SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC …
CS 133/2019

In the matter between:

JAMES LESPERANCE **Plaintiff**
(rep. by France Bonte)

and

ALLAIN ERNESTINE **1st Defendant**
(rep. by Alexandra Madeleine)

MARIE ALISE ERNESTINE **2nd Defendant**
(rep. by Alexandra Madeleine)

Neutral Citation:	*Lesperance v Ernestine and Anor* (CS 133/19) [2021] SCSC ……. (……. June 2021).
Before:	Pillay J
Summary:	Plea in limine – Res Judicata
Heard:	
Delivered:	….June 2021

ORDER

The plea in limine is upheld and the Plaint is accordingly dismissed.

RULING

PILLAY J

[1] This ruling follows a plea in limine filed by the Defendants to the effect that:

(1) The plaint does not disclose any reasonable cause of action against the 1st and 2nd Defendants and should be struck out.

(2) The plaint is barred by res judicata.

(3) The plaint constitutes an abuse of process of the court in that the issues giving rise to the said plaint have been fully and finally determined by the Supreme Court in ***CC69/2015 James Lesperance v Allan Ernestine, Marie-Alise Ernestine and Eden Entertainment (Pty) Ltd*** *and the said plaint tries to re-litigate the said case CC69/2015.*

[2] The parties were given time to file submissions however up to today neither side have filed any submissions whatsoever.

[3] In any event I will proceed to consider the plea in limine as raised by the Defendant.

No Cause of Action

[4] The first limb of the Defendants' plea in limine is that "The plaint does not disclose any reasonable cause of action against the 1st and 2nd Defendants and should be struck out".

[5] The court has a discretion to strike out pleadings for failure to disclose a cause of action under section 92 of the Code of Civil Procedure which provides that:

> *"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, or in 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 judgement on such terms as may be just."*

[6] The Court in defining the meaning of 'cause of action' in the case of **Joubert v Philoe & Ors (CS 75/2014) [2016] SCSC 243 (05 April 2016)** relied on the Eastern African case of **Auto Garage v Motokov [1971] EA 514**, wherein at page 519 thereof, Spry P "*summarize[d]the position as [he saw] it by saying that if a Plaint shows that the Plaintiff enjoyed a right that has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed."*

[7] In the case of **Bessin v Attorney-General (1936-1955)** the Court held that a court hearing an application for the dismissal of an action on the basis that it disclosed no cause of action must limit itself to the allegations contained in the pleadings and no extraneous

evidence was admissible to support the application. It went further adding that "where the non-existence of a reasonable cause of action or answer was not beyond doubt ex facie the pleadings, the pleading ought not to be struck out."

[8] This rule was re-iterated in the case of **Gerome v Attorney-General (1970)**, **Albest vs Stravens (No 1) (1976) SLR p 158**, **Oceangate Law Centre vs Monchouguy (1984).**

[9] Essentially the Court has to consider on the face of the pleadings if the Plaintiff has disclosed a cause of action.

[10] At paragraph 1 to 5 the Plaintiff alleges that the Plaintiff and the first Defendant are businessmen and the second Defendant is the wife of the first Defendant. The Plaintiff sets outs the loans he took out and the manner that the loans were secured.

[11] At paragraph 6 of the Plaint, the Plaintiff alleges that there was a contractual relationship between the Plaintiff and the Defendants as follows:

> *The Plaintiff avers that on 10th December 2014 he sold his shares in Eden Entertainment Ltd to the Defendants, (copy of share transfer agreement attached) whereby it was agreed, inter alia, that the Defendants shall pay the Plaintiff the sum of Rs3, 000, 000.00 to be paid as follows:*
>
> . *Rs2, 000, 000 upon signing of the share transfer*
>
> . *Rs1, 000, 000 to be paid within 6 months of the date of signing if the agreement.*
>
> . *the Defendants shall cause all mortgages to be released from the Plaintiff's properties namely Lesperance Complex by the end of February 2015 and the North East Point property by the 30th April 2015 – Refer to Paragraph 4 (iii) and Paragraph 5 of the share agreement.*

[12] At paragraph 9 and 10 the Plaintiff alleges as follows that:

> *9. That todate the Defendants have still not cause all mortgages to be released from the Plaintiff's properties namely Lesperacne Complex and the North East Point properties and further the Defendants are in default of the shares transfer agreement and have failed to repay the loans and*

interest on the loan and the debt has come to the sum of 15 million Seychelles Rupees.

10. The acts of the Defendants amounts to a breach of contract and they are obliged to repay the Plaintiff for the loss of SR15 million such loss having been the direct result of their breach of contract.

