

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 304

MA223/2022

Arising in CS132/2019

In the matter between:

DORIS MATILE-OTAR

(rep. by Joshua Revera)

APPLICANT

And

GOPINATH BUILDERS (PTY) LTD

(rep. by Karine Dick)

RESPONDENT

Neutral Citation: *Doris Matile-Otar vs Gopinath Builders* [2023] SCSC 304.; MA223/2022

Before: Dodin J

Heard: 27 February 2023 and written Submission

Delivered: 21ST April 2023

RULING

DODIN J.

[1] This is a ruling on an application by the Defendant, Gopinath Builders (Pty) Limited represented by its managing director Karsan Kerai for amendments to its defence and counterclaim. In a supporting affidavit, the deponent avers, inter alia that in the Defendant's Statement of Defence and Counterclaim, his legal representative claimed for the unpaid works done by the Defendant and for the outstanding payment that the Plaintiff owes the Defendant for extra works done, on her instructions. The amounts claimed in the

Counterclaim were incorrectly transcribed and thus both the Statement of Defence and the Counterclaim have to be amended to reflect the true amounts that are in arrears.

- [2] The Defendant avers further that the amendments are sought in good faith and that they will not convert the nature of suit CS 132/2019 into a suit of a different nature. Hence the Defendant is seeking leave of the Court to amend the Statement of Defence and Counterclaim and in accordance with the advice of his lawyer. A draft amended Statement of Defence and Counterclaim including the proposed amendments in red was attached to the application. The Deponent further avers that he had been advised by his lawyer and verily believe that the amendments are necessary in order to allow for the real issues in controversy to be dealt with and be properly disposed of.
- [3] The main thrust of the amendments was the assertion by the Defendant that the Plaintiff owes it the sum of **SCR 669,284.00** for unpaid works **per the agreement between the parties and the sum of SCR 452,935.80** for extra works carried out under her instructions. These works were detailed and **partly** priced in a schedule dated (32 August 2018) addressed to the Plaintiff, and the sum remains outstanding to this day.
- [4] In an affidavit in reply, the Plaintiff objected to the motion and application for amendments. The Deponent avers that she had sought and obtained legal advice on Gopinath's Application and verily believe the same to be true that the application is defective and bad in law; the Affidavit of Karsan Kerai cannot be relied upon in support of the application and that the application should be dismissed with costs.
- [5] She avers that she denied paragraph 3 of Karsan Kerai's affidavit and state that she did not instruct the Defendant to carry out/or agree on any scope and fee of any extra works with the Defendant other than for a retaining wall. The Defendant did not build a retaining wall but a boundary which is now in state of disrepair. The Defendant was partly paid for the agreed cost of retaining wall. All works were carried out from materials paid for by me and which were on the construction site.

- [6] She avers further that she denied paragraph 4 of Karsan Kerai's Affidavit and state that the Statement of Defence and Counterclaim has been filed on 21st November 2019 over 3 years prior to the conclusion of the case and the amendment is being sought after the conclusion of the case and filing of submissions at a very late stage.
- [7] She avers further that she denied paragraph 5 of Karsan Kerai's Affidavit and stated that the amendment is not sought in good faith in that it makes new claims and seeks new prayers and substantially inflates sums claimed after the closure of case.
- [8] She further avers that the amendments are sought at a very late stage after closure of the case and filing of submissions and that she will be seriously prejudiced by the amendments in that it will greatly prolong and delay the settlement of the case and she will be denied the opportunity to amend her defence to the counterclaim, to cross-examine the Defendant on the new sums and claim and make further submissions.
- [9] She avers that she denied paragraph 6 of Karsan Kerai's Affidavit and stated that she objected to the proposed amendment in that it seeks to repair Defendant's case after the closure of the case in circumstances that prejudice cannot be averted without further delaying the conclusion of the case and the amendments are also inconsistent with the evidence.
- [10] She avers further that she denied paragraphs 7 and 8 of Karsan Kerai's Affidavit and stated that she had sought and obtained legal advice and verily believe the same to be true that the proposed amendments are not necessary to allow the real issues in controversy to be dealt with and properly disposed of but is intended solely to repair the Defence case after the closure of the case and is unfair in all circumstances. The said amendments inflate original claims and will deny her the fair opportunity of defending the counterclaim and the said counterclaim is inconsistent with the evidence.
- [11] She therefore moved the Court to dismissed the application for amendments with costs.

- [12] Both learned counsel made additional submissions in support of the respective positions of the litigants.
- [13] Learned counsel for the Respondent/Applicant submitted that such amendments of counterclaim are allowed under SCCP article 146 up to judgment provided the amendments would not cause prejudice. Learned counsel submitted that the correct sum needs to be adjudicated upon. There is no bad faith, only to correct mistakes and would not change the cause of action. There would be no unfair disadvantage and no delay as the case is ripe for judgment. Learned counsel further submitted that the Plaintiff admitted she kept some money but did not say how much. The amendments would give Court a fix sum to determine on under Article 170 of the SCCP.
- [14] As to whether the affidavit of Applicant is defective learned counsel submitted that it is not as paragraph 6 of the affidavit in response is not to be decided in this motion but to be determined in the main case.
- [15] Learned counsel for the Plaintiff submitted in response that whilst the Court has a discretion whether or not to allow any amendment to pleadings before or after the trial an amendment applied for before the close of the case, should not be refused by the court if – (a) it is sought in good faith; (b) it would cause no prejudice to the other party; and (c) it would alter the nature of the suit. Amendments to the pleadings will normally be granted unless there are exceptional reasons why it should not be granted. An amendment will be refused if it is sought in bad faith, alters the nature of the suit, changes the cause of action, or causes prejudice or injustice to the other party that could not be compensated by costs. 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.
- [16] Learned counsel submitted that this Court should not entertain the application because it fails to satisfy the conditions for amendment of pleadings in that it is not sought in good faith and would prejudice the Defendant as made out in paragraphs 6,7,8,9, 10 and 11 of the Affidavit of Doris Matilde. The amendment of statement of defence and counterclaim

