

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MA 225/2016**  
**(arising in CC17/2013)**

**[2017] SCSC**

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**MULTICHOICE AFRICA LIMITED**  
Applicant

versus

**INTELVISION NETWORK LIMITED**  
First Respondent

**INTELVISION LIMITED**  
Second Respondent

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Heard: (Written submissions)

Counsel: Bernard Georges for applicant

Basil Hoareau together with Laura Valabhji for first respondent  
Basil Hoareau together with Laura Valabhji for second respondent

Delivered: 8 August 2017

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**RULING ON MOTION**

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**Robinson J**

[1] **NATURE OF MOTION**

[2] Plaintiff is MultiChoice Africa Limited and Applicant in the application. First Defendant is Intelvision Network Limited and First Respondent in the application. Second Defendant is Intelvision Limited and Second Respondent in the application.

[3] This is the second application for leave to amend. Applicant files Notice of Motion supported by an affidavit for leave to amend at the trial. The affidavit proceeds to allege as follows —

**"AFFIDAVIT**

*I Frederik Jonker, of 141 Bram Fisher Drive, Randburg, South Africa, make oath and say as follows:*

- 1. I am the senior anti-piracy manager for MultiChoice Africa Limited, the Plaintiff herein, and am empowered to swear this affidavit on behalf of the Plaintiff pursuant to a power of attorney from the plaintiff, attached hereto as "FCJ 1".*
- 2. This matter has been set for hearing before this Honourable Courton 1, 2, 5 and 6 September, 2016.*
- 3. Upon consideration of the Plaint as currently drafted, and taking cognizance of the matters which were canvassed during the arguments of the preliminary pleas in the matter, and the Judgment of the Seychelles Court of Appeal, the Plaintiff has concluded that it will be proper, for the complete adjudication of all the issues in the matter, for the Plaint to be amended so as to include further averments against defendants as set out in the motion.*
- 4. The Plaintiff has formulated the amendments in the document attached herewith as "FCJ 1". The amendments are in red.*
- 5. I verily believe that these amendments are proper and in the interests of bringing out all matters on which the Court will be called to rule.*
- 6. I verily believe that the intended amendments will cause no prejudice to the Defendants.*

*...".*

[4] The intended amendments, to the amended plaint, have been specified in red in a "Further Amended Plaint" exhibited with the affidavit as "FCJ 1".

[5] Respondents file "*Affidavit*" in reply opposing the application to *further* amend the amended plaintiff. Respondents oppose the motion on the basis that the amendments purport to convert the plaintiff into a suit of another and substantially different character to the existing one. Respondents oppose the intended amendments, to paragraphs 4 to 7, which seek to enlarge the scope of the contractual breaches alleged to have been committed by Defendants, paragraphs 8 to 10, which constitute new causes of action, paragraph 4, which Applicant states is necessary by reason of the new causes of action, and prayer 5 for costs. Respondents did not oppose the amendments to paragraph 3.

[6] **THE WRITTEN LAW**

[7] Section 145 of the Seychelles Code of Civil Procedure regulates the amendments of pleadings. (*Seychelles Code of Civil Procedure is hereinafter referred to as the "Code"*). Learned counsel for Applicant submits that section 105 also applies to the present application. The court is referred to Order XXVIII, rule 1, of the Rules of 1883 and O. 20, r. 5, of the Rules of the Supreme Court, 1965.

[8] Section 105 of the Code deals with joinder of causes of action and 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."*

[9] Section 146 of the Code provides —

*"Amendment of pleadings*

146 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.

[10] Amendment of indorsement or pleading with leave (Order XXVIII, rule 1)

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"1. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or 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..."

