

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MA 48/2018**

**(arising in CS 83/2017)**

[2018] SCSC 616

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**LYDIA MUBARAK ALI**

Applicant

Versus

**ATTORNEY GENERAL**

Respondent

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Counsel: Mr. G. Ferley for Applicant

Ms. Emily Gonthier for Respondent

Delivered: 29<sup>th</sup> May, 2018

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**ORDER ON MOTION**

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**Carolus J**

- [1] Lydia Mubarak Ali, the Applicant in this motion is the 1<sup>st</sup> Defendant in Civil Side 83 of 2018 (hereinafter referred to as the main case). The Plaintiff in the main case Millen Jean has filed a Complaint against her and three other Defendants namely Faiz Mubarak Ali (2<sup>nd</sup> Defendant), Allen Julie (3<sup>rd</sup> Defendant) and Jimmy Deletourdie (4<sup>th</sup> Defendant).

- [2] In terms of the present motion, the Applicant now seeks to join the Attorney General as a Defendant in the main case under sections 112 and 115 of the Seychelles Code of Civil Procedure (Cap 213) on the grounds that its presence before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon all the questions in the cause before the Court. The Application is made by way of Notice of Motion supported by an Affidavit sworn by the Applicant.
- [3] The facts of the main case as disclosed in the Plaint are that the Plaintiff and the 2<sup>nd</sup> Defendant who is a real estate agent entered into an agreement on 1<sup>st</sup> August, 2013, for the second defendant to locate an area for the Plaintiff to conduct business. The 2<sup>nd</sup> Defendant introduced the Plaintiff to the 3<sup>rd</sup> Defendant who was the owner of a mechanic workshop and wanted to sell it. The 2<sup>nd</sup> Defendant handled negotiations for the price of the property and the first Defendant, a Public Notary as well as being the wife of the 2<sup>nd</sup> Defendant was to carry out the process of transfer of the land on which the garage stands. Sometime in August, 2013, at the request of the 2<sup>nd</sup> Defendant, the Plaintiff made a cheque payment of SR2,000,000, which the 2<sup>nd</sup> Defendant informed him would be retained with the 1<sup>st</sup> Defendant until all transactions had been completed and the property registered in the Plaintiff's name, and for which the 1<sup>st</sup> Defendant gave a receipt.
- [4] The second Defendant subsequently informed the Plaintiff that Government land can only be registered on companies and not individuals, and upon the advice of the 2<sup>nd</sup> Respondent, the Plaintiff formed a company M & G together with the 3<sup>rd</sup> Defendant of which they became shareholders. The company M & G was registered in August, 2013.
- [5] The 2<sup>nd</sup> Defendant then suggested to the Plaintiff to buy property adjacent to that of the 3<sup>rd</sup> Defendant belonging to the 4<sup>th</sup> Defendant (also the owner of a mechanic workshop) so he could carry out his business on a larger scale. The second Defendant undertook negotiations for the sale of the property and the sum of SR1,500, 000 was agreed upon by the Parties. The 2<sup>nd</sup> Defendant, on two consecutive occasions, requested advance payments of SR50,000 and SR650,000 respectively which he claimed was being requested by the 4<sup>th</sup> Respondent. Both sums were paid by the Plaintiff to the 1<sup>st</sup> Defendant by cheque, to be deducted from the sale value of the property.

