

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 19 of 2017

[2018] SCSC 112

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**ASCENT PROJECTS (SEY) (PTY) LTD**  
**HEREIN REPRESENTED BY ITS MANAGING DIRECTOR MR RAJESH PANDYA**

Plaintiff

versus

**EVELYN FONSEKA OF SERRET ROAD VICTORIA MAHE**

First Defendant

**ROCH PILLAY OF BEL OMBRE MAHE**

Second Defendant

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Heard: 7<sup>th</sup> day of December 2017

Counsel: Mr. D. Belle for Plaintiff  
Ms. Gill standing in for Mr. B Georges for the Defendants

Delivered: 9<sup>th</sup> day of February 2018.

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**RULING ON PLEA IN LIMINE LITIS AS RAISED BY THE DEFENDANTS: RULE OF  
ABUSE OF PROCESS**

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**S. GOVINDEN-J**

- [1] This is a Ruling arising out of a Plaint filed before Court by Ascent Projects (Sey) (Pty) Ltd (Plaintiff”) and which Plaint was filed on 10<sup>th</sup> day of August 2017 against Evelyn Fonseka (“1<sup>st</sup> Defendant”) and Roch Pillay (“2<sup>nd</sup> Defendant”) (Cumulatively referred to as “Defendants”), requesting *inter alia* for an Order against the Defendants to jointly pay the Plaintiff the total amount of Euro 103,288.99 with costs. On the 23<sup>rd</sup> day of October 2017, the Defendants filed a Statement of Defence, which included a plea in *limine litis* which is the subject matter of this Ruling.

- [2] Thereafter, both Learned Counsels filed written submissions for and against the *plea in limine litis* on the 4<sup>th</sup> and 6<sup>th</sup> December 2017 respectively and of which contents have been duly considered.
- [3] For the purpose of this Ruling, a brief summary of the salient factual and procedural background to the Plaint is in essence as follows.
- [4] On 10<sup>th</sup> day of August, 2017, the Plaintiff filed the Plaint against the Defendants requesting *inter alia* for an Order that the Defendants jointly pay the Plaintiff the total amount of Euro 103,288.99 with costs and this prayer arising out of particulars of loss suffered as a result of an alleged breach of contractual obligation on the Defendants' part.
- [5] Plaintiff alleges that the Plaintiff being a building contractor, entered into a contract with the 1<sup>st</sup> Defendant on the 19<sup>th</sup> May 2009, wherein the 1<sup>st</sup> Defendant contracted the services of the Plaintiff for the construction of a house on parcel V 17062 ("house"), belonging to the 1<sup>st</sup> Defendant and situated at Serret Road.
- [6] That it was agreed as per the contract, that the obligations and work to be undertaken by the Plaintiff were *inter alia*, to perform works as shown in the architectural drawings and structural drawings, approval application No DC 847/07 within a term of 10 months from the date of commencement of works. The works were to commence on the 1<sup>st</sup> June 2009 to be completed on the 31<sup>st</sup> March 2010.
- [7] The Plaintiff further alleges that delays to complete the work within the time occurred during the execution of the project due to changes in the foundations and other works as instructed by the engineer and an extension of time to complete the work was requested by the Plaintiff on the 7<sup>th</sup> February 2011 and 17<sup>th</sup> February 2011 and sent to the 2<sup>nd</sup> Defendant but the 2<sup>nd</sup> Defendant failed to respond to the claim of the Plaintiff.
- [8] The Plaintiff further alleges that the 1<sup>st</sup> Defendant sent a list of work to be finalized, and the Plaintiff complied with the list and notified the 1<sup>st</sup> Defendant on the 8<sup>th</sup> July 2011.
- [9] It is further alleged by the Plaintiff that the house was completed on the 8<sup>th</sup> July 2011 and taken over by the 1<sup>st</sup> Defendant's representative, her husband one Mr. Manfred on the 29<sup>th</sup> August 2011 and that the 1<sup>st</sup> Defendant even after taking over the house was still sending notification for snagging, even though those were completed as per the list sent by the 1<sup>st</sup> Defendant.
- [10] The Plaintiff further avers that he sent the final claim as per the contract for the 1<sup>st</sup> Defendant to do final inspection of the house and to settle the final claim sent to the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant, which they have failed to do.
- [11] The Plaintiff finally alleges that the 1<sup>st</sup> Defendant has claimed liquidated damages in the sum of Euro 7000, and the Plaintiff has requested the claim to be evaluated by the 2<sup>nd</sup> Defendant which he has failed to do.

