SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable/ Redact
[2023] SCSC 298
CS 56/2022

In the matter between:

ROLLY MANCIENNE **Plaintiff**
(rep. by Frank Elizabeth)

and

OWEN PAYET **Defendant**
(Pesi Pardiwalla)

Neutral Citation:	*Mancienne v Payet* (CS56/2022)[2023] SCSC ...298... (21 April 2023)
Before:	Carolus J
Summary:	Plaint struck out for not disclosing a cause of action and suit dismissed – Section 92 of the Seychelles Code of Civil Procedure.
Delivered:	21 April 2023

ORDER

The plaint is struck out for not disclosing a cause of action. Accordingly the suit is dismissed.

RULING

CAROLUS J

Background & Pleadings

[1] This ruling arises from a plea in *limine litis* raised by the defendant in his statement of defence.

[2] The plaintiff who is the proprietor of parcel number H7116 leased a portion of that parcel with the building thereon to the defendant for a period of 20 years commencing on 1st March 2011 for a monthly sum of SCR2000.00. The lease is subject to renewal for a further

period of 20 years upon such terms and conditions as determined by the parties. He avers in his plaint that the leased premises is in a prime location next to and facing the sea and within one minute's walking distance to the beach. He claims that the term and conditions of the lease are onerous, grossly unfair and unreasonable to him in that the lease agreement does not contain a termination clause. He further avers that without such a termination clause being inserted or implied in the lease agreement, he (the plaintiff), his heirs and assigns would not be able to terminate the lease under any circumstances and would be burdened by the defendant occupying his property for 40 years. He avers that he is desirous that a termination clause providing a right to both the lessor and the lessee, at any time, to terminate the lease on one months' written notice, for any reason, to be inserted in the said lease agreement so as to bring it in line and consistent with leases of this nature generally. He avers that it is fair, equitable, reasonable and in the interest of justice for the Court to expressly or impliedly impute such a term in the said lease agreement as is common in the trade and industry in Seychelles and elsewhere in the modern world generally. He therefore prays for an Order that such termination clause is impliedly or expressly inserted in the lease agreement, providing a right to both the lessor and the lessee, at any time, to terminate the lease on one months' written notice, for any reason.

[3] The defendant, in his statement of defence filed on 7th September 2022 raised the following pleas in *limine litis*:

> *The Plaint is not maintainable in law and should be dismissed for the following reasons:*
>
> *(i) The Plaint does not disclose a cause of action against the Defendant.*
>
> *(ii) The Plaint is an abuse of the process of the Court in that it seeks from the Court an order to revise a lease agreement, to include terms that have not been agreed upon by the parties. This is not a function of a court under the laws of Seychelles.*

[4] On the merits, the defendant admits the existence of the lease and its terms as stated in the plaint, but states that he has invested substantially in the renovation of the house on the property which was in derelict condition. He also denies that a termination clause has to be expressly or impliedly inserted by the Court in the lease agreement, and states that the relevant provisions of the Civil Code of Seychelles, including its articles relating to the

termination of leases are implied in the lease. He further states that in any event the termination provisions that are sought to be inserted in the lease are inconsistent with clause 4 of the lease agreement and also with customs and practice, and are unfair and unreasonable, given the investments made by the defendant on the leased property and the duration of the lease. On that basis he prays for the dismissal of the plaint.

[5] On 7th September 2022, Mr. Elizabeth counsel for the plaintiff, appeared in Court and stated the following: *"I have received the defense of my learned friend. He has raised two points of law. If he can be given some time to make written submissions on the point of law, I will then reply"*. This was stated even before Mr. Pardiwalla had the opportunity to request that the pleas in *limine litis* be heard prior to the matter on the merits. The Court proceeded to fix dates for written submissions to be filed by the respective counsels.