- [6] On 8<sup>th</sup> August, 2014, the Plaintiff received a letter from Attorney Joel Camille requesting the Plaintiff to vacate the premises within 14 days as the property belongs to his client Simon Alcindor by way of a lease of 60 years with the defunct Small Enterprise Promotion Agency (SIDECA). The 1<sup>st</sup> Defendant assured the Plaintiff that Simon Alcindor had been sent away from the property by SIDECA for more than 20 years and that the property was given to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
- [7] On 2<sup>nd</sup> September, 2014, the Plaintiff signed an Offer for Lease of Parcel V6822 situate at Providence Industrial Estate, from the Ministry of Land Use and Housing, and on 9<sup>th</sup> September received his letter of approval for the Lease of the said parcel. On 11<sup>th</sup> September, 2014, the Plaintiff paid a premium of R18,180 to the Government of Seychelles in respect of the Lease Agreement. On 1<sup>st</sup> October, 2015, the Plaintiff and the 3<sup>rd</sup> Defendant signed the Lease before the Government Officer at National House in the presence of the 1<sup>st</sup> Defendant. After signature of the Agreement and at the request of the 1<sup>st</sup> Defendant, the Plaintiff paid her the sum of SR3,736 by cheque to be used for the registration of the Lease Agreement. On 2<sup>nd</sup> February, 2015, at the request of the 1<sup>st</sup> Defendant, the Plaintiff paid a sum of SR525,000 being part payment of the balance due to the 4<sup>th</sup> Defendant, the outstanding balance of SR269, 000 to be paid later.
- [8] The Plaintiff, after requesting several times for the Lease Agreement from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and being told to wait, on 31<sup>st</sup> March, 2016, made enquiries at the Land Registration Office and was told that the Lease Agreement could not be registered as there was a problem. Despite being informed, nothing was done by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to remedy the situation and after waiting for a further period, the Plaintiff decided to abandon the project. He requested from the 2<sup>nd</sup> Defendant the return of the total sum of SR3,228,736 paid by him to the 1<sup>st</sup> Defendant. This was not done and in late June, 2016, the Plaintiff requested the refund of his money from the 1<sup>st</sup> Defendant and was told that there was no money as the money had been given to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Until 9<sup>th</sup> June, 2017, he has not received any money from any of the Defendants.
- [9] The grounds on which the Applicant in this motion is seeking to join the Respondent as a Defendant is that its presence before the Court is necessary in order to enable the Court to

effectually and completely adjudicate upon all the questions in the cause before the Court. In her Affidavit in support of the motion, the Applicant *inter alia* makes the following averments:

“3. I am applying to the court to join the respondent the Attorney General at the instance of the Ministry of the Land Use & Housing as a party to the said suit. I state that the presence of the respondent is necessary before the Court in order that the court may effectually and completely adjudicate upon the question before it and this for the following reasons:

3.1. The transaction as averred in the plaint happened because the Ministry of Land Use & Housing had promised to the 3<sup>rd</sup> Respondent that he, as he was in occupation and possession of parcel V6822, would be granted a lease to parcel V6822. On that basis the 3<sup>rd</sup> Respondent entered into an agreement to sell his assets situated on the said parcel to the plaintiff and also to cause the leasehold interest in the said parcel to be transferred to a company owned (sic) the 3<sup>rd</sup> defendant and the plaintiff. (sic) the plaintiff as soon as it was formally transferred to him. The plaint has been shown to me and attached and marked as **exhibit P1**.

3.2. The 4<sup>th</sup> Defendant who also had a garage on the said parcel V6822 also agreed to sell his garage to the plaintiff. As a consequence the plaintiff, the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant approached me to formalize their agreement.

3.3 The company M& G Company Limited was incorporated between the plaintiff and the 3<sup>rd</sup> defendant to facilitate the transfer of the land. On 2<sup>nd</sup> September 2014 the respondent wrote to 3<sup>rd</sup> defendant and the company M&G Company Ltd offering it the leasehold to parcel V6822 for the term 60 years. The Plaintiff and the 3<sup>rd</sup> defendant confirmed acceptance of the offer, on behalf of the company by signing the letter of offer. The letter has been shown to me and is

attached herewith marked as **Exhibit P2**. Further on 9<sup>th</sup> September 2014 the respondent wrote to the 3<sup>rd</sup> defendant, the plaintiff and the M&G Company Limited offering again to lease parcel V6822 to M&G Company Limited. The said letter has been shown to me and is attached herewith marked as **Exhibit P3**. The plaintiff paid the first premium in the sum of **SR 18,180** for the lease to Government thereby concluding the process of acceptance of the lease to the company. Copy of the receipt is shown to me and marked as **Exhibit P4**.

