

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. Fernando (J.A), B. Renaud (J.A), F. Robinson (J.A)]

Civil Appeal SCA19/2018

(Appeal from Supreme Court Decision CS N0: 93/2015)

Clifford Andre

Appellant

Versus

Sarah Noella Jupiter

Respondent

Heard: 2 May 2019

Counsel: Mr Camille for the Appellant
Mr Gabriel for the Respondent

Delivered: 10 May 2019

JUDGMENT

F. Robinson (J.A)

1. In an amended plaint dated 22 October 2015, the respondent (then the plaintiff) sued the defendants Numbered 1 to 5, namely June Monette Tregarthen, Clifford Andre, Land Registrar, Attorney General and Suzanne Jean-Louis, claiming damages and other remedies. The appellant, in this appeal, was the second defendant in the court below.
2. The amended plaint contained the following averments:

"1. At all material times, the Plaintiff is the purchaser of parcel

number S214 by virtue of a deed of transfer dated 2nd day of April 2012.

2. *The Second Defendant is an Attorney at Law and Notary Public practicing in Seychelles.*
3. *The Third Defendant is the land Registrar who oversees the registration of all title Deeds executed in Seychelles.*
4. *The fourth Defendant is the employer of the Third Defendant and also represents the Government of Seychelles.*
5. *At all material times, the first Defendant was the previous co-owner along with one Suzanne Tregarthen in title of land parcel S214 with house thereon situated at Turtle Bay, Anse Aux Pins, Mahé, Seychelles.*
6. *On the 2nd day of April 2012, the first Defendant through her proxy and agent Suzanne Jean-Louis and by virtue of a power of attorney dated 14th day of October 2011 transferred the said land parcel with house to the Plaintiff for the consideration of One Million Nine Hundred Thousand Rupees.*
7. *The Transfer Document was notarised by the Second Defendant and the consideration stated in the Deed of Transfer was One Million Rupees.*
8. *The Second Defendant further handed in two receipts to the Plaintiff for the amount of One Million Rupees and Nine Hundred Thousand Rupees.*
9. *However the said Transfer Deed was never registered with the Third defendant.*
10. *On the 17th day of March 2013 the first Defendant by virtue of a signed document duly registered, revoked the appointment of her proxy Suzanne Jean-Louis.*
11. *By a further document dated the 17th day of March 2014 the first Defendant applied for a restriction against the said title number S 214 forbidding the registration of the transfer deed signed by the Plaintiff.*
12. *The Third Defendant complied with the application without notifying the Plaintiff and entered a restriction against the said land title.*
13. *The Second Defendant in his capacity as Notary Public acting for the Plaintiff, failed to ensure that title Deed S214 was free from all encumbrances before executing the land transfer documents and accepting the two payments from the Plaintiff.*

14. *By virtue of the above averments the Plaintiff has suffered loss and damages in that she has been unable to register the Transfer of the land parcel S 214 with house for which she has paid the sum stated above in paragraph 8.*

Wherefore the Plaintiff prays the Honourable Court to:

- "a) Order the First Defendant to refund the sum of One Million Nine Hundred Thousand Rupees that was paid to her by the Plaintiff through the Second Defendant;*
- b) Alternatively, order a mandatory injunction against the first Defendant for her to comply with the transfer obligations dated the 2nd day of April 2012 and duly signed by her proxy Suzanne Jean-Louis and the cancellation of the Restriction entered against the said land title S 214;*
- b) Order all the defendants jointly and severally to pay damages to the Plaintiff in the sum of Three Hundred Thousand Rupees;*
- c) Order for costs."*

3. The appellant denied the claims of the respondent in his amended defence dated the 30 October 2017. The amended defence contained a plea in *limine litis* to the effect that the plaintiff did not disclose a cause of action against the appellant.
4. The closing submissions, offered on behalf of the appellant in the court below, contended in *limine litis* that the amended plaintiff disclosed no explicit cause of action against the appellant. In the same vein, the written submissions stated that paragraph 13 of the amended plaintiff failed to expressly aver that the cause of action was one founded on "*faute*". In that regard, the closing submissions stated that the plaintiff did not meet the test of section 71 (d) of the Seychelles Code of Civil Procedure (the "*Code of Civil Procedure*"), and that it should be dismissed against the appellant. Section 71 (d) of the Code of Civil Procedure provides:

"71. The plaintiff must contain the following particulars:

[...]

