7 M&W* 501, 503-4 is often credited with the institution of the notion of inherent jurisdiction —

> *"The power of each Court over its process is limited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion."*

62. Lord Diplock said practically the same thing in *Bremer Vulakn Schiffbau und Maschinenfabrik v. South India Shipping Corpn Ltd. [1981] A.C. 909, 977.* Nonetheless, he opined that it would be conducive to clarify if the use of the expressions *"inherent power"* and *"inherent jurisdiction"* of the High Court were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.

63. We now refer to the Taylor v Lawrence jurisdiction. Taylor [supra] concerned an application for reopening an appeal decision where a Circuit Court Judge had not fully disclosed that the firm of solicitors of one of the parties had acted for him and his wife as late as the evening before judgment. An appeal against the judgment failed. Upon subsequently becoming aware of the information concerning the Judge's relationship with the solicitors of the successful party, the Appellant sought the reopening of the case.

64. Having established that the Court of Appeal was set up by statute with general jurisdiction to hear appeals only, the Court, per Lord Woolf CJ, then considered the issue of inherent jurisdiction —

> *"17 We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals. It is also important when considering authorities which, it is suggested, are laying down principles as to the jurisdiction of a court, to ascertain whether they are doing more than setting out statements of the current practice of the court, which can be changed as the requirements of*

> *practice change.* ***These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term "inherent jurisdiction" is used in this sense (as to which see The Inherent Jurisdiction of the Court by Master Sir Jack Jacob, Current Legal Problems (1970) 23 at p.32 et seq.), the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction****".*[Emphasis supplied]

65. In Taylor [supra], the Court of Appeal stated that it did not have inherent jurisdiction, but that it had implicit, residual or implied authority —

> *"50 If, as we believe it is necessary to do, we go back to first principles, we start with the fact which is uncontroversial, that the Court of Appeal was established with a broad jurisdiction to hear appeals.* ***Equally it was not established to exercise an originating as opposed to an appellate jurisdiction. It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court to which we have referred already*** *(see para 26 above)".* [Emphasis supplied]

66. The pursuit of these objectives, the Court of Appeal in Taylor [supra] found, gave it the power to reopen an appeal —

> *"Before turning to Mr Eder's argument, it is desirable to note that, while, if a fraud has taken place a remedy can be obtained, even if the Court of Appeal has no "jurisdiction", it does not necessarily follow that there are not other situations where serious injustice may occur if there is no power to reopen an appeal.* ***We stress this point because this court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents****. (See the White Book Service 2001 paragraph 52.0.3.)"* [Emphasis supplied]

67. The Court of Appeal in Taylor [supra] was persuaded by the conclusions from Lord Diplock and Lord Morris —

> *"53 In our judgment the final words of Lord Diplock, "the doing by the courts of acts which it needs must have power to do in order to maintain its character as a*

court of justice" express the situation here under consideration exactly. If more authority is required, reference may be made in a very different context to the speech of Lord Morris of Borth-Y-Gest in Connelly v DPP [1964] AC 1254, 1301 where Lord Morris said:

"There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process." "

68. The Court of Appeal in Taylor [supra] concluded that it possessed jurisdiction to reopen an appeal. This was so as to avoid real injustice and to be used in exceptional circumstances. To resort to the jurisdiction, the Court had to be satisfied that significant injustice had probably occurred and that there was no alternative effective remedy —

"54 Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.

55 One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied

that an appeal from this court is one for which the House of Lords would not give leave."

69. We now look at the case of *R v Smith 3 NZLR 617* (a criminal appeal). This case was based on a flawed earlier procedure. The Court considered Taylor [supra]. The Court of Appeal held that it had inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. This was an implied power necessary for the Court to maintain its character as a Court of Justice. Recourse to the power to reopen was not to undermine the general principle of finality; it was available only where a substantial miscarriage of justice would result if a fundamental error in procedure were not corrected and where there was no alternative effective remedy reasonably available.

70. The Court in Smith [supra] set out its jurisdiction thus —

> *"[28] The Court of Appeal has jurisdiction conferred by statute. It does not include any statutory power to rehear appeals it has finally disposed of by judgment, at least once the judgments has been perfected by entry on the Criminal Register of the Court (R v Nakhla (No 2) [1974] 1 NZLR 453). The court does, however, have implied or inherent power to regulate its procedure and practice. Such power enables the Court to correct slips or ommissions in a judgment or order which do not affect its substance. But the inherent or implied powers go further than the correction of evident slips.*
>
> *[29] Thus in R v Nakhla the Court of Appeal accepted as correct a submission that it had inherent jurisdiction to set aside its own order if it could properly be described as a "nullity". "*

71. Reviewing the decisions in Pinochet No. 2 and adopting the reasoning of Kirby J's dissent in DJL v Central Authority [supra], the Court of Appeal in Taylor [supra] concluded —

> *"[36] The reasoning of Lord Woolf CJ and Kirby J applies with equal force to the judgments of this Court. The Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. Such powers is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not*

corrected and where there is no alternative effective remedy reasonably available. Without such a response public confidence in the administration of justice would be undermined.

[37] There may be cases where it is a close call whether recourse to the exceptional power is appropriate. This is not such a case. The system applied by the court was held to be "contrary to the fundamental conceptions of fairness and justice". The errors included presumptive bias, breach of natural justice and unlawful procedure. As a result, an appeal by right was denied. Justice miscarried because the failure to observe procedural due process meant that no decision that the appeal were unmeritorious could properly have been reached."

72. The *Privy Council in 2009 in Bain v The Queen Privy Council Appeal No 9 of 2006*, an appeal from New Zealand, categorically stated that it, too, had inherent jurisdiction —

"The Privy Council, like other final courts of appeal, has an inherent jurisdiction to discharge or vary its own orders in cases in which this is necessary for the purposes of justice. But the exercise of this jurisdiction will be rare, because finality is generally in the interests of justice. In Taylor v Laurence [2003] QB 528 the English Court of Appeal discussed the circumstances in which it would exercise the jurisdiction in cases in which it was for practical purposes a final court of appeal because the case was not of sufficient general public importance to justify leave to appeal to the House of Lords. Lord Woolf CJ said (at p.547) :

"What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy."

73. The Seychelles Court of Appeal in Belmont & Anor [supra] upon consideration of Taylor [supra] – that the Court of Appeal has a residual jurisdiction or an inherent power to set aside and rehear an appeal *"in cases of serious procedural unfairness or irregularities such that the judgment or order ought to be treated as a nullity"*. However, the Court did not invoke its powers there as it did not consider the impugned decision a nullity, nor that there had been serious procedural irregularity causing a failure of natural justice.

74. In Attorney-General v Marzorcchi [supra], the Court of Appeal held that it would only intervene to rehear an appeal where there has been a serious procedural irregularity such that the previous decision is really not a decision at all. The Court stated —

> *"[9] We are here not concerned with the question of rectifying a clerical or incidental mistake, but are faced with what appears to be an irregularity which taints the validity of the proceedings and renders them a nullity. In such a situation, the doctrine of functus officio has no application and is therefore, of no consequence. Further, where a procedural irregularity of the nature complained of in this case has occurred a judgment or an order given in these proceedings, must surely be treated as a nullity. In the circumstances, the Court must exercise its inherent jurisdiction to set aside the said judgment or order".*

75. In parenthesis, we state that the above cases illustrate that the distinction between what is jurisdiction and what constitutes power is not always straight forward as one would have anticipated. Courts have grappled with the reach of inherent jurisdiction and inherent power. We agree with Counsel for VIJAY that the reasoning of the respective courts brings into stark focus the numerous issues attendant on the subject of the inherent authority of courts.