[6] Mr. Pardiwalla duly filed written submissions on the pleas in *limine litis* on behalf of the defendant on 21st September 2022, as ordered by the Court. On the 5th October 2022, instead of filing written submissions for the plaintiff as ordered, Mr Elisabeth sought more time to do so. He forwarded his written submissions by an email on 17th October 2022. On 19th October 2022, the matter came before the Court and Mr. Elisabeth confirmed that his submissions were essentially that the pleas in *limine litis* should be heard at the hearing on the merits and not prior, on the basis that the Court had to hear evidence in order to make a determination on such pleas in *limine litis*. Since one of the reasons he had given for evidence to be heard before the court could make a determination on the pleas in *limine litis,* was that the Court had to determine whether it was the intention of the parties to have a termination clause in the agreement, it was pointed out to him that the issue of intention had not been raised in the plaint. The matter was adjourned to 16th November and subsequently on 7th December 2022 for Mr. Pardiwalla's views to be sought on the matter as he was being represented by other counsel. Mr. Pardiwalla was of the view that the matter should be dealt with prior to the hearing.

[7] In the meantime, on the 2nd November 2022, Mr. Elizabeth, counsel for the plaintiff filed a motion for amendment of the plaint. The proposed amendments are by the addition of the following paragraphs to the plaint:

7. *The Plaintiff avers that it was the common intention of the parties that such a termination clause be included and inserted into the lease agreement at the time that they entered into the agreement.*

8. *Further the Plaintiff avers that a termination clause is a usual clause in such a contract and when not expressly stated in the contract, such a clause may be implied.*

9. *The Plaintiff avers that such a clause should be implied into the contract as it is common and usual for such a contract to have a termination clause.*

[8] It is obvious that the motion for amendment was filed to counter the plea in *limine litis* filed by the defendant. It was opposed by Mr. Pardiwalla, counsel for the defendant who filed objections thereto, praying for the application to be struck out in its entirety.

Submissions

[9] The submissions of counsels for both parties are set out below. It is to be noted that while Mr Pardiwalla's deal with the points of law raised, Mr Elizabeth's submissions are more or less limited to reasons why these points of law should be dealt with at the hearing of the case on the merits.

Reasonable Cause of Action

[10] Mr Pardiwalla submits that that the plaint does not disclose a reasonable cause of action against the defendant, inasmuch as it does not allege any breach of the lease by the defendant. He argues that the averment that the inclusion of a provision for termination by one month notice would be desirable or reasonable, and the suggestion that this is not acceptable to the defendant does not amount to an allegation of any breach or otherwise constitute an actionable or justiciable cause. It is his contention that in matters of contract, the Court may only be properly seized where the plaint contains an allegation for breach of contract, which the plaint does not in the present case.

[11] For his part, Mr. Elizabeth submitted that the plaint does disclose a cause of action. He states that *"[t]he cause of action disclosed by the ... plaint is the fact that the parties entered into a lease agreement on the 14th February 2011 which does not contain a termination clause. The Plaintiff has averred that the lease agreement is unfair and*

unreasonable thus evoking the equitable jurisdiction of the Court to impute a termination clause in the agreement" (paragraph 10 of plaintiff's submissions).

[12] He submits that *"[a]lthough admittedly, the Plaint does not contain an averment that the Defendant is in breach of the lease agreement, it does raise issues of fairness, reasonableness and equity which merit an investigation by the Court. Therefore ... it is premature for the Court to deal with the point of law at this juncture as the Court will need to hear some evidence to decide whether there is some element of truth in what the plaintiff has pleaded ... [T]he Court is incapable of making a ruling on the point of law without hearing substantive evidence"* (paragraph 17 of plaintiff's submissions).

[13] In support of his position he relied on a number of cases including *Elizabeth v President of the Court of Appeal & Anor* (2 of 2009) [2010] SCCC2 (29 July 2010) which in fact supports the opposite view. In that case the Constitutional Court, in regards to section 92 of the SCCP which empowers the Court to strike out pleadings on the ground that they disclose no reasonable cause of action or answer, stated the following *"[i]n Bessin v Attorney General (1950) SLR 208 a decision of the Court of Appeal of Mauritius, sitting on appeal from a decision of the Supreme Court of Seychelles, it was held that any such enquiry must be limited to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the Court resort to the summary process of dismissing an action."*(Underlining is mine). Since section 92 was adopted from the English Rules of the Supreme Court, Order 25, rule 4, the Court of Appeal in *Frank Elizabeth v The President of the Court of Appeal* also considered English decisions for guidance and stated that the summary procedure to strike out a Statement of Claim under Order 25, rule 4, *"is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the Statement of Claim as it stands is insufficient, even if proved, to entitle the Plaintiff to what he asks*".

