SUPREME COURT OF SEYCHELLES

Not Reportable

[2023] SCSC 728
CS87/2021

PARAMESWARAM PILLAY **1ST PLAINTIFF**
(Represented by Mr. Rouillon)

RAJAGOPAL PILLAY **2ND PLAINTIFF**
(Represented by Mr. Rouillon)

SENTHILKUMAR PILLAY **3RD PLAINTIFF**
(Represented by Mr. Rouillon)

G.S PILLAY **4TH PLAINTIFF**
(Represented by Mr. Rouillon)

and

MR. JAYACHADRAN PILLAY **DEFENDANT**
(Represented by)

Neutral Citation: *Pillay and Ors vs Pillay CS87 of 2021 [2023] SCSC 728*
Before: Esparon J
Summary: Plea in limine litis on prescription and that the Counter- claim is bad in law.
Delivered: 20th September 2023

Order

Plea In Limine Litis- that both the plaint and the counter- claim are prescribed by law and that the Counter claim is bad in in law- Court dismissed the *plea In Limine Litis* of the Defendant and that of the Plaintiff.

RULING

D. Esparon, J

Introduction

[1] This is an action by way of plaint whereby the Plaintiffs are claiming from the Defendant the amount owed to them by virtue of a breach of contract plus interest in the sum of Rs10,205,889.

[2] After the Defendant had completed giving his evidence in Court, Counsel for the defendant raised a plea In Limine Litis namely that the Plaintiffs' cause of action cannot be entertained by this Honourable Court as they are prescribed by law.

[3] The Plaintiffs on the other hand raised a plea In Limine Litis namely that the counter-claim is prescribed and bad in law and should be dismissed.

Submissions of Counsels

[4] Counsel for the Defendant submitted to the Court that the cause of action stems from the addendum to the agreement dated the 10th of December 2012 which stipulates that the parties agree to rent the premises for a period of two years to the 12th December 2014.

[5] Counsel for the Defendant further submitted that in the present case, prescription would start from the date that the Plaintiffs were expected to vacate the premises and effect the necessary payment to the Defendant, which is the 12th December 2014.

[6] Counsel for the Defendant relied on Article 2271 of the Civil Code which provides that all rights of action are prescribed by 5 years of which in the present case the prescriptive period of 5 years had extinguished in December 2019.

[7] According to Counsel for the Defendant, the cause of action is one to recover the value of property and not a real action in respect of rights of ownership of land of which the 5 years prescription period applies. Counsel for the Defendant relied on the case of ***Maurel and Ors V Geers and ors (2022) SCSC 460*** in support of her submissions.

[8] Counsel for the Defendant further submitted to the Court that the Plaintiffs in choosing to vacate 5 years later contrary to what was stipulated in the agreement does not mean that the payment time was simultaneously extended of which agreements cannot be

amended unilaterally and that any variation must be agreed between the parties (Vide: ***Boldrini V/s Pillay (1980) SLR***.

[9] According to Counsel for the Defendant, any variation to a written agreement must be in writing. Furthermore a tacit renewal agreement does not vary a written contract in respect of a debt relating to the value of property.

[10] Counsel for the Plaintiffs on the other hand has submitted to the Court that the Plaintiffs agree that the cause of action stems from the agreement dated 10th December 2012 but submitted to the Court that the Plaintiffs disagree that the primary purpose of that agreement was not a lease agreement rather to deal with property since the property was to be dealt with in the agreement with the payment by the Defendant of RS 9,500,000 as the difference between the value of providence property payable on vacating of the premises by the Plaintiff and his entitlement and that the lease agreement was a facility between the parties completely divorced from the settlement.

[11] According to Counsel for the Plaintiffs, vacating the premises seems to be the effective date for the payment to be made and this only happened on the 25th November 2019.

