68SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact
[2022] SCSC …
CS68/2021

In the matter of:

SALMAN JASSEM AL DARWISH **Plaintiff**
(Clifford Andre)

and

EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION **Defendant**
(Tamara Christen)

Neutral Citation: Al Darwish v Eden Island Village Management Association (CS68/2021) [2022] SCSC ….. (15 February 2022).
Before: Carolus J
Summary: Plea in Limine Litis – No Cause of Action – Section 92 Seychelles Code of Civil Procedure
Delivered: 15 February 2022

ORDER
The Plea in limine litis is dismissed.

RULING

E. CAROLUS, J

Background

[1] The plaintiff in this case Mr. Al Darwish has filed a plaint against the defendant the Eden Island Village Management Association ("EIVMA") seeking amongst other remedies an interlocutory injunction preventing the defendant from demolishing a structure erected by him. The EIVMA has filed a statement of defence and counterclaim. In its defence it raises a plea in *limine litis* that *"[t]he Plaint discloses no reasonable cause of action and*

is bad in law and ought to be dismissed with costs". The defendant also opposes the counterclaim and has filed a reply thereto.

[2] Counsels for the parties have agreed that the preliminary objection should be dealt with before hearing the matter on the merits and have both made written submission in that regard. It is this preliminary objection which is the subject matter of this Ruling.

[3] The pleadings of the parties provide the necessary background for determination of the issue at hand and as such the contents of the plaint and statement of defence, insofar as relevant, will be briefly set out below. In his plaint Mr. Al Darwish avers that he owns Villa No. 48 on Eden Island since ownership of the property was transferred to him on 25 November 2015. He owns a jet ski and built a corrugated iron shelter to store it in. He avers that the shelter is well established, constitutes no danger and holds the same colour and design to fit the surroundings. On 2 July 2021, Mr. Al Darwish received an email from Mr. De Clarisse, the manager of the defendant, informing him that his request to build a shelter for his jet ski had been rejected by the Aesthetics Committee for aesthetics and safety concerns. Mr. Al Darwish avers that in an email dated 6 July 2021 to Mr. De Clarisse, he requested clarification regarding the safety concerns in order to cure them to the satisfaction of the Aesthetics Committee. However, this was not met with any response and instead Mr. Al Darwish was asked by the EIVMA to remove the jet ski shelter, failing which the EIVMA itself would remove it and bill Mr. Al Darwish for the labour. In terms of the plaint Mr. Al Darwish prays the court for three orders which can be summarised as follows:

(i) An interlocutory injunction preventing the defendant from demolishing his jet ski shelter;
(ii) An order to compel the defendant to provide him with specificities on safety of the jet ski shelter; and
(iii) Any order the court may deem fit.

[4] As stated, the defendant has raised a point of law in its statement of defence, on the basis of which it seeks the dismissal of the plaint with costs. On the merits, in essence, the EIVMA avers that Mr. Al Darwish, by virtue of owning property on Eden Island, agreed

to become a member of the EIVMA and comply with the provisions of its constitution and all rules made pursuant thereto, and that by building his jetski shelter without following the section III building plan approval and procedure and without first seeking the permission of the Aesthetics Committee, Mr. Al Darwish breached the constitution and design guidelines. The EIVMA also avers that the Aesthetics Committee did not approve the application because of aesthetic and safety concerns. In respect safety, the plaintiff was informed that strong winds were considered a concern. As such, EIVMA claims that it acted within its rights to order Mr. Al Darwish to remove the jet ski which was erected without permission as required by the constitution and design guidelines, and further that it acted within its rights under the constitution to inform Mr. Al Darwish that if he failed to remove the jet ski shelter, the EIVMA would remove it at his cost. The EIVMA further avers that Mr. Al Darwish failed to follow the appeals processes available to him and has opted instead to file a suit in the Supreme Court. The EIVMA seeks the following remedies in its statement of defence:

(i) Dismissal of the plaint in its entirety with costs;
(ii) The dismantling of the jet ski shelter at the costs of Mr. Al Darwish; and
(iii) Any other order the court may deem fit.