[14] It is obvious from these authorities that in applications to strike out pleadings on the basis that they do not disclose a reasonable cause of action, the Court is only required to consider the pleadings themselves and not any extraneous evidence. Moreover the Court is not required "*to decide whether there is some element of truth in what the plaintiff has pleaded*"

at this stage. This is only done after hearing the case on the merits. Mr Elizabeth's argument that this point of law has to be determined at the hearing of the case on the merits because the Court has to hear evidence therefore fails.

[15] Although the defendant has not raised the issue of the plaint being frivolous and vexatious, which incidentally is also dealt with under section 92 of the SCCP which permits striking off of pleadings in such cases, counsel for the plaintiff has also dealt with this issue again relying on the case of *Elizabeth v The President of the Court of Appeal & Anor* (supra). In that regard he submits in relevant part, at paragraph 23 of his submissions, that *"the Plaintiff's claim, as currently pleaded, has a reasonable chance of success against the defendant; as lease agreements in general does contain a termination clause and the Court has to establish the intention of the parties at the time they entered into the lease agreement; if they intended the lease agreement to have a termination clause or none at all."* (Underlining is mine). He goes on to submit that *"[t]he Court has to ascertain whether in all the circumstances of the case, it is reasonable, equitable and just for the Court to intervene to impute a termination clause in the lease agreement or not"* and concludes that *"[t]he matter therefore, does call for evidence to be led for the Court to be able to ascertain what was the intention of the parties at the time they entered into the lease agreement"* (Underlining is mine).

[16] A perusal of the plaint shows that the issue of the intention of the parties was never pleaded. It is not averred anywhere in the plaint that it was the intention of the parties to have a termination clause in the lease agreement at the time they entered into such agreement. It is trite that a Court cannot consider evidence on matters which are not pleaded.

Abuse of process

[17] The defendant has pleaded in *limine litis* that the plaint is an abuse of the process of the Court in that it calls on the Court to introduce new terms in the lease agreement. His counsel submits that the proposed term, notably no-fault termination, is inconsistent with clause 4 of the Lease which contains a warrantee of peaceful enjoyment for the term of the lease as long as the lessee pays the rent and observes the conditions of such lease, as well as Article 1719 (Paragraph 3) of the Civil Code 1975 – now Article 1720 (c) of the Civil Code 2020

– which places an obligation on the owner of leased property to allow the tenant peaceful enjoyment during the period of the lease.

[18] Counsel states that the Court's jurisdiction in contractual relations is to adjudicate disputes arising from an alleged breach of the contract, and that it is neither a proper nor a lawful function of the Court to revise a contract that implements a unilateral wish of one of the parties in a bilateral agreement, and less so to revise it to create inconsistency among its provisions.

[19] He further submits that the remedy sought by the plaintiff amounts to undue judicial interference with the contractual freedom of the lessee to undo the binding effect of the terms of the lease and relies in that regard on Articles 1134 and 1135 of the Civil Code, as well as clause 5(d) of the Lease which stipulates that the lease is legally binding and enforceable against the parties in accordance with its terms.

[20] For these reasons, it is submitted that the plaint should not be entertained by the Court and should be dismissed with costs.

[21] Mr. Elizabeth, for his part, submits that section 92 of the SCCP, although it does not specifically mention abuse of process sets out the law relating to the inherent powers of the Court to prevent its process from being abused. He submits that the basic principle is that the Court will not condone frivolous and vexatious applications.

