

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 289
CS 36/19

In the matter between:

BERTINE AH-KONG
(rep. by Alexandra Madeleine)

Plaintiff

and

SANGALIA COMPANY PTY LTD
(rep. by Frank Elizabeth)

1st Defendant

FRANK ELIZABETH
(rep. by Frank Elizabeth)

2nd Defendant

MARIA ELIZABETH
(rep. by Frank Elizabeth)

3rd Defendant

PUBLIC UTILITIES COMPANY
(rep. by Somasundaram Rajasundaram)

4th Defendant

Neutral Citation: *Ah-Kong v Sangalia Pty Ltd & Ors* (CS 36/2019) [2020] SCSC 289 (22 May 2020)

Before: Pillay J

Summary: Section 90, 91 and 92 of the Seychelles Code of Civil Procedure

Heard: By way of submissions

Delivered: 22 May 2020

ORDER

The plea in limine shall be disposed of during the trial.

RULING

PILLAY J

- [1] This ruling arises from a verbal motion by counsel for the first, second and third Defendants for the plea in limine to be heard before the trial since it would substantially dispose of the matter.
- [2] Counsel for the Plaintiff opposed the motion and both sides filed submissions in support of their respective positions.
- [3] The pleas in limine raised by the first, second and third Defendants are as follows:
- (1) *The Plaintiff does not disclose a cause of action against the 2nd and 3rd Defendants and ought to be dismissed with costs.*
- (2) *The Plaintiff is bad in law and ought to be dismissed as it pleads two concurrent causes of action in contract and in tort.*
- [4] In support of his motion counsel for the first, second and third Defendants submitted that “it is incumbent on the Defendants to satisfy the court that the point of law should be heard before the case proper as they substantially dispose of the whole cause of action”.
- [5] Counsel for the first, second and third Defendants relied on the rule of privity of contract along with the cases of **Brutus v Namasivayan and Another (54 of 2003) [2009] SCSC 4 (15 November 2009)** as well as **Faure v Hoareau and Others (Civil Side No. 103 of 2012) [2013] SCSC 64 (10th May 2013)**. Counsel also relied on the case of **Solomon v Solomon & Co. Ltd (1897) AC 22** and that of **G.E.Ry v Turner (1872) L.R. 8 Ch 149**.
- [6] Counsel further relied on the case of **Frank Elizabeth v The President of the Court of Appeal (2010) SLR 382** to support his position that “the action of the Plaintiff against the second and third Defendants is frivolous and vexatious, and the Court should exercise its discretionary power under Section 92 SCCP to strike it off.”
- [7] Counsel for the Plaintiff submitted that the exceptions in section 90 are not applicable to the current case in view of the Plaintiff’s objections to the points of law being heard prior to the merits of the case. There is therefore no consent of the parties on this point.
- [8] Counsel submitted that the pleas will not substantially dispose of the whole action against the Defendants as per section 91 of the Seychelles Code of Civil Procedure.

- [9] It was counsel's submission that in applying the test in **Georgina Rideau v Judith Elizabeth (1979) SLR 81**, the non-existence of a reasonable cause of action is not beyond doubt ex-facie the Plaintiff and Defence filed. It was counsel's submission that the court ought not at this stage to strike out or dismiss the plaintiff.
- [10] Counsel further submitted that ex-facie the pleadings the cause of action against the first, second and third Defendants is based on a breach of a commercial lease agreement. It was Counsel's submission that the facts are inextricably linked and that the court should hear the whole case before it hears and decides on the merits of the case.
- [11] It was further the Plaintiff's counsel's submissions that the claim for damages arises from the breach of contract, from the first Defendant's contractual liability and not faute.
- [12] Counsel of the Plaintiff relied on the cases of **Bessin v AG (1950) SLR 208**, **Figaro & Anor v Nanon (1986 117**, **Luc Grandcourt v Denise Coehlo (1984) SLR 79**, **Maria Georgina Rideau v Judith Elizabeth (1979) SLR 81**, **Peter Pool v Daniella Souris Civ. App No. 20 of 1995 (delivered on 29 Feb 1996)**, in support of her position.
- [13] The issue for the Court is a very narrow one, should the plea in limine be heard before or during the trial.
- [14] The law with regards to pleas in limine is found in sections 90, 91 and 92 of the Seychelles Code of Civil Procedure which provide as follows:

“Section 90. Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

Section 91. If in the opinion of the court the decision of such point of law substantially dispose of the whole cause of action, ground of defence, set-off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just.

