

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 444

MA 168/2023

(Arising out of CS 62/2020)

In the matter between:

NATASHA HELDA MICHELLE BONNE
(Represented by Mr William Herminie)

Applicant

and

VANESSA SINON
(Trading as JASE Construction)
(Represented by Ms Karen Dick)

1st Respondent

And

ANNA GONTHIER
(Represented by Mr Ryan Laporte)

2nd Respondent

Neutral Citation: *Bonne vs Sinon & Or* (MA 168/2023) [2023] SCSC 444 (9th June 2023)

Before: Adeline J

Summary: Application by way of Notice of Motion supported by an affidavit to set aside order dismissing the plaint for want of prosecution and to reinstate the same on the cause list.

Heard: Submissions (Oral & Written)

Delivered: 9 June 2023

FINAL ORDER

The plaint is dismissed.

RULING

Adeline, J

[1] This ruling arises from an application, made by way of Notice of Motion supported by an affidavit brought by the Applicant, one Natasha, Hilda, Michelle, Denise of Anse Louis, Mahe, Seychelles (“the Applicant”) (Plaintiff in the main suit) against one Vanessa Sinon, (“the 1st Respondent”) and Anna Gonthier (“the 2nd Respondent”) (Defendants in the main suit) which affidavit is duly sworn by herself. By her application, *inter alia*, the Applicant seeks to set aside the order of this court made on the 22nd February 2023 which dismissed the main suit in CS No: 62/2020 due to her absence (for want of prosecution) as well as counsel representing her in the suit when the same was called upon in open court, and to re-instate the same on the cause list.

[2] The application was opposed by the 1st Respondent by way of an affidavit filed in reply. In the affidavit in reply, the 1st Respondent, *inter alia*, makes the following averments;

“2. That I have been advised by my lawyer and verily believe that the application to reinstate CS 62/2020 on the cause list is bad in law. This raises a plea in limine litis in that the procedure is flawed and the only recourse where a suit has been dismissed is to file the case a new.

3. That I therefore pray this honorable Court to dismiss this application with cost.”

[3] The application was also opposed by the 2nd Respondent who did not file an affidavit in reply but opted to raise a number of preliminary objections to the effects that;

“1. The application ought to be dismissed on the basis that;

(a) The application and its accompanying affidavit are defective in that the Applicant has failed to exhibit documentary evidence in support of the application which is sought to be relied upon, and

(b) The application and its accompanying affidavit are furthermore defective in that the Applicant has failed to state under which provision of the law from which the application emanates from, or

(c) The court having properly dismissed the plaint in accordance with Section 67 of the Civil Procedure Code is non functus officio.

[4] In her affidavit in support of her application, *inter alia*, the Applicant (Plaintiff in the main suit, CS 62/2020) makes the following averments;

“5. That his Lordship R. Govinden CS, subsequently allocated the case CS 62/2020 to his Lordship B. Adeline J to continue with the hearing of the case.

6. That the case was first mentioned on the 15th February 2023 before his Lordship B. Adeline J and the next mention date was fixed for the 22nd February 2023, both counsel and I were absent on that day. I had wrongly entered the mention date for the 28th February 2023, instead of 22nd February 2023.

7. That subsequently my counsel advised me that he also was not in attendance for reasons that he had lost his right of audience before the court and had to spend the whole day that day (22nd February 2023) looking for the receipts to prove that he had long satisfied the judgment of her Ladyship M Twomey CJ as she was then (see the letters of suspension and subsequent re-instatement from the Registrar).

8. That though the letter of suspension was dated on the 15th February 2023, I am advised by counsel that he received the said letter only in the morning of the 22nd February 2023.

9. That I have a constitutional right to a fair hearing and I aver that I have a strong case for breach of contract against the Defendant in CS 62/2020 with a high probability of success.

10. That the dismissal of my case will deprive me of my right to a fair hearing and to my right to a remedy for breach of contract.

