SUPREME COURT OF SEYCHELLES

Not Reportable
[2020] SCSC ~~...~~767
CS 13/2020

In the matter between:

ROSALITA REGINALD **Plaintiff**
(rep. by Bernard Georges)

and

ANNE-MARIE EDWINA VITAL **Defendant**
(rep. by Anthony Derjacques

Neutral Citation:	*Reginald v Vital* (CS13/2020 [2020] SCSC ~~...~~767. (15 October 2020).
Before:	Carolus J
Summary:	Plea in Limine Litis - Res Judicata – Prescription – Abuse of Process
Delivered:	15 October 2020

ORDER

The plea of res judicata and prescription are dismissed. The plea of abuse of process will be determined at the conclusion of hearing of the suit.

RULING

Carolus J

Background

[1] The plaintiff has filed a plaint to set aside a judgment by consent dated 26th October 2015 entered into by the parties in CS59/2014 as null and void. She further seeks to remit CS59/2014 to a judge for hearing and for costs.

[2] The present suit arises from two previous suits. The first, CS315/2005 filed by the plaintiff against her aunt Andrine Pointe concerned rebuilding of the house of the said Andrine Pointe by the plaintiff with her own funds. Andrine Pointe was at the time the owner of

parcel V7062 with a dwelling house thereon. The plaintiff avers that Andrine Pointe transferred the parcel to the plaintiff's sister (defendant in CS59/2014 i.e. Anne-Marie Edwina Vital) for the sum of SCR130,000.00 by an agreement dated 11th October 2012 which was registered on 11th April 2013. Eleven days later, on 22nd October 2012, the plaintiff entered into a judgement by consent with said Andrine Pointe who agreed to pay her SCR185,000.00.

[3] Being unable to execute the judgement by consent, the plaintiff filed a second suit against the defendant (Rosalita Reginald v Anne-Marie Edwina Vital CS59/2014) alleging that the transfer of parcel V7062 was a sham and a deliberate attempt by the defendant to protect Andrine Pointe from paying the sum of SCR185,000.00 as per the judgment by consent in CS315/2005. The plaintiff claims that on 26th October 2015, the trial judge forced the settlement of the suit in CS59/2014, in terms of which the plaintiff agreed by way of a judgment by consent of the same date, to accept SCR90,000.00, payable in instalments, to discharge the sum of SCR185,000.00 which she was seeking in the said suit.

[4] The plaintiff avers that she entered into the judgment by consent dated 26th October 2015 in CS59/2014 under duress in that (1) she was coerced by the trial judge and her own counsel into accepting a settlement that was less than she had been awarded by the Court in CS 315/2005 and which she was seeking to recover in CS59/2014; and (2) she was erroneously induced by the trial judge and her own counsel into believing that she would be unable to obtain satisfaction in her action if she pursued it. Alternatively, the plaintiff claims that the said judgment by consent is voidable for lesion in that the settlement she obtained in terms of it is less than one half of the value of the judgment in CS 315/2005 which she was pursuing.

[5] The defendant has filed a statement of defence, which, as well as dealing with the matter on the merits, raises the following pleas in limine litis:

1. *It is submitted that this case cannot proceed for being res judicata. This case was fully and finally determined through a Judgment by Consent of the Supreme Court, in Civil Side 59 of 2014 entered on the 26th Day of October 2015.*

2. *This said action is prescribed for being based on alleged documents occurring and signed on the 12th October 2012 and registered on 11th April, 2013. This Plaint was filed on 4th February 2020.*
3. *This action is frivolous and vexatious and further amounts to an "abus de droit."*

[6] The parties made oral submissions on the three points of law raised by the defendant, each of which are dealt with below.

Analysis

Res Judicata

[7] The defendant has pleaded that the present suit is res judicata because the same matter was *"fully and finally determined through a Judgment by Consent of the Supreme Court, in Civil Side 59 of 2014 entered on the 26th Day of October 2015"*.

[8] It is the defendant's case that the Court in CS59/2014 by entering a judgment by consent as a judgment of that Court under section 131 of the SCCP fully and finally determined the matter before it, and that the same matter cannot be canvassed in the present suit in that it is res judicata. He submitted through Counsel that there is threefold identity of parties, subject matter and cause required for a successful plea of *res judicata* in that both suits concern the same property and claim.

