

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) M. Twomey, (J.A) , B. Renaud (J.A)

Civil Appeal SCA 45/2017

(Appeal from Supreme Court Decision MA225/2016 arising in CC17/2013

Multichoice Africa Limited

Appellant

Versu
s

Intelvision Network Limited

1st Respondent

Intelvision Limited

2nd Respondent

Heard: 26 February 2019

Counsel: Mr. Bernard Georges for the Appellant

Mr. Basil Hoareau for the Respondent

Delivered: 09 April 2019

JUDGMENT

M. Twomey (J.A)

Background to the appeal

[1] The Appellant is a company with headquarters in Mauritius providing television services through the trading name DStv to parts of Africa including Seychelles. The Respondents operate a business providing downloaded television channels to customers of the First Respondent in Seychelles. The First Respondent is an offshore company registered in Turks and Caicos and concludes agreements with suppliers of channels, and the Second Respondent is a Seychellois registered and domiciled company providing the service in Seychelles.

[2] The Appellant entered into a representation agreement with the First Respondent to provide it with equipment for accessing channels being supplied by the Appellant and

information technology equipment to enable the Respondents to store information relating to subscribers to the business of the Respondents. The Respondents were obligated to pay the Appellant a set fee per subscriber and to maintain records of subscribers.

- [3] The representation agreement came to an end after three years. It is the Appellant's case that the Respondents continued to offer the channels to the Seychellois subscribers despite the agreement coming to an end and did not report to or pay the Appellant for its continued downlinking of its services.
- [4] In 2019, the Appellant filed a suit in the Supreme Court seeking the cessation of the downlinking of its services by the Respondents, the return of its equipment and the payment of fees charged to the Respondents' subscribers in respect of the DStv business. The Respondents filed a preliminary point relating to the jurisdiction of the Court to hear the suit which failed, as did their appeal from this decision. Subsequently amendments were sought and granted for both the Plaintiff and the Defences in the suit.
- [5] The present appeal concerns other amendments now sought by the Plaintiff. The Supreme Court (Robinson J) granted in part and denied in part the Plaintiff's motion to amend its Plaintiff. It is against this ruling that this appeal has been brought.

The Decision of the Supreme Court

- [6] The Learned Trial Judge found that in general Paragraphs 4 – 7 of the proposed further amendments sought to enlarge the scope of the contractual breaches of the agreement by the Defendants, paragraphs 8-10 proposed new or alternative causes of action and the proposed amended prayers at Paragraph 13 reflected the proposed amendments in the Further Amended Plaintiff.
- [7] It was the Learned Trial Judge's finding that the proposed amendments in paragraphs 6, 7, 8, 9, 10 and 13 would change the suit from one nature to the other. In particular, while the Learned Trial Judge allowed the minor amendments to paragraphs, 1, 2.2, 7, prayers 1- "3" and prayer 2-"2" and the substantive amendment in paragraphs 3 (the equipment supplied by the Plaintiff to the First Defendant) it denied the substantive amendments in

paragraphs 6 a, 6c, 6d, 6e, 6f, 6g, 7b, 7e, 7g, 7h, 7i on the grounds that they would convert the suit of one character into a suit of another and substantially different character.

[8] The Learned Trial Judge also ruled that the proposed amendments in paragraphs 8, 9 and 10 notwithstanding the proviso in section 146 of the Seychelles Code of Civil Procedure allow the Appellant to plead a new cause of action relating to the breaches specified in the Plaint. Consequently, the proposed paragraph 13 relating to liability for damages and/or compensation in equity and/or accounting for profits in the said sum of USD24, 500,000 was also denied.

[9] Finally, the Learned Trial Judge found that the consequent reliefs sought in the prayers to the proposed Further Amended Plaint could not be allowed.

The Appeal

[10] From this decision the Appellant has filed the following grounds of appeal:

1. The Learned Trial Judge erred, in breach of settled law to the opposite effect, in placing emphasis on the submission of the Respondents that the addition of a new cause of action results in the conversion of the suit into a suit of a different nature.
2. The Learned Trial Judge erred in her finding at paragraph [31] of her ruling that the proposed new paragraph 4 did not arise out of the same or substantially the same facts as the original action.
3. The Learned Trial Judge erred in her finding at paragraph [34] of her ruling that the proviso to section 146 of the Seychelles Code of Civil Procedure applied to the intended amendments to paragraphs 8,9 and 10 because these sought to add new causes of action.