[11] "Amendment of writ or pleading with leave (O. 20, r. 5) —

"5.—(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or 5 is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not a misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sued (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the

*amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.*

*(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the actions by the party applying for leave to make the amendment."*

[12] **SUBMISSIONS OF COUNSEL**

[13] *Mr. Georges for Applicant.* It is a guiding principle of fundamental importance on the issue of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real questions in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. Bowden LJ. in *Cropper v Smith* [1884] 26 Ch D 700, 710, stated the following on the issue —

*"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

The court has considered Cropper and observes that it relies on Order XXVIII, rule 1, of the Rules of 1883, which reads, "*All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties*". It is noteworthy that Order XXVIII, rule 1, of the Rules of 1883, does not contain the proviso, which is contained in our section 146.

[14] In *Fishermen's Cove Limited v Petit & Dumbleton Limited* [1978] SLR 15atp 17, Sauzier J. opined that section 145 of the Code is based on Order XXVIII, rule 1, of the old

English Rules of the Supreme Court; and that the proviso is based on a judgment of the High Court in the case of *Raleigh v Goshen* [1898] Ch at p 81. In *Petit Car Hire v Mandelson* [1977] SLR 68at p 72, Sauzier J. opined that, "*[a]part from the specific prohibition in the proviso, section 143 is couched in very wide terms and must be given a liberal meaning.*". The court notes that the observations in Cropper, which have been applied in Fishermen's Cove Limited, were made in connection with an attempt by a litigant to do something which he would be entitled to do, but to do it late. The court has also considered *Tiddlesley v Harper* Court of Appeal 18 November 1878 [1876 T. 67.] (1878) 10 Ch. D. 393, applied in Petit Car Hire. In Tiddlesley Mr. Justice Fry was of the opinion that the giving of a bribe was not sufficiently denied by the statement of defence, and must be taken to be admitted under Order XIX., rule 17, and he refused to give the defendant leave to amend his defence, but at once gave judgment for the plaintiffs. The defendant appealed. Thesiger, L.J. stated the following on the issue —

*"I am also of the opinion that it is important that the rules of the court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."*

The court notes that Tiddlesley concerned a *bona fide* slip in the pleading.

[15] In Petit Car Hire Sauzier J. formulated the following principles —

*"An amendment should be granted to enable the real questions in controversy between the parties to be settled and to avoid the necessity of another suit if—*

- (a) *The amendment is made in good faith;*
- (b) *The amendment would cause no injustice to the other party (there is no injustice if the other party can be compensated by costs); and*
- (c) *The nature of the suit is not altered."*

[16] On the basis of the above, learned counsel opines that applications will be denied in the following two instances —

- if injustice, not curable by an order for costs, will be caused to the other party
- if the amendment will convert the suit of one character into a suit of another, substantially different, character.

[17] In the present case, the application for amendment also seeks to join several causes of action to the original suit. Learned counsel opines that an amendment to add a new cause of action, even one founded on a different legal principle, including equity, will be allowed, unless a suit is to be wholly transformed (see the cases of Fishermen's Cove Limited and *De Silva & Ors v United Concrete Products (Seychelles) Limited* [1996] SLR 68. With respect to the plea of unjust enrichment, at new proposed paragraph 10, learned counsel states that it is not sought to be joined otherwise than as an alternative plea. The position being that a plea of unjust enrichment cannot be joined to any other cause of action by reason of the fact that the remedy of unjust enrichment is only available in the absence of any other remedy (see *Labiche v Ah-Kong* [2010] SLR 172).

[18] *Mr. Hoareau for Respondents*. Section 146 of the Code is based on what is now O. 20, r. 5 of the Rules of the Supreme Court, 1965. The proviso to section 146 of the Code is not found in the provisions of the Rules of the Supreme Court, but is based on a judgment of the High Court in the case of Raleigh (see Fisherman's Cove Ltd). Learned counsel explains that it is on that basis that our law regarding amendments of pleadings is different from that of England, in that we have codified and given statutory basis to the principle enunciated in Raleigh. He asks the court to be cautious when applying English authorities as the principle set out in Raleigh may not have been considered in deciding those cases.

[19] Learned counsel opines that the addition of a new cause of action would convert a suit from one character into a suit of another and substantially different character, despite the fact that the rest of the suit remains intact. He asks the court to depart from the finding of Sauzier J. in Fishermen's Cove Ltd.