[9] Counsel for the defendant also submitted that it is a breach of the defendant's right to a fair hearing under Article 19(7) of the Constitution for the plaintiff to canvass issues which have been heard and determined in a previous case in another case. He submitted that the Constitutional right to a fair hearing reinforces the principle of *res judicata* which is based on the principle that there should not be multiplicity of litigation between the same parties on the same issue and stated that the Court frowns upon and will not permit continued litigation on an issue it has already decided.

[10] Counsel further draws attention to the fact that the judgment in CS59/2014 was neither appealed against nor reversed by an appellate court. He states that the plaintiff's claim that she was coerced and entered into the judgement by consent under duress should have been canvassed and dealt with on appeal and by not appealing she has lost her right to contest

the decision. Further, not appealing is a strong indication that the settlement was a genuine one and not oppressive or obtained through duress. He submitted that the proper forum for this matter should have been the Court of Appeal and it is not a matter for a court of equal jurisdiction to rehear otherwise than pursuant to the provisions for a petition for new trial. In the circumstances the only options open to the plaintiff were to appeal to the Court of Appeal or Petition for a new trial to the Supreme Court neither of which has been done.

[11] The plaintiff on the other hand contends that the present matter is not *res judicata* because it does not have the confluence of the three issues as provided for by Article 1351, namely similarity of parties, of subject matter and of cause of action as the previous case, namely CS59/2014. Counsel submitted that in CS59/2014, damages were sought as a result of alleged fraud in the making of the transfer document dated 11th October 2012, which was registered on 11th April 2013, whereas the present matter is based on a judgment by consent, which is sought to be set aside on the ground that it was obtained by duress as considerable pressure was exerted on the plaintiff to settle the matter.

[12] It was submitted that whereas the jurisdiction of this Court to set aside a judgement by consent is derived from English law and dealt with under the SCCP, once the threshold of jurisdiction is met, the matter becomes one of French law dealt with under the Civil Code, from which the Court derives its substantive powers to set aside the judgment by consent. It was explained that a judgment by consent is a classic example of a *contrat compromissoire* i.e. a contingent contract provided for under Article 2044 of the Civil Code. It is a contract in which the parties have rights but agree to enter into a compromise, which abrogates those rights and determines and puts an end to the dispute between the parties. Such contract is subject to exactly the same conditions as other contracts for its formation as set out in Article 1110 of the Civil Code including consent. It was submitted that the judgement by consent, which the plaintiff is seeking to have set aside, was entered into by the plaintiff under duress and was thus viciated by lack of consent, which is an essential element for the validity of every contract.

[13] On that basis, it is argued that while the parties might be the same, the subject matter and cause of action of the two suits are different. One is in respect of the fraud alleged to have

been perpetrated and the second is the vitiation of a *contrat compromissoire* in the form of a judgment by consent because of duress. There is, therefore, no congruence of the 3 principles necessary for a plea of *res judicata* to succeed. In support of her argument she relied on the cases of *Delpech v Gregoretti and Anor* (3 of 2005) [2006] SCCA14 (28 November 2006), *Pouponneau and Ors v Janisch* (1979) and *Corporation v Petrousse* (1987).

[14] Counsel further submitted that the plea of *res judicata* disregards the fact that a second and alternative relief on the ground of lesion is sought because the judgment by consent was of a sum less than half that of the previous judgment by consent.

[15] The principle of *res judicata* is embodied in Article 1351 of the Civil Code which provides as follows:

> *"Article 1351*
>
> 1. *The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject-matter; that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities.*
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> 2. *Paragraph 1 of this article shall also have effect in respect of proceedings to establish status, without prejudice, however, to the binding effect of uncontested declarations relating to civil status or to judgments which establish new status, such as a decree of divorce, or to the actions to establish descent, to the extent that only certain specified persons are entitled to bring certain types of proceedings.*
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> 3. *Repealed. (3/7/1990)"* Emphasis added

[16] The rationale behind the *res judicata* principle was explained by the Court of Appeal in the case of *Georgie Gomme v Gerard Maurel and Ors* (SCA 06 of 2010). It had this to say:

> *"We consider that it is apposite that at this state we state a few things about multiplicity of litigation. The plea of res judicata provided for in article 1351 of the Civil Code was designed to stop such abuses ...*
>
> *The rationale behind the rule of res judicata and its strict application is grounded on a public policy requirement that there should be finality in a Court decision and*

an end to litigation in a matter which has been dealt with in an earlier case and that the proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehearsing the same issue in multifarious forms. Litigation must be reserved for real and genuine issues of fact and law."