3. If the criteria for setting aside have been met in this motion

76. We have concluded that the Court of Appeal has the authority to reopen its judgment and rehear it. We have concluded that this authority emanates from its inherent, implied, implicit or residual jurisdiction or inherent, implied, implicit or residual power.

77. To determine whether or not the criteria for setting aside have been met in this motion, it is fundamental that we consider when the Court of Appeal should reopen its decision.

78. EEEL contended that the outcome of the appeal in SCA28/2020 was final, and the Court of Appeal was *functus officio*. EEEL also submitted that, if which it did not agree, the Court of Appeal has jurisdiction or power to set aside its judgment; it was a jurisdiction or power only to be exercised in exceptional circumstances.

79. In *R (on the application of Elizabeth Wingfield) v Canterbury City Council & Anor [2020] EWCA Civ 1588,* the English Court of Appeal stated — *"53. Finality in ligation is a general rule of high public importance…. 54. The modest inroads into the principle of finality represented by CPR52.30 have their origins in Taylor v Lawrence …".*

80. Lord Brown-Wilkinson in Pinochet No2 stated —

> *"… [I]t should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure."*

81. According to Taylor [supra], the Court of Appeal has a residual jurisdiction to reopen a final judgment of an appeal to avoid real injustice in circumstances that are exceptional and that there is no alternative remedy (Court of Appeal had an implicit jurisdiction to do what was necessary to achieve its two principal objectives, i.e. of correcting wrong decisions, and ensuring public confidence in the administration of justice).

82. Taylor[18] [supra], was applied in *Re Uddin (A Child) (Serious Injury: Standard of Proof) [2005] EWCA Civ 52, [2005] 3 All ER 550, [2005] 1 WLR 2398* (**the Taylor v Lawrence jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at first appeal, has been critically undermined). The Court of Appeal has emphasised the exceptional nature of this jurisdiction**: see, for instance, *Re Uddin (A Child) (Serious Injury: Standard of Proof)* at [18]; *Matlaszek v Bloom Camillin (a firm)* [2003] EWCA Civ 154, [2003] All ER (D) 38 (Feb); *Hardy v Pembrokeshire CC* [2006] EWCA Civ 1008, [2006] All ER (D) 252 (Jul). [Emphasis supplied]

83. In R (on the application of Elizabeth Wingfield) [supra], the English Court of Appeal extracted the following five principles from the authorities —

> *"(1) A final determination of an appeal, including a refusal of permission to appeal) will not be reopened unless the circumstances are exceptional.*

[18] The reasoning and approach in Taylor [supra] extends to the appellate functions of the High Court: Seray-Wurie v Hackney London Borough Council [2002] EWCA Civ 909, [2002] 3 All ER 448, [2003] 1 WLR 257; and see Butland v Powys DC [2009] EWHC 151 (Admin), [2009] LLR 615, [2009] All ER (D) 41 (Feb); Estephane v Health and Care Professions Council [2017] EWHC 2146 (Admin), [2017] All ER (D) 24 (Sep) (jurisdiction of Taylor v Lawrence is not restricted to the Court of Appeal).

(2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy.

(3) The paradigm case is fraud or bias or where the Judge read the wrong papers.

(4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality.

(5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

84. We have considered all the authorities and legal principles with care. The Court of Appeal of Seychelles has inherent authority of its own. We will be guided by cases from courts of other jurisdictions, which are not binding on the Court of Appeal.

The factual background

85. In the appeal, Twomey JA delivered a judgment concurring with the reasoning and order of Dingake JA and wrote a separate concurring judgment *"for the purposes of engaging in a discussion relating to the invocation, by the President of the Court of Appeal (PCA), of Rule 18(9) of the Court of Appeal Rules (the Rules) read with sections 3(1), 6(2), 11(1)(b)"*.

86. Dingake JA delivered a judgment dismissing the appeal with costs. In his judgment, Dingake JA dealt with the propriety of the Notice dated 15 September 2020 issued by the Fernando President.

87. Fernando President delivered a dissenting judgment *"allowing the appeal, reversing the orders made by the Trial Judge and dismissing the plaint of the respondent [EEEL] seeking enforcement of the 18 August 2015 Order and the Order of Mrs. Justice Cockerill dated 18 October 2018"*.

88. The question in this motion arose because, as The Judgment and the proceedings at the appeal revealed, Fernando President sent out a Notice dated 15 September 2020 to Counsel for VIJAY and EEEL, seeking some clarifications of some fundamental matters. Fernando President, in his minority judgment, stated that he was decisively of the view that he would not be able to decide the appeal unless he had submissions of Counsel for VIJAY and EEEL on those fundamental issues, which in his opinion, had been overlooked by them at the trial and appeal stages and the Supreme Court.

89. He sent out a Notice dated 15 September 2020 to both Counsel seeking some clarifications from them in the *"interests of justice"*. He stated that he was permitted by rules 3 (1), 6 (2), 11 (1) (b), and 18 (9) of the Court of Appeal Rules to send the said Notice and reconvene the Court of Appeal.

90. Fernando President, in his minority judgment, explained why he reconvened the Court of Appeal by way of Notice dated 15 September 2020 as follows — *"***[s]*ince my colleagues were in disagreement to my suggestion to reconvene**, I as the President of the Court of Appeal invoking the powers given to me by the rules … of the Seychelles Court of Appeal Rules decided to reconvene the Court on 18 September 2020 by way of Notice dated 15 September 2020"*. [Emphasis supplied]

91. We reproduce the Notice dated 15 September 2020 (see paragraph [2] of the minority judgment) —

> *"15 September 2020*
>
> ***As President of the Court of Appeal**, I have decided under the powers given to me by **rules 3(1), 6(2), 11(1)(b) and 18(9) of the Seychelles Court of Appeal Rules** to have the case of Vijay Construction (Pty) Ltd vs Civil Appeal SCA 28 of 2020, which was argued on the 3rd September 2020 and now fixed for judgment on 2nd October 2020, mentioned on Friday the 18th of September 2020 at 10 am, to have the following matters clarified in the interests of justice:*
>
> *1. Whether leave to have the judgments of Justice Cooke and Justice Cockerill registered in the Supreme Court had been granted by the*

Supreme Court before the filing of the Plaint on 31 January 2019, in accordance with the Practice and Procedure Rules made under section 3(4) of the Reciprocal Enforcement of British Judgments Act? If it had not been obtained what consequences flow from it?