[13] As was found in the case of **Parcou v Bentley (250 of 2002) [2004] SCSC 15 (16 May 2004)** "A cause of action arises when the wrong or imagined wrong for which a plaintiff is suing, is one for which the substantive law provides a remedy. If a claim is at all arguable, it should not be struck out as disclosing no reasonable cause of action. Thus, on an application to strike out a plaint, it is assumed in favour of the plaintiff that, if the action were to go to trial, the plaintiff would establish all the facts pleaded."

[14] On that basis whatever may be the failings of the Plaint it cannot be said that the Plaint discloses no cause of action.

Res Judicata

[15] The second limb of the plea in limine is that '*the plaint is barred by res judicata*'.

[16] The plea of *res judicata* provided for in article 1351 of the Civil Code was designed to stop abuses by parties filing continuous matters. It reads:

> *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.*

[17] 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.

[18] It is necessary therefore to look at the identities of the parties in the matter, the nature of the action and the relief sought by the Plaintiff in the current matter and compare them to that of the matter already decided.

[19] The Plaintiff's prayer in the current case is as follows:

> *Wherefore the Plaintiff prays this Honourable Court to find that the Defendants are in breach of the shares transfer agreement that consequent to such breach they have caused the Plaintiff a loss of SR 15 million and consequently the need to pay the Plaintiff the sum of SR 15 million plus damages in the sum of SR5 million with interest and costs plus any other order as the court deems fit (sic).*

[20] The basis for the prayer is that the Plaintiff took a loan from Nouvobanq in the sum of SCR 10, 200, 000.00 or around 29th August 2013 by providing as security a charge against Title B1298 belonging to one of his companies. He took out a further loan of SCR 3, 300, 000.00 which he secured by way of a charge against one of his properties namely Title H6353. On 10th December 2014 he sold his shares in Eden Entertainment Ltd to the Defendants with an agreement that amongst others the Defendants would "cause all mortgages to be released from the Plaintiff's properties namely Lesperance Complex by the end of February 2015 and the North East Point property by the 30th April 2015".

[21] The Plaintiff claims that "todate the Defendants have still not cause all mortgages to be released from the Plaintiff's properties namely Lesperance Complex and the North East Point properties and further the Defendants are in default of the shares transfer agreement and have failed to repay the loans and interest on the loan and the debt has come to the sum of 15 million Seychelles Rupees."

[22] In **CC29/2015 James Lesperance v Allain Ernestine, Marie-Alise Ernestine and Eden Entertainment** the prayer was as follows

> *The Plaintiff prays the Court for an order as follows:*
>
> *i) order specific performance of the said share transfer agreement ordering the 3rd Defendant to comply with all of its obligations thereunder within 14 days of judgment.*
>
> *ii) in the event that the 3rd Defendant is unable or unwilling to perform its legal obligations under the said share transfer agreement, to order the lifting of the corporate veil and to order the 1st and 2nd Defendant to discharge the obligations of the 3rd*

Defendant to the Plaintiff under the said share transfer agreement.

iii) order the 1st, 2nd and 3rd Defendants jointly and severally to pay the Plaintiff damages in the sum of SCR 1, 500, 000.00 together with interest and costs.

[23] In **CC29/2015** the matter was dismissed on failure of the Plaintiff to prove its case. This Court is not aware of any appeals having been filed in the said matter.

[24] On a cursory reading of the prayer in the current matter and the facts on which it is based it is clear that the basis for the current claim is the share transfer agreement signed on 10th December 2014. This same agreement was the basis of the matter in **CC29/2015**. The parties were the same in **CC29/2015** as in the current matter with the exception that in **CC29/2015** there was a third Defendant, the company to which the share transfer agreement related.

[25] On the basis that CC29/2015 and the current matter share identity of parties, subject and cause therefore the matter is res judicata.

Abuse of Process

[26] The third limb of the plea in limine is that the *'plaint constitutes an abuse of process of the court in that the issues giving rise to the said plaint have been fully and finally determined by the Supreme Court in* ***CC69/2015 James Lesperance v Allan Ernestine, Marie-Alise Ernestine and Eden Entertainment (Pty) Ltd*** *and the said plaint tries to re-litigate the said case CC69/2015.'*

[27] The Court of Appeal in the case of **Gomme v Maurel & Anor (SCA 06 of 2010) [2012] SCCA 28 (07 December 2012)** explained the law on abuse of process:

> *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.

[28] Domah JA went on to explore "a recent application of the doctrine, one may refer[ing] 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."*

[29] As simply put by Kerr LJ in ***Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd*****[1982] 2 Lloyd's Rep 132 at page 137**:

> *it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppels on the ground that the parties or their privies are the same.*

[30] With that said it is my view that the Plaintiff's attempt at a second bite at the cherry is an abuse of the process of this Court.

[31] In the circumstances the plea in limine is upheld and the Plaint is accordingly dismissed.

Signed, dated and delivered at Ile du Port on …

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Pillay J