[20] On the subject of the present application, he contends that only the amendment to paragraph 3 ought to be allowed, as it relates to the supply of equipment, which forms the

basis of the present plaintiff. The rest of the amendments, more specifically the intended amended paragraphs 4, 6, 7, 8, 9, 10 and 13, and the prayers are contrary to the proviso to section 146 of the Code. He explains that —

- (a) the present plaintiff contains no cause of action relating to the subscribers to the DStv business and information relating to them;
- (b) the present plaintiff is based on contract but the intended amended paragraphs 8 and 9 are introducing a cause of action based on tort whilst the intended amended paragraph 10 is introducing a cause of action based on unjust enrichment;
- (c) on the basis of *sub-paragraphs* (a) and (b) above, the present plaintiff is being converted into a suit of another and substantially different character as there is a new cause of action relating to the breach of contract and added elements (despite being in the alternative) of tort and unjust enrichment.

[21] **DISCUSSION**

[22] The court has considered the intended amendments to the amended plaintiff in light of all the submissions of both counsel. The court has to determine whether the amendments, more specifically the intended amended paragraphs 4, 6, 7, 8, 9, 10 and 13, and the prayers are contrary to the proviso to section 146 of the Code. It is to be noted that the intended amendments are substantial and in the court's view relate to an alleged state of affairs, which existed at the time that the plaintiff was filed in 2013.

[23] The court finds nothing objectionable about the intended amendments —

- (a) in paragraph 1 – (*the "Dstv business"*)
- (b) in paragraph 2.2 - "*and*"
- (c) in paragraph 6 - "*On a proper construction of the Representation Agreement, alternatively as a tacit or implied term thereof under the proper law of the Agreement, being South African law,*" in view of the ruling, of the Court of Appeal of Seychelles, on the pleas in *limine litis*



- (d) in paragraph 7 - "*Under South African and/or Seychelles law, "in view of the ruling, of the Court of Appeal of Seychelles, on the pleas in limine litis*
- (e) in paragraph 7. a) - "*failed or*"
- (f) prayer 1 - "3"
- (g) prayer 2 - "2".

The court allows the amendments.

[24] A —

*""cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court (see Read v. Brown (1888) 22 Q.B.D. 128 per Lord Esher M. R. at p. 131). The phrase comprises every fact which is material to be proved to enable the plaintiff to succeed (see Cooke v. Gill (1873) L.R. 8 C.P. 107, per Brett J. at p. 108, and cf. Buckley v. Hann (1850) 5 Exch. 43 ; Hernaman v. Smith (1855) 10 Exch. 659 per Parke B. at p. 666, but as to where a cause of action arises, see Distillers Co. (Biochemicals) Ltd. V. Thompson [1971] A.C. 458, p.c., applying Jackson v. Spittfall (1870) L. R. 5 C.P. 542). The words have been defined as meaning "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (per Diplock L.J. in Letang v. Cooper [1965] 1 Q.B. 222 at p.942...".*

(See O. 15, r. 1 (15/1/2A of the Rules of the Supreme Court, 1965).

[25] The amended plaint is for breach of obligations, by First Defendant and/or Second Defendant, relating to the supply, by Plaintiff, of a quantity of equipment, to First Defendant, pursuant to the Representation Agreement, to enable First Defendant to carry out the activities contemplated in the Representation Agreement. The obligations alleged to have been breached by First Defendant and/or Second Defendant are the following —

*"a. refused to return to the Plaintiff the equipment listed in Schedule 1 hereof;*

- b. *continued to downlink the signals of the channels listed in Schedule 2 hereof which the Plaintiff has the sole or non-exclusive right to distribute in Seychelles;*
- c. *continued to distribute the said channels to the Seychelles public for reward without the permission of, or payment to, the Plaintiff.*
- d. *not paid the plaintiff in respect of the said subscribers."*

[26] In the amended complaint, Plaintiff seeks the following remedies from the court —