- [12] The Plaintiff maintains that since the 1<sup>st</sup> Defendant has not paid for the final claim submitted by the Plaintiff in the sum of Euro 103,288.99 sent to the 2<sup>nd</sup> Defendant, and the 2<sup>nd</sup> Defendant had failed to evaluate the final claim amounting to the total of Euro 103,288.99 and then since the 1<sup>st</sup> Defendant is already in enjoyment of the property, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants' action render them liable in law in favour of the Plaintiff.
- [13] The Defendants on their part, by way of their statement of defence (supra), in a gist firstly, raises a *plea in limine litis, subject matter of this Ruling*, whereby it is averred that, “*the Pleint is an abuse of process of this Honorable Court. Identical Plaints between the same parties raising the same cause of action were dismissed by this Honorable Court in CC 01/2013 and CC 27/2014.*” Secondly, the Defendants vehemently deny the alleged breach of contract as alleged by the Plaintiff (supra), and the 1<sup>st</sup> Defendant additionally avers that the Plaintiff did not complete the works on the agreed date, hence the agreed works substantially delayed beyond the agreed date and the 2<sup>nd</sup> Defendant was not party to the contract/agreement as between the 1<sup>st</sup> Defendant and the Plaintiff.
- [14] It is further denied by the 1<sup>st</sup> Defendant that the Plaintiff complied with the lists provided by the 1<sup>st</sup> Defendant to him.
- [15] Further, whilst the 1<sup>st</sup> Defendant denies breach of contract on the basis of uncompleted works, the 2<sup>nd</sup> Defendant maintains non-contractual obligation for not being party to the alleged agreement.
- [16] I shall now move on to address the legal standards and analysis for the purpose of this Ruling thereto.
- [17] Based on the above illustrated factual summary, this Court is being called upon to determine, “*whether the Pleint as filed is an abuse of process of the Court in that identical Plaints between the same parties raising the same cause of action were dismissed by this Court in CC 01/2013 and CC 27/2014.*”
- [18] In relation to that issue, it is paramount for the Court to consider briefly as to what was described as “*the imaginative use*” of the rule of abuse of process developed by the Courts.
- [19] Our local case law is rich and illustrate clearly the position of our Courts vis-a-vis the *rule of abuse of process* and in this Ruling, I will simply cite a few, which decisions to my mind accord with the facts of this case, hence *standardization of the use of certain basic principles applied*.
- [20] In the case of The ***(Republic versus Yuan Mei Investment (Prop) Ltd, Criminal Side No. 24 of (1998))***, Perera J held on the issue of abuse of process *citing Lord Diplock in the case of (Hunter v Chief Constable of West Midlands (1982) A.C. 529 at 536)*, when he stated that:
- “... this is a case of abuse of process of the High Court. I concerns the inherent power which any Court of justice must possess to prevent misuse of its procedure in a way, which, although not inconsistent with the literal application of its procedural rules, would nevertheless be***

***manifestly unfair to a party to litigation before it, or would otherwise bring the Administration of Justice into disrepute among right-thinking people.”***

- [21] In the ***Yuan Mei case***, reference was also made to the case of (***Connelly v D.P.P. (1964) A.C. 1254***), wherein Lord Devlin considering the duty of a Judge to prevent an abuse of process stated that:

***“The fact that the crown has.... and that private prosecutors have generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now it emerges, it is seen to be one of the great constitutional importance. Are the Courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment from those who come or are brought before them?”***

- [22] As illustrated, engrained in the above-cited view, is the principle that, in the administration of justice, unnecessary delays must be avoided.

- [23] What is clearer, is the Court of Appeal’s Ruling in (***Gomme v Maurel (2012) SLR 342***), where referring namely to the English case of (***Bradford & Bingley Building Society v. Seddon Hancock &Ors. [1999] EWCA Civ. 944***), it explained the difference between the rule of *res judicata* and abuse of process and cautioned against conflating the two and stating that the rule of abuse of process encompasses more situations than the three requirements of *res judicata*. (***Reference to (Zena Entertainments (Pty) Ltd v. Lucas &Ors. [2015] SCCA 48***),stating that ***Gomme’s case***, is authority that *res judicata* as expressed in Article 1351 is a subset of abuse of process.

