

SUPREME COURT OF SEYCHELLES

Reportable

[2023]

MA 182/2023

Arising in CS 122/22

In the matter between:

SUNSHINE PROPERTIES (PTY) LTD

(rep. by Frank Elizabeth)

Applicant

and

AMADOU DINA

(rep. by Kieran Shah)

Respondent

Neutral Citation: Sunshine Properties (Pty) Ltd v Amadou Dina (MA 182/22023 arising in CS 122/2022) [2023] (..... November 2023).

Before: Pillay J

Summary: Security for costs and damages

Heard: 13th October 2023

Delivered: 14th November 2023

ORDER

The Application is denied

RULING

PILLAY J:

[1] It is not disputed that the Applicant is a company registered in Seychelles and carrying on business as a property developer, rental, leasing and selling of properties. Nor is it disputed that the Respondent was a tenant of the Plaintiff. The Applicant by way of a Plaint dated 21st October 2022 sues the Respondent for breach of a lease agreement seeking SCR512, 945.00 in damages.

- [2] The Respondent accepts that on 22nd May 2020 the parties entered onto a lease agreement whereby the Applicant agreed to lease and the Respondent agreed to rent a house at Anse Aux Pins for the sum of SCR 30, 000.00 per month.
- [3] The Respondent accepts that the lease agreement contained inter alia the following terms:
- (i) *that the lease shall commence on the 22nd May 2020 and will expire on the 22nd May 2022.*
 - (ii) *that the tenant shall pay rent in the sum of SCR 30, 000 per month.*
 - (iii) *that the tenant shall pay a security deposit in the sum of SCR 60, 000.00*
 - (iv) *that the tenant shall keep the house in good tenantable condition throughout and shall return the house to the Plaintiff at the end of the leased period in the same condition that it was given to the Defendant at the commencement of the lease period.*
 - (v) *that in the event that either party wants to terminate the lease agreement, the party wishing to terminate shall give two months' notice to the other party.*
- [4] However, the Respondent disputes the remainder of the Applicant's claims, including the claim for SCR 512, 945.00, and counterclaims the sum of SCR 357, 666.00.
- [5] The Applicant has filed a Motion for Security for Costs and Damages supported by an Affidavit sworn by Nabil Elmasry acting in his capacity as a director of the Applicant.
- [6] The deponent avers that the Respondent is a foreigner and has no known assets in Seychelles. He further avers that the Respondent is employed by Airtel and his contract of employment is coming to an end and he is about to leave the Republic permanently.
- [7] In answer the Respondent states that there is no legal basis to order the Defendant to pay security for costs and deposit the sum being claimed against it before being allowed to continue to defend the suit. The Respondent states that the Defendant is solvent and is employed by Airtel, an International Company of repute, in the capacity as CEO and will be based in any country where Airtel does business. In such capacity the Respondent states that he has a reputation to maintain.

[8] Learned counsel for the Applicant couches his Application pursuant to the amended section 219 of the Seychelles Code of Civil Procedure. He submits that in view that it is undisputed that the Respondent is not resident, the Applicant only needs to show good reason. He questions the ability of the Applicant to realise the fruits of a judgment if the Respondent is non-resident without any assets in Seychelles. He submits that the Court has to take a cursory look at the Plaintiff and consider if it is likely to succeed or whether its frivolous and vexatious. He submits that if the Application is dismissed the case is futile.

[9] Learned counsel for the Respondent submits that the Respondent is claiming SCR 392, 000.00 less a partial refund which brings the total claimed to SCR 357, 366.00. The Applicant claims SCR 512, 945.00 under paragraph 5 of the Plaintiff. The Respondent disputes the claims which in the breakdown at paragraph 5.1 comes nowhere close of SCR 512, 945.00. It is Learned counsel's submission that the Respondent is still a CEO within the same company just not in Seychelles. He further submits that in the event that there is a judgment against the Respondent same can be enforced in another country. By his calculation the sum claimed by the Applicant comes to SCR 254, 000.00 which is less than the amount claimed by the Applicant. He submits that the Application should not be granted.