- "a. *to grant an injunction restraining the First Defendant, its servants or agents, and/or subsidiaries, including but not limited to the second Defendant, from downlinking the signals of the channels listed in schedule 2 hereof, which the Plaintiff has the sole of non-exclusive right to distribute in Seychelles and distributing them to the public;*
- b. *to grant an order against the first Defendant, and/or its servants and/or agents, and/or its subsidiaries including but not limited to the second Defendant, to return the equipment listed in Schedule 2;*
- c. *To award the Plaintiff the sum of USD 24,500,000.00 against the Defendants jointly and severally, with interest at the commercial rate thereon since 1 July 2007; and*
- d. *To grant an order against the Defendants to jointly or severally pay the costs of this suit."*

[27] The intended amended paragraph 3 seek to plead that the equipment supplied by Plaintiff to First Defendant "*comprised both that which would belong to the first Defendant and that which would be returned to the Plaintiff at the expiration or sooner determination of the Representation Agreement. Schedule 1 sets out the two categories of equipment*". Respondents consent to the amendment. The court allows the amendment.

[28] The intended amended paragraph 4 alleges that, "*[i]n addition to the said equipment, the Plaintiff supplied the first Defendant with information technology and facilities for storing, retrieving and accessing information relating to subscribers to the DStv business, it being a fundamental term of the Representation Agreement that the said subscribers to the DStv business were and would remain subscribers of the Plaintiff, and information relating to them would be and remain the property of the Plaintiff*".

[29] The intended amended paragraph 6 alleges the obligations of First Defendant relating to the supply, by Plaintiff, to First Defendant, of information technology equipment and facilities for storing, retrieving and accessing information relating to subscribers to the DStv business as follows —

"6. On a proper construction of the Representation Agreement, alternatively as a tacit or implied term thereof under the proper law of the Agreement, being South African law, upon the termination of the Representation Agreement the First Defendant was:

- a) obliged to return the equipment supplied to the First Defendant in terms thereof that was intended to be returned to the Plaintiff, ***as well as the information technology and facilities relating to subscribers to the DStv business in Seychelles;***
- c) ***obliged to deliver to the Plaintiff all information kept by the first Defendant in respect of each subscriber that held a valid and subsisting agreement and used a decoder to enable reception of the Plaintiff's DStv subscription service provided in Seychelles;***
- d) ***obliged to return to the Plaintiff all confidential information obtained by it from the Plaintiff in relation to the conduct of the Representation Agreement;***
- e) ***obliged to refrain from gaining any revenue or profit arising out of the continuation of activities, which had been undertaken and authorised under the Representation Agreement;***
- f) ***under a continuing obligation of loyalty owed to the Plaintiff: and/or***
- g) ***obliged to account to the Plaintiff as a fiduciary for all dealings it had undertaken in respect of, and all revenues and profits gained out of, such activities, which accounting obligation would endure until it was discharged to the reasonable satisfaction of the Plaintiff or the Court."***

For the avoidance of doubt the intended amendments under consideration are indicated in bold italics.

[30] The intended amended paragraph 7 avers the obligations alleged to have been breached by First Defendant and/or Second Defendant in relation to the subscribers to the DStv business and information relating to them —

"7. Under South African and/or Seychelles law, in breach of these obligation, the First Defendant and/or the Second Defendant has/have:

...

***b) failed or refused to return to the Plaintiff the information technology and facilities relating to subscribers to the DStv business in Seychelles;***

...

***e) continued to breach the obligation of good faith to the Plaintiff;***

...

***g) failed or refused to deliver or return the information referred to in paragraphs 6(c) and 6(d) above;***

***h) continued to gain revenue and profits from the activities referred to in paragraph 6 e) above; and/or***

***i) failed to account, and continued that failure, for the dealings or revenues and profits referred to in paragraph 6 (f) above."***

For the avoidance of doubt the intended amendments under consideration are indicated in bold italics.