- (d) a plain and concise statement of the circumstances constituting the cause of action and where and when it*

arose and of the material facts which are necessary to sustain the action;

[...]"

5. The learned Chief Justice, in a judgment, dated the 1 March 2018 (the "*Judgment*"), rejected the appellant's plea in *limine litis* and gave the following reasons to justify her decision:

"[36] The first task that befalls this court is to enquire into the liability of each party sued in this action. In this respect, I have had regard to the Amended Complaint as filed. It certainly contains some infelicities. While it can be inferred from the complaint that this is an action in breach of contract, the second Defendant seems to be under the impression that it is one in delict. The difficulty lies in the fact that although a breach of contract is implied in terms of the First, Second and Fifth Defendants, the same cause of action cannot be implied against the Third and Fourth Defendants as there are implications of fault on their part.

[...]

[43] It is obvious from the authorities cited above that what is sought in pleadings are the material facts which comprise the cause of action but not evidence or principles of law. When pleadings are well drafted the facts of the case and the legal principles that relate to the cause of action are clear to the parties and the court.

[44] However, in addition to these rules of procedure, in cases involving contract and delict, it must be further noted that although it is not necessary for a party to expressly state the relevant law in issue in the case, Article 1370(2) of the Civil Code of Seychelles prohibits duplicitous actions and obliges an aggrieved party to opt for only one cause of action to pursue when it can be founded either in contract or delict.

[45] As regards the First, Second and Fifth Defendants it is clear that the cause of action as averred or implied in the complaint is one founded on contract. As for the Third and Fourth Defendants the only action that can be implied in the pleadings against them is one founded in delict, in that the allegation is that the Third Defendant entered a restriction against land title S214 without notification to the Plaintiff. There are different causes of action in the same suit but no two causes of action are made against any same defendant. It is my view therefore that the complaint as drafted has neither breached procedural rules nor the provisions of the Civil Code."

(Emphasis supplied)

6. In relation to the merits, after reviewing the evidence, the learned Chief Justice found that the appellant had breached his duties as notary set out in the Judgment and ought to be suspended. However, she was mindful of section 11 (6) of the Notaries Act that provisions: *"Before suspending or removing a notary from office under this section the Supreme Court shall inform the notary of the charge or complaint against him and give the notary an opportunity to be heard in person or by counsel as the notary thinks fit."*
7. She also concluded that, *"to make matters worse"*, the appellant had pocketed 300,000/- rupees of the proceeds of sale of the land comprised in title number S214 situated at Turtle Bay, Anse Aux Pins, Mahe, Seychelles (the *"Property"*), and that the said sum had to be refunded.
8. The learned Chief Justice proceeded to make the following orders against the appellant:
 - "1. *I Order the Second Defendant to pay the sum of SR300, 000 in the Supreme Court deposit Account held under the Government of Seychelles, and parties with an interest may make a claim on the sum. Unless claimed, this sum shall remain in escrow account for a period of one year from the date of this judgment, at which point it shall be forfeited to the Government of Seychelles.*
 2. *I Order that the restriction entered on Parcel S214 be removed forthwith and the transfer of Parcel S241 in the name of Sara Jupiter as the bare interest owner and Frida Jupiter as the usufructuary to be registered with this Order to be served on the Land Registrar for compliance.*
 3. *I Order that this Judgment be served on the Judicial Committee on Legal Practitioners set up by the Office of the Chief Justice and consisting of three judges of the Supreme Court, and who shall at their next convention notify the Second Defendant of a hearing of the matters complained of regarding his notarial duties and obligations. He will be given an opportunity to be heard. The Committee shall after the hearing recommend to the Chief Justice any measures if any, to be taken against the Second Defendant.*
 4. *The whole with costs against the Second and Fifth Defendants, jointly and severally"*.