- 3.4** The parties, including the plaintiff in reliance on the offer of lease and acceptance by the company M&G Company Limited of same continued with plans to develop the proposed project on parcel V6822.
- 3.5** I, on numerous occasions thereafter contacted the respondent to get the lease signed and registered but to no avail. I made a search at the land registry and found out that the previous owner of the land the SIDEC had leased the land to one Simon Alcindor in 1994.
- 3.6** Upon further queries I was informed that the lease to Simon Alcindor was forfeited because of non-payment of ground rent. I verily believed same to be true because the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendants each had a garage established on the said plot for more about 20 years.
- 3.7** I was informed by Miss Brigit Confait Assistant Official Notary that procedures were being done to formally cancel and deregister the lease in the name of Simon Alcindor and that we have to wait until this is done.
- 3.8** In September 2015, I, the 3<sup>rd</sup> defendant and the plaintiff were asked to visit the Attorney General's chambers to complete the formalities

for the transfer. The plaintiff and the 3<sup>rd</sup> defendant signed the lease before the Assistant Official Notary Miss Brigit Confait. The document were then sent to the Registrar of Lands together with a cheque for payment of stamp duty. After that I was informed by the Registrar that she could not register the leasehold interest in the name of M&G Company Limited because Simon Alcindor has entered a restriction against parcel V6822.

**3.9** The Respondent has not provided me and the other parties to this case with explanation as to why it has not done the necessary to (sic) formalities to deregister the leasehold interest in the name of Simon Alcindor despite the lease having been forfeited.”

[10] The Respondent has objected to the Application and filed a Reply to the Application on points of law moving for dismissal of the motion. The grounds for the objection are as follows:

- “1. The Respondent should not be joined as a party as there is no reasonable cause of action against the Government of Seychelles.
2. The Plaintiff (CS 83 of 2017), discloses no claim being made against the Government of Seychelles. The Plaintiff seeks to be paid the sums that he paid to the Defendants in respect of the transactions as set out in the Plaintiff.
3. The Applicant’s application does not disclose her intention to seek any relief from the Respondent by joining the Respondent to the suit but rather for the Respondent to testify as to facts personal to the Respondent and the production of documents in its possession that might be relevant to the Applicant’s defence.
4. The Respondent can be summoned as witness in the case without the Respondent being joined as a defendant.”

[11] Counsel for the Parties also made oral submissions before the Court.

- [12] Mr Ferley for the Applicant firstly stated that he relied on the Affidavit evidence of the Applicant in support of the motion. He then proceeded to address the points raised by the Respondent in its Reply.
- [13] He submitted that the motion was made under section 112 of the Seychelles Code of Civil Procedure and that the Court only needed to decide whether the Application met the requirements of that section, that is, whether or not the Court is satisfied that the presence of the Respondent before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in this cause or matter. He submitted that section 112 does not lay down the requirement for there to be a cause of action that is raised or alleged against the Defendants intended to be joined.
- [14] He stated that a reading of the Complaint and the Affidavit of the Applicant, will show that the matter before the Court has a lot to do with the Respondent, that is the Government of Seychelles, in that the Ministry of Land Use and Habitat refused to honour its obligations to transfer a lease to a company M & G Company Limited as they had agreed to do in writing in a letter of offer attached as exhibit P3 to the Complaint. If the Respondent had done so then the matter would have been settled. He submitted that the gist of the cause of action raised by the Plaintiff in his Complaint is that he could no longer wait for Government and that is why he brought this action asking for the Parties to return the funds invested. He stated that it is necessary that the Respondent is joined because if they are not and a Judgment is given against the Defendants, this will give rise to further litigation, as they will sue the Respondent to get them to transfer the lease to them as per their contract which is legally binding on them.
- [15] Mr. Ferley relied on three authorities in support of his submission, copies of which he has provided to the Court, and which I will refer to below.
- [16] Mr Ferley quoted from Ex Parte: Mr. Yves Morel acting as Executor for the late Max Joseph Maurel and Angelika Milheim CS MA 204/2015 arising in CS30/2015 delivered on 12<sup>th</sup> February, 2016, where the Court dealt with an Application for the joinder of a co-Defendant and stated “It follows thus that the guiding principle with regards to amendments and joinder of party as a co-defendant is whether such amendment and or joinder is