[22] He cites from a number of cases including *Gomme v Maurel & Anor* (SCA 6 of 2010) [2012] SCCA 28 (07 December 2012) explaining the concept of abuse of process. He also cites the following from Halsbury's laws of England:

> *An abuse of the process of the Court arises where its process is used, not in good faith and for the proper purposes, but as a means of vexation or oppression or for ulterior purposes or, more simply, where the process is misused. In such a case, even if the pleading or indorsement does not offend any of the other specified grounds for striking, the facts may show that it constitutes an abuse of the process of the Court and on this ground the Court may be justified in striking out the whole pleading or indorsement of any offending part of it.*

[23] He however fails to explain how these cases and citations are relevant to the matter in hand and in particular how the action brought by the plaintiff is not an abuse of process.

[24] He concludes by urging the Court to make a finding that the point of law cannot be properly dealt with at this stage because given the nature of the case, the remedy sought and the legal principle upon which the plaintiff seeks the interference of the Court, it is necessary for the Court to hear some substantive evidence first, before it can make its decision. He goes on to submit that to dismiss the plaintiff's case at this juncture would offend the principle of fair hearing and the concept of natural justice, but does not expand further on this latter argument.

[25] In my view Counsel has not sufficiently justified why the Court needs to hear substantive evidence before making a determination as to the plea of abuse of process. Furthermore it is not sufficient for him to make sweeping statements as to breach of the right to fair hearing and natural justice without explaining how dismissing the plaint would cause such breach.

[26] For the reasons given above, I do not find it necessary to hear evidence before making a determination on the pleas in limine litis.

[27] Furthermore given that submissions had been filed in regards to the plea in *limine litis* before the motion for amendment was even filed, this Court will deal with the pleas in *limine litis* first as it is entitled to do in terms of section 90 of the Seychelles Civil Procedure Code. Section 90 permits the Court, either by consent of the parties or on an application of one of the parties to dispose of a point of law raised in the pleadings before the trial. Admittedly there was no application as such made for the matter to be heard prior to the hearing, but there was an agreement to that effect between the parties during the proceedings of 7th September 2022. Mr. Elizabeth subsequently reneged on his agreement but Mr Pardiwalla maintained his position that the points of law should be dealt with prior to the hearing, which the Court acceded to.

Analysis

[28] Mr. Elizabeth for the plaintiff has submitted that the cause of action disclosed by the plaint is the fact that the parties entered into a lease agreement on the 14th February 2011 which does not contain a termination clause. At paragraph 5 of the plaint it is averred that *"the terms and conditions of the lease are onerous, grossly unfair and unreasonable to the Plaintiff, in that there is no termination clause in the lease agreement at all"*.

[29] At paragraph 6 of the plaint it is averred that *"... without ... a termination clause being inserted or implied in the lease agreement, the Plaintiff, his heirs and assigns would not be able to terminate the lease under any circumstances and would be burdened by the Defendant occupying his property for 40 years."*

[30] The lease agreement in the present case provides that the lease shall be for a term of 20 years and is subject to renewal for a further period of 20 years upon such terms and conditions as the parties may determine. The plaintiff seems to be under the impression that the lease agreement will be automatically renewed after the expiry of the initial term of 20 years hence his averment at paragraph 6 of the plaint. I do not think this is the case. The agreement makes provision, after the expiry of the initial term of 20 years, for the possibility to make changes to the terms and conditions thereof, and it is only where such changes are agreed upon by both parties that the agreement can be renewed. This would be for example an increase in the rent payable. If the parties do not agree on such increase then the lease will not be renewed. Hence the lease agreement would terminate at the end of the initial term of 20 years if the parties do not agree on the terms and conditions for its renewal, which would have to be notified to the other party prior to the expiry of the initial term of twenty years. However if the agreement is renewed for a further period of twenty years, according to Article 1737 of the Civil Code, the lease agreement would terminate as of right at the end of that second period of twenty years. Article 1737 provides as follows:

> *1737. If the hire was in writing, it shall be terminated as of right at the end of the term fixed, without the requirement of notice.*

[31] It is therefore incorrect for the plaintiff to state that without a termination clause, he would not be able to terminate the lease for forty years after the parties entered into the lease

agreement. The need for termination only arises in the event that the plaintiff wants to terminate the agreement prior to the expiry of the initial term of twenty years, or if it is renewed, prior to the expiry of the second term of twenty years.