9. I remark that orders 1 and 3, contained in paragraph [8] above, were neither based on the pleadings of the case nor were such orders sought by the respondent in the relief prayed for in the amended plaint set out in paragraph [2] of this judgment.

10. The appellant, dissatisfied with the Judgment, had appealed on the following grounds:

- "1. *The Learned chief erred in law to have concluded that on the basis of the plaint, there was a sufficient cause of action or a cause of action pleaded against the Appellant.*
2. *The Learned Chief Justice erred in law to have relied on the principle enunciated in the case of Carolus v Scully and Ors [2017] SCCA 45, as same case is clearly distinguishable to the current pleadings filed in this present matter.*
3. *The Learned Chief Justice erred in law and on the facts in having failed to fully appreciate that the 5th Defendant in this matter Mrs Tregarden, has herself given written authority to Suzanne Jean Louis in regards to the signature for transfer and receipt of the sum of Seychelles Rupees One Million Six Hundred Thousand, which evidence was tendered before the Court.*
4. *The Learned Chief Justice erred in law and on the facts in failing to appreciate that the respondent filed the current action only after the Supreme Court had dealt with all irregularities relating to the transfer of the property in a ruling/judgment. In the circumstances, the Learned Chief Justice was wrong to have found the Appellant liable to make good to the Respondent.*
5. *The Learned Chief Justice erred in law and on the facts in failing to appreciate that both the Appellant and the Respondent mentioned Walter Alcindor and that the Respondent even mentioned that it was Mr. Alcindor who gave the keys to the house, therefore it would have been the lady or Mr. Alcindor who had the authority to state the price of the sale and not the Appellant. In the circumstances, the Learned Chief Justice was wrong to have found that the Appellant liable to make good to the Respondent the sum of SR 300,000 which was the commission paid to Mr. Walter Alcindor.*
6. *The Learned Chief Justice erred in law and on the facts in failing to appreciate that there was no cause of action in calling for the matter to be referred to the Attorney-General as well as the Judicial Committee since the matter had already been dealt with by the former CJ on 20 August 2014 to which the current CJ had access to and such was notified by the Respondent."*

11. A determination of grounds 1, 2, 5 and 6 of the grounds of appeal will suffice to dispose of this appeal. I now deal with the grounds of appeal in the order that appears most appropriate.

Ground 6 of the grounds of appeal

12. In relation to the arguments raised by the appellant in ground 6, Counsel for the appellant has, in response to a query from the court with regards to whether or not the matter had already been dealt with by the former Chief Justice, indicated that he was not sure if that had been the case.
13. Be that as it may, I agree with Counsel for the appellant that the third order made by the learned Chief Justice, referred to in paragraph [8] and which relates to the sixth ground of appeal, was *ultra petita* in the absence of any pleadings or any relief sought in that respect by the respondent.
14. In the Judgment, the learned Chief Justice, in dealing with the plea in *limine litis*, made the following observations in relation to the contents of pleadings, which in my opinion apply to the contention in ground 6:

[37] *In respect of the contents of pleadings generally, section 7 (sic) of the Seychelles Code of Civil Procedure provides in the relevant part that:*

"The plaint must contain the following particulars:

[...]

(d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action ..."

[...]

[39] *Similarly in Tree Sword v Puciani and ors [2016] SCCA 19, the Court of Appeal explored the application of these procedural rules in Seychelles which find their origin from England and*

stated:

[16] Rule 13 of Order 18 of the Supreme Court Rules of England applicable at the time of Seychelles' Independence in 1976 provide that every pleading must contain necessary particulars of every claim. In explaining the function of the rule the following note is made:

'The function of the particulars is to carry into operation the overriding principles that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs. This function has been stated in various ways as follows:

- (a) to inform the other side of the nature of the case they have to meet distinguished from the mode in which the case is to be proved (per Lindley L. J. in Duke v Wisden (1897) 77 L.T. 67, 68; Aga Khan v Times Publishing Co. 91924) 1 KB 675, 679)*
- (b) to prevent the other side from being taken by surprise at the trial (per Cotton L.J. in Spedding v Fitzpatrick (1888) 38 Ch. d. 410)*
- (c) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial (per Cotton L.J. ibid.) (See Supreme Court Practice (Sweetband Maxwell 1991) 18/12/12, 299).'*

[17] These authorities are supported in Seychelles. In *Gallante v Hoareau* (1988) SLR 122, G. G. D de Siva J stated:

'The function of pleadings is to give a fair notice of the case which has to be met and to define the issues upon which the court will have to adjudicate in order to determine the matters in dispute between the parties.'