[17] It was held by Renaud J in the case of *Pragassen v Vidot* [2010] SLR 163, with reference to Article 1351 of the Civil Code that *"for a plea of res judicata to be upheld there must be threefold identity of subject-matter, cause and parties between the first and second case."* This is settled law in this jurisdiction which is consistently followed by our Courts.

[18] The plaintiff and the defendant in CS59/2014 and the present suit are the same. The question for determination is whether the two cases have the same subject matter and cause?

[19] In *Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo* [31 August 2018], Twomey JA remarked that the word *"cause"* is not used at all in Article 1351 of the Civil Code but attempted to explain the meaning thereof by examining the history of that Article. She stated at paragraph 13:

> *"[13] ... Article 1351 1 above was the translation made by Chloros in 1975 of the French provision then in effect which read as follows:*
>
> *"L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité (emphasis added).*
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> *[14] The original English translation of the provision used in Seychelles until 1975 was Blackwood's Wright's version namely:*
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> *A judgment has only the effect of res judicata as regards the subject-matter of the judgment. In order that the thing should be res judicata, the claim must be (1) for the same thing, (2) based on the same legal grounds, (3) be between the same parties, and brought by and against them respectively in the same right (emphasis added).*
>
> *[15] It is generally accepted in Seychelles that the word class used by Chloros was a misprint for cause, an error which was never corrected. The case of Hemrick decided in 1973 before the new Code was enacted referred to*

cause, emanating from the original French Code which was then in use and which meaning has survived in jurisprudence constante to date.

[16] It must however be noted however that Souyave CJ in Hemrick made the following comment in explaining the three issues that has to coincide in both cases for a plea of res judicata to succeed:

> *"The "objet" is what is claimed. "La cause" is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated."*

[17] Hemrick concerned a claim by a concubine who had first made a claim under unjust enrichment for services she had carried out for the defendant as his housekeeper. That claim was dismissed on the grounds that the cause of action arose out of an "immoral association" which the court could not condone. In her second claim, this time for the return of SR5000 which she claimed the defendant had given her to leave his home, but then had subsequently assaulted her and taken it back, the court found that the cause of action was entirely different."

[20] On the basis of the above interpretation, the *"subject matter"* of a judgment (current Article 1351-1) is the equivalent of *"la chose demandée"* in the original French provision, which as per Blackwood's Wright translated version refers to *"the claim must be ... for the same thing"*. The subject matter is, therefore, what the plaintiff is claiming. In CS59/2014, the plaintiff sought *inter alia* a declaration that the deed dated 11th October 2012 effecting the transfer of parcel V7062 from Andrine Pointe to the defendant was null and void and fraudulent, the cancellation of the registration of the said parcel in the defendant's name, and the payment by the defendant of SCR185,000 in satisfaction of the judgment in CS315/2005. In the present suit the plaintiff seeks the setting aside of the judgement by consent entered by the Court in CS59/2014 on the ground that she entered into the said judgment by consent under duress and the remittance of CS59/2014 to a judge of the Supreme Court for hearing. It is clear that what the plaintiff is claiming is not the same in the two cases. It is also clear that the plaintiff could not have claimed the setting aside of the judgment by consent as entered into under duress in the same case in which the judgement by consent was entered as a judgment of the Court.

[21] I move on to "*cause*". As to the definition of "*cause*", the original French version of Article 1351-1 provides that "*Il faut ... que la demande soit fondée sur la même cause*". As explained in the *Cable and Wireless* case (supra) "*cause*" was defined by Souyave CJ in Hoareau v Hemrick (1973) as "*the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated*". It is clear that, although the plaintiff's objective in both CS59/2014 and the present case is ultimately to recover the sum of SCR185,000, which was awarded to her in CS CS315/2005 for her contribution to repairing Andrine Pointe's house situated on parcel V7062, her right of action in CS59/2014 arises from the alleged fraudulent transfer of parcel V7062 by Andrine Pointe to the defendant, whereas the plaintiff's right of action in the present case springs from allegedly entering into a judgment by consent under duress.

[22] On the basis of the above, I find that, although, there is identity of the parties, the subject matter and the *cause* in the two cases are not the same. The plea of *res judicata* therefore fails.

[23] On the issue raised by the defendant that the judgment by consent entered by the court in CS59/2014 may only be challenged by way of appeal or a petition for new trial, and may not be set aside by a court of equal jurisdiction as the plaintiff is doing in the present case, I note that the setting aside a judgment by consent is an accepted practice before our Courts and I find no merit in this point raised by the defendant.