2. *Whether the Judgment Creditor had applied to the Supreme Court to have the judgments of Justice Cooke and Justice Cockerill registered within the time specified in section 3(1) of the Reciprocal Enforcement of British Judgments Act?*

3. *Whether duly authenticated or certified copies of the judgments of Justice Cooke and Justice Cockerill have been filed by the Judgment Creditor before the Supreme Court in accordance with the Practice and Procedure Rules made under section 3(4) of the Reciprocal Enforcement of British Judgments Act?*

4. *What consequences flow if there has been non-compliance with the said provisions?*

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

"Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.
Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

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

One of the Justices of Appeal have expressed the view that I as the President, have no right under the law to call back Counsel for clarifications after the conclusion of the arguments on 03 September 2020. According to the said Justice of Appeal, "the appeal has been heard and there is nothing left to be heard as all

> *the points canvassed have been heard". The said Justice of Appeal had stated: "I will not sit on a further appeal". I would therefore wish both Counsel to address me on this issue also.*
>
> *Sgd.*
> *President*
> *Court of Appeal".* [Emphasis is not ours]

92. Fernando President stated in his minority judgment that at the appeal hearing on 18 September 2020, the two Justices of Appeal refused to associate themselves with the proceedings. The two Justices stated that he had no authority to unilaterally convene the Court of Appeal without their consensus after the appeal hearing had been concluded on the 3 September 2020 to hear submissions on the clarifications he had sought.

93. Next, Fernando President, in his minority judgment, explained why he forwarded a *Questionnaire* to Counsel for VIJAY and EEEL that was based on the clarifications sought by way of the Notice dated 15 September 2020 —

> *"8* ***Since it was embarrassing to continue with the sitting,*** **[he]** ***decided in view of the impasse the Court had unfortunately reached****, to inform Counsel on both sides that* [he] *would then forward the questions and request Counsel to submit to me, their responses within 3 days of the dispatch of the Questions. Counsel for the Appellant and the Respondent agreed to comply with the request of the President of the Court of Appeal and agreed that the responses to the said questions would be submitted within 3 days of the receipt of the questions, for the consideration of the President of the Court of Appeal".* [Emphasis supplied]

94. We reproduce the *Questionnaire* (see paragraph [9] of the minority judgment) —

> *"9. "Notice of 21 September 2020 pertaining to the Questions to Counsel for the Appellant and Respondent for their responses:*
>
> *QUESTIONS TO COUNSEL FOR THE APPELLANT AND RESPONDENT ON THE BASIS OF CLARIFICATIONS SOUGHT BY WAY OF NOTICE DATED 15 SEPTEMBER 2020:*
>
> *At the sitting of the convened hearing of the Court of Appeal on the afternoon of 18 September 2020, by way of Notice dated 15 September 2020, by the President of the Court of Appeal and at the sole instance of the President of the Court of Appeal; the other two Justices of the panel refused to associate themselves with*

the proceedings on the basis that the President of the Court of Appeal had no authority to unilaterally convene the Court without their consensus, after the hearing has been concluded on 03 September 2020. It was their position that so far as they are concerned, they were not prepared to consider any fresh issues after the conclusion of hearing on 03 September 2020 as all the points canvassed in the appeal have been heard and thus there is nothing left to be heard.

The President of the Court of Appeal clearly stated that he was unable to come to a determination of the case without seeking clarifications on the issues that he considers relevant and material and which had been forwarded to Counsel representing the Appellant and the Respondent by way of Notice dated 15 September 2020. In view of the stalemate, the President of the Court of Appeal informed Counsel on both sides that he would then forward the questions based on the issues referred to in the Notice dated 15 September, and ask Counsel to submit to the President of the Court of Appeal, their responses within 3 days of the dispatch of the Questions. It was the position of the President of the Court of Appeal, that had these clarifications been sought during the hearing, despite the fact that they related to matters not raised in the grounds of appeal, Counsel could not refuse to answer questions from Court although emanating from a single Judge and despite the other two Justices of Appeal, refusing to associate themselves with the questions pertaining to clarifications on the ground that they were not raised by the Appellant. Counsel for the Appellant and the Respondent agreed to comply with the request of the President of the Court of Appeal. It was agreed by both Counsel that the responses to the said questions would be submitted within 3 days of the receipt of the questions, for the consideration of the President of the Court of Appeal. The President orders the parties to submit the responses before 25 September 2020, so that he could consider them in making a determination in the case and in view of the fact that the judgment in the case is scheduled to be delivered on 02 October 2020. ***Please take note that on the failure of any Counsel to submit to any of the questions*** *it would be taken as they have no submissions to make; and the President will come to a determination of the case on the basis of the proceedings and documents on record in the Supreme Court briefs in relation to the ex-parte application and the trial of the case and the applicable law.*

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

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

1. *Was the application to have the Order of 18 August 2015 registered under section 3 of Reciprocal Enforcement of British Judgments Act (hereinafter referred to as, REBJA), made "within 12 months after the date of the judgment i.e. before 18 August 2016 or such longer period as may be allowed by the Court".*

2. *Did the Ex-Parte Petition filed on 16 November 2018, seek orders according to the prayer under section 4(5) of Foreign Judgments (Reciprocal Enforcement) Act?*

3. *Did or did not the Amended Petition that was filed on 04 December 2018, convert the 16 November 2018 petition, to one under section 3(1) of REBJA? Is it the prayer seeking relief or the caption that is decisive of the nature of an action? Did or did not the Amended Petition of 04 December 2018, convert the pleadings to one of another character? Did this offend section 146 of the Seychelles Code of Civil Procedure?*

4. *Could the Supreme Court have allowed the amendment to the Petition?*

5. *Was the Respondent conscious of the fact that the registration of the Order of 18 August 2015 before the Supreme Court was out of time in view of the averments in paragraph 2 of the Affidavit of Daniel Terrence Burbeary dated 15 November 2018?*

6. *Can it be said that the Judgment and Order of Justice Cockerill dated 11 October 2018, kept alive the Order of ~~14~~ 18 August 2015 from running out its time limit for registration as required by section 3 of REBJA, in view of the orders made therein?*

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

   Assuming it was attached and could be made use of:

   i. *Is it sufficient for D. T. Burbeary, to simply aver that "as a matter of English law EEEL was unable to take any steps to enforce the Cooke Order pending the final determination of the Set-Aside Application"?*

   ii. *What is the reference to the English law? Where is it to be found? Is it necessary to plead and prove foreign law?*

8. *If there was a failure to prove foreign law, should not S. 230 of the Seychelles Code of Civil Procedure apply?*

9. *If the limitation imposed by S.3 of REBJA had not been complied with, could the Supreme Court have entertained the suit?*

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

1. *Do the copies of the Order of 18 August 2015, Cockerill Judgment and Order, filed and produced at the trial under rule 3 of the Practice and Procedure Rules bear any certification?*

2. *Have the requirements in section 3 of REBJA and rules 2 and 3 of the Practice and Procedure Rules been complied with?*

3. *Is there a requirement to file the original orders and judgment along with the plaint in accordance with rule 3 of the Practice and Procedure Rules?*

4. *Is there a difference in filing Orders and Judgment at the Leave stage (rule 2 of the Practice and Procedure Rules), which is a threshold stage; and the Trial stage (rule 3 of the Practice and Procedure Rules)? Was the original of the Orders and Judgment produced at the Trial stage? Is there a necessity to prove the Orders and Judgment at the trial according to section 3 of REBJA and rules 2 and 3 of the Practice and Procedure Rules?*