[31] It is clear that the intended amended paragraph 4 does not arise out of the same facts or substantially the same facts as the original plaint in respect of which Applicant has claimed remedies. The basis of the original plaint is the quantity of equipment supplied to First Defendant by Plaintiff to enable it to carry out the activities contemplated in the Representation Agreement. The court agrees with learned counsel for Respondents that the intended amendments clearly seek to add new facts that are relied upon to support a new cause of action relating to the subscribers to the DStv business and information relating to them. It is the court's view that the proviso to section 146 of the Code applies in the present matter. It is clear that the intended amendments will convert the suit of one character into a suit of another and substantially different character, notwithstanding the fact that the rest of the suit remains intact. In other words the intended amendments will substantially change the nature of the suit. It is to be noted with regret that the affidavit in support of the application does not explain why the intended amendments, other than

those allowed by the court, in paragraphs 6 and 7, are being made three years after the filing of the original suit.

[32] For the reasons stated above, the court will not allow the intended amendments to paragraphs 6 a), 6 c), 6 d), 6 e) 6 f) and 6 g) and 7 b) 7 e), 7 g), 7 h), and 7 i).

[33] The court now considers the intended amended paragraphs 8, 9 and 10 —

""8. *Further or alternatively, the second Defendant at all material times knowingly, and in any event unlawfully, assisted the first Defendant to commit the aforesaid breaches with the intention of gaining a commercial advantage for the first and/or the second Defendant to the detriment of the Plaintiff.*

9. *Alternatively, by their actions and omissions pleaded above, the first and/or second Defendants committed a fault, intentionally or negligently and thereby caused harm and damage to the Plaintiff.*

10. *Further alternatively, by reason of the facts and matters pleaded above, the first and/or second Defendant, was or were unjustly enriched at the expense of the Plaintiff and the Plaintiff thereby suffered loss and damage for which the Defendants are liable."*

[34] Having considered the intended amendments, the court holds that the proviso to section 146 of the Code applies, notwithstanding that the original suit remains intact. As rightly stated by learned counsel for Respondents the intended amended paragraph 8 seeks to plead a new cause of action relating to the breaches stated in the intended amended paragraph 7. Further, the intended amended paragraphs 9 and 10 also seek to plead new causes of action (despite being in the alternative) of tort and unjust enrichment.

[35] For the reasons stated above, the court will not allow the intended amendments to paragraphs 8, 9 and 10. Consequent to that, the court will not allow the intended amended paragraph 13 - *"for damages and/or compensation in equity and/or accounting for profits"*.

[36] Finally, the court considers the reliefs being claimed by Plaintiff. Because the basic nature of the suit has changed substantially, the nature of the reliefs claimed have changed substantially as follows —

- "4) *Alternatively to the previous prayer, by reason of the Plaintiff not being in possession of the Defendants' information relating to the first and second Defendant's activities and dealings referred to above, an order:*
- a. *that the first Defendant shall account to the Plaintiff and the Court for the dealings undertaken by it and/or the second Defendant in relation to the Dstv business from 1 July 2007 to date;*
  - b. *that all necessary enquiries be undertaken and interrogatories submitted to in relation to revenues and profits gained by the first Defendant and/or second Defendant arising out of or in respect of the activities referred to in paragraph 6(e) above;*
  - c. *that the first Defendant deliver up all documents and vouchers in support of such accounting;*
  - d. *that the accounting, if not delivered to the Plaintiff's reasonable satisfaction within 60 days of the date of this Order, be investigated by a Commissioner appointed by this Court under such terms of reference as this Court deems meet."*

[37] Having considered all the above, the court is satisfied that it cannot allow the intended amended prayer 4) a. b. c. d..

[38] In view of the decision of the court, the question of joinder does not arise.

[39] **DECISION**

[40] The court grants leave to Plaintiff to amend its plaint in terms of the amendments allowed by it. The plaint shall be redrawn in its amended form and a copy of it supplied to the Respondents.

[41] Applicant shall bear the costs of these proceedings.

Signed, dated and delivered at Ile du Port on 8 August 2017

F Robinson  
**Judge of the Supreme Court**