[32] Article 1761 of the Civil Code provides as follows:

> *1761. Unless there is agreement to the contrary, the lessor shall not terminate the lease.*

[33] Article 1134 provides:

> *1134.(1) Contracts lawfully concluded have the force of law for those who have entered into them.*
>
> *(2) Contracts cannot be revoked except by mutual consent or for reasons authorised by legislation.*
>
> *(3) Contracts must be performed in good faith.*

[34] Article 1135 further provides:

> *1135. A contract binds the parties not only in respect of what is expressed in the contract, but also to all the consequences of the contract which are implied by equity (equité), practice, or legislation.*

[35] Article 1160 also provides:

> *1160. Usual clauses are implied in a contract even if they are not expressly stated.*

[36] It would seem from the above provisions that the agreement of the parties is required for the termination of the lease agreement. It cannot be unilaterally terminated by the lessor unless the agreement expressly makes provision to that effect or it is implied in the contract in terms of Articles 1135 and 1160. As stated the lease agreement in question does not contain any termination clause, and it does not seem that the parties have entered into any other agreement to terminate the lease either.

[37] As to whether a termination clause is implied in the lease agreement, the plaintiff has averred at paragraphs 6, 7 and 8 of the plaint that:

6. *The plaintiff avers that without such a termination clause being inserted or implied in the lease agreement, the Plaintiff, his heirs and assigns would not be able to terminate the lease under any circumstances and would be burdened by the Defendant occupying his property for 40 years.*

7. *The Plaintiff is desirous that the following clause be inserted in the said lease agreement in order to bring it in line and consistent with leases of this nature generally:-*
   i) *"The Lessor will have the right, at any time, to terminate this Lease on one months' written notice (the "Termination Notice") to the Lessee for any reason."*
   ii) *The Lessee shall have a corresponding right, at any time, to terminate this Lease on one months' written notice (the "Termination Notice") to the Lessor for any reason."*

8. *The plaintiff avers that it is fair, equitable and in the interest of justice for the court to expressly or impliedly impute such a term in the said lease agreement as is common in the trade or industry in Seychelles and elsewhere in the modern world".* Underlining is mine.

[38] In terms of the remedy, the plaintiff prays for the Court to make an order that the termination clauses as set out at paragraph 7 of the plaint *"are implied or expressly inserted into the said lease agreement between the Plaintiff and the Defendant".*

[39] The plaintiff has not averred that a termination clause is implied in the lease agreement as such, but is rather seeking for the Court to make a declaration that such a termination clause is implied in the agreement. Although the prayers are not expressed in the alternative, it would also seem that if the Court does not find that such term is implied in the lease agreement then the plaintiff seeks for the Court to expressly insert such clause in the lease agreement. In any event, the Court is not being asked at this juncture to determine this issue.

[40] Notwithstanding Articles 1761 and 1134, the Civil Code itself provides for circumstances in which a lease agreement may be terminated by the owner/lessor subject to requirements as to notice to the other party or to a judicial decision to that effect, where applicable. This brings to mind Article 1135 in terms of which the parties to a contract are bound *"to all*

the consequences of the contract which are implied by ... legislation". The relevant provisions are as follows:

> *1722.(1) If during the hire the thing is totally destroyed owing to an inevitable accident, the agreement is terminated as of right.*
>
> *[...]*
>
> *1729. If the tenant uses the thing under hire for some purpose other than the purpose for which it was intended or in a way that may cause loss to the owner, the latter may, according to the circumstances, cause the hire to be cancelled.*
>
> *[...]*
>
> *1737. If the hire was in writing, it shall be terminated as of right at the end of the term fixed, without the requirement of notice.*
>
> *[...]*
>
> *1741. The contract of hire shall be terminated by the loss of the thing under hire and by the failure of the owner and the tenant respectively to fulfil their obligations.*

[41] Other articles of the Civil Code providing for rescission of contracts such as Article 1184 where there is breach of a condition of such contract may also be invoked by a lessor who wants to terminate such contract.