5. *Does the Order of 18 August 2015 satisfy the requirements of rule 3 of REBJA Rules?*

    i. *Was the original order of 18 August 2015 produced?*
    ii. *Does the Order of 18 August 2015 bear the name of Justice Cooke? What do the initials which is to be found at the end of page 2 of the Order stand for?*
    iii. *Is there a verified or certified or otherwise duly authenticated copy of the 18 August 2015 Order from a Competent Authority of UK?*
    iv. *Could Ms. Lucie A. Pool, Notary Public of Seychelles, have certified the Order of 18 August 2015?*

6. *Is the certification by Solicitor Elizabeth Edmonds, of Mrs. Justice Cockerill's Judgment and Order, in compliance with section 28(2) of the Evidence Act? Is Solicitor E. Edmonds, a Competent Authority designated by UK to issue a certificate in accordance with The Hague Convention on Abolishing the Requirements for Foreign Public documents 1961?*

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

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

Sgd.
President
Court of Appeal" (verbatim)

Copies of the Questionnaire were forwarded to the other two Justices on the panel on 22 September 2020 by the Assistant Registrar of the Court of Appeal by e-mail. Both the Appellant's and Respondent's Counsel submitted their responses to questions by the President of the Court of Appeal on the 25th of September as ordered to the Court. I have been informed that the other two Justices have also been served with the responses. The Respondent's Counsel had however stated that although she was submitting as a friend of the Court, the clarifications sought are "new grounds of appeal, that were never raised, never argued and they were not raised by the Court at the hearing on 03 September 2020". It is the Respondent's position "raising new grounds after the close of arguments in this appeal are unfair, unjust and onerous for the Respondent." I have dealt with this matter at paragraph 6 above… The question and answer shows that both Counsel and the Court took everything for granted without proper scrutiny of the documents which have been filed, as could be seen from the paragraphs below."

95. Having considered rules 3 (1), 6 (2), 11 (1) (b) and 18 (9) of the Court of Appeal Rules, Fernando President concluded that the Court of Appeal had correctly been reconvened. He stated in paragraph [6] of his minority judgment —

"6. …Surely a Court cannot close its eyes to fundamental errors made by the Trial Court in entertaining a suit and granting relief, simply because they have not been pleaded or raised in the grounds of appeal. I am firmly of the view that be it the Trial Court or the Court of Appeal, the first question to be determined by the Trial Court and now by this Court is whether there has been compliance with the REBJA and the Practice and Procedure Rules made thereunder. That is not taking any one party's side".

96. In her *separate concurring judgment*, Twomey JA held that rule 18 (9) of the Court of Appeal Rules confers an exception on the Court of Appeal to step outside the bounds of the pleadings. She held the view that this *"must be done infrequently and in "exceptional*

circumstances"" and *"in doing so the Court must afford all parties to the proceedings the opportunity to engage with and respond to the issue or ground that the Court seeks to rely on"*. In this respect, she stated the following in paragraph [6] of her *separate concurring judgment —*

> *"[6] The majority decision then goes on to hold that in determining the existence of exceptional circumstances, an individual Justice of Appeal, regardless of his seniority on the Bench, does not have the power to invoke Rule 18(9). The exercise of this discretion must be exercised by the Court as defined in the Rules. The rationale behind this is succinctly explained, and I fully agree with my Brother Justice Dingake's reasoning that this interpretation ensures that a single Justice of Appeal does not control the decision making of the Bench. The interpretation of the Rules, and the limits to Court and presidential power, adopted by Dingake JA cannot be faulted."*

97. The *separate concurring judgment* of Twomey JA acknowledged that —

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

98. We turn to the majority judgment, in which Dingake JA stated —

> *"5. Before delving into the merits of the appeal certain preliminary issues have arisen that require this Court to determine, relating to the propriety of a notice dated the 15th of September 2020 issued by the President of the Court of Appeal, (PCA), reconvening the Court, for the purposes of dealing with the questions he had formulated in his capacity as such. In the notice that was issued to the Parties, PCA cited a number of sections in the Rules of the Court of Appeal that entitled him to reconvene the Court in his capacity as the President of the Court of Appeal*
>
> *6. It bears stating by way of broad context that the questions formulated by the PCA were not raised in the grounds of appeal nor by the Court at the hearing of the appeal at its sitting on the 3rd September 2020 or at any stage.*
>
> *7. Pursuant to the said notice the Court sat on the 18th of September 2020 to consider whether, among other things, the Court was properly reconvened, as the threshold issue before dealing with the questions formulated by the PCA, in the event it was properly convened.*

[…] ***Speaking for myself I was loathe to agree to the reconvening of the Court to hear additional arguments because in an adversarial system, where parties are represented by lawyers it is better to leave the determination of the issues to the parties themselves save in exceptional circumstance. This approach is one that many courts embrace.***

[…]

28. Subsequent to the sitting of the 18th of September 2020, I received another notice by the President to the parties entitled "Questions to Counsel for the Appellant and Respondent on the basis of clarifications sought by way of notice dated 15 September 2020". The said notice that seems to have been issued on the 21st of September 2020, asks further questions in order to clarify the questions contained in the notice of the 15th of September 2020. The notice is about three pages long.

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

99. Having considered at length rules 3(1), 6(2), 11(1) (b) and 18(9) of the Court of Appeal Rules, Dingake JA concluded that the Court of Appeal had been wrongly reconvened —

"24. In summation, it seems to me that the general trend from the above authorities seem to be that save in exceptional circumstances, a role of a judge is akin to that of an impartial umpire in a game, who is very careful not to be seen to be unduly aiding another side at the expense of the other. It is our solemn duty to keep the ring and not to enter the fight of the parties.

25. In my respectful opinion a restrained approach accords with procedural fairness. It works on the assumption that a fair process in which the pleadings drive the issues to be determined is the best way to get to the truth of the controversy between the parties. A Court that interferes with the process by stepping out of the role of an umpire and into the role of an adversarial participant by becoming involved in the framing of the questions to be argued by the parties may risk upsetting the scales of procedural fairness.

26. ***In my considered and respectful view formulating questions to be answered and then proceeding to answer them, even after the court has heard from the parties concerned, after reserving judgment and hearing full arguments, unless absolutely compelling, is better avoided as it risks***

casting the Court as the judge, jury and the executioner.

27. ***Having regard to all the above I hold that the PCA has no power under the rules to unilaterally reconvene a Court after it has heard full argument from the parties and reserved judgement, but that the Court may do so under exceptional circumstances. It follows therefore that we could not hear the parties on the questions formulated by the President for that reason.****"* [Emphasis supplied]

Analysis

100. As the proceedings at the appeal revealed, both Counsel replied to the clarifications sought by Fernando President.

101. In its written submissions, VIJAY claimed that its motion herein is that the judgments of the majority of the Justices of Appeal deprived it, then Appellant, of a fair hearing of the appeal. VIJAY also stated that the Court of Appeal, as the apex Court from which there is no appeal, should reopen its judgment as the injustice visited was through no fault of VIJAY.