Plea in Limine Litis – No cause of action

[5] In her submissions, in regards to its claim that the plaint discloses no reasonable cause of action, counsel for EIVMA relies on section 92 of the Seychelles Code of Civil Procedure ("SCCP") and invites the court, on that basis, to exercise its discretionary power under that provision to dismiss the matter.

[6] Counsel interprets section 92 as providing two benchmarks that need to be reached in order for an action to be maintained before the Court, the first being that there needs to be a cause of action and second that such action must be reasonable. She further relies on the judgment of the Mauritius Court of Appeal in *Bessin v Attorney General* (1950) SLR 208 delivered on 12 December 1951, to state that *"a motion that a pleading be struck out is to*

be decided solely on the pleadings" and *"hence no other documents, evidence or other matters are to be taken into account other than the plaint itself*".

[7] Counsel submits that that there are four causes of action that the plaintiff could have raised namely breach of contract, fault, breach of a quasi-contract and a quasi-delict, and that none of these are averred in the plaint, contrary to what is required under section 92. She therefore submits that the plaint does not disclose any legal basis for the action and hence leaves the defendant and the court guessing not only as to what gave rise to the cause of action but also what the cause of action is. She submits that they are *"left to take random guesses as to what the breach is and how the breach arises"*. This, she states, is contrary to the rules of pleadings that the cause of action must be disclosed and the breach particularised, that the plaint is therefore materially defective and bad in law and ought to be struck out. Furthermore without being able to clearly identify a cause of action, the EIMVA is unable to formulate a proper and effective defence.

[8] Counsel relies on the case of *Philip Rath v Robin Richmond* [2017] SCSC 433 as to the meaning of reasonable cause of action namely *"a cause of action with some chance of success when only the allegations in the pleading are considered"*. Further that a plaint which discloses a reasonable cause of action must contain all material facts that must be proved in order for the plaintiff to succeed in its claim. She goes on to state that the plaint in the instant matter is significantly lacking in material facts that ought to have been pleaded and therefore does not disclose a reasonable cause of action; that dismantling a jet ski shed does not amount to a cause of action, let alone a reasonable one; and that for the court to find otherwise would amount to making a case for the plaintiff and deciding on its own whether the claim is a contractual or tortious one which, she submits, the Court cannot do. On that basis she invites the court to strike out the plaint.

[9] The submissions of counsel for the plaintiff are not only brief but also unhelpful. He focuses on the prayers of the plaintiff instead of the material facts averred in the plaint which form the basis of the cause of action, and which would show whether or not there is a reasonable cause of action.

Analysis

[10] The EIVMA relies upon Section 92 of the SCCP to move for dismissal of the present case on the ground that it discloses no reasonable cause of action. Section 92 provides as follows:

> *92.* ***The court <u>may</u> order any pleadings 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 pleadings to be frivolous of vexatious,* ***the court <u>may</u> order the action to be stayed or dismissed, or <u>may</u> give judgment, on such terms as may be just****.* Emphasis added.

[11] A close reading of section 92 reveals that it envisages two scenarios: (1) where a pleading discloses no reasonable cause of action or answer; and (2) where the action or defence is shown by the pleading to be frivolous or vexatious. The wording of the provision suggests that in the former case the pleading may be struck out, but in both cases the court may order the action to be stayed or dismissed or may give judgment on such terms as may be just. The court is given a discretion as to the actions that it may take.

[12] The principles governing the treatment of applications under section 92 are established in our jurisprudence and consistently followed by our courts.

[13] Counsel for EIMVA cites the following at paragraph [8] of *Rath* (supra) in regards to the definition of the term cause of action:

> *The term cause of action comprise, according to English authorities, every fact which is material to be proved to enable a plaintiff to succeed; in other words, every fact which, if traversed, the plaintiff must prove to obtain judgment, so that a plaint which will not aver all material facts, would therefore, not disclose a reasonable cause of action [Cooke v Gill, L.R. 8 C.P. p.116 Buckley v Hann, 5 Exch. 43; Read v Brown, 22 Q.B.D. p.131, C.A.].*

and submits that the plaint in the instant matter is significantly lacking in material facts that ought to have been pleaded and therefore does not disclose a reasonable cause of action.