[24] In the case of Gill v Freminot and Anor (4 of 2006) [2006] SCCA 7 (28 November 2006) the court after stating that "*[T]he existence of a procedure for entering a consent-judgment in Seychelles law is provided in section 131 of the Code of Civil Procedure*" stated the following –

> "*[8] The section, we understand, is used in practice fairly frequently and has been the subject-matter of judicial decisions: see Pardiwalla v Pardiwalla 1993 Supreme Court Judgment No 15 (unreported), where Perera J., recognised not only the existence of a judgment by consent but also the legal effect that flows from such a judgment...*
>
> *[9] To that extent, if the law of Seychelles allows for a consent judgment to be entered, it is our view that it should also allow an avenue for challenge not*

necessarily by way of appeal which in the majority of cases may be foreclosed because of an absence of determination by the court either on the facts of the case or the law applicable in the case. In such circumstances, the only avenue left to the parties would be to go the Supreme Court ... for the purposes of setting it aside. If an applicant can demonstrate that there are good grounds for setting aside the order made, it may do so and order that the case where the consent judgment was given proceeds for hearing in the normal course of things.

[10] .... Another avenue open to the judge was to invoke his equitable jurisdiction and dynamize the little used section 6 of the Courts Act (Cap 52) which provides that no aggrieved person shall be left without a remedy notwithstanding that "no sufficient remedy is provided by the law of Seychelles." ...

Prescription

[25] The defendant claims that the present action filed on 4th February 2020, is prescribed *"for being based on alleged documents occurring and signed on the 12th October 2012 and registered on 11th April, 2013"*.

[26] In his submissions, Mr. Derjacques appearing for the defendant conceded that the plea of prescription is weakened by the interruption of the period of prescription by litigation between the parties and stated that he would not be overly relying on that plea.

[27] I agree with Counsel for the plaintiff (relying on *Simon Emmanuel and Anor v Edison Joubert* Civil Appeal No. 49/1996 [1997] (28 November 1997)), that in respect of the present suit, which seeks to set aside a judgment by consent dated 26th October 2015 which was entered as a judgement of the court on the same date, prescription will start to run from that date. The present suit will only be prescribed on 24th October 2020, and the plaintiff, having filed the matter on 4th February 2020, did so within the prescription period.

[28] In reply Counsel for the respondent explained how the plaintiff's alternative plea of lesion was prescribed. He stated that, although, the plaint in CS59/2014 was filed on 4th July 2014, the deed transferring parcel V7062 from Andrine Pointe to the defendant was registered prior to that on 11th April 2013. The judgment by consent in CS59/2014 was entered and finalised on 26th October 2015. If prescription is calculated from 26th October 2015 to the time of filing of the present suit, the case has been filed seven days within the prescription

period. However, the period of one year and one month between the registration of the transfer deed (11th April 2013) and the filing of CS59/2014 (4th July 2014) has to be taken into account in calculating the prescription period: the period of one year and one month added to four years and seven months amounts to more than the five year prescription period for filing of a case for lesion. If the challenge is based on lesion a plaint still has to be entered within five years, starting on 11th April 2013 when the transfer was registered. There is interruption, which has to be deducted, but still resulting in the present matter having been filed seven months out of time.

[29] I cannot agree with the defendant's arguments in that respect. The plaintiff has pleaded in the alternative that the judgment by consent entered into on 26th October 2015 in CS59/2014 is voidable for lesion in that in the settlement she obtained in the said judgement is less than half. Prescription of a plea of lesion cannot then run from the date of registration of the deed transferring parcel V7062 from Andrine Pointe to the defendant i.e. 11th April 2013. It should start running from the time the lesion occurred, i.e. when the judgement by consent was entered into on 26th October 2015 in CS59/2014 in terms of which the plaintiff agreed to accept the sum of SCR 90,000 to discharge the sum of SCR185,000, which it was seeking in that suit, in satisfaction of the judgment debt which she had obtained in C/S315/2005. This is the time when the cause of action arose.

[30] The plea of prescription therefore fails.

Frivolous, vexatious and "Abus de Droit"

[31] Counsel submits that a claim that an action is frivolous, vexatious and an *abus de droit* is borne out if it can be shown that there was imprudence in the filing of the action, that the court process has not been utilised in a prudent manner but in an oppressive one, and outside the legal principles and procedures.