102. Counsel for EEEL replied under protest that the issues raised by Fernando President were new and not raised by EEEL or the Court *proprio motu* during the hearing of the appeal and were thus unfair and unjust to it. EEEL agreed with Twomey and Dingake JJA that the sitting of 18 September 2020 was improperly and wrongly reconvened. EEEL, in support of that proposition, claimed that only the Court of Appeal as a whole had the power to reconvene, and the clarifications sought would serve to give VIJAY an advantage to the detriment of EEEL. EEEL claimed that no one Justice of Appeal (not even the President of the Court of Appeal) may exercise the power to reconvene the Court of Appeal. EEEL relied *inter alia* on rule 4 of the Court of Rules to support its submissions.

103. Hence, EEEL contended that the two learned Justices of Appeal were correct in not considering the merits of the clarifications sought by Fernando President and strongly contended that VIJAY had not been denied the right to a fair hearing.

104. In parenthesis, we state that the Court of Appeal Rules were amended after The Judgment was delivered. The proviso to rule 30 (5) of the Court of Appeal Rules 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).".*

105. Fernando President claimed that he invoked the power conferred on him by the Court of Appeal Rules to reconvene the Court to receive further submissions from VIJAY and EEEL on fundamental issues in the interests of justice, after the hearing of the appeal, given that the two learned Justices of Appeal refused his requests to reconvene the Court.

106. The proceedings and The Judgment revealed that neither Twomey JA nor Dingake JA engaged with the clarifications sought by Fernando President and submitted by Counsel for VIJAY and EEEL. The two Justices were of the view that neither the President of the Court of Appeal nor an individual Justice of Appeal has the power to invoke rule 18 (9) of the Court of Appeal Rules. The judgments of the two learned Justices of Appeal stated that the Court of Appeal in certain circumstances may reconvene and consider matters beyond the grounds of appeal based mainly on rule 18 (9) of the Court of Appeal Rules. The two learned Justices of Appeal held the view that the Court of Appeal may reconvene *"when absolutely compelling"* or in *"exceptional circumstances"* and *"distinctive or unprecedented"* matters. Twomey JA, in her *separate concurring judgment*, recognised that the *"interests of justice"* as guided by the Constitution is an important consideration. In their judgments, the two learned Justices of Appeal also stated that the Court of Appeal's power to reconvene may be exercised by the Court as a whole as defined in the Court of Appeal Rules and not by the President alone.

107. In light of the written and oral submissions of VIJAY and EEEL, the principal issue that

arises for determination is whether or not the Court of Appeal may reconvene after the hearing of an appeal to receive further submissions from the parties, in respect of one or more issues, for the purpose of clarification. This question involves considering whether or not, if such a power exists, it may be exercised by an individual Justice of Appeal or by two Justices of Appeal or by the Court of Appeal as a whole. Linked to this issue is the inevitable question of whether or not the two learned Justices of Appeal were correct in barring the determination of the issues raised by Fernando President and refusing to engage with the issues raised by him.

108. In the majority judgment, Dingake JA stated that both Counsel *"seemed to agree that only the Court can decide to reconvene and not the PCA,* ***although Mr Georges for the Appellant on occasions seemed to faintly suggest that it may be possible for the PCA to reconvene the Court…****"*. [Emphasis supplied]. We note that the ability of the President of the Court of Appeal to reconvene the Court of Appeal was a live issue at the appeal.

109. Article 121 of the Constitution defines the composition of the Court of Appeal, namely the President of the Court of Appeal and two or more Justices of Appeal, plus all the judges of the Supreme Court, *ex-officio*. Article 136 (1) of the Constitution empowers the President of the Court of Appeal to make *"Rules"* of the Court of Appeal. *"Court"* under the Court of Appeal Rules *"means the Seychelles Court of Appeal"*. For its conclusion that only the Court as a whole has the power to reconvene the Court of Appeal, the majority judgment relied heavily upon rule 4 of the Court of Appeal Rules, which stipulates that *"*[i]*n respect of any appeal, the Court shall consist of those Judges, not being less than three, whom the President shall select to sit for the purposes of hearing the appeal."*

110. We have considered the Court of Appeal Rules with care. It is undisputed that the Court of Appeal Rules are silent on the ability of an individual Justice of Appeal (or the President of the Court of Appeal) or two Justices of Appeal or the Court as a whole to reconvene the Court, or how such a recall would be exercised.

111. For instance, the Practice Direction concerning Civil Appeals at the Court of Appeal for Ontario[19] contains provisions dealing with post-hearing submissions, as follows —

> *"19. POST-HEARING SUBMISSIONS*
>
> *1.The parties are expected to fully argue all issues on an appeal in the factum and in oral submissions at the hearing of the appeal. Attempts by the parties to provide the court with additional written submissions, authorities, or other material after the hearing are improper, subject to the exceptions discussed here.*
> ***2.On occasion, after the hearing of an appeal, the court may wish to receive further submissions from the parties in respect of one or more issues. The Executive Legal Officer will advise the parties of any request by the court for further submissions and will give a timetable within which to serve and file this material.***
>
> *3.The parties may become aware of a newly-decided authority that might have an impact on a reserved appeal. The authority may be sent, without submissions, to the attention of the Executive Legal Officer, who will ensure that the material is transmitted to the panel that heard the appeal.*
>
> *4. If a party wishes to make submissions concerning the impact of a new authority, a request to do so should be included in a covering letter addressed to the Executive Legal Officer and copied to the other parties. The Executive Legal Officer will advise the parties whether the court is prepared to entertain such submissions and, if necessary, will give a timetable for serving and filing submissions.*
>
> *5.In exceptional circumstances, a party may seek to make additional submissions to the court while an appeal is under reserve. The request, outlining the essentials of the argument and the reasons the argument was not made at the hearing of the appeal, should be made in writing to the attention of the Executive Legal Officer. Opposing parties may respond in writing to the request. The Executive Legal Officer will advise the parties whether the panel will receive further submissions. This process is not to be viewed as a substitute for properly preparing the factum and fully arguing the issues at the hearing of the appeal.*
>
> *6.* ***After a panel has released its reasons for judgment, the decision of the court is final. The normal recourse for a party who objects to the court's decision is by way of an application for leave to appeal to the Supreme Court of Canada.***

[19] This Practice Direction was filed with the Secretary of the Civil Rules Committee on 24 January 2017 and is published pursuant to rule 1.07 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It is effective as of 1 March 2017. This Practice Direction was amended as of 10 July 2018 and 7 July 2021.

> *7. In accordance with rule 61.16(6.1) of the* Rules of Civil Procedure*, an order or decision of a panel of the Court of Appeal may not be set aside or varied except in accordance with rules 37.14 and 59.06. Parties should be aware that rule 59.06 provides for a very narrow jurisdiction to set aside or vary an order made by a panel. This rule and the authorities that have interpreted it should be consulted before commencing a motion under rule 59.06.*
>
> *8. In accordance with rule 2.1.02 of the* Rules of Civil Procedure*, the Court of Appeal will automatically screen motions under rule 59.06(2) to ensure that the motion is not frivolous, vexatious, or otherwise an abuse of the process of the court".* [Emphasis Supplied]

112. We turn to rule 3 of the Court of Appeal Rules, which deals with *"practice and procedure of the Court and cases not provided for"*. Rule 3 of the said Rules stipulates —

> *"3(1) The procedure and practice of the Court shall be prescribed in these Rules, but the Court may direct a departure from these Rules at any time when this is required in the interests of justice.*
> *(2) In any matter for which provision is not made by these Rules or other legislation, the President may on application or informally give directions as to the procedure to be adopted".*

113. Counsel for VIJAY is correct to submit that rule 3 (1) of the Court of Appeal Rules does not apply. The written submissions of EEEL do not address rule 3 (2) of the Court of Appeal Rules. In his written submissions, Counsel for VIJAY submitted that rule 3 (2) of the Court of Appeal Rules empowers the President of the Court of Appeal to reconvene the Court of Appeal after it has risen following an appeal hearing because the Court of Appeal Rules and the law are silent on the point. He added that the Court of Appeal itself could have ordered its reconvening. He added that rule 3 (2) of the Court of Appeal Rules is not a mere administrative power. It empowers the President of the Court of Appeal to direct procedure in an appeal when there is legal silence.

