

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS154/2012

[2016] SCSC166

**EDEN ISLAND DEVELOPMENT COMPANY (SEYCHELLES) LTD A
COMPANY INCORPORATED IN SEYCHELLES, WITH REGISTERED
OFFICE SITUATE AT HOUSE OF NSUYA, REVOLUTION AVENUE,
VICTORIA, MAHE, SEYCHELLES**

Plaintiff versus

**WSP CONSULTING ENGINEERS (PTY) LTD, A COMPANY
INCORPORATED IN SOUTH AFRICA, HAVING A PLACE OF BUSINESS AT
3RD FLOOR, 35 WALE STREET, CAPE TOWN, 8001, SOUTH AFRICA**
1st Defendant

AND

**ELECTRICAL AND MECHANICAL ENGINEERING LTD (TRADING AS EME
OVERSEAS LTD) A COMPANY INCORPORATED IN MAURITIUS WITH
REGISTERED OFFICE SITUATE AT 95 AVENUE VICTORIA, QUATRE-
BORNES, MAURITIUS**
2nd Defendant

Heard: 27th January 2016
Counsel: Mr. K. Shah for Plaintiff
Mr. R. Durup for the 1st Defendant
Mrs. A. Armesbury for the 2nd Defendant
Delivered: 11th day of March 2016

RULING ON PLEA IN LIMINE LITIS

Govinden J

- [1] Both Defendants in this case have raised “pleas in *limine litis*” three in all, dated the 14th and 21st day of October and 4th day of December 2015 respectively to the following effect.
- [2] Both Defendants raised their first plea in *limine litis* on the ground that *the Plaintiff is time barred in that the Plaintiff was issued on or about the 28th day of November 2012, which is more than five years after the discovery of the alleged defects that form the basis for the Plaintiff’s claim against both Defendants.*
- [3] The first Defendant further raised a second plea in *limine litis* on the ground that *the Plaintiff discloses no reasonable cause of action against the 1st Defendant.*
- [4] The second Defendant further raised a second plea in *limine litis* on the 21st day of October 2015 more particularly that:

“the 2nd Defendant EME Engineering Ltd had no contract with Vijay Construction Ltd, so it is wrongly suited; the 2nd Defendant was not trading as EME Overseas Limited in the Seychelles and EME Overseas entity (BVI Registered Company) which has nothing in common with EME Engineering Ltd”. (Emphasis is mine).
- [5] All Learned Counsels as above-referred, filed written submissions in support and against their legal stance *vis-a-vis* the points of law as raised of which contents have been duly considered for the purpose of this Ruling.
- [6] I do not deem it necessary at this stage of the proceedings to go into a history of the Plaintiff for it would inevitably lead to the Court having to indulge into a consideration of the facts of the case proper which is not the subject matter of this Ruling. Suffice to state that, this case arises

out of “alleged breaches of a series of contracts” entered into on or about August 2007 between the parties.

[7] I will now treat the pleas *in limine* as illustrated above for sake of clarity.

[8] Now as to the first plea in *limine litis* raised, namely on the ground that *the Plaint is time barred as it was filed on or around 28th November 2012 which is more than 5 years after the discovery of alleged defects that form the basis for the Plaintiff’s claim against the Defendants.*

[9] It was submitted by the Defendants that the Plaintiff’s cause of action against the 1st and 2nd Defendant is subject to prescription of five years as per Article 2271 of the Civil Code. That the Plaint goes on to say in paragraph 10 “*in or around November 2007*” and this vague reference is maintained despite a request for further and better particulars in which the specific date was requested. That the material date is not the date on which the defects were discussed in a meeting ie: the 1st December 2007 but on the date that the alleged defects were discovered hence the vague use of the word immediately does not suffice to avoid a claim for prescription.

[10] Now, **Article 2271 of the Civil Code of Seychelles (Cap 32)** provides that:

“All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code”.(Emphasis is mine).

[11] Articles 2262 and 2265 refers to special prescription periods of twenty and ten years in respect of all real rights of ownership of land or other interests therein subject to Title, value and good faith which is not subject matter of this case but mentioned for sake of clarification.

[12] A very careful perusal of the Plaintiff in the light of the defences and submissions of both Defendants, it is abundantly clear that there is no dispute by the parties in this case the action accrued when the Plaintiff discovered that there were defects and the defects confirmed on site inspection.

[13] In paragraph 10 of the Plaintiff as referred by all parties it is averred that:

“In or around November 2007, and during a pre-commissioning site inspection by a contractor appointed by the Plaintiff, the following deficiencies in respect of the marine reticulation works rendered by the 2nd Defendant in the Marina were discovered:

a) Deficiencies in the material used;

b) Unsafe installation of earthing;

c) Materials used being of the wrong specification, especially with regard to the fact that the H07 cables, as specified in the blank Bills of Quantities, were not used in the reticulation of the Marina; and

d) Damage of data-cabling and the incorrect installation thereof.”