necessary in order to enable the trial court to effectually and completely to adjudicate upon all the questions in the cause or matter now before the Court.” The Honourable Judge S. Govinden had in that case relied on what Mr. Ferley referred to as a pertinent authority on this subject namely Controller of Taxes v Union Vale Car Hire Co (Pty) Ltd [1979] SLR 79 in which it was held, granting the Application, that “(1) although the parties sought to be joined were not parties who ought to have been joined as no claim was made against them, they were parties whose presence before the Court was necessary in order to enable the Court to effectively and completely the Court effectively and completely to adjudicate upon and settle all questions involved in the cause, because, should the Court find the Defendant Company was liable to pay the tax and surcharge claimed in the Plaintiff, the Party sought to be joined might have to pay such tax and surcharge to the Defendant company by virtue of an agreement mentioned in the defendant company’s affidavit. Hence the determination of the action would directly affect the legal rights or pecuniary interest of the parties sought to be joined. (2) It was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this case for the Parties sought to be joined to be made co-defendants.

[17] On the basis of the abovementioned cases Mr. Ferley submitted that the question is not whether there is a cause of action that is raised against the Defendant sought to be joined but whether the presence of such Defendant will be necessary based on the Affidavit evidence of the Applicant, which he submits it is, because the whole matter hinges on the Lease Agreement which he submits they had an obligation to give effect to.

[18] Mr Ferley further submitted that if the Respondent is not joined there will be further litigation. He referred to the case of Vestalene Investments Limited v Cable & Wireless (Seychelles ) Limited C.A. Civil Side No. 17 & 18 of 2002 in which he stated that the Court of Appeal has pronounced itself clearly on the necessity to decide on matters once and for all and to discourage further litigation. In that respect he quoted the following “ It is clear from the section [section 112 of the SCCP] that no cause or matter shall be defeated by reason of the misjoinder of Parties, even if that is the case ..... and CWS would have had to file a separate action against Soft-Cell to recover the amount mistakenly paid.” Mr Ferley stated that in view of the above, the Court, once seized of a matter, has an obligation



to decide on all issues surrounding this matter, and if it is necessary to arrive at this end to join a party, then the Court must do so.

- [19] He therefore submitted that the Respondent's contention that there is no cause of action raised against it in the Plaint is not substantiated and is not supported in light of the above cases.
- [20] Mr. Ferley further made reference to the case of Vanacore v Port Louis (2011)SLR 143 and in particular the Court's statement that "Nevertheless the general principles discussed in that case may find application to this case insofar as the emphasis is on justice being done and and *the principle that all questions in controversy should be tried at the same time in one trial*. In order to do so Courts would be more inclined to grant amendments to pleadings rather than refuse them."Mr. Ferley stressed that in this case, although proper procedures were not followed, the Court still found it necessary to join the party sought to be joined.
- [21] With regards to the Respondents reply at paragraph 3 that "The Applicant's application does not disclose her intention to seek any relief from the Respondent by joining the Respondent to the suit but rather for the Respondent to testify as to facts personal to the Respondent and the production of documents in its possession that might be relevant to the Applicant's defence", Mr. Ferley submitted that based on the Judgment quoted and a proper interpretation of section 112 of the SCCP, there is no necessity to show a cause of action against the Respondent at this stage of the proceedings. If the Court is satisfied that they must be joined, the Applicant (1<sup>st</sup> Defendant in the main case) will in her Defence in the main case, plead that it is the Respondent who is responsible and that a Judgment be given against the Respondent to compel the Respondent to honour its obligation and the Court will then decide the matter at that particular time. Mr. Ferley reiterated that it is not necessary to show at this stage that there is a cause of action against the Respondent but it is only necessary that the Court when looking at all the facts pleaded in the Affidavit to satisfy itself that the presence of the Respondent namely the Government of Seychelles is necessary to allow it to adjudicate completely on the matter before it.