- [40] In addition to these clearly enunciated principles of pleadings, there is also jurisprudence constante in Seychelles that a court will not formulate a case for parties and that their pleadings must disclose all the facts, which they intend to bring in evidence at trial. *Tirant v Banane* (supra) is authority that all facts to be relied on at trial have to be pleaded so that both parties and the Court

are made fully aware of all issues between the parties. It was followed in Sophola v Desaubin SCA 13 of 1987; Confait v Mathurin SCA 39 of 1994; Equator Hotel v Minister of Employment and Social Affairs SCA 8 of 1997; Verlaque v Government of Seychelles SCA 8 of 2000; Barbe v Hoareau SCA 5 of 2001; Gill v Gill SCA 4 of 2004.

[41] *In Vandange Plant Hire Ltd v Camille 2015 SCCA 17, the Court of Appeal reiterated that:*

"In terms of procedure and pleadings, the rule bears no repetition that parties are bound by their pleadings and that they may not ask nor can the Court grant any relief which goes beyond the four corners of the plaint and the pleadings. Nor may it consider any issue any more than grant a remedy flowing from that issue when that issue was not joined by the parties in the first place."

In *Blay v Pollard and Morris (1930) 1 K.B. 628* (Court of Appeal), Scrutton L.J. stated that: *"[c]ases must be decided on the issues on the record. If it is desired to raise other issues they must be placed on the record by amendment."*

15. I allow ground 6 of the grounds of appeal.

Ground 5 of the grounds of appeal

16. Ground 5 of the grounds of appeal relates to the first order referred to in paragraph [8]. In the Judgment, the learned Chief Justice stated that the appellant: *"pocketed three hundred thousand rupees of the proceeds of sale."* She stated that the appellant did not establish any evidence to show why he deducted this sum of money. She stated that if the deduction was for fees, there is certainly no evidence to that effect. She further, stated that no fees arise given the circumstances of the case. She concluded that this money will have to be refunded. Consequently, she made the first order referred to in paragraph [8] above.

17. The appellant did not offer any written submissions in support of ground 5. Nonetheless, by the same reasoning that I have adopted in relation to ground 6, I am led to conclude, after close examination of the amended plaint, that the issue which the learned Chief Justice decided upon was not placed on record by amendment, and that, therefore, the order was

ultra petita.

18. In view of the above, there is clearly no reason for me to consider the contention of the appellant, which flows from the order referred to in paragraph [8].
19. I allow ground 5 of the grounds of appeal.

Grounds 1 and 2 of the grounds of appeal

20. As can be gathered from the wording of grounds 1 and 2 above, the appellant is challenging the finding of the learned Chief Justice rejecting his plea in *limine litis* that the amended plaint disclosed no cause of action against him. The appellant stated, in his written submissions, that the only averments made by the respondent, in her amended plaint against him, are contained in paragraph [13] of the said amended plaint, referred to in paragraph [2] here. In that regard, the appellant contended that, since the learned Chief Justice had found that the cause of action as averred or implied in the plaint was one founded on contract, she should have found that the averments contained in paragraph [13] of the amended plaint did not meet the test of section 71 (d) of the Code of Civil Procedure.
21. I have given due consideration to the submissions of Counsel for the respondent, but find that they provide no adequate refutation of the points made by Counsel for the appellant. Counsel for the respondent contended that, in deciding whether or not a plaint disclosed a cause of action, the evidence available was a relevant consideration. I contend that a plea in *limine litis* to the effect that a plaint disclosed no cause of action must be decided solely on the basis of the plaint, taken with regards to relevant particulars supplied, and that a plaint that does not disclose a cause of action cannot be cured by the eventual production of evidence. As I understand it, the submissions offered on behalf of the respondent also contended that the reasoning in *Carolus v Scully and Ors (2017) SCCA 45* applies to this case. With respect to the *Carolus* case, *supra*, I am of the opinion that its reasoning does not apply as the material facts in both cases are different. Suffice to say that in *Carolus*, *supra*, the issue was whether or not the learned trial Judge erred in law for having made his ruling in the absence of evidence before him. He concluded that the appellants ought to

have pleaded malice so as to take the action of the respondents outside the scope of the respondent's legal protection and to convert their action into a "*faute*" in law.