[32] He states that it is imprudent and oppressive to come again before this Court to make a claim on a matter which it had already decided when plaintiff was properly represented by counsel, namely Mr. Herminie. This is further not in line with the SCCP, the Court of

Appeal Rules as well as the Constitutional right to a fair hearing which includes a right of appeal which was not exercised by the plaintiff.

[33] Counsel for the plaintiff cited the following definition of the term *"vexatious proceeding"* from the case of *Lotus Holding Company Ltd v Seychelles International Business Authority* CS 121/2010 [2010] (30 July 2010): *"... two or more sets of proceedings in the same subject matter which amount to harassment of the Defendant in order to fight the same battle more than once with the attendant multiplication of costs, time and stress"*. She reiterated that the present case and CS59/2014 do not have anything in common in relation to their subject matter, sets of facts or cause of action and that, therefore, the defendant is not being made to fight the same battle all over again. She argued that the present matter is not an abuse of process as it only seeks to set aside a judgment entered into by the plaintiff under duress and has nothing to do with the claim for money in CS59/2014. She further submitted that the plaintiff's intentions are of good faith and that she is only seeking to enforce a right available to her to obtain the relief pleaded in CS13/2020.

[34] The Court has to determine whether in light of the particular facts of this case, the present action is frivolous, vexatious and an *abus de droit.* The first case CS59/2015 was essentially for the setting aside of a transfer deed between Andrine Pointe and the defendant as null and void for fraud and for the recovery by the plaintiff of the sum of SCR 185,000 awarded to her in CS315/2005. The present case seeks to set aside the judgement by consent entered into by the parties wherein the plaintiff accepted the sum of SCR 90,000 in settlement of her claim of the sum of SCR 185,000, which she was claiming in that suit in satisfaction of the judgment debt which she had obtained in C/S315/2005 on the basis that she did so under duress.

[35] In the *Gomme v Maurel* case (supra), the Court of Appeal considered the rules pertaining to *res judicata* and abuse of process in light of their objectives to stop multiplicity of pleadings. The Court stated -

> *"The rationale behind the rule of res judicata and its strict application is grounded on a public policy requirement that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case.*

Because of the imaginative use that has been made to go round the rule, courts have developed the rule of abuse of process. The rule of abuse of process encompasses more situations than the three requirements of res judicata. Courts cannot stay unconcerned where their own processes are abused by 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 brought 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: see Bradford & Bingley Building Society v Seddon Hancock & Ors [1999] 1 WLR 1482, House of Spring Gardens Ltd & Ors v Waite and Others [1990] 2 All ER 990, and In Re Morris [2001] 1 WLR 1338."

[36] The Court then went on to quote Auld LJ in the case of Bradford & Bingley Building Society v Seddon Hancock & Ors [1999] 1 WLR 1482 on the difference between the two rules. He had this to say on *"abuse of process not qualifying as res judicata"*-

"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."

[37] The Court having examined the scope of the rule of abuse of process, went on to define its limits. It stated –

"So much for the scope. Now for the limit. That may be found in what Lord Wilberforce, delivering the opinion of the Board in Brisbane City Council v Attorney-General for Queensland [1979] AC 411 at 425, stated when he confined it 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.*

As Kerr LJ and Sir David Cairns respectively emphasized in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132 at 137 – 139, 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" inasmuch as the purpose was to prevent abuse by not endangering the maintenance of genuine claims.

For a recent application of the doctrine, one may refer to Sir Thomas Bingham MR as he then was, in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 at 260:

> *The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."*

[38] In light of the above pronouncements on the scope and limits of the rule of abuse of process, bearing in mind that the plaintiff claims that she entered into the impugned judgment by consent under duress in that –

a. *she was coerced by the trial judge and her own counsel into accepting a settlement that was less than she had been awarded by the Court*
b. *she was erroneously induced by the trial judge and her own counsel into believing that she would be unable to obtain satisfaction in her action if she pursued it,*

it is my considered view that, the issue of abuse of process should be determined at the close of this case after evidence has been adduced. Even more so because the defendant relies heavily on the fact that the plaintiff was represented by counsel in the proceedings involving the judgment by consent. The Court will, after hearing evidence, be in a better position to assess whether the plaintiff has a genuine claim or her claim is frivolous or vexatious and she is seeking to perpetuate litigation or to harass the defendant.

Signed, dated and delivered at Ile du Port on 15 October 2020.

Carolus.

Carolus J