[22] Ms. Gonthier, Counsel for the Respondent, submitted that the Respondent should not be joined as a Defendant in this matter. She referred to section 109 of the SCCP which reads as follows:

“109. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.”

[23] She submitted that in the Plaintiff there is no claim being made against the Government of Seychelles; that the Plaintiff, prior to any dealings or agreement with the Government of Seychelles, sought the services of and entered into several transactions with the Defendants to the Plaintiff; and that the relief being sought by the Plaintiff in the Plaintiff is the reimbursement of sums of money paid by the Plaintiff to the Defendant with regards to these transactions and services obtained prior to any interaction with the Government of Seychelles.

[24] With respect to paragraph 3 of her Reply, namely that “The Applicant’s application does not disclose her intention to seek any relief from the Respondent by joining the Respondent to the suit but rather for the Respondent to testify as to facts personal to the Respondent and the production of documents in its possession that might be relevant to the Applicant’s defence”, Ms Gonthier submitted that the Respondent cannot speak as to the intention of the Applicant beyond what is provided in the Application. She conceded that while the presence of the Respondent may be necessary before the Court, it would only be as a witness as it appears from the Application that the Respondent will only be required to establish certain facts which can be achieved by the Respondent testifying and or producing certain documents in its possession that might be relevant to the case, as the agreement between the Plaintiff and the Respondent was independent of the initial agreements between the Plaintiff and the Defendants.

[25] The case for the Applicant is essentially that the transactions averred in the Plaintiff which gave rise to the present claim, were undertaken in reliance on an undertaking given by the Ministry of Land Use and Habitat to the third Respondent, who was in occupation and

possession of parcel V6822, that he would be granted a lease to the said parcel. The Applicant avers that it was on the basis of that undertaking that the third Respondent entered into an agreement to sell his assets situated on the said parcel to the Plaintiff and also to cause the leasehold interest in the said parcel to be transferred to a company owned by the 3<sup>rd</sup> Defendant and the Plaintiff as soon as it was formally transferred to him. She avers that subsequently an offer for lease of the said parcel was made by the Government to a company incorporated by the Plaintiff and the 3<sup>rd</sup> Respondent which was accepted, and a premium paid to the Government, and a Lease Agreement signed by the Plaintiff and 3<sup>rd</sup> Defendant in the presence of the Official Notary but that the Lease Agreement could not be registered because a restriction had been entered against the said parcel by Simon Alcindor to whom the land had been leased in 1994, by its previous owner. According to the Applicant, prior to signature of the Lease Agreement by the Plaintiff and the 3<sup>rd</sup> Defendant, she had been informed that procedures were being done to cancel and deregister the lease in the name of the said Simon Alcindor.

[26] In view of the above, I am satisfied that, although no claim has been made against the Respondent, the presence of the Respondent before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions in the main case.

[27] Accordingly, in terms of sections 112 and 114 of the Seychelles Code of Civil Procedure, I grant the motion and Order the Plaintiff to amend the Plaint adding the Respondent as a Defendant to the main case.

Signed, dated and delivered at Ile du Port on 29<sup>th</sup> May, 2018.

*E. Carolus*

E. Carolus  
**Judge of the Supreme Court**