22. Upon a close reading of paragraph [13] of the amended plaint, I am of the view that the submission made by the appellant is well founded. I hold the view that the vague averment contained in paragraph [13] cannot be sufficient to disclose a precise cause of action founded on contract, which is the basis of the relationship between the appellant and the respondent, having regard to the averments contained in the amended plaint.
23. *"The words "cause of action" comprise, according to English authorities, every fact which is material to be proved to enable the plaintiff to succeed; in other words, every fact which, if traversed, the plaintiff must prove to obtain judgment [Cooke v Gill, L.R. 8 C.P. p. 116 Buckley v Hann, 5 Exch. 8 43; Read v Brown, 22 Q. B. D. p. 131, C.A]. "The word "material" means necessary for the purpose of formulating a complete cause of action, and if any one "material" fact is omitted, the statement of claim is bad.' (Bruce v Odhams Press Ltd. [1936 1 KB at p. 697]). A plaint which will not aver all the material facts would, therefore, not disclose a cause of action. The same principle would apply to the defence.*
24. In my view averments should have been made to the effect that the appellant and the respondent had entered into a contract whereby the appellant had accepted to transfer the Property, that the respondent had instructed the appellant to do an official search of the Property on the register, and that in breach of the contract, the appellant had failed to do the official search.

Misjoinder

25. In her Judgment the learned Chief Justice came to the finding that: "[45] ... *there are different causes of action in the same suit but no two causes of action are made against the same defendant.*"
26. Counsel for the appellant argued before this court that there was misjoinder of causes of

action, but did not raise this issue before the court below.

27. Section 105 of the Code of Civil Procedure provides:

" Joinder of causes of action

When different causes of action may be joined in same suit

105. 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."

28. I agree with the learned Chief Justice that different causes of action had been joined in the suit against different defendants and consequently, in accordance with section 105 of the Code of Civil Procedure, there was misjoinder of causes of action.

29. Paragraph 15/1/6 of the Supreme Court Practice Rules 1979 states in relation to misjoinder of causes of action:

"Objection to Misjoinder of Causes of Action. — Where the plaintiff has not obtained the requisite leave and so has improperly joined several causes of action in the same action, the defendant may enter a conditional appearance and apply to set aside the writ.

If the defendant takes a step in the action without raising the objection, he waives the irregularity, (Lloyd v. G. W., etc., Dairies Co., [1907] 2 K. B. 727, C. A., explaining Pilcher v. Hinds, 11 Ch. D. 905); but the objection may be taken after appearance before taking any step (Hunt v. Worsfold, [1896] 2 Ch. 224)). It is too late to object at the trial (Re Derbon (1888), 58 L. T. 519).

30. In the light of section 105 of the Code of Civil Procedure and English authorities mentioned above, Counsel for the appellant ought to have raised the issue of misjoinder of causes of action as a plea in *limine litis* and had he done so, the suit ought to have been dismissed or set aside on the ground of misjoinder of causes of action.

Conclusion

31. In the light of the above findings, I find it unnecessary to consider the other grounds of appeal.
32. In the light of the above, I am led to conclude that the learned Chief Justice's conclusion, in relation to the appellant's plea in *limine litis*, that the plaintiff disclosed a cause of action against him, was erroneous.
33. In view of my conclusion, I allow the appeal, quash the decision of the learned Chief Justice in the Judgment and substitute therefor a decision upholding the plea in *limine litis* of the appellant that the plaintiff discloses no cause of action against him. The whole with costs against the appellant.

F. Robinson (J.A)

I concur:..

I concur:..

A. Fernando (J.A)

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019