114. We accept the submissions of Counsel for VIJAY. We add that a direction to reconvene the Court of Appeal is a matter of procedure. Clearly, it does not extend into the area of substantive law. We state that his submissions carry much greater weight since we know that the proviso in rule 30 (5) of the Court of Appeal Rules has been made and Gazetted after the delivery of The Judgment.

115. As stated above, Fernando President is empowered under rule 3 (2) of the Court of Appeal Rules to *"informally"* direct the reconvening of the Court of Appeal, after it has risen following an appeal hearing, to receive further submissions from the parties for the purpose of clarification in respect of one or more issues.

116. We observe that the judgements of the two learned Justices of Appeal did not consider rule 3 (2) of the Court of Appeal Rules. We conclude that the informal reconvening of the Court of Appeal by Fernando President in the interest of justice was covered by rule 3 (2) of the Court of Appeal Rules. Moreover, rule 18 (9) of the Court of Appeal Rules does not speak of a requirement to have *"exceptional circumstances"* to exercise the Court's power under rule 18 (9).

117. Hence, we reject the submissions of EEEL that the reconvening of the Court of Appeal by the President of the Court of Appeal was improper and illegal. As the Court of Appeal was legally reconvened, it stands to reason that the objections to the propriety and the authenticity of the documents were legally raised. Twomey JA correctly stated in her *separate concurring judgment* that *"in doing so the Court must afford all parties to the proceedings the opportunity to engage with and respond to the issue or ground that the Court seeks to rely on"*[20]. The proviso in rule 18 (9) of the Court of Appeal Rules serves to protect the right of EEEL. Rule 18 (9) of the Court of Appeal Rules stipulates —

> *"(9) Notwithstanding the foregoing provisions, the Court in deciding the appeal shall 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 the case on that ground."*

118. Rule 31 (5) of the Court of Appeal Rules is also relevant to the issue and an added safeguard —

> *"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*

[20] For example, the respondent may contend that it is *ultra petita* for the Court of Appeal to raise the ground or the matters raised in that ground fall outside of the pleadings or have acquired *"l'autorité de la chose jugée"* (*resjudicata*), as the case may be. See the numerous authorities of the Court of Appeal on *ultra petita*.

> *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 —*
>
> ***Provided that the Court may, notwithstanding that it is the opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred****."* [Emphasis supplied]

119. Fundamentally, the two learned Justices of Appeal erred in not engaging with the clarifications sought by the President of the Court of Appeal and in ignoring them in their respective judgment. It is not even clear why the two learned Justices of Appeal addressed the jurisdiction or authority of the Court of Appeal on the 18 September 2020, when it reconvened. EEEL is adamant in its affidavit evidence that this approach of the two learned Justices of Appeal was correct. Clearly, there was no issue concerning the jurisdiction or authority of the Court of Appeal. Dodin J stated in his minority judgment that he *"subscribes to the view that the reconvening of the Court was by the Court and not PCA alone"*.

120. Twomey JA stated in her separate concurring judgment — *"[3]* [h]*ow the Court applies these rules, and exercises the powers conferred thereunder, is a matter of fundamental importance that goes to the heart of access to justice, fairness and the purpose and rationale of the constitutionally created court hierarchy".* This statement commends itself to us.

121. We conclude that those errors are fundamental errors in procedure, which have caused a failure of natural justice or denial of a right to a fair hearing. Halsbury's Laws of England Fourth Edition Vol 26 para 556 states — *"[t]here is no decisive test for ascertaining what irregularities will render a judgment void as distinct from voidable, but one test which may be applied is whether the irregularity has caused a failure of natural justice"*.

122. These clarifications resulted in the President of the Court of Appeal allowing the appeal in his minority judgment. We accept the submission of Counsel for VIJAY that it was probable that, had the two learned Justices of Appeal engaged with the clarifications raised by Fernando President, they may have been equally persuaded by them.

123. In our view, the circumstances are exceptional and appropriate. We note that there is *"no alternative effective remedy"*. We observe that *"*[j]*ustice miscarried because the failure to observe procedural due process meant that no decision that the appeal was unmeritorious could properly have been reached*[21]*". "The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy*[22]*". "The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined; see* Taylor v Lawrence, [supra].*"* The Court of Appeal in Attorney-General v Marzorcchi [supra] was convinced that *"it was prudent to err on the side of caution".*

124. 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.

4. Whether or not the motion was an abuse of the process of the Court of Appeal

125. EEEL claimed that Vijay's motion was an abuse of process of the Court and was frivolous, vexatious and spurious.

126. Abuse of the process of the Court involved something that amounts to a misuse of the process of litigation: see, for example, *Brandt v Commissioner of Police and others [2021] 5 LRC 294 – Privy Council [2021] UKPC 12*.

127. We have concluded that procedural irregularities caused by the position of the two learned Justices of Appeal were of sufficient importance to critically undermine the whole appeal and require that The judgment be set aside. Hence we hold that this motion is not an abuse of the process of the Court of Appeal.

128. We also hold that the motion does not fall within the definition of *"*frivolous or vexatious*"*.

[21] DJL v Central Authority [supra]
[22] Taylor v Lawrence [supra]

129. Hence we reject the prayers of EEEL contained in its affidavit evidence to also dismiss the motion on these grounds.

DECISION

130. For the reasons stated above, we make the following orders on the motion —

1. The Judgment is declared to be null

2. The hearing of the appeal is set aside

3. The Court of Appeal is directed to fix a date for the de novo hearing as early as may be convenient to the Court and to VIJAY and EEEL.

4. The interim order of the 9 March 2021 SCA MA24/2020 [2021] SCCA 4 is vacated.

5. There will be no order as to costs.

F. Robinson, JA _____

I concur _____

S. Andre, J

Signed, dated and delivered at Ile du Port on 21 March 2022.

DODIN JA (MINORITY JUDGMENT)

Summary: *Jurisdiction and Powers of the Seychelles Court of Appeal - whether the Court of Appeal has all the inherent jurisdiction and/or inherent powers of the Supreme Court. - whether the Court of Appeal can suspend its own judgment - if the Court of Appeal can suspend its own judgment, what are the necessary criteria if any - if there are criteria to be met, whether the criteria for setting aside were met.*

Heard: 30 September 2021 & 1 October 2021

Delivered: 21 March 2022

ORDERS

1. This Application is dismissed in its entirety.
2. The interim order of stay of execution of the Supreme Court judgment of 30th June 2020 in CS/2020 is vacated.
3. The hearing of the grounds of appeal numbered 2, 4, 5 and 6 of the Applicant/Appellant in SCA15 and 18 of 2017 is denied.
4. Cost is awarded to the Respondent.

