

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC 22/2017**

**[2018] SCSC 205**

---

**MATHEW CHANYUMWAI**

Plaintiff

versus

**SEYCHELLES YACHT CLUB  
HEREIN REPRESENTED BY ITS COMMODORE/VICE COMMODORE**

Defendant

---

Heard:

Counsel: Mr. Rene Durup for plaintiff

Mr. Frank Elizabeth for defendant

Delivered: 28 February 2018

---

**RULING**

---

Pillay, J

**[1]** This ruling follows a plea in limine by the Defendant on three points:

(i) that the Plaint is res judicata since the Rent Board has already dealt with the matter in case RB22/2017.

(ii) the action is an abuse of process since the Plaintiff filed the same action before the Rent Board in RB No. 22/17

(iii) the Plaintiff cannot claim moral damages in a civil suit based on breach of lease which is a commercial transaction in law.

- [2] It is clear by section 90 of the Seychelles Code of Civil Procedure that “any party shall be entitled to raise by his pleadings any point of law...” as raised by the Defendant.
- [3] It is also not disputed that the Court can hear and dispose of the point of law at any time before the trial, on the consent of the parties or on order of the court on the application of either party. Counsel for the Plaintiff did not object to the point of law being heard before the trial and hence it proceeded.
- [4] That said I will now move straight on to the first point raised; is the matter res judicata?
- [5] For a plea of res judicata to be upheld there must be the threefold identity of subject-matter, cause and parties between the first and second case (see **Pragasen v Vidot [2010] SLR 163.**)
- [6] In the case of **Nourrice v Assary [1991] SLR 80** the Supreme Court held that where an earlier application is dismissed for procedural irregularity the plea of res judicata does not apply.
- [7] “The principle of res judicata operates where there has been a final determination of the parties’ dispute” as was found in the case of **Clarisse v Sophola [2005] SLR 96**
- [8] In the case of **Gamatis v Chaka [1989] SLR 235** the Supreme Court found that “where there is identity of parties, subject-matter and cause of action, a plea should succeed if the matter has been “judicially considered” and finally decided by a competent tribunal, which need not be a court.
- [9] In effect this Court has to decide whether or not the issues raised in this case have been raised by the same parties before another judicial forum and a final decision given on the merits.
- [10] I note that the Plaintiff did indeed file a case before the Rent Board on 26<sup>th</sup> May 2017. His prayers in the said case were as follows:

- (a) to quash the unlawful purported termination of the Lease Agreement,
- (b) to prohibit Respondent, as mentioned premises, engaging into any new lease agreement with another party or alternatively quash any lease agreement entered into by Respondent with any person pursuant to purported termination,
- (c) to order Respondent to restore all equipment interfered with by Respondent, especially those removed from the kitchen and placed in the car park, back to original position in the kitchen,
- (d) to order Respondent to allow Applicant to continue to operate his restaurant business in peace as per the Lease Agreement,
- (e) to order Respondent to pay Applicant damages at rate of R. 200,000 per month,
- (f) in event that restoration of Applicant back to premises is untenable, to order Respondent to pay Applicant damages (profit of R. 45,000 monthly) for duration of lease agreement,
- (g) that this matter be heard urgently due to going concern of a business and not least employing staff, and
- (h) that the Respondent pay costs of this action.

**[11]** In the present case the only prayer is for damages to business and moral damages in the total sum of SR. 1, 418, 106.16.

**[12]** I note further the following, that paragraphs 1, 2, 3, 4, 5, 6, 7 of the Rent Board case has been rehearsed in paragraphs 2, 5 through to 10 of the present case.

**[13]** The Plaintiff in the present case is based on the same facts as the case before the Rent Board.

**[14]** However as per the proceedings dated 27<sup>th</sup> October 2017 which I reproduce below

“27/10/17

Applicant - Mr Rene Durup

Respondent - Mr. Elizabeth

Court - Applicant was to take a position as to whether he would proceed with case before board despite preliminary points raised by board in regards to jurisdiction or whether he would withdraw and seek recourse before another forum.

Applicant - I have talked to my client. I wish to withdraw this Applicant before the board.

Respondent - No objections.

Court - Application granted, case withdrawn.

Signed. N. Burian 27/10/17”

it is abundantly clear from the above that the matter was not decided, in spite of it having been partly heard on 25<sup>th</sup> August 2017, the evidence of the Applicant having been taken, no final decision was given on the merits of the case.

