IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC …
MA 27/2020
Arising in MC107./2019)

DIETER DUGASSE **Petitioner**
(rep. by Clifford Andre)

and

PATRICK HERMINIE **Defendant**
(rep. by Frank Elizabeth)

Neutral Citation:	*Dieter Dugasse v Patrick Herminie* (MA27/2020) [2020] SCSC 26 June 2020).
Before:	Vidot J
Summary:	Recusal of Judge and setting aside Order to have the case ex-parte, alleged breach of Practice Direction
Heard:	through written submissions
Delivered:	26 June 2020

ORDER

Application denied.

RULING

VIDOT J

[1] The Applicant has filed an application to have an ex-parte hearing vacated and for the recusal of the undersigned Judge from hearing the suit in case No.107 of 2019. On the 02nd October 2019, a Preliminary Hearing of the case was held. Both parties were represented by Counsels on that date. The Applicant had filed his Defence on the 25th September 2019. The Pre Trial Review (PTR) date was set for the 15th January 2020. That date was set by the Deputy Registrar, Ms. M.A Barbe. She also set the case for hearing on the 24th February 2020.

[2] On the date set for the PTR, neither Counsel for the Applicant, not the Applicant were present in Court. Due to this absence, Counsel for the Respondent made Application for the suit to be heard ex-parte. The Court acceded to that application. A notice of the ex-parte hearing date was served on the Applicant's Counsel. The case was set for the 21st January 2020 for ex-parte hearing and the matter was heard on that day. The Applicant arrived in Court late at which point the Respondent had nearly completed his testimony. The judgment is still pending.

[3] Counsel for the Applicant has filed this Application not only seeking an Order to set aside the ex –parte hearing but also to have the undersigned Judge recused from the case. He complained that the undersigned Judge did not *"entertain"* his lawyer after he came to Court. He lamented that his lawyer had received the Notice from court late and therefore could not put up appearance any sooner. Counsel for the Applicant failed to follow proper procedure as far as asking for recusal of a Judge is concerned as established in **Government of Seychelles & Anor; Michel & Ors v Dhanjee SCA 4/2014**. Basically, the Applicant acted in contravention of Rule 4 of rules governing recusal set out in that case. The rule is that after Counsel have evaluated that there was sufficient cause that a Judge should be asked to recuse himself or herself, Counsel should have sought an appointment with the Judge in Chambers in the presence of Counsel for the other side. Therefore, that being the case I shall not deal with this issue any further.

[4] The point of contention of the Applicant against having the case heard ex-parte was that the Court did not act in conformity of Practice Direction No. 3 of 2017, particularly "the section on PTR." Firstly, I wish to address some issues that I feel are erroneous. It is not correct to state that the Court did not hear entertain his Counsel and continued to hear the case ex-parte. Court proceedings reveal that when Counsel walked in Court, which as stated was nearing the end of the evidence of the Respondent, he interjected and asked for permission to be heard and that permission was granted. He explained that he received the notice late and that he moved court to vacate the ex-parte order. So, it is important that when a client states that he is informed of certain facts by his Counsel that such fact is indeed correct. Indeed, it is unbecoming of Counsel who attaches the same affidavit

fails to bring to the attention of his client that such averments were wrong. This jurisdiction and the legal profession need counsels who are honest.

[5] The Practice Direction (clause 14) dealing with PTR reads as follows;

"There will be a Pre-Trial Review on an appropriate date, approximately 6 weeks before trial date, which shall also be fixed at the listing appointment referred to above. The parties and the Counsels are to attend the Pre-Trail Review. At the Pre-trial Review the party shall confirm to allocated Judge whether all directions have been complied with and whether the suit is ready for trial. If all directions have not been complied with, the allocated Judge may strike out the suit, enter judgment against the Defendant, or make other suitable order but the Judge will not adjourn the trial or take the case out of the list without consent of the Chief Justice"

Unfortunately. Learned Counsel, with many years' experience, did not competently advice his client that the provisions of that clause 14 had to be read in its entirety for it to make complete sense. One cannot decide to read part of a clause in isolation with other parts. Counsel chose to allow client to swear an affidavit that refers only partly to clause 14 presenting it as the entire clause. He only quoted the following as being clause 14; "*the Judge will not adjourn the trial or take the case out of the list without consent of the Chief Justice."* That is a mockery of clause 14.

[6] What is clear from that clause is that the *"parties and counsels are to attend the Pre-Trial Review."* They did not attend. At that review they have to confirm with the Judge that all directions have been complied with and that the suit is ready for trial. The Court could not have done that in the absence of the Applicant. At that point, due to non-attendance of the Applicant or his counsel, the Court had option of entering judgment against him. The Court did not adopt that course of action due to the quantum of damages of SR3,000,000.00 which was considered excessive. So, it was felt that suitable orders needed to be made and that was for hearing of the case ex-parte. The case was not adjourned as an adjournment connotes postponement of the case and if anything it was brought forward and nor was taken away from the list. The case remained on the list.

Therefore, the consent of the Chief Justice was not required. There was no breach of Clause 14 of the Practice Direction.

[7] Counsel for the Applicant upon arriving in Court, asked for Court *"to vacate the ex-parte Order"* (underline mine)(p7 proceedings of 21st January 2020). His request was not to vacate the ex-parte hearing which was already in motion. The Court cannot vacate an Order that it had already activated. The hearing was already in process. Counsel did not even make application to cross-examine the Respondent after he had finished his examination in chief.

[8] However, it is important that a Court considers what would be in the interest of justice in deciding whether or not to allow an Application to vacate an order to hear a case ex-parte. I have in this process considered section 66 of the Civil Procedure Code ("CPC") and the case **Cedric Petit v Marghita Bonte SCA 9 of 1999**. I have also considered the Applicant's right to a fair hearing pursuant to article 19(7) of the Constitution.

[9] Section 66 of the CPC provides;

"If the Court has adjourned the hearing of the suit ex-parte, and the Defendant, at or before the hearing (underline mine) *appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to cost or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."*

I find that from the affidavit attached to the Application that the Applicant did not provide good cause for his previous non-appearance. Counsel for the Applicant gave reasons for his late appearance on the date set for the hearing. He states that it was because he received the court notice late that same morning. The Court does not dispute that. However, there are no legal provisions for the court to send notices to the absentee litigant. In this case the Court did so only out of curtesy to the Applicant and his Counsel.

[10] The Applicant is granted the right to a fair hearing, however, it is incumbent on him to safeguard that right. He should have been present at the PTR. He cannot shirk that responsibility to safeguard his right and then apportion blame to others. Processes before Court is guided by rules of procedure and such rules have to be respected. When he

realised that he missed the PTR date, it was his responsibility to verify with court registry the status of his case. He failed to do that.

[11] I find that allegation of a breach of clause 14 of the Practice Direction is not well grounded and I find that the Applicant's affidavit and his Counsel did not provide good cause for his previous non-appearance at the PTR. That being the case, I have no alternative but to deny the notice of motion which is hereby dismissed. I make no order as to cost.

Signed, dated and delivered at Ile du Port on 26 June 2016

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Vidot J