JUDGMENT

DODIN J.

[This judgment has been written after I have had the opportunity to read in draft the judgment of Her Honourable Justice Robinson and hence does not contain a repetition of the facts in issue or a detailed analysis of the jurisdiction and powers of the Court of Appeal except in so far as this judgment differs in analysis and conclusion.]

[1] The Applicant, Vijay Construction (Proprietary) Limited, hereinafter referred to as *"VIJAY"*, being dissatisfied with the judgment of the Court of Appeal SCA28/2020 delivered on the 2nd October, 2020, applies to the Court of Appeal for the following reliefs:

a. Suspend its judgment of 2 October, 2020 in SCA28/2020;

b. Stay the execution of the Supreme Court judgment of 30th June 2020 in CS/2020; and

c. Hear the grounds of appeal numbered 2, 4, 5 and 6 of the Applicant/Appellant in SCA15 and 18 of 2017.

The Application is supported by an affidavit of Kaushlkumar Patel, a director of Vijay who has been duly authorised to swear the same for the applicant.

[2] The Respondent, Eastern European Engineering Limited, hereinafter referred to as *"EEEL"* objects to the Application and moved the Court of Appeal to dismiss VIJAYS's motion with costs. The Respondent's objection is supported by the affidavit of Vadim Zaslanov, a director of EEEL duly authorised to swear the affidavit on behalf of EEEL.

[3] The evidence contained in both affidavits have been reproduced with pronounced clarity in the judgment of Justice Robinson [Presiding] and need not be repeated here.

[4] In respect of relief b. above, the relief was granted pending the determination of this Application whilst relief sought in c. depends to some extent on the outcome of this Court's determination of relief a.. This judgment therefore is principally a determination of relief a. and seeks to determine the jurisdiction and powers of the Seychelles Court of Appeal to suspend its own judgment.

[5] With respect to relief a., the prayer is for the this Court to *suspend its judgment of 2 October, 2020 in SCA28/2020*. There is difference between *suspending* a judgment and *setting aside* a judgment or declaring the judgment a nullity. To look at the literal definitions; to *suspend* a judgment means to hold the judgment inabeyance, to defer the judgment or to render the judgment temporarily ineffective until something is done about it. It is a means pending an end or to a restitution. To set aside a judgment would result in having to discard the judgment, to reject the judgment, to declare the judgment invalid, to annul the judgment or to overrule the judgment. Granting that remedy is an end in itself.

[6] In civil law the principle of *non ultra petita***,** meaning "not beyond the request", means that a court may not decide or award more than it has been asked to. In particular, the court may not award more to the winning party than it prayed for. The same principle therefore no doubt calls for clear, specific and proper pleadings. The Court cannot go out on its own motion to include in its determination, order or award what has not been pleaded by the party. Even where the party

has pleaded for any other order that the Court shall deem fit, such other order must not surpass what is implicit in the pleadings and the prayers. This *ultra petita* principle goes to the core of a court's jurisdiction and powers.

[7] As the pleadings and prayers of the Applicant do not include the request for any other order other than the 3 pleaded and prayed for, any remedy, order or declaration allowing more than the suspension of the judgment of the 2 October, 2020 in SCA28/2020 would be *ultra petita* this Application.

[8] Consequently I find that this Court cannot *set aside* the judgment of 2 October, 2020 in SCA28/2020 as to do so would grant the Applicant more than it requested in its Application.

[9] I now refer to whether this Court can suspend its own judgment and for the reasons advanced by the Applicant. For this purpose, I have also read the exposee on the jurisdiction and powers of the Supreme Court and the Court of Appeal contained in the judgment of the Honorable Presiding Justice of which I am mostly in agreement with the following reservation in respect of jurisdiction and powers of the courts:

i. The Supreme Court has unlimited jurisdiction by virtue of article 125(1) of the Constitution of the Republic of Seychelles and inherent jurisdiction under sections 4 to 10 of the Courts Act. However the jurisdiction and powers of the Supreme Court is not the issue to be determined within the context and pleadings contained in this Application. A look at the jurisdiction and powers of the Supreme Court is only relevant to the extent that it can assist this Court in its interpretation of article 120(3) of the Constitution of the Republic of Seychelles.

ii. The jurisdiction of the Court of Appeal is contained in article 120(1) and (3) of the Constitution of the Republic of Seychelles in addition to original jurisdiction in constitutional matters arising before it as per article 130(6) of the Constitution of the Republic of Seychelles.

Article 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.

(3) The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought and such other authority, jurisdiction and power as may be conferred upon it by or under an Act."

Article 130(6) Where in the course of any proceedings in any court, other than the Court of Appeal or the Supreme Court sitting as the Constitutional Court, or tribunal, a question arises with regard to whether there has been or is likely to be a contravention of this Constitution, other than Chapter III, the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

[10] The Courts Act also reflects the constitutional provisions in respect of the Court of Appeal. Section 12 of the Courts Act provides:

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.

(2) (a) In civil matters no appeal shall lie as of right-

(i) from any interlocutory judgment or order of the Supreme Court; or

(ii) from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.

(b) In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

(c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

> *(3) For all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the powers, authority and jurisdiction of the Supreme Court of Seychelles and of the Court of Appeal in England*." [Emphasis mine].

Section 12(3) is very telling in its curtailment of the powers, authority and jurisdiction of the Court of Appeal.

[11] The Seychelles Court of Appeal's jurisdiction is therefore limited to determining of appeals and such appellate jurisdiction conferred upon it by the Constitution or an Act. [Emphasis mine]. Furthermore, only within the context of exercising its appellate jurisdiction, does the Court of Appeal has authority, jurisdiction and power of the court from which the appeal is brought or such other authority that might have been conferred upon it by or under an Act. [Emphasis mine]. As such, the Court of Appeal has not been conferred with unlimited original jurisdiction in all matters as the Supreme Court and cannot invoke for itself unlimited inherent powers or the same inherent powers of the Supreme Court.

[12] To conclude that the Seychelles Court of Appeal has the same jurisdiction and powers whether statutorywise or inherent as the Supreme Court is erroneous. To do so would blur the distinct functions and raison d'etre of each court. It would further attempt to pull the Seychelles Court of Appeal from the stricter confines of it appellate jurisdiction and powers (in addition to specific constitutional matters arising for the first time before it), to the wider unlimited jurisdiction and powers conferred upon the Supreme Court or which can be invoked by the Supreme Court.

[13] I am therefore in agreement with learned counsel for EEEL that the jurisdiction of the Seychelles Court of Appeal and the powers that are not conferred upon the Court of Appeal by the Constitution and the law are limited to only such inherent jurisdiction and powers which is necessary to the exercise and discharge of its appellate jurisdiction and other than its original jurisdiction under article 130(6) of the Constitution, it cannot assume any jurisdiction and powers outside of and not necessary for the discharge of its appellate jurisdiction.

[14] Now what are the jurisdiction powers, authority and jurisdiction that the Court of Appeal can invoke in the discharge of its appellate functions? Obviously, except in accordance with article 130(6) of the Constitution, the Court of Appeal has no other statutory original jurisdiction. The Court of Appeal may also have inherent original jurisdiction allowing it the deal with contempt in the face of the court although that is not an issue for this Application.

