SUPREME COURT OF SEYCHELLES

Reportable
MA 162/2024
(Arising in CS 102/ 2022)

In the matter between:

ROGER VER **Applicant**
(rep. by Frank Elizabeth)

and

SMART VEGA HOLDING LTD **Respondent**
(rep. by Audrick Govinden)

Neutral Citation:	Roger Ver v *Smart Vega Holdings Ltd (MA162/2024(arising inCS102/2022))*
Before:	Esparon J
Summary:	Application for leave to admit fresh evidence- Plea of res judicata and abuse of process of Court
Heard:	28th June 2024
Delivered:	18th July 2024

ORDER

The plea of res judicata is dismissed

The plea of abuse of process of Court is upheld.

Application is dismissed with cost

RULING

ESPARON J

Introduction

[1] The Applicant Mr Roger Ver is seeking an Order from this Court that the Applicant be granted leave to file additional documents, namely an email from Jihan Wu, showing that

the Respondent, Smart Vega Holding Limited is holding substantial funds for and on behalf on the Applicant.

[2] On the 24th June 2024. a point of law was raised by the Court, in the presence of both parties for the parties to address the Court as to the effect of the non-production of these emails as exhibit by the Court of which the Respondent was relying on these emails since they had made averments in their Affidavit in reply to the Application. Counsel for the Respondent immediately moved the Court viva-voce seeking an order from the Court to grant leave to the Respondent to allow the Respondent to produce the said emails since according to Counsel it had not been produced due to an inadvertence since the emails had been produced in another case. The said application was disallowed by the Court.

Plea in Limine Litis

[3] The Respondent in the matter filed his response to the Application by raising the following Plea in Limine Litis;

1. The Application has already been determined and disposed of by Court order dated 24th June 2024 by this Honourable court. To institute proceedings concerning the same cause of action regarding the same subject matter between the same parties before this Honourable Court after having been already sought redress before this Court and of which an order was made amounts to Res Judicata and an abuse of process of Court.

Submissions of Counsels

[4] As regards to the issue of Res Judicata, Counsel the Respondent relied on Article 1351 of the Civil Code and cited the case of Pragassen v Vidot which according to counsel held that for a plea of res judicata to be upheld there must be three-fold identity namely that it is the same subject matter, it is the same cause and that it is between the same parties. According to counsel what is being demanded or claimed has already received deliberation and adjudication and it is between the same parties and being of the same cause of action and that it has already reached finality.

[5] As regards to the issue of abuse of process of Court, counsel for the Respondent submitted to the Court that because the procedure here is being used in a manner where the Court has made an order by stating that it would not allow the Applicant in this case to adduce fresh evidence and that a ruling would be given in the main application and now in the final hour the Applicant refiles again something which has already been concluded by the court and thus stopping the Court to make a ruling on the main Application.

[6] On the other hand, Counsel for the Applicant submitted to the Court that there is no Res Judicata in this matter since Res Judicata and abuse of process are separate legal concepts of which if one is successful it does not mean that the other will be successful and cited the case of Commercial Housed One Seychelles v Eden Island Development Company SCA 29 of 2023. He further submitted to the Court that as regards to the principle of Res Judicata, there must be a finality of judgment also and that in the present matter there is no finality of judgment since the Court has not given a judgment on the merits of the main case yet and that he has not brought the same case again and that this does not prevent the parties from bringing the same motion again since there is no finality.

[7] Counsel for the Applicant further invited the Court to use its inherent jurisdiction in order to re-open such a matter and cited the case of Vijay Construction (PTY) Limited v Eastern European Engineering MA 24 of 2020 SCCA 5 2022. Counsel for the Applicant also urged the Court not to look at this Application in isolation with the main case and to look at the pleadings of the parties.

Analysis and determination

[8] As regards to the issue of Res Judicata this court hereby reproduces Article 1351 (1) of the Civil Code of Seychelles Act which reads as follows;

> 'The Authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject-matter; that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities.'