[14] Further particulars were sought by the Defendants *“for the specific date in November 2007 and the specific dates of the discovery that the materials used were of the wrong specification, especially with regards to the fact that the H07 cables, as specified in the blank Bills of Quantities were not used in the reticulation of the marine.”*

[15] The Plaintiff answered that *the specific date was between the 30th November 2007 to the 2nd December 2007 with on-site inspection carried out on the 1st December 2007 and the date of discovery for materials of the wrong specification was as from the 1st December 2007.*

- [16] The Complaint is dated the 28th day of December 2012 and a receipt showing the date 29th day of November 2012 is on file, confirming that the Complaint was filed on the 29th day of November 2012 hence within the time limit of 5 years.
- [17] On that basis, with respect to both Learned Counsels for the Defendants, it cannot be “implied, that the discovery of the alleged defects by the Plaintiff occurred before the 30th November 2007, thus causing rights of action against the Defendants to be prescribed”.
- [18] It follows, thus that the first plea *in limine* as raised is overruled accordingly.
- [19] In respect of the second plea in *limine litis* as raised by the 1st defendant, on the ground that *the Complaint discloses no reasonable cause of action against the 1st Defendant*.
- [20] It is trite and our local case law, I should state, is very rich in that respect, that in determining whether or not a Complaint discloses a reasonable cause of action, it is the obligation of the Court to look only at the pleadings and not the evidence as such. (Vide: inter alia, the cases of **Gerome v Attorney General (1970)**; **Albest v Stravens (No. 1 (1976))**; **Oceangate Law Centre v Monchouguy (1984)** and **Get High (Pty) Ltd and Ors v Steve Gerrad and Ors (Commercial Case No. 08 of 2012)**).
- [21] **Section 92 of the Seychelles Code of Civil Procedure** allows the Court to strike out a pleading that discloses no reasonable cause of action and to dismiss the action. It provides that:
- “92. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case....., the court may order the***

action to be stayed or dismissed, or may give judgement on such terms as may be just.”

(Emphasis in mine).

- [22] As rightly ruled in the latter above-cited case, *“a cause of action is not defined in the Seychelles Code of Civil Procedure but comparative case law is of persuasive authority and value. That in Auto Garage v Motokov [1971] EA 514, the Court of Appeal for East Africa considered the meaning of cause of action. And after a review of a number of English decisions on the subject, Spry VP, defined it in the following words at page 519 thereof, that: ‘I would summarize the position As I see it by saying that if a Plaintiff shows that the Plaintiff enjoyed a right, that has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed’”.*
- [23] Now, in the instant case, the first Defendant comments in his submissions on this plea on a series of paragraphs of the Plaintiff more particularly of paragraphs 5, 6, 7, 13, 14 and 15 thereof of which submissions delve substantially in the evidence proper which is not yet before the Court and cannot be admitted with respect, from the bar to support such a plea.
- [24] It is thus, in my opinion, that this plea in *limine litis* cannot be dealt with at this point by the Court unless evidence is led and considered by the Court accordingly. In fact, it is carefully noted as rightly pointed out by Learned Counsel for the Plaintiff in his response, that the Learned Counsel for the 1st Defendant even states in his response that the 1st Defendant was not a signatory and therefore could not be a party to the JJBC contracts (subject matter of which involved works to be carried out by the 2nd Defendant for the plaintiff) even though allegedly “identified” as “agent 5 therein”. It is clear thus, that since none of the parties have been called upon to give evidence or produce evidence as

exhibits before this Court, these kinds of averments cannot be substantiated from evidence given from the bar, hence, such a plea cannot be entertained at this stage but rather after the hearing of the case on the merits proper.

[25] In the light of the above analysis on the second plea in *limine litis*, same is also overruled accordingly.

[26] Vis-à-vis the third plea in *limine litis* as raised by the second Defendant on the 21st day of October 2015 more particularly that: “*the 2nd Defendant EME Engineering Ltd had no contract with Vijay Construction Ltd, so it is wrongly suited; the 2nd Defendant was not trading as EME Overseas Limited in the Seychelles and EME Overseas entity (BVI Registered Company) which has nothing in common with EME Engineering Ltd*”, I have no better option, but to reiterate my analysis and Ruling in respect of the second plea in *limine litis* as raised by the first Defendant as illustrated at paragraphs 19 to 25 thereof. It is also additionally clear in that respect, that those points will be better dealt with as part of the hearing on the merits rather than a plea in *limine litis*, hence overruled accordingly.

[27] It follows, therefore that all the pleas in *limine litis* as raised by the 1st and 2nd Defendants as above illustrated are overruled accordingly and the matter should proceed to the hearing on the merits as against both 1st and 2nd Defendants.

Signed, dated and delivered at Ile du Port on 11th day of March 2016.

Govinden J
Judge of the Supreme Court