Section 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 of the

action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just.”

- [15] Using the word “shall”, section 90 of the Seychelles Code of Civil Procedure is drafted in mandatory language. The rule therefore, is that any point of law raised by a party in his pleadings must be dealt with at the trial. However, if the parties agree or alternatively, if the Court orders it, the point of law can be dealt with prior to the trial. With the Plaintiff objecting to the point of law being heard prior to the trial, it is for the Court to decide now if an order should be made to that effect.
- [16] Section 91 of the Seychelles Code of Civil Procedure provides the criteria for the Court to consider in coming to a decision as to whether an order should be made for the point of law to be heard prior to the trial. Section 91 provides that the Court may dismiss the action if in its opinion the point of law substantially disposes of the whole cause of action.
- [17] Section 92 of the Seychelles Code of Civil Procedure in turn provides that the Court may strike out any pleadings that do not disclose a cause of action and may also dismiss an action on the ground that the pleadings show that the action is frivolous or vexatious.
- [18] In summary, in order to satisfy the Court that an order has to be made for the hearing of a point of law before the trial, the party making the said motion has to show that the point of law would dispose of the whole action or that the pleadings do not disclose a cause of action or that the pleadings show that the action is frivolous or vexatious.
- [19] In the case of **Bessin v AG (1950) SLR 208** the Court held that “a court hearing [an application for dismissal on the basis that there is no cause of action disclosed] must limit itself to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the court resort to the summary process of dismissing an action.”
- [20] The Constitutional Court in the case of **Frank Elizabeth v The President of the Court of Appeal (2010) SLR 382** relied on the case of **Bessin v AG (1950) SLR 208** and the

case of **Auto Garage v Motokov (No 3) [1971] J EA 514** as persuasive authority to explain the concept of reasonable cause of action and find that there was no cause of action disclosed.

[21] The Constitutional Court went on to define ‘frivolous or vexatious’ in the following manner:

“Turning to the question of whether a matter is ‘frivolous or vexatious’ we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary and Thesaurus (at page 600) frivolous is defined as ‘adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.’ We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.

Vexatious is defined at page 1750 of the Oxford Dictionary (supra) as ‘adj. 1 such as to cause vexation. 2 Law not having sufficient grounds for action and seeking only to annoy the defendant.’ Vexatious therefore relates to the effect on a defendant. It is vexatious if an adverse party is made to defend something that would not succeed.

It appears from the wording of section 92 of the Seychelles Code of Civil Procedure that a finding of any one of these, frivolous or vexatious would be sufficient to trigger an order for stay of the action, or dismissal of the same on such terms as may be just.”

[22] In that regard, I take note of the Defence and Counterclaim of the first, second and third Defendants filed on 23rd October 2019, more specifically paragraph 3 which reads in part as follows – *“...the Defendants aver that the parties had a meeting before the 1st July 2017 and did an inventory of the equipment, improvements, repairs, addition and renovation cost of the guesthouse. The Defendants aver that the handover was peaceful and amicable and the Plaintiff signed an acknowledgment of debt or a promise to pay the 2nd Defendant the sum of SCR 707, 567.00 by instalment of SCR 10, 000.00 per month until such time that the whole debt is fully paid...”*

[23] By his own averment the second Defendant places himself squarely in the middle of the issues between the parties. That in itself supports the contention of the Plaintiff that the issues and parties are inextricably entwined and a final decision on the plea in limine can only be taken at the conclusion of a trial and not on the face of the pleadings.

[24] As regards the claim for damages, the particulars of loss and damages detail the claim as being premature termination of lease and non-payment of 3 months' rent in lieu of notice, outstanding liabilities and moral damages for anxiety, stress and emotional distress resulting from financial losses by non-payment of notice, financial burden by outstanding liabilities and threat of disconnection.

[25] It is clear on the Plaintiff that the claim for damages arise from the alleged breach of contract.

[26] On the basis of the above, this Court is of the opinion that the points of law raised by counsel for the first, second and third Defendants would not dispose of the whole cause of action and orders that the points of law be disposed of at the trial.

Signed, dated and delivered at Ile du Port on 22nd May 2020

Pillay J