[9] The case of Nourice V Assary (1991) SLR 80, Attorney general V Mazorchi SCA 8/1996 LC312 laid down the four pre-requisites for a successful plea of Res Judicata-

a) The subject matter should be the same;

b) The cause of action should be the same;

c) The parties should be the same;

d) The previous Judgment should be a final judgment of a Court of competent jurisdiction.

[10] This Court is of the view that by reading the opening words of Article 1351(1) of the Civil Code of Seychelles Act namely 'the Authority of the final judgment' implies that there should be a final judgment for the principle of Res Judicata to be applicable as it was also held in the case of Nourice (Supra) above. Hence I am in agreement with the submission of learned counsel for the Applicant that for the principle of Res Judicata to be applicable, there must be a finality of judgment also and that in the present matter there is no finality of judgment since the Court has not given a Judgment on the merits on the main case. Hence I find that the plea of Res Judicata is not applicable in the present matter and as a result I accordingly dismiss the plea of Res Judicata.

[11] As regards to the issue of abuse of process of Court, this Court shall consider case laws both locally and in other jurisdictions. In the case of Gomme v Maurel Court of Appeal 6/ 2010, the Court relied on the case of Bradford and Bingley Building society v Sedon Handcock and Org (1999) 1 WLR 1482 where the Court held;

> *'The rule of abuse of process encompasses more situations than the three requirements of Res- Judicata. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time to decide enough is enough, where lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the Court that advisors are indulging in various strategies to perpetuate litigation either at the expense of their clients*

who may be hardly aware or at the instance of their clients who have some ulterior motive such as harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial processes.'

[12] In the case of Bradford and Bingley Building Society (supra) Auld LJ Stated the following;

'In my judgment, it is important to distinguish clearly between Res Judicata and abuse of process not qualifying as Res Judicata, a distinction delayed by the blurring of the two in the Courts 'subsequent application of the dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also save in 'special cases 'or special circumstances see Thoday v Thoday (1964 P. 181 197-198 per Diplock LJ and Arnold v National Westminster Bank PLC (1991) 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not to be unjustly hounded given the earlier history of the matter.'

[13] In the case of Gomme v Maurel (supra) Domah JA stated the following;

'Abuse of process is not a new discovery under the rule of law and the Court's control of cases coming to Court. The source of the doctrine of abuse of process' may be traced to a 1947 decision of Somervell LJ in Greenhalgh v Mallard (1947) 2 All ER 255 at 257. The scope may be found in the following pronouncement of the Court that abuse of process is:

...not confined to the issues which the Court is actually asked to decide, but ...covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.'

[14] The Court in the Case of Gomme (supra) stated the following;

'So much for the scope. Now for the limit that may be found in what Lord Wilberforce delivering the opinion of the Board of Brisbane City Council v Attorney

General for Queensland (1979) AC 411 at 425, stated when he confined it to its 'true basis' the prohibition against re-litigation on decided issues. Abused of process-

.... ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

[15] The Court held in the above-mentioned case the following;

'To come back to the present Appeal, we have gone through the record of the history of the dispute which started 11 years ago. The decision of the Chief Justice cannot be impugned when he found that the Appellant was engaged in re- litigation. The case of Bradford and Bingley Building society (supra) is pretty clear on this point that even parties who were not originally in the case may be caught by the doctrine of abuse of process if seek a re-litigation of a case which has already decided upon'.

[16] In the case of Ascent Projects (Sey) Ltd v Evelyn Fonseka and Ors CS 19/2017 whereby in this matter a Plea in Limine Litis was raised that the plaint is an abuse of process of Court since identical plaints between the same parties raising the same cause of action were dismissed by this Honourable Court in CC 01/2013 and CC 27/2014. The Court in this case relied on the case of Board of Brisbane Council v Attorney general for Queens land (1979) AC. 411, 425, the case of DPP v Humphrys (1970) A.C 1 at 46 and the case of Hui Ming VR (1992) 1 A.C 34, Judge S Govinden as she was then stated the following;

'Now in the case, this Court based on the above analysis of the facts in line with the rule of abuse of process and its irrelevant criteria as set out by case law both in the jurisdiction and other relevant jurisdictions. I find that the Plea in Limine Litis as raised, has no reasonable basis, for there is no evidence ex-facie the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the defendants of a protection provided by law or to take advantage of a

technicality and or that the defendants will be prejudiced in the preparation or conduct of their defence'.

