

FranIN THE SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 276

CS 60/2020

In the matter between

SRI VINAYAGA EXPORTS (PTE) LIMITED

represented by its Director

Manichavasagum Jothinathan

(rep. by Mr. S. Rajasundaram)

PLAINTIFF

and

FRANCOURT IMPORTS (PTY) LIMITED

represented by its Director

Serge Francourt.

(rep. by Mr. Charles Lucas)

DEFENDANT

Neutral Citation: *Sri Vinayaga Exports (Pte) Limited vs. Francourt Imports (Pty) Limited (CS60/2020) [2022] SCSC*

Before: Dodin J.

Heard: Written submissions

Delivered: 23 March 2022

RULING

Dodin J

[1] The Plaintiff moved this Court by way of Notice of Motion to amend the Defendant's name in the cause title from Francourt Imports (Pty) Limited to Francourt & Sons (Pty) Limited. The Application is accompanied by an affidavit in support maintaining inter alia that unless the Plaintiff is suitably amended the Plaintiff would be "put to serious prejudice in terms of the maintainability of the suit against the defendant with the correct name".

[2] The Defendant objected to the Application to amend the Plaintiff title maintaining that the Seychelles Code of Civil Procedure makes no provision for substitution of a Defendant in the same suit at any stage during the hearing of a suit.

- [3] In his submission, learned counsel for the Plaintiff argues that there is no material change to the Plaintiff except the name of the Defendant except to replace “Imports” by the word “& Sons”. Learned counsel referred the Court to article 146 of the Seychelles Code of Civil Procedure maintaining that since Mr Serge Francourt is a Director of both companies, Francourt Imports (Pty) Limited and Francourt Imports (Pty) Limited, the suit will not be converted from one character to another substantially different character.
- [4] Learned counsel for the Defendant submitted that the replacement of the Defendant in any cause of action would amount to a completely new cause of action against a third party unrelated to the cause of action that has closed proceedings and in the process of exhaustion of hearing. The law requires every cause of action to be registered before Court in the form of originating action save for actions of joinder of parties to the suit.
- [5] The Plaintiff in this case initiated proceedings against a company Francourt Imports (Pty) Limited represented by its Director Serge Francourt. Pleadings were closed and hearing began on the 15th October 2021. During the course of examination of the Plaintiff’s first witness, intimated that there was no record of the Defendant in their system and that the records being requested were for another company, Francourt & Sons (Pty) Limited. As it became obvious that there had been no transaction between the Plaintiff and the Defendant, learned counsel moved the Court to adjourn proceedings so that the Plaintiff would decide what step had to be taken in respect of the case. Subsequently this Application for amendment was filed.
- [6] Article 146 of the Seychelles Code of Civil Procedure thus in respect of amendment of pleadings:

“146. The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and substantially different character.”

The purpose of the amendment is to determine the real question in controversy between the parties. It does not allow for the substitution of one party by another or to convert a suit of one character into one of substantially different character.

- [7] Since the case of *Salomon v A Salomon & Co Ltd [1897] AC 22* statutory laws and common law have not moved away from the concept that each company is a separate legal entity, that can sue and be sued in its own right, distinct from its owners or shareholders. In the recent case of *Prest v Petrodel Resources Ltd [2013] 2 AC 415 (at 476)* Lord Sumption stated:

“Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholder. In Salomon v A Salomon & Co Ltd [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company.

... The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law.”

The same stands true to companies registered in Seychelles. A company is a separate legal person from its directors, shareholders or another company carrying business under similar but different name.

- [8] It is therefore incorrect for learned counsel for the Plaintiff to argue that changing the name of the Defendant company Francourt Imports (Pty) Limited to Francourt & Sons (Pty) Limited would be of no consequence since Serge Francourt is a director of both companies. The fact is that Francourt Imports (Pty) Limited and Francourt & Sons (Pty) Limited are two different entities for which each must sue and be sued in its own right. The question now is whether the substitution by amendment of the name of the Defendant is permitted by law.

[9] Learned counsel for the Plaintiff referred the Court to the following passages in the case of *Multichoice Africa Ltd v Intelvision Network Ltd & Ors (Civil Appeal SCA 45/2017) [2019] SCCA 1 (09 April 2019)*:

“The two most instructive cases in the domestic jurisprudence relating to amendments to pleadings are the following:

1. *Petit Car Hire v Mandelson [1977] SLR 68, 72-73, in which Sauzier J stated that an amendment to a plaint before the close of one’s case should not be refused (1) if sought in good faith, (2) would not cause prejudice to the other party, (3) would not be compensated by costs and (4) did not alter the nature of the suit. He added that apart from the specific prohibition in the proviso to section 146, the provision was couched in very wide terms and must be given a liberal meaning.*

2. *Fisherman’s Cove Limited v Petit and Dumbleton Limited (1978) SLR 15, 18 in which Sauzier J stated that an amendment sought would be permitted where it was necessary for the real questions in controversy between the parties to be determined once and for all. He permitted an additional cause of action in the alternative.”*

Learned counsel also referred the Court to articles 112 and 114 of the Seychelles Code of Civil Procedure as supporting the amendment to the Plaint so that the correct name of the Defendant be made a party to the proceedings.

[10] In both cases, *Petit Car Hire* and *Fisherman’s Cove Limited*, Sauzier J. is correct and reflects the wider context and spirit of article 146 of the Seychelles Code of Civil Procedure. Secondly articles 112 and 114 although concerned with misjoinder and addition of parties and not the complete substitution of a litigant by another illustrate the wide discretion enjoyed by the Court in respect of amendments to pleading before judgment. At the end of the day what is central and fundamental to the decision of whether to allow an amendment to substitute a litigant or not is the prejudice that such amendment would cause the incoming or departing Defendant and whether the suit would not be converted from one character into a suit of a substantially different character.

[11] Considering all the aspects of this case, I find that the departing Defendant would not be prejudiced, provided it is compensated for its expenses to defend the case levelled against it until the amendment. The incoming Defendant would also not be prejudiced provided it

is granted ample opportunity to attend to the pleadings, prepare its defence and conduct its defence accordingly. I also find that the suit itself remains essentially the same albeit the change of defendant.

[12] Consequently, I find in favour of allowing the amendment for the substitution of the Defendant as prayed and I make the following orders:

1. The amendment to replace the Defendant Francourt Imports (Pty) Limited by Francourt & Sons (Pty) Limited is granted.
2. Costs until today is awarded to the outgoing Defendant and must be paid by the date the incoming Defendant is scheduled to appear.
3. The amended Plaintiff shall be served on the incoming Defendant.
4. Any proceedings held and defended by the outgoing Defendant shall be voided unless otherwise agreed to by the parties.

Signed, dated and delivered at Ile du Port on 23 March 2022.

G. Dodin

Judge