[14] She rightly submits on the authority of both *Bessin* and *Rath* (supra), that a reasonable cause of action is one which must have some prospect of success which should be obvious on the pleadings to the exclusion of any other extraneous evidence.

[15] In *Rath* (supra) Robinson J at paragraph [7] citing the following from O.18/19/5, Rules of the Supreme Court, Pleadings (Supreme Court Practice 1979 1 Part 1 Orders 1-114, explained what the term "reasonable cause of action" means:

> *… A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1All E.R. 1094, C.A.).*

[16] It was also held in *Bessin* –

> *that a Court hearing such an application [for dismissal of an action on the basis that it discloses no cause of action] must limit itself to the allegations contained in the pleadings and that no extraneous evidence was admissible to support the application.*

[17] In *Bessin* it was further held "that *only in plain and obvious cases should the court resort to the summary process of dismissing an action"*. This was reiterated in Rath at paragraph [7]. In essence this means that the court cannot strike out a claim unless it is plain and obvious that there is no cause of action. In that regard the Court at page 213 cited the following from the English Annual Practice, 1931 at p. 426 on O. 25 r. 4 of the English Rules of the Supreme Court (of which section 92 is a reproduction):

> *'No Reasonable Cause of Action' — "There is some difficulty in affixing a precise meaning to this term. In point of law … every cause of action is a reasonable one (per Chitty, J., Rep. of Peru v. Peruvian Guano C. D. p. 495). But the practice is clear. So long as the statement of claim or the particulars (Davey v Bentinck, 1983, 1Q.B. 185) disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (Moore v. Lawson, 31 Times Rep. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 ALL E.R. 871, C.A. …).*

[18] At page 215, the Court also quoted from *Luxmore L.J. in Arbon v v. Anderson & Ors*., (1942) 1 A. E. R. 7, at p 264, as follows:

> *It is well settled that it is only in plain and obvious cases that recourse should be had to the summary process of dismissing an action under R.S.C. Ord. 25, r. 4 and that an action will not be dismissed under it unless the case is beyond doubt.*

[19] A reading of the plaint clearly reveals that Mr. Al Darwish is a home owner on Eden Island and that he enjoys certain rights by virtue thereof. It is also clear that as a homeowner he is aggrieved by the EIVMA's decision not to allow him to build a shelter for his jetski and to demolish the one he has constructed in breach of those rights. On that basis he has filed the present claim for an equitable remedy restraining the EIVMA from preventing him from demolishing his jetski shelter and ordering the EIVMA to provide him with requirements for the safety and improvement of the shelter. However the plaint fails to articulate all this clearly. The plaint narrates a series of events without clearly stating the rights that Mr. Al Darwish enjoys by virtue of being a home owner, the source of those rights and exactly how EIVMA has infringed those rights. In my view, this shows poor drafting on the part of Mr. Al Darwish's counsel rather than the absence of a cause of action.

[20] Furthermore the EIVMA have given reasons of 'aesthetics' and 'safety' concerns for ordering Mr. Al Darwish to demolish the shelter. Mr. Al Darwish on his part has averred that these are matters that can be remedied and asked guidance regarding the same which was not provided. The EIVMA further claims that Mr. Al Darwish is in breach of its constitution and rules. Mr. Al Darwish on his part claims that he was never provided with the constitution until 6 July 2021 although it seems that the constitution forms part of the transfer agreement.

[21] In the circumstances, I can do no better than reiterate what the Court stated in *Bessin* which I find applicable to the present case, namely that *"[t]he pleadings would perhaps have gained by being expressed with greater clarity … In either case on the face of the [plaint] a cause of action was disclosed, which even if it were not clearly expressed, demanded investigation and discussion …".*

[22] In any event, as in the *Bessin* case, it is my view that in the present matter the non-existence of a reasonable cause of action is not beyond doubt.

Decision

[23] On the basis of the above, it my view that the plaint does disclose a cause of action. Whilst admittedly the plaint is poorly drafted, I find that this does not render it defective so as to warrant it being struck out or dismissed. I therefore find no merit in the plea in *limine litis* that the plaint discloses no cause of action. The matter is to be fixed for hearing on the merits.

Signed, dated and delivered at Ile du Port on 15th February 2022.

E. Carolus J