The Law

[11] With regard to different causes of action being joined in the same suit the Seychelles Code of Civil Procedure provides:

“Different causes of action may be joined in the same suit, provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities, but if it appear to the court that any of such causes of action cannot be conveniently tried or disposed of together, the court may, either of its own motion or on the application of the defendant, order separate trials of any of such causes of action, or may make such other order as may be necessary or expedient for the separate disposal thereof, or may order any of such causes of action to be excluded, and may make such order as to costs as may be just.”

[12] With regard to amendments to pleadings, Section 146 of the Seychelles Code of Civil Procedure provides:

“The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and substantially different character.”

[13] The two most instructive cases in the domestic jurisprudence relating to amendments to pleadings are the following:

1. *Petit Car Hire v Mandelson* [1977] SLR 68, 72-73, in which Sauzier J stated that an amendment to a plaint before the close of one’s case should not be refused (1) if sought in good faith, (2) would not cause prejudice to the other party, (3) would not be compensated by costs and (4) did not alter the nature of the suit. He added that apart from the specific prohibition in the proviso to section 146, the provision was couched in very wide terms and must be given a liberal meaning.
2. *Fisherman’s Cove Limited v Petit and Dumbleton Limited* (1978) SLR 15, 18 in which Sauzier J stated that an amendment sought would be permitted where it was necessary for the real questions in controversy between the parties to be determined once and for all. He permitted an additional cause of action in the alternative.

Legal Submissions by Counsel

- [14] In the course of this appeal it was agreed by the parties that the main issue to be decided at this appeal was whether adding a new cause of action to the pleadings constituted a conversion of the suit from one nature to another so as to offend the proviso to section 146 of the Seychelles Code of Civil Procedure.

Submissions of the Appellant

- [15] Mr. Georges, Learned Counsel for the Appellant has submitted, relying on *Fisherman's Cove Limited* (supra) that adding new facts does not amount to the conversion of a suit of one nature into a suit of another nature if the substantial cause of action does not change. He relied on the Mauritian authority of *Bronsema v Mascareigne Shipping and Trading Company* (1985) MLR 79, 82 in which the Court ruled that:

“... the court will not refuse to allow an amendment simply because it introduces a new cause but it will do so where the amendment would change the action into one of a substantially different character which would more conveniently be the subject of a new action”.

- [16] In *Bronsema* (supra), the court ruled that a proposed amendment to a statement of claim containing a claim for damages and/or *de in rem verso* in addition to an original claim for unlawful termination of contract would be permitted because although it introduced a new cause of action it was not inconsistent with the issue raised in the original statement of claim. It must be noted here that the defendant in *Bronsema* contributed to the reason for the plaintiff's proposed amendment in that the defendant had caused the plaintiff to be refused a work permit.

- [17] It is also Mr. George's submission that by contrast the abandonment of one cause of action for another would amount to a *conversion* as in the Mauritian case of *Gunpath & ors v Ranmawz & ors* (1960) MLR 127. In that case, the plaintiff having brought a case in fraud then sought to introduce an averment of *donation deguisé*, an amendment which was denied by the court, on the grounds that the amendment sought would introduce into

the case a new cause of action totally different to that in the previous case. Furthermore, the new cause would be manifestly contradictory to the previous case.

[18] With regard to the proposed amendment in the present case relating to the alternative grounds of delict, Mr. Georges has submitted that a plea in the alternative, as is the case in the proposed amendment, does not offend against the principle of *non cumul* contained in Article 1370 (2) of the Civil Code as both contract / delict are not pleaded together but only in the alternative which is not precluded by the Civil Code.

[19] Similarly, with regard to the proposed amendment with respect to unjust enrichment he submits that such a claim under Article 1381(1) can only be pleaded when no other cause of action can be pleaded. It is his submission that so long as the plea is in the alternative it can stand especially if the plaintiff is unable to plead its case in contract or in delict based on the same facts as the original plaint. He relied on the case of *Labiche v Ah-Kong* (2010) SLR 172, in which the Court of Appeal found that a cumulative claim for contract and unjust enrichment could not succeed but that a prayer for the alternative remedy in *de in rem verso* could be entertained (see pages 172-180 of *Labiche*).