[15] In the circumstances the motion for dismissal on the basis that the matter is res judicata cannot be upheld.

[16] As for whether there is an abuse of process, counsel for the Defendant submits that “the Plaintiff is hounding the Defendant by filing multifarious litigations against the Defendant in different courts.”

[17] Counsel relies on the authority of Gomme v/s Maurel (2012) SLR 342. I note of relevance that “Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, **the court requires the parties to that litigation to bring forward their whole case**, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of **matter which might have been brought forward as part of the subject in**

**contest;** which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.” (highlighting my own)

- [18] Indeed I agree that an abuse of process can arise in circumstances where the Plaintiff files numerous cases and withdraws them before a final decision is given or for that matter they are dismissed on preliminary points without being decided on its merits.
- [19] However I note that in the present case, on 20th October 2017 the Plaintiff’s counsel, then Applicant, was informed by the Board that he would “maybe better suited to file claim before Supreme Court.” At that time only the evidence of the Applicant himself had been taken and the case had been adjourned for the evidence of two more witnesses which were not taken. Following the advice of the Board, the Applicant promptly withdrew the said case before the Rent Board on 27<sup>th</sup> October 2017 and filed the present case on 29<sup>th</sup> November 2017.
- [20] On a perusal of the records of the Rent Board case, RB 17/17, as well as on a consideration of the authorities I find that the Plaintiff is not abusing the process of the court. On that basis the motion for dismissal of the matter for abuse of process fails.
- [21] As for the third point that moral damages cannot be claimed in a civil suit based on breach of lease which is a commercial transaction in law, counsel has relied on the case of **Nathalie Weller v/s Sarah Walsh Civil Appeal No. 3 of 2015**. On my reading of the named case the Court Appeal allowed the appeal with regards to the claim for moral damages not because one cannot claim moral damages in a commercial case but because the moral damages had not been established.
- [22] I reproduce paragraph 40 of the said judgment below with relevant highlighted portion showing that moral damages can be recovered in an action for breach of contract.
- [23] “**GROUND 6 OF APPEAL** is against the award of moral damages in a sum of GBP 15,000.00. Mr. Tim Walsh had claimed GBP 30,000.00 for disappointment, anxiety and moral damages in his Plaint. The Respondent had not given any evidence in this regard. In the case of **Vidot Vs Libanotis [SLR 1977, 192] SauzierJ** said: “*In this case the learned Magistrate did not make a critical evaluation of the moral damages and based his finding only on the amount of damages claimed. That was a wrong principle of law on*

which the trial court acted and it is the duty of this Court as an appellate court to assess the damages on the evidence which the learned magistrate had before him”. Moral damages are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrong doer. Moral damages are not punitive in nature but are designed to compensate and alleviate the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar harm unjustly caused to a person. **Barry Nicholas in his book ‘The French Law of Contract’ second edition** states: “*dommage moral, include a very wide range of non-pecuniary loss*”. **Article 1149 (2) of the Civil Code of Seychelles Act** states: “*Damages shall also be recoverable for any injury or loss of rights of personality. These include the rights which cannot be measured in money such as pain and suffering, and aesthetic loss and loss of any amenities of life*”. To recover moral damages in an action for breach of contract the following conditions have to be met. (i) There must be an injury, whether physical, mental or psychological, sustained by the claimant. A mere allegation of “disappointment, anxiety”, are insufficient. (ii) There must be evidence that the respondent acted in bad faith, fraudulently, recklessly, out of malice or in wanton disregard of his contractual obligation. (iii) The wrongful act or omission of the respondent should be the proximate cause of the injury sustained by the claimant. I am therefore of the view that the learned Trial Judge erred in making an award for moral damages. I therefore allow this ground of appeal.”

[24] I further take note of the decision in **Kopel v Attorney General [1955] SLR 315** and that **Pillay v Lesperance & Or [1991] SLR 88** that though “in principle moral damages ought not to be awarded in a case of breach of contract, yet in certain circumstances the Court ought to do so”.

[25] On the basis of the above I find that the third point of law cannot be maintained.

[26] The plea in limine is accordingly dismissed and the matter is to be listed for preliminary hearing.

Signed, dated and delivered at Ile du Port on 28 February 2018

L. Pillay, J  
Judge of the Supreme Court