- [24] The Court in the ***Gomme case*** quoted favorably ***Bradford’s*** distinction between *res judicata* and abuse of process, which explained that:

***“The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or ‘special circumstances.’ The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the Court being to draw the balance between the competing claims of one party to put his case before the Court and of the other not to be unjustly hounded given the earlier history of the matter.”***

- [25] Further, in the ***Gomme case***, the Court of Appeal held on the rule of abuse of process that:

***“....the Courts cannot stay unconcerned where their own processes are abused by the parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the Court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have bought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial process”. (Reference to Bradford 7 Bingley Building Society v/s Seddon***

**Hancock & Ors 1999 1 WLR 1482; House of Spring Gardens Ltd & Ors v/s Waite and others 1990 2 AER 990; and In Re Morris 2001 1 WLR 1338).**

- [26] It was further decided that:  
*“abuse of process is not a new discovery under the rule of law and the Court’s control of cases coming to Court. That the source of the doctrine of abuse of process may be traced to 1947 decision of Somervell L. J in (Greenhalgh v/s Mallard [1947] 2 ALL E.R. 255, at p 257). The scope may be found in the following pronouncement of the Court, namely that, “abuse of process is not confined to the issues which the Court is actually asked to decide, but... covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.”*
- [27] It is to be noted further that in the opinion of the *(Board in Brisbane City Council v/s Attorney General for Queensland [1979] A.C. 411, 425)*, wherein it was stated that:  
*“when it is confined to its true basis, namely, the prohibition against re-litigation on decided issues, abuse of process ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.”*  
  
(Emphasis is mine).
- [28] Further, as decided in the case of *(Bragg v/s Oceanus Mutual Underwriting Association (Bermuda) Ltd (1982) 2 Lloyd’s Rep 132, 137, 138-139)*, that:  
*“the Courts should not attempt to define or categorize fully what may amount to an abuse of process and that the doctrine should not be circumscribed by unnecessarily restrictive rules in as much as the purpose was to prevent abuse by not endangering the maintenance of genuine claims”.*  
  
(Emphasis is mine).
- [29] Now, to come back to the present matter, the question which begs to be asked and answered, ***is whether in the light of the above enunciated and illustrated principles, the filing of the current Plaintiff by the Plaintiff is an abuse of process by the Plaintiff as against the Defendants?***
- [30] Now, it is argued by the Plaintiff that the matters in CC 01/2013 was dismissed before it was heard and reinstated by this Honorable Court as CC27/2014 and the latter case fixed for hearing on the 28<sup>th</sup> July 2017 and the previous counsel for the Plaintiff, in conformity with the process of this Court, appeared in person and as requested by the Judge in view of the previous Counsel’s application for her withdrawal from the case. That mindful of her duty and responsibility before the Court, the previous counsel exercised diligence in her attempts to make herself heard by this Honorable Court. Counsel went to the extent of obtaining a colleague to stand in for her as she later described in her letter to the Chief Justice, but to no avail as the Judge summarily dismissed the case. And same is illustrated as letter to the Chief Justice of the 16<sup>th</sup> August 2017 of which

contents is duly noted by this Court as to “explanations of absence and representation by Ms. Pool.