Submissions of the Respondents

[20] Learned Counsel for the Respondents, Mr. Hoareau, conceded that in respect of Article 1370 (2), one was not precluded from pleading both causes of action in contract and in delict in the same suit as long as they were in the alternative. He also conceded that similarly a claim for unjust enrichment could be pleaded in the alternative in a suit for breach of contract.

[21] He however cautioned the court not to rely on the Mauritian authorities submitted by the Appellant in relation to amendment of pleadings as these were based on the interpretation of a Mauritian provision relating to amendments which differed from that of Seychelles. In particular he submitted that the rule relating to the amendment of pleadings in Mauritius is similar to the English provision. But neither have the proviso contained in the Seychellois provision.

[22] Mr. Hoareau referred the court to the case of *Raleigh v Goschen* [1898] 1 Ch. 73 in which the High Court of England established for the first time that an application for an amendment to pleadings would be refused if it changed one action into another of a substantially different character. It is his submission that the proviso to section 146 of the Seychelles Code of Civil Procedure is a reproduction of the principle relating to amendments enunciated in *Raleigh*. The proviso necessarily has to be taken into account by the Court as it qualifies section 146. The reliance on English and Mauritian cases which do not have a similar proviso in their statutory provisions relating to amendment of pleadings is therefore in his view dangerous and erroneous.

[23] It is his view that *Fisherman's Cove* was wrongly decided as a new cause of action was permitted in the amendment of the suit despite the proviso to section 146. In Mr. Hoareau's submission Sauzier J' reasoning is wrongly premised on the fact that there is no conversion of a suit of one character to another if there is an additional cause of action in the amendment but only if there is a substitution of a cause of action for another.

Our analysis

[24] We do not find the provisions of section 105 of the Seychelles Code of Civil Procedure relating to joinder of suits of much help in deciding this appeal. The apposite provisions of section 146 of the Code guide us in our deliberations.

[25] We note that in the original plaint the Plaintiff averred that it supplied a quantity of equipment to the Defendant (detailed in an attached Schedule) which the Defendant was obliged to return. We note that the amendments refused by Robinson J relate to the following:

[1] Paragraph 4 seeking to include information relating to subscribers.

[2] The consequential amendment in a new paragraph 7 to aver breaches by the Defendant in relation to these subscribers.

[3] An additional or alternative breach by the Second Defendant in unjust enrichment or delict in paragraph 8.

- [4] An additional or alternative breach by the Respondents in delict in paragraph 9.
- [5] An additional or alternative breach by the Defendants in unjust enrichment in paragraph 10.
- [6] Consequential amendments to the prayers at Paragraph 13 to reflect the additional or alternative breaches pleaded.
- [26] In considering whether these amendments should have been allowed by the trial judge we are guided by the case of *Petit Car Hire* (supra) which in our view lays out the applicable principles with respect to amendments to pleadings. With regard to *Fisherman's Cove*, the new cause of action proposed in the amendment was in the alternative. In discussing the origin of the proviso to section 146 (then section 145), Sauzier found that the case of *Raleigh* concerned an amendment sought to replace the representative capacities of the original parties from one in which the cause of action arose out of their liability as officers of the Admiralty to one of them being sued in their personal capacities. This was in his view rightly refused.
- [27] We note that in *Fisherman's Cove*, the original cause of action was one of breach of contract whereas the amendment sought concerned an alternative ground alleging a breach of warranty. The case concerned the demolition and construction of a hotel in accordance with specifications. As a result of the defendant not complying with the specifications, the hotel was affected by termites and wet rot. Sauzier J found that the amendment sought alleging in the alternative a breach of warranty did not involve a change substantially or otherwise of the facts. He did find that the proposed amendment was based on a new cause of action but stated that since the "first suit contained in the original plaint remain[ed] intact" and the proposed new cause of action was in the alternative, a conversion of the suit would not occur. We find it difficult to reconcile *Fisherman's Cove* with *Raleigh* and the proviso to section 146 of the Seychelles Code of Civil Procedure.
- [28] In *Prunias v Darou* (1997) SLR 87, an amendment relating to the representative capacities of parties in the suit was also sought and allowed. *Prunias* however can be distinguished from *Raleigh* in that the parties had capacity to sue as fiduciaries of the co-

owned land whereas the caption had neglected to include their capacity as fiduciaries and had entered them as plaintiffs in their own name.