11. That I have suffered serious prejudice as a result of the breach of contract by the Defendant in CS 62/2020.

12. That in the interest of justice and fairness, I implore his Lordship B Adeline, to reinstate case CS 62/2020 on the cause list and to hear the case as one of extreme urgency”.

- [5] In his submission, learned counsel for the Applicant, in reply to the opposition and objections to the grant of the application, submitted, that although the jurisprudence in this area of law seems to be against reinstatement, based on the facts and circumstances as averred in the affidavit in support of the application, the court should treat the case as an exceptional one in view of the circumstances, and more so, given that the case has been partly heard.
- [6] Learned counsel also submitted, that on the day the case was called on the 22nd February 2023, he was here at the court’s premises but was unable to appear in court because he had lost his right of audience as is borne out of the Applicant’s affidavit in support of the application. Learned counsel further submitted, that he spent the whole day trying to have his license reinstated, and that it was only reinstated 24 hours after it was suspended, and by then the case had already been dismissed.
- [7] It was the submission of learned counsel that in his view, should the court decline to reinstate the case on the cause list, that would prejudice the Applicant (the Plaintiff in the suit) immensely through no fault of her own as her lawyer was there present but could not perform. According to counsel, he had hoped that the court would have been notified of his suspension, and that could have averted the dismissal of the case. Learned counsel also submitted, that but for the elevation to the Court of Appeal of Andre J (as she then was) the case having been partly heard, would have been concluded given that the Applicant (the Plaintiff in the main suit) had already deposed and was being cross examined. Learned counsel did not back any of his propositions by case law.

- [8] In her submission on behalf of the 1st Respondent, learned counsel stated, that she adopts the written submission of her friend, counsel for the 2nd Respondent as regards to the preliminary objections raised. In addition, learned counsel submitted, that counsel for the Applicant could have sent a friend of his to stand for him but chose not to, and that even the Applicant herself was not present when the case was called. Furthermore, learned counsel submitted, that “it is trite law that the proper procedure when a case has been dismissed that it needs to be filed afresh”. Learned counsel cited the case **Francis Gill and Ors vs Film Ansalt SCA 28 of 2009** as the case law authority for the proposition in point.
- [9] In his written submission on behalf of the 2nd Respondent as regards to the 2nd Respondent’s preliminary objections, learned counsel takes issue with the application and the affidavit in support of the same, arguing that they are defective for the reason that the Applicant has failed to exhibit documentary evidence in support of the application. Learned counsel cited several case law authorities suggesting that affidavits are sworn evidence and that they have to be in compliance with the law of evidence as to its admissibility, notably, **Michel vs Michel (MA 399/2019) 2020 SCSC 303 (9th June 2020)**, in which case the court relied on **Elmastry & Anor v Hua Sun (MA 195/2020) arising in CM 13/2014 [2019] SCSC 96 (8 November 2019)**.
- [10] Learned counsel submitted, that the supporting affidavit to the motion contains averments that are not supported by any documents, and therefore, those averments are not substantiated. Learned counsel cited the case of **Laurette & Ors vs Savy SCA MA 13/2019 [22 October 2019]** stating, that even when one seeks to rely on a judgment of the court, the judgment has to be exhibited with the affidavit, and that the failure to do so indicates a deficiency of evidence as indicated by Robinson J, (as she then was) who had stated that;
- “the judgment had not been exhibited to the affidavit”
- [11] In essence, it is the submission of learned counsel for the 2nd Respondent, that having failed to exhibit the documents which the Applicant seeks to rely on to have the order dismissing the plaint set aside and the same reinstated on the cause list, means, that the Applicant has

tendered no evidence before this court for the court to decide whether the application should succeed or not.

- [12] Learned counsel also argued, that based on case law, court rules have to be followed. He cited the case of **Nyaro v Zading (YL 124 of 2015) [2016 NG CA 10] (28th July 2016)**, in which case, Onalaja JCA had said the following;

“The law, no doubt is that rules of court should be obeyed”.