[12] Counsel for the Plaintiffs relied on the case of ***Charlemagne Grancourt ad another V/S Christopher Gill, SCA 7 of 2011,*** of which this case cited Article 1612 of the Civil Code which concerns the right of non- performance (non-adimpleti contractus)

[13] Counsel for the Plaintiffs submitted to the Court that if we are to apply these principles to the present case, it is clear that the Defendant has breached the contract by not paying the last instalment on time. The letters of the 4th May and 5th May indicate that he was given time to meet his obligation. Counsel for the Plaintiffs further submitted that the Plaintiffs view this case as arising purely out of a right of action under Article 1142 of the Civil Code, the obligation to perform and that French jurisprudence has maintained that despite the provisions of Article 1142, there is an inherent right to specific performance corresponding with that contained in Article 1183.

[14] Counsel for the Plaintiffs further submitted to the Court that one is clearly entitled to say that the 2 years written rental agreement did lapse but the parties continued with their arrangement with no claims or applications for a recision of the agreement or

eviction notice. In fact the Defendant continued enjoying the benefit of R40,000/ as rental payment until the Plaintiffs vacated the premises in 2019.

[15] Counsel for the Plaintiffs also submitted that the Defendant/Counter-claimant gave no mise en demeure or any attempt to cancel the parties' agreement which impliedly continued until the Plaintiffs vacated his premises. According to counsel, the two years lease agreement may have lapsed but the usual terms of a lease agreement in that the terms continue even after the written agreement has lapsed. Hence Counsel for the Plaintiffs submitted that prescription for the lease would start from the date that the Plaintiffs were expected to vacate the premises for enforcing the terms of the lease agreement by the course of conduct of the parties until there was the actual vacation of the premises and that the date to effect the lump sum payment would be running from the date that there was the actual vacation of the premises and that the Plaint was filed in October 2021.Therefore the Plaintiffs were well within their rights to make their claim as they did since the prescription started running against them when they vacated the premises.

[16] As regards to the *plea In Limine Litis* of the Plaintiffs namely that the counter- claim is prescribed and bad in law and should be dismissed, Counsel for the Plaintiffs submitted to the Court in support of their plea In Limine Litis raised that there is an evident and gross latches of the Defendant/Counter-claimant in making his claims from an original set of understandings dating back to 2009. He was admittedly in charge of the company when the agreement was drawn up and that he knew where the properties of the company were located, he knew what money and bank accounts the company had and yet to date he has produced nothing to prove any such properties or accounts actually existed, in whose names and where they are in the event they existed.

[17] It is further submitted by counsel for the Plaintiffs that since 2009 the Defendant/Counter-claimant has never sought to crystalise or pursue his claims to further his interests until he was forced to pay his share of the property of which his own valuation has been put above the value of other siblings valuation. His pleadings are vague and relate to allege properties with no details of anything to back up his claim.

[18] Therefore Counsel for the Plaintiffs submitted that the Counter-claim is bad in law for not being specific enough.

[19] On the other hand, counsel for the Defendant/Counter-claimant has submitted to the Court as regards to the Plaintiffs' *plea In Limine Litis* that in the interpretation of Contracts, the predominant consideration is the true intention of the parties and their intention as expressed in the deed, the former must prevail (***Ladouceur V/S Bibi 1975 SLR 27; Ladouceur v Bibi (1979 SCAR 1974); Dogley V/S Renaud (1982) SLR 187; Cook V Lfevre (1982) SLR 416).***

[20] Counsel for the Defendant/Counter- claimant submitted to the Court that the Plaintiffs have failed to address when the prescription would have started to run and under what section or when in fact the time limit had allegedly run out. It is not for the Court to make this calculation as it is trite law that he who asserts must prove and hence counsel for the Defendant/ Counter-claimant prays this Court to dismiss the plea In Limine Litis raised by the Plaintiffs.

The Law

[21] Article 2271 of the Civil Code of Seychelles Act provides that 'All rights of actions shall be subject to the prescription after a period of five years except as provided in articles 2262 and 2265 of this Code'.

[22] It follows that under this Article, the prescriptive period is 5 years except as provided for under Articles 2262 and 2265 of the Civil Code of Seychelles Act of which the said 2 articles apply only to real actions.