[42] Therefore in addition to termination in the circumstances stated at paragraph [30] above, the lease agreement in the present case can be terminated on the basis of the aforementioned provisions, if the circumstances envisaged in these provisions exist, even if there is no termination clause.

[43] Having set out the circumstances in which the lease agreement in the present case may be terminated by the lessor, I will now turn to the issue of whether the plaint discloses a cause of action. The applicable law is section 92 of the SCCP which provides as follows:

Striking out pleadings

92. 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 judgment, on such terms as may be just.

[44] In the case of *Elizabeth v President of the Court of Appeal* (supra) which was relied upon by counsel for the plaintiff in his submissions, the Constitutional Court, relying on the case of *Auto Garage v Motokov* (No 3) [1971] J EA 514, considered the issue of whether or not a pleading has established a cause of action. It stated that in the Auto Garage case Spry VP had stated at page 519 -

...the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.

[45] The Court pointed out that the decision in the *Auto Garage case* was a decision of the East Africa Court of Appeal, on appeal from Tanzania, considering the Civil Procedure Rules in East Africa, which similarly to section 92 of the Seychelles Code of Civil Procedure has its origins in the English rules of procedure. Consequently it stated that the remarks in Auto Garage are of persuasive value in defining the concept of reasonable cause of action. The Court went on to state that:

In the instant case before us in order for the petition to disclose a cause of action it must show that the petitioner -

(a) enjoyed a constitutional right;
(b) the right had been violated; and
(c) the defendant is liable for the said violation.

A cause of action would not be reasonably disclosed if any of the above mentioned elements are absent or non-existent.

[46] Following the above the Constitutional Court found that:

> *Although the allegation of a right enjoyed by the petitioner is established in the petition, the petitioner has failed to establish in his pleadings that the constitutional right he enjoyed has been violated. ...*
>
> *Even if one is to accept the petitioner's contention that the first respondent erroneously decided to hear a matter based on a letter from one of the parties, this certainly does not translate into a violation of a constitutional right but would be an error in procedure ...*
>
> *It is our view if any party thereto was aggrieved by any such alleged procedural irregularity or decision made in those proceedings, the proper recourse of such a party was to go to the full court to challenge such procedural irregularity or the decision made by a single judge of the Court of Appeal, rather than to allege contravention of a constitutional right to a fair trial.*
>
> *Further the record clearly indicates the President of the Court of Appeal summoned all parties to appear and participate in the proceedings before him. The record indicates that an opportunity was specifically provided to the petitioner to be heard and his response specifically called for by the President of the Court of Appeal in respect of the application made by the Speaker of the National Assembly. Therefore by being summoned to appear and participate in the said proceedings and an opportunity being specifically provided for him to be heard, we are of the view that the applicant's right to a fair hearing was clearly observed on the information he has put to us.*

[47] On the basis of the above, the Constitutional Court held that:

> *For the aforementioned reasons we are satisfied that the petitioner has failed to establish on the pleadings the second element necessary to disclose a cause of action.*

[48] Following the same process as in the *Elizabeth v President of the Court of Appeal* (supra), this Court is unable to find on the face of the pleadings, that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable. I fail to see how the non-insertion of a termination clause in the lease agreement which was entered into by the plaintiff and the defendant on terms agreed upon by them, can constitute a violation of any

right of the plaintiff. More so, in the absence of any circumstance which would have rendered the termination of the contract necessary, and which could not have been dealt with under the other provisions of the civil code. Consequently I cannot make a finding that the plaint discloses a cause of action.

[49] Having found that the plaint does not disclose a cause of action this Court finds no necessity to consider the plea in *limine litis* of abuse of process.

[50] Accordingly the plaint is struck out and the suit dismissed.

Signed, dated and delivered at Ile du Port Victoria on 21st April 2023

Carolus

Carolus J