[15] Like any other court, the Court of Appeal has inherent jurisdiction and powers to recall, to reopen, to review or to reconsider a judgment or order within the confines of exercising its appellate jurisdiction in order to correct typographical errors, correct an accidental slip or omission in a judgment or order provided of course it does not affect the fundamental integrity of the judgment or order. However this Application goes further than correction. It wants this Court to suspend its judgment.

[16] In reference to the powers and jurisdiction of the English Court of Appeal, the Honorable Presiding Justice has quoted the following:

> *"The English Court of Appeal may finally dispose of a case. Thus the Court of Appeal has, besides its jurisdiction to hear appeals, all the powers of a trial court. It may in its discretion, consider points raised for the first time of appeal, though this may result in depriving the successful appellant of his costs. It may avoid the need of a new trial. It may, however, grant a new trial where that is just. It may, as has been seen, hear further evidence on appeal."*[sic].

I am in agreement with the above statement in so far as the jurisdiction Court of Appeal is limited to what is necessary for the hearing and determination of any appeal, and the amendment, execution, and enforcement of any order made on such appeal. This supports my finding above that any inherent power or jurisdiction of the Court of Appeal does not go beyond the jurisdiction and power to rectify, execute, enforce its judgment or order but not to suspend the same once delivered.

[17] In the present case the issues giving rise to this application are two-fold. Firstly, the PCA's setting the case down for further hearing on matters raised by himself and not by

any of the parties to the appeal and the decision he came to taking these matters into consideration in his dissenting judgment which was in favour of the Applicant. Secondly, the apparent lack of engagement by the two other Appellate Justices to the re-called sitting and their majority decision which indicated their rejection of the procedure of reconvening the sitting for additional matters not contained in the grounds of appeal and their decision based only on the original grounds of appeal which were determined in favour of the Respondent, hence the majority judgment.

[18] The determination of this Court now is that with the limited jurisdiction and powers the Court of Appeal, did it lawfully do the two things above; that is to reconvene the sitting after close of arguments to hear counsel on matters *ultra petita* the grounds of appeal and whether when so reconvened, it was lawful for the majority of the panel to maintain objection and non-participation to the sitting and gave the majority judgment without considering the points raised in the extra sitting. This is in the context of the Applicant's contention in this Application that the hearing of the appeal and the resulting majority judgment was a violation of its right to a fair hearing as provided for in article 19(7) of the Constitution.

[19] It is noted that this Court is not being convened as a Constitutional Court to determine whether there was a violation of the Applicant's constitutional right, namely article 19(7). This Application is asking the Court of Appeal to suspend a judgment of the Court of Appeal for adopting procedures resulting in judgments out of which the majority judgments are seemingly in violation of the Applicant's constitutional right. That is why the provenance of the Court of Appeal's jurisdiction and powers, inherent or otherwise have been analysed above. I now apply that legal analysis to the impugned procedures and judgments.

[20] On the first point of the reconvened sitting, the jurisdiction and powers of the Court of Appeal does give it the right to regulate its own proceedings in addition to powers incidental to the hearing and determination of any appeals. However the reconvened sitting must be for purposes which are within the lawful parameters of the law and not for matters *ultra petita* as analysed above. In this case, the matters to be addressed at the

reconvened sitting must have been matters within the pleadings and not matters that neither party had raised to be determined on appeal. Where pleadings by parties are deficient, it is not for the Court to assist the parties by its own additions to what the parties have failed to address. I am therefore in agreement with the majority decision of the Court of Appeal in *SCA28/2020* that the reconvened sitting was unlawful and hence should have had no relevance to the determination of the appeal.

[21] Furthermore, since the dissenting judgment of the PCA was a minority decision, it has no particular legal effect and therefore not fatal to the outcome of the appeal in the impugned case SCA28/2020. To that end it cannot amount to a violation of the Applicant's right to a fair hearing especially noting that the dissenting judgment was in favour of the Applicant although it has no operative value.

[22] On the second issue of the majority Justices of Appeal not interacting during the reconvened sitting and giving the majority judgment against the Applicant and further not addressing the issues raised during the reconvened session, the Applicant failed to make any strong connection between the postures adopted by the majority Justices of Appeal and their judgments which were based purely on the grounds of appeal raised in the pleadings and the alleged failure to grant the Applicant a fair hearing. It is imperative that in order for the Court of Appeal to consider invoking its inherent jurisdiction to suspend its judgment that the Applicant establishes that the procedures followed or the content of the judgment is outside the realms of the law, that is illegal, or that the judgment itself was procured by illegal means such as fraud or deliberate deception which could not have been detected prior to the judgment; or there was a genuine misapprehension of facts or law fundamental to the matter to be determined.

[23] The case of *Attorney-General v Marzorcchi Civ App 8/1996*, has been touted as one where the Court of Appeal set aside its own judgment. A brief look into the circumstances and reasoning in *Marzocchi* clearly shows that the Court of Appeal had to go as far as presume that the Applicant had not been heard at all and made a finding to that effect. Where the Applicant had not been heard at all through no fault of his own, it would definitely amount to a serious fundamental breach of his right to a fair hearing and

may result in the Court invoking its inherent power to set aside the judgment. In this case, the Applicant was given more hearing than it deserved or pleaded for.

[24] Secondly, the reasons advanced by the majority Justices of Appeal reflect the jurisdictional powers issues addressed above in respect of hearing of appeals. I agree with Dr Twomey JA at paragraph 13 of her judgment that:

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

[25] Whilst I subscribe to the view that the reconvening of the Court was by the Court and not PCA alone, paragraphs 24 and 25 of the judgment of Dingake JA reflect the correct approach that should have been taken and on which the majority judges based their judgments.

> *[24] In summation it seems to me that the general trend from the above authorities seem to be that save in exceptional circumstances, a role of a judge is akin to that of an impartial umpire in a game, who is very careful not to be seen to be unduly aiding another side at the expense of the other. It is our duty to keep the ring and not to enter the fight of the parties.*
>
> *[25] In my respectful opinion a restrained approach accords with procedural fairness. It works on the assumption that a fair process in which the pleadings drive the issues to be determined is the best way to get to the truth of the controversy between the parties. A Court that interferes with the process by stepping out of the role of an umpire and into the role of an adversarial*

participant by becoming involved in the framing of the questions to be argued by the parties may risk upsetting the scales of procedural fairness."

[26] The above show without doubt that the decision of both Justices of Appeal were rational, within the bounds of established jurisprudence and cannot be censured for having breached the right to a fair hearing of the Applicant. Consequently, in final conclusion I find that there is no ground before this Court to support the Application to suspend the judgment of 2 October 2020 in SCA 28/2020.

[27] Final Orders.

i. This Application is dismissed in its entirety.

ii. The interim stay of execution of the Supreme Court judgment of 30th June 2020 in CS/2020 is vacated.

iii. The hearing of the grounds of the grounds of appeal numbered 2, 4, 5 and 6 of the Applicant/Appellant in SCA15 and 18 of 2017 is denied.

Signed, dated and delivered at Ile du Port on 21 March 2022

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Dodin JA