Analysis and determination

[23] This Court shall now deal with the *plea* In Limine Litis raised by the Defendant that the Plaintiffs' cause of action cannot be entertained by this Honourable Court as they are prescribed by law. In the case of ***Yves Maurel and Ors V/S Mary Gears and Ors C.S No 30 of 2015***, Esparon J stated the following;

'It should also be noted that there is a distinction between action in respect of rights of ownership of land (droit reel) and action to recover the value of the property (droit personnel/droit de creance). Where the action is for the latter, a prescription of 5 years may apply (***Reddy & Anor v Ramkalawan (CS 97/2013) [2016] SCSC 31 (26 January 2016); Albert v St Jorre (2002) SLR 30; Gayon v Collie (2004-2005) SCAR 67;***

Armand Khany & Others v Leonel Cannie (1983) SLR 65; Nourrice & Ors v Nicette (CS 57/2015) [2016] SCSC 208 (29 March 2016)'.

[24] In the present case, it is clear that the Plaintiffs' claim is based on an action in breach of contract namely to recover the value of the property namely the sum of SR 9,500,000 plus interest amounting to the total sum of 10,205,889 of which the said contract is dated the 10th December 2010. This Court is of the view that since the action of the plaintiffs is an action to recover the value of the property (droit personel/droit de creance) as opposed to an action in respect of rights of ownership of land (droit reel), the action of the Plaintiffs is prescribed by 5 years.

[25] In order to decide whether the action of the Plaintiffs is prescribed by law, this Court has to determine when does the cause of action starts running. The said agreement between the parties is dated the 10th December 2012 of which the Court admitted the said document as exhibit and marked it as exhibit P1 of which the said agreement was an addendum to the arrangement of mutual partition dated 28th August 2009.

[26] Clause 6 of the said agreement stipulates that;

'The first party being the beneficiary of providence property, the value of which is SR 24,500,000 is now liable to pay the other three parties in the sum of SR 9,500,000 (Seychelles rupees Nine Million and Five Hundred only) the difference between the value of providence property and his entitlement'.

[27] Clause 7.a of the said agreement stipulates as follows:

'All the parties herein agree, that in view of the Seybrew distribution business being carried on the Ground Floor at providence property, both parties herein agree to rent the Seybrew distribution premises for a period of two years as from 13th December 2012 to 12th December 2014 for a monthly rent of SR 40,000.00 (Forty thousand only) payable to the first party and same shall be paid on or before 5th day of every month'.

[28] Clause 7.b of the said agreement stipulates as follows;

'Upon vacating the premise by the 2nd party without notice, the first party is entitled to pay the sum of SR 9,500,000 (Seychelles Rupees Nine Million and Five Hundred

Thousand Only) that is referred to in article 6 above, in a period of 3 months from the date of accepting the premises '.

[29] Clause 7.c of the said agreement stipulates as follow;

'Upon vacating the premises by the second party with the prior notice of 3 months period and in the event the 1st party is unable to pay the said sum of SR 9,500,000 upon receiving the possession of the premises, he liable to pay the second party together with interest of existing rates all the commercial banks at that time, for all sums unpaid until it is fully settled. The interest starts running as from the last day of the said three months period'.

[30] The issue which is before the Court is how to interpret these conflicting clauses of the contract in order for the Court to determine when does the cause of action for the Plaintiffs arose in order to make a finding whether the action of the Plaintiffs is prescribed by law.

[31] This Court hereby reproduce Article 1156 of the Civil Code of Seychelles Act;

'In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words. However in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood'.

[32] In the case ***Whoolly Pillay V/S Joe Dingwall (1982) SLR 263***, where the Court had to interpret 2 clauses in an agreement which stipulated that the balance purchase price of the boat was to be made within 13 months and payable by 13 cheques of R 5000 each. F. Wood J stated the following;

'The intention of the parties was for the payment of balance purchase price in 13 monthly instalments. The defendant had acted hastily in repossessing the boat as the agreement made provisions for retaking the boat if the balance purchase price was not made within 13 months and therefore was in breach of the agreement'.