- [13] Learned counsel proceeded to add, that this was emphasised by the court in **Lablache De Charmoye v Lablache De Charmoye SCA 9 of 2019 SCCA 34 (17 September 2019)** when the court had this to say;

“Rules cannot be overlooked for the sake of expedience or simplicity because rules are to be followed”.

- [14] It is the submission of learned counsel, that the application is also deficient because it doesn't disclose under which provision of the law is this application being made, and that the application itself is bad in law given that it is well settled law that when a plaint is dismissed “the proper procedure in law is to file the case afresh”. Learned counsel cited the case of **Gill & Ors v Film Ansalt (SCA 28 of 2009) [2013] SCCA 11 (03 May 2013)** as the case law authority in support of this proposition.

- [15] I have given due consideration to the Applicant's application to set aside the order of this court dismissing the Plaintiff's plaint on the 22nd February 2023 and to reinstate the same on the cause list. Learned counsel for the Applicant himself has made it clear that he has resigned to the fact that the jurisprudence in this area of law does not favour a positive outcome. That is true, and has been well discussed and argued by learned counsel for the 2nd Respondent citing different case law authorities in support of his various points of contention. I find no good reason to elaborate further or to repeat the law as expounded by the various case law authorities cited. Suffice to say, therefore, that I totally agree that the

affidavit in support of the application is defective because it fails to exhibit the necessary documentary evidence which the Applicant has sought to rely on to justify why this application should be considered as an exception one and therefore succeeds.

- [16] I also take issue with the points raised by learned counsel for the 2nd Respondent that rules of court are there to be obeyed. This proposition is supported by a plethora of case law authorities. As an example, in **Nyaro v Zading (YL 124 of 2015) [2016 NG CA 10] (28th July 2016)** Onalaga JCA had this to say;

“The law, no doubt is that rules of court should be obeyed”.

- [17] Therefore, the averments made in the Applicant’s affidavit in support of her application are therefore simply assertions without proof. “He who asserts must prove”. Proof has to be in accordance with the law of evidence. In **Daniella Lablache De Charmoye vs Patrick Lablache De Charmoye (Civil Appeal SCA MA 08/2019, SCSC, 35 (17 September 2019)**, Twomey CJ (as she then was) had this to say;

“Affidavit are sworn evidence and evidential rules of admission cannot be waived”.

- [18] This proposition was also re-emphasized by the court in **Lablache De Charmoye v Lablache De Charmoye SCA 9 of 2019, SCCS 34 (17 September 2019)** when the court also had this to say;

“Rules cannot be overlooked for the sake of expedience or simplicity because rules are to be followed”.


- [19] The crux of this application is about setting aside an order dismissing a plaint for want of prosecution and to reinstate the same on the cause list. The case of **Gill & Ors v Film, Ansalt SCA 28 of 2009) [2013] SCSA 11 (03 May 2013)** is very instructive in spelling out the law. I recommend that learned counsel for the Applicant reads the case because

based on the principles developed in this case, the present application has not feet to stand on and must therefore fail.

[20] Finally, the point made by learned counsel for the Applicant about fairness has no relevance given that the court cannot invoke equity when the law is very clear. Equally, the argument about right to a fair hearing is out of context and is not worthy of consideration for the purpose of this ruling.

[21] The application is therefore dismissed.

Signed, dated and delivered at Ile du Port 9 June 2023.

The seal of the Supreme Court of Seychelles is circular. It features a central emblem with a bird, possibly a phoenix, rising from a wreath. The text "SUPREME COURT" is written in a circle around the emblem. Below the emblem, the text "SEYCHELLES" is written. At the bottom of the seal, it says "Supreme Court Judge". The name "Brassel Adeline" is written across the top of the seal.

B Adeline, J