is sought at a really late stage of the proceedings and although the court would normally have discretion to allow amendments of pleadings before judgment, in the present case the Court is invited to give due weight to the prejudice that will ensure for the Plaintiff. The amendments are sought to pleadings that have been filed and closed since 2019. The amendments are sought after the main suit, the case of the parties have been closed and submissions filed.

- [17] Learned submitted that the motive behind the amendment is not to correct a clerical mistake or to align the averments of the statement of defence and counterclaim to the rest of the defendant's pleading but to make new claims and set new prayers. Further the amendments seek to correct and/or repair the defence case. Thus the amendment is not sought in good faith.
- [18] Learned counsel further submitted that the amendments sought necessarily require the Plaintiff to recall the Defendant and cross-examine him anew on the new amendments which will incur further delay in completion of this matter which commenced in 2019. Prejudice to the Plaintiff cannot otherwise be averted without causing further delay to the Plaintiff which is unfair in all circumstances and offends the applicable principles in which the Court should exercise its discretion to allow amendment of pleadings.
- [19] Learned counsel further submitted that even if the Court were minded to allow the amendments it is submitted that the Court's discretion is curtailed by the fact that the very motion before the Court is defective and unsupported by the affidavit which is incapable of supporting support the motion. The motion seeks the contrary of what the affidavit seeks. The Affidavit is evidence that should support the motion but falls short of doing so by being defective.
- [20] As agreed by learned counsel for both parties, article 146 of the Seychelles Code of Civil Procedure Act provides for amendment of pleadings as follows:

“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.”

[21] In the Ugandan case of *Okello Wilbert v Obel Ronald MA No: 97/2020 arising in CS No. 157/2017* the Court in reference to *Order 6 Rule 19 of the Civil Procedure Rules* which is similar to article 146 and empowers the Court to grant leave to a party to amend their pleadings at any stage of the proceedings, the Court elaborated thus on how to apply the provision:

“The principles that have been recognized by the courts as governing the exercise of discretion to allow or disallow amendment of pleadings have been summarized in a number of decided cases and they boil down to the following:

- a. Amendments are allowed by the courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.*
- b. An amendment should not work an injustice to the other side. An injury that can be compensated by an award of damages is not treated as an injustice.*
- c. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*
- d. An application that is made malafide should not be granted.*
- e. No amendments should be allowed where it is expressly or impliedly prohibited by any law.*

f. The court shall not exercise its discretion to allow an amendment which has the effect of substituting one distinctive cause of action for another.

In this case, the amendment is sought to amend the counterclaim by changing the values of the sums first pleaded in the counterclaim to reflect the sums the counterclaimant asserts were supported by the evidence adduced. It is obvious that the new sums claimed are much more than were originally pleaded.

- [22] The Seychelles jurisprudence has adopted a liberal application in respect to amendment of pleadings. See the cases of *Petit Car Hire v Mandelson* [1977] SLR 68 and *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* SCA 10/2014 [2016] SCCA 4. Nevertheless, whilst I do not find the affidavit of the counterclaimant to be faulty as claimed by the Plaintiff, I find that the increase in the sum claimed by the amended counterclaim would have the effect of depriving the Plaintiff the opportunity to cross-examine the representative of the Defendant on the increased counterclaim now being advanced by the amendment. There is no indication of bad faith but unless the Plaintiff is granted the opportunity to cross-examine the representative of the Defendant and possibly other witnesses on the quantum being counterclaimed the Defendant/counterclaimant would have an unfair advantage over the Plaintiff as the new sums claimed would not have been tested by cross-examination.
- [23] The remainder of the objections raised by the Plaintiff are matters of evidence to be determined by the Court in determining the case on the merits.
- [24] In final consideration, I find that in order to determine the real issues in contention between the parties, it would be fair to allow the counterclaimant to amend the counterclaim as otherwise the Court would not be able to allow a higher sum not pleaded even if the evidence so prove. On the other side of the coin, it would be unfair for the Plaintiff not to test the new claim made in the proposed amendment to the counterclaim in case the Court were to allow the counterclaim.
- [25] Consequently I decide as follows:

- i. The Applicant is granted leave to amend its pleadings in CS 132 of 2019.
- ii. The Applicant shall file the amended defence and counterclaim within 15 days from the date of this Ruling.
- iii. The Plaintiff shall then be granted sufficient time to file amended defence to the counterclaim as amended and allowed to recall any witnesses for further examination or cross-examination as the Plaintiff shall so require.
- iv. The parties shall then be given the opportunity to revise their final submissions or address the Court further before judgment.
- v. The costs of this application shall follow the outcome of the main suit.

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



C G Dodin

Judge