[33] In the case of ***Paul Chow V/S Josselin Bossy SCA 7/2005***, the Court of Appeal held following;

'When interpreting a contract, the 1st step is to determine the common intention of the parties'.

[34] In the case of ***Jeanne Lesperance V Lucine Vidot, SCA NO 25 /O7***, the Court of Appeal held that 'the conduct of the parties after a transfer may be taken to be what the parties intended in a contract of transfer: see Wilmot v. W & C. French (Seychelles)'.

[35] This Court is of the view that since the clauses in the agreement have been badly drafted, this Court has to therefore determine as to what was the common intention of the parties as regards to when the payment of SR 9,500,000 was to be due as regards to the said agreement. It is to be noted that the Defendant never gave notice to the Plaintiffs after the 2 years period had elapsed as per the agreement and neither did he seek any remedy before the Court after this period and simply accepted to receive payment of rent of SR40,000 monthly from the Plaintiffs until the Plaintiffs vacated the property. Likewise the Plaintiffs did not file any action in Court for breach of contract till after they had vacated the property showing by their conduct that the intention of the parties were that payment of the sum of SR 9,500,000 was to become payable upon the Plaintiffs vacating the said property at Providence.

[36] This Court has perused meticulously clause 7.a, 7.b and 7.c of the said agreement as referred to in paragraphs 27, 28 and 29 of this ruling as well as the submissions of counsel for the Plaintiffs and counsel for the Defendant, the above case laws as referred to above and is of the view that it was the common intention of the parties that the said payment of SR 9,500.000 became due and payable upon vacating the said premises at providence by the Plaintiffs. This is further reinforced by the fact that the parties by their conduct as referred to in paragraph 35 of this ruling intended that the payment of the said sum was to become due upon the Plaintiffs vacating the said property at Providence. As such the cause of action would have arisen in this matter from the date the premises at Providence had been vacated by the Plaintiffs.

[37] It is not in dispute that the Plaintiffs only vacated the premises at Providence on the 25th November 2019. Since the Plaint was filed on the 4th of October 2021 of which the cause of action of the Plaintiffs has arisen on the 25th November 2019, the date that the Plaintiffs had vacated the said premises at Providence and as this Court has already

ruled in this matter at paragraph 24 of this ruling that this matter is prescribed by 5 years, this Court finds that this matter is not prescribed by law.

[38] In the case of ***Public utilities Corporation V/S Eliza***, Court of Appeal 20/2009, (2011) SLR, whereby when the case came for continuation on the 23rd November 2007, it was put on the 22nd February 2008. It was on this latter hearing date that the Appellant moved to amend the Defence In Limine to the effect that the action was time-barred in law and could not be maintained against the corporation by virtue of section 18(2) and 18(3) of the Public Corporation Act, (the Act). The Court held that 'an objection based on a limitation period will be waived if it is raised too late in the Court process. Hence the Appellant having invoked a statutory protection long after filing its defence is deemed to have waived the protection which the law affords it'.

[39] In the present matter, the Defendant had raised a plea In Limine Litis based on prescription after the time the Plaintiffs have closed their case and the Defendant had completed giving his testimony in Court of which in any case it was after filing his defence to the Plaint. As a result of the above case law as referred to in paragraph 38 of this ruling, this Court finds that the Defendant is deemed to have waived his objection as to the prescriptive period or limitation period in view that the Defendant has raised it too late during the proceedings and in this case, it was raised after the Plaintiffs had closed their case and the defendant had completed giving his testimony in Court.

[40] For the above reasons, I accordingly dismiss the *plea In Limine Litis* raised by the defendant.

[41] As for the *plea In Limine Litis* raised by the Plaintiffs namely that the Counter-claim is prescribed and bad in law and should be dismissed, this Court notes that counsel for the Plaintiffs in his written submissions has not made any submissions on the applicable law, the period of prescription and the date the cause of action has arisen as rightly stated by counsel for the Defendant in her submissions, hence this Court has to determine the effect of counsel for the Plaintiffs not submitting on such *Plea In Limine Litis* raised.