- [29] In *De Silva and Ors v UCPS* (1996) 68 SLR Alleear J allowed an amendment to a plaint which introduced a new claim for an equitable remedy finding that no new facts would be introduced or any new parties joined. We again have difficulty reconciling this decision with the terms of the proviso to section 146.
- [30] In *Morin v Pool* (2002) SLR 144, Perrera ACJ allowed an amendment to a plaint which in his view did not convert the suit from one character to another. That case concerned a claim for right of way. The amendment sought was to add that the right of way was necessary because the plaintiff's land was enclaved. We are of the view that the amendment granted in this case was not excepted by the proviso.
- [31] If we were to distil the legal principles from the statutory provisions and the law outlined above, we find ourselves back at our point of departure in our discussions on the jurisprudence. We are of the view that the decision in *Petit* which seems to have withstood the test of time is the correct statement of the law applicable with regard to amendments of pleadings.
- [32] It is our view that the case of *Cropper v Smith* [1884] 26 CH D 700 cannot be relied on because *Raleigh*, which came subsequently, qualifies it. Similarly, other cases from other jurisdictions that do not have the express qualification of our proviso to section 146 would also not be applicable.
- [33] It seems to us having examined the legal provisions and examined the jurisprudence that any amendment that allows the ventilation of the issues raised in the original plaint ought to be allowed. *Prunias* and *Morin* would fall within that category.
- [34] What cannot be allowed is a new cause of action which changes the suit into an entirely or substantially different one. Hence adding a new set of facts premising a new remedy cannot in our view withstand the application of the proviso to section 146 however wide its interpretation. We are fortified in this view by the fact that in parallel, procedural rules dictate that litigants are bound by their pleadings (see in this respect sections 71 and 75 of

the Seychelles Code of Civil Procedure and the cases of *Charlie v Françoise* (1995) SCAR 49, *Monthy v Esparon* (2012) SLR 104, *Lesperance v Larue* (Civil Appeal SCA15/2015) [2017] SCCA 46). Hence, allowing an amendment that adds a new cause of action, albeit in the alternative, negates this established principle.

[35] Necessarily litigating an additional or alternative cause of action will require the adduction of evidence not within the confines of the original cause of action. It is clear that a conversion of the original suit takes place. As long as this conversion does not lead to a substantive change to the character of the original suit it must be permitted by the court. *Prunias* and *Morin* are apposite examples of non-conversions.

[36] Viewing the proposed amendments in this light leads us to the conclusion that the learned trial judge did not err in exercising her discretion to refuse the application for the proposed amendments. In particular, the proposed paragraphs 4 and 6 introduce new facts not originally pleaded which add a new perspective to the case. While it had been originally alleged that upon termination of the representation agreement the First Defendant was obliged to return the Plaintiff's equipment and to cease downloading and providing channels supplied by the Plaintiff to the Seychellois public to other persons or entities, the proposed amended plaint now additionally alleges that the First Defendant was also obliged to deliver information kept by it in respect of Seychellois subscribers, return confidential information obtained by its Representation Agreement, refrain from gaining revenue or profit from its activities and obliged to account to the Plaintiff as fiduciary for all dealings it had undertaken in respect of revenues and profits gained from its activities. These do not allow a ventilation of the issues in the original plaint. They are setting the ground for a separate claim.

[37] Similarly, the proposed paragraph 7 alleges breaches of obligations that were not raised in the Plaintiff's previous pleadings. These additional breaches, although in the alternative, ground the proposed claims in delict and/ or unjust enrichment in paragraphs 8, 9 and 10 of the proposed amended plaint.

[38] In the circumstances we hold that the proposed amendments would substantially change the character of the suit. We therefore dismiss the appeal with costs.

[39] Counsel for the Respondent also raised an issue relating to the non-conformity with procedural rules of the Affidavit filed in support of the motion for amendment of the pleadings by the Appellant. There was no cross-appeal to ground this submission. We therefore do not propose to deal with this issue.

[40] Given the age of this suit, we order that the Appellant is to redraw the plaint urgently in terms of the amendments allowed by the Supreme Court. We further order that this matter is now remitted without further ado to the Supreme Court for the hearing of the suit proper. There shall be no further delay in the hearing and disposal of this suit.

M. Twomey (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 April 2019