- [31] It is clear that it is against this background that the current counsel was to be present before Court on the date fixed for hearing of the case but due to circumstances beyond his control namely due to unforeseen illness as attested by letter of the 27<sup>th</sup> July 2017 and Medical Certificate of the same date he could not attend Court as scheduled.
- [32] Now, counsel for the Defendants argues that the proceedings of the 20<sup>th</sup> July 2017 show that this is the third manifestation of this case. That in CC 01 of 2013 the case was filed for a first time and the Defendant counterclaimed and on the date the case was to be heard, the Plaintiff applied to withdraw the case. That the Application was allowed, and the matter proceeded on the counterclaim. This resulted in an award in favour of the first Defendant.
- [33] Further, that in CC 27 of 2014, the Plaintiff filed an identical case as CC 01 of 2013, issues were joined and legal pleas were argued and dismissed. On the date of the substantive hearing the Plaintiff and counsel were both absent, the Court having been advised that counsel would be withdrawing, ***the case was dismissed by the Court on the basis that the Plaintiff was clearly not interested in prosecuting the case.***
- [34] Additionally that in this case, the Plaintiff tries to take the third bite at the same cherry and it has for a third time filed an identical plaint seeking the same relief as the previous cases as cited which in themselves failed to pursue. According to the Defendants on the above basis, it cannot be said that the Plaintiff here has diligently pursued its claim for it withdrew it first and did not turn up to prosecute on the second Plaint which was consequently dismissed hence moving for dismissal on ground of abuse of process.
- [35] Defendants further argue thus that, in order to put an end to litigation, Courts are given procedural powers and an inherent jurisdiction to stop abuses of its processes and the powers are found in section 92 of the Seychelles Code of Civil Procedure being inter alia, that the Court upon being satisfied that an action is vexatious ex facie the pleadings, to order the action to be dismissed.
- [36] Now, *it is clear that the Plaint in CC 01/2013 was never adjudicated upon by the Court for it was withdrawn by the Plaintiff hence no final Judgement on the subject matter of the Plaint as between the same parties as in this case hence the issue of res judicata not arising and rightly so not raised.*
- [37] However, the crux of the matter, *is whether the Plaint being filed for a third time before the Court, is an abuse of process? And this is to be clearly decided on the circumstances surrounding the re-filing of the Plaint for a third time.*
- [38] *Firstly, the issue of the Plaint being withdrawn once and dismissed once and filing for a third time being statutorily time barred has not been raised hence irrelevant for the purpose of this Ruling.*

[39] It is thus the re-filing which is of crucial importance here. In that light I refer to the case of *(D.P.P. v Humphrys (1970 A.C. 1 at 46))*, wherein Lord Salmon held that:

***“A judge has not and should not appear to have any responsibility for the institution of prosecutions; nor he has any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious that the judge has the power to intervene”.***

(Emphasis is mine).

[40] As it is revealed from the documentations attached in support of the objections to the *plea in limine litis* on behalf of the Plaintiff, and illustrative of the reasons leading to the dismissal of CC 27 of 2014 and hence re-filing of CC 19 of 2017, due diligence was exercised by both the outgoing and the incoming counsels for the Plaintiff towards the Court with a view to be heard albeit their respective illustrated predicaments which disallowed them for reasons beyond their control to comply with due process of Court and not being able to proceed with the hearing of CC 27 of 2014. In the same light, this Court notes the apologies from the Registrar of the 31<sup>st</sup> July 2017 to counsel for the Plaintiff and also the grant of waiver of filing fees granted to the Plaintiff for the presentation of the Plaintiff CC 19/2017.

[41] Now, having highlighted the specific circumstances of this case as illustrated at [paragraph 40] (*supra*), I am left with not much option but to endorse the statement of Lord Salmon in the *Humphrys case* (*supra*) in that:

***“it is only if the prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious that the judge has the power to intervene”.***

[42] I find *no such oppressive and or vexatious nature in the filing of CC 19/2017. In fact, no negligence and or inefficiency and or mala fide has been illustrated on records which would amount to, “something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings”.* (***Reference in that light made to Hui Chi Ming v R (1992) 1 A.C. 34 by the Privy Council.***

[43] Now, in this case, this Court, based on the above analysis of the facts in line with the rule of abuse of process and its relevant criteria as set out by case law both in the Jurisdiction and other relevant Jurisdictions, I find that the *plea in limine litis* as raised, has no reasonable basis, for there is no evidence *ex-facie* the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the Defendants of a protection provided by the law or to take advantage of a technicality and or that the Defendants will be prejudiced in the preparation or conduct of their defence.

[44] It follows, thus, that the *plea in limine litis* of the Defendants as raised is dismissed accordingly for reasons given and the Plaintiff is to proceed for hearing on the merits as per pleadings filed.

Signed, dated and delivered at Ile du Port on 9<sup>th</sup> day of February 2018.

S. Govinden  
**Judge of the Supreme Court**