[17] It is clear from the above case laws that the rule of abuse of process encompasses more situations than the three requirements of Res - Judicata. From the facts of the case it is clear that Applicant is engaging into re-litigation on a decided issue since the Applicant had move the Court by way of a viva-voce application and the court had ruled on the same issue of which the Applicant filed a written Application on the same issue and seeking for the same remedy. This Court is of the view that ex-facie the pleadings in the Application, I find that the Applicant is misusing the process of the Court so as to deprive the defendants of a protection provided by law and that the defendants will be prejudiced in the preparation or conduct of their defence in the event this Application is allowed (vide: Ascent Projects (Sey) Ltd V/S Evelyn Fonseka and Ors, CS 19/2017).

[18] Furthermore, since this Court has already ruled on the same issue, this Court finds that it is functus officio and in fact to allow such an application would be in fact asking this court to sit on Appeal on its own decision which is highly improper.

[19] Counsel for the Applicant, submitted to the Court that the Supreme Court has inherent jurisdiction to hear such an application of which the Application had already been ruled upon on a viva-voce application and cited the case of Vijay v EEEL MA 24 of 2020 arising out of SCA 28 of 2020 in which an application was made for the court to set aside its own judgment and to rehear an appeal to which it agreed.

[20] In the case of Vijay (supra) it was concluded that the Court of Appeal had the authority to reopen its judgment and rehear it. It was determined that this authority emanated from its inherent, implied, implicit or residual jurisdiction or inherent, implied, implicit or residual power. But that to determine whether or not the criteria for setting aside a judgment, it was fundamental that the Court of Appeal considers when should it reopen its decision.

[21] The Court of appeal referred to Taylor v Lawrence which questioned the inherent jurisdiction of the court to reopen an appeal. It was concluded that to resort to the jurisdiction, the Court had to be satisfied that significant injustice had probably occurred

and that there was no alternative effective remedy. The criteria for setting aside of the judgment had been met.

[22] This Court distinguishes the case of Vijay from the present case since the case of Vijay (supra) was one of reopening of an appeal once it has been finally determined by a Judgment. There was no alternative effective remedy but to set aside its Judgment. In the present Application there is an alternative remedy for the Applicant which is an Appeal and that this Court is not satisfied that an injustice has occurred to the Applicant since the Applicant was allowed to submit on the issue as to whether the averments in the Affidavit was unsupported by documents and the effect of such of which the Applicant decided to make a viva-voce motion which this Court had already ruled upon and thereafter filed a written application on the same issue.

[23] In the case of Mickael Dydray George Esparon v Electoral Commission Seychelles and the Attorney General (MA 29/2022) (arising in CP 3/2021), the Constitutional Court held that 'where a point of law is raised in a suit, be it preliminary objections or plea in limine litis, however it may be termed, for the Court to allow a party to simply rectify the issue, thereby negating the objection raised by the other side, would be contrary to the principles of fairness and justice'.

[24] In the same way, I find that to allow the Respondent in the main case being the Applicant in this Application to simply rectify the issue, thereby negating the point of law raised by the Court, would be contrary to the principles of fairness and justice and would cause prejudice to the Applicant in the main Application since both the Applicant and the Respondent had the opportunity to address this Court on the issue but the Applicant being the Respondent chose to move the Court by way of a viva –voce motion in a bid to rectify the issue raised by the Court.

[25] As a result of the above, this Court finds that by filing a fresh application on an issue of which the Court had already ruled upon, this is an abused of process of Court of which I accordingly dismiss this Application with cost.

Signed, dated and delivered at Ile du Port on the 18th July 2024.

Esparon J