[42] In the case of ***Vel V/S Knowles SCA 41/1998, 42/1998,*** where the Court held that 'a Court may not formulate a case for a party after listening to the evidence or grant relief not sought in the pleadings'. Further guidance may be sought from a recently decided

case by the Court of Appeal, the case of ***James Lesperance and Allen Ernestine and Ors, SCA 14 /2023***, whereby the record at the Appeal revealed that both parties did not file any written submissions on *plea In Limine Litis*. F. Robinson JA, stated the following;

'Suffice to state that it was not possible for the learned Judge to proceed to determine the *plea In Limine Litis* 'nobody filed submissions' to address the issues raised by the said pleas. It was also irregular in the present case for the learned Judge to deliver a ruling based on her 'own research'. The Appellant was correct to complain that he had not been heard on the matters decided by the trial Court. We find that the learned Judge had failed in her duty to do justice between the parties when she determined the *plea In Limine Litis* in the absence of a hearing'.

[43] Based on the above case laws, since counsel for the Plaintiffs did not make any submissions on the plea of prescription, this Court guards itself that it is not permitted to formulate a case for a party after listening to the evidence in the matter. Furthermore it would be irregular for this Court to deliver a ruling based on its own research on the plea of prescription without hearing submissions on the issue by the party who raised the said plea. Furthermore, this Court holds that failure by Counsel for the Plaintiffs to submit on a *plea In Limine Litis* raised by the Plaintiffs, the Plaintiffs are deemed to have abandoned, waived or withdrawn such *plea In Limine Litis*.

[44] In the case of ***Public Utilities Corporation V/S Eliza***, Court of Appeal 20/2009, (2011) SLR, whereby when the case came for continuation on the 23rd November 2007, it was put on the 22nd February 2008. It was on this latter hearing date that the Appellant moved to amend the defence In Limine to the effect that the action was time-barred in law and could not be maintained against the corporation by virtue of section 18(2) and 18(3) of the Public Corporation Act, (the Act). The Court held that 'an objection based on a limitation period will be waived if it is raised too late in the Court process. Hence the Appellant having invoked a statutory protection long after filing its defence is deemed to have waived the protection which the law affords it'.

[45] In the present matter, the Plaintiffs have raised a plea In Limine Litis based on prescription after the time that the Plaintiffs had closed their case and the Defendant had completed giving his testimony in Court of which it was long after the filing of his

defence to the Counter-claim. As a result of the above case law as referred to in paragraph 44 of this ruling, this Court finds that the Plaintiffs are deemed to have waived their objection as to the prescriptive period or limitation period in view that the Plaintiffs have raised it too late during the proceedings and in this case it was raised after the Plaintiffs had closed their case and the Defendant had completed giving his testimony in Court and in any case is was long after filing their defence to the counter-claim.

[46] For the above reasons, I accordingly dismiss the *plea In Limine Litis* raised by the Plaintiffs as regards to prescription.

[47] As regards to the *plea In Limine Litis* raised by the Plaintiffs that the Counter-claim is bad in law since his pleadings are vague and relate to allege properties with no details of anything to back up his claim. This Court takes note that the Plaintiffs have neither raised such a point of law as to the pleadings being bad in law either in their defence to the Counter-claim or raised the objection before the close of their case. This Court is of the view that the acts of the Plaintiffs in raising such plea at such a late stage in the proceedings without putting the Defendant on its guard is tantamount to ambushing the Defendant and hence is highly improper and should not be condoned by this Court. However this Court has perused the averments in the Counter-claim and is of the view that such is not bad in law for being vague as this Court holds that material facts and particulars have been pleaded in the said Counter-claim.

[48] For the above reasons, I accordingly dismiss the *plea In Limine Litis* of the Plaintiffs that the Counter-claim is bad in law.

Signed, dated and delivered at Ile du Port on the 20th September 2023

D. Esparon, J

DAVID ESPARON
SUPREME COURT
SEYCHELLES
SUPREME COURT JUDGE