[10] Following the amendment of the Civil Code in 2022 security for costs and damages is provided for by virtue of section 219 of the Seychelles Code of Civil Procedure as amended by the Civil Code of Seychelles (Consequence of Enactment) Act, 2021.

[11] Sub-section 2 of section 219 of the Seychelles Code of Civil Procedure reads as follows:

When one party to a civil action is a non-resident, the Court may, at the request of the other party, and for good reason, make an order requiring the non-resident party to give security for costs and for any damages that may be awarded against that party.

[12] The newly enacted subsection 2 of section 219 of the Seychelles Code of Civil Procedure is a repeat of the old Article 16 of the Civil Code which provided then as follows:

When one of the parties to a civil action is a non-resident, the Court may, at the request of the other party, and for good reason, make an order requiring such a

non-resident to give security for costs and for any damages which may be awarded against him.

[13] Section 219 (1) provides thus:

The Court may, on the application of the defendant, require the plaintiff to give security for costs in all cases in which under the Civil Code such security may be required and also when the plaintiff is known to be insolvent.

[14] In the case of ***Leonard Gill v Christopher Gill & Anor (MA 140 of 2022) [2023] SCSC 63 (27 January 2023)*** the Court followed the decision in ***Sidney King-Fuk v Takaland Company Limited & Ors MA11 of 2009*** where it was held that;

“Article 6 of the Seychelles Civil Code has two tenets: the first tenet of non-residency was addressed above and the second tenet is the requirement of “good reason” being shown by the party requesting for the order for security for costs and damages. This court ruled further on that point that, “for the purpose of the sought Order, to my mind it shall encompass insufficient assets in Seychelles to meet the Order for costs and damages” to fulfil the requirement of good reason. It is to be considered that the Plaintiff’s assertion that he has assets in Seychelles that made an adverse judgment against him enforceable as “unsubstantiated”. As such it was held that “in the absence of uncontroverted evidence to the contrary, the Defendant’s / Applicant’s averment and claim that the Plaintiff / Respondent is not known to have assets in Seychelles valuable enough to satisfy a judgment against him plausible, reasonable and uncontroverted.”

[15] The above jurisprudence is still applicable in my view as section 219 (1) and (2) of the Seychelles Code of Civil Procedure has similar requirements of non-residency and good reason. It also remains within the discretion of the Court whether to grant such an Application.

[16] In ***Barton & Anor v Lafontaine SLR [1986] 84*** the Court held that in exercising its discretion proper consideration should be given to the following;

- i. *The Plaintiff’s claim is ‘bona fide’ and not a sham;*
- ii. *The admissions or denial on the pleadings or elsewhere that the money is due;*
- iii. *There is reasonable good prospect of success or collapse of the case;*

- iv. *Whether or not the application for security for cost is being used oppressively so as to stifle a genuine claim;*
- v. *The sum claimed as security is reasonable and not prohibitive;*
- vi. *It is no longer a rigid rule that a plaintiff resident abroad should provide security for cost; and*
- vii. *Security will not be required from a person residing out of jurisdiction; if he has sufficient property within it.*

[17] With the above in mind, in the instant case it is accepted that the Respondent is not resident in Seychelles. Further the Respondent does not dispute the assertion that he has no assets in Seychelles.

[18] The Applicant seeks security for costs and damages in the sum of SCR 512, 945.00. There is no estimate of the costs. The sum sought as security is the total sum claimed in the Plaint as damages. However, by my calculation, the total sum of the claim from paragraph 5 of the Amended Plaint is SCR 281, 445.00 and not SCR 512, 945.00. The Respondent has admitted that he was a tenant of the Applicant and further has admitted the conditions of the lease. The Respondent counter claims for the recovery of the sum of SCR 392, 000.00 less the sum of SCR 34, 334 which has been refunded. The Applicant does not dispute that the Respondent was refunded for “an overpayment”. Having considered all the circumstances of the case, including the principles in *Barton* the Applicant has not shown that this is a proper case in which the Court should exercise its discretion to make an order for security for costs and damages.

[19] In the circumstances the Application is denied.

Signed, dated and delivered at Ile du Port on ...14/11 November 2023



Pillay J