

IN THE SUPREME COURT OF SEYCHELLES

**Civil Side No: MA 108 of 2014
Arising out of Cs No. 05 of 2017**

[2017] SCSC 1006

H SAVY INSURANCE COMPANY LIMITED

Plaintiff

v/s

RICCHI SAVY

First Defendant

ALLIED AGENCIES LIMITED

Second Defendant

STATE ASSURANCE COMPANY LIMITED

Third Defendant

Heard: 27th day of July 2017

Counsel: Mrs. Burian and Mr. Ally representing the Plaintiff
Mr. Elizabeth representing the First Defendant
Mr. Lucas representing the Second Defendant
Mr. Shah representing the Third Defendant

Delivered: 31st day of October 2017

**RULING ON MOTION OF THE PLAINTIFF FOR LEAVE TO AMEND THE PLAINT
AND SUBSTITUTE PLAINTIFF**

Govinden-J

- [1]. This is an Application started by way of Notice of Motion on the 16th day of January 2017 arising out of Civil Side No. 05 of 2017 by H. Savy Insurance Limited (hereinafter referred to as the “Plaintiff”), to amend its original Plaintiff filed on the 29th day of October 2014 (hereinafter referred to as the “Application to Amend”). In its Application to Amend, Plaintiff seeks to substitute H Savy Insurance Company Limited, the current Plaintiff, with Berjaya Beau Vallon Bay Beach Resort Limited (hereinafter referred to as “Berjaya”) in its suit against Ricci Savy (hereinafter referred to as the “First Defendant”), Allied Agencies Limited (hereinafter referred to as the “Second Defendant” and State Assurance Company Limited (hereinafter referred to as the “Third Defendant”) collectively (hereinafter referred to as “Defendants”). In addition to all Defendants objecting to the Application to Amend, the Second Defendant filed an objection in the form of an affidavit on the 24th day of May 2017 and the Third Defendant filed an objection on the 21st day of June 2017.
- [2]. The relevant factual and procedural background to this Application is in essence as follows.
- [3]. On 29 October 2014, Plaintiff, a company incorporated in the Seychelles carrying on business as an insurer or insurance broker, filed its original Plaintiff. Plaintiff’s original Plaintiff contended that First and Second Defendants were jointly and severally liable for the loss and damages resulting from a vehicle collision on the 26th day of August 2010 between First Defendant, an alleged employee of Second Defendant, and the Manager of Berjaya. Plaintiff maintains that the vehicle driven by the Manager of Berjaya (Vehicle S 19268) was owned and registered in the name of Berjaya and insured by the Plaintiff under a comprehensive motor vehicle insurance policy.
- [4]. Plaintiff alleges that while driving during the course of his employment with the Second Defendant, First Defendant hit a concrete wall, lost control, and collided with the Berjaya’s Manager’s vehicle (Vehicle S 19268). Plaintiff further avers that the vehicle driven by the First Defendant (Vehicle S 15555) was owned by the Second Defendant and insured by the Third Defendant. Plaintiff contends that as a result of the accident, Berjaya suffered damages in the sum of SR 772, 805.
- [5]. Moreover, Plaintiff maintains that upon the First and Second Defendant’s acceptance of liability for the accident and damage to Berjaya, the Plaintiff settled Berjaya’s damages in the sum of SR 772, 805. Plaintiff indicates that on 15 June 2012, the First Defendant was convicted of negligent driving and ordered to pay a fine of SR 5, 000 in relation to the accident. (*Republic v Savy, Cr. No. 52/12*). Importantly, Plaintiff alleges that by reason of its settlement of Berjaya’s damages, Plaintiff assumed and Berjaya assigned all rights and claims regarding the accident to the Plaintiff.
- [6]. Plaintiff maintains that as a result of the alleged subrogation and assignment, it wrote several letters to the Third Defendant requesting that it be indemnified. In response, however, Plaintiff indicates that by way of letter dated 23 day of January 2013, Third Defendant refused. Plaintiff maintains that the First Defendant and/or the Second Defendant, by reason of vicarious liability, are liable for the damage; and that the Third

Defendant, as insurer of the Second Defendant and/or Vehicle S 15555, is now liable to indemnify Plaintiff under the policy insurance of the Second Defendant.

- [7]. In response to the original Plaintiff, Defendants at the hearings and in their respective statements of defence, maintained *inter alia* that because Plaintiff had paid and was obliged to pay Berjaya's loss pursuant to the comprehensive insurance policy, any assignment and subrogation could not be maintained as Berjaya no longer had any rights and claims in respect of the accident. (***Records of proceedings of the 15 Oct. 2015 at 9 A.M. refers***)
- [8]. It appears that in response to this defence, Plaintiff filed **a copy** of an Amended Plaintiff on 20th day of January 2016 and at a hearing on 8 day of July 2016 sought leave to file the Amended Plaintiff to substitute in Berjaya as Plaintiff and thereby remove any references to subrogation and assignment, as well as strike out the Third Defendant from the suit. (***Records of proceedings of the 8th day of July 2016 at 1:45 P.M refers***). Defendants, however, objected to the amendment.
- [9]. Finally, the record indicates that Plaintiff filed its Application to Amend, pursuant to sections 112-115 of the Seychelles Code of Civil Procedure on 17th day of January 2017. This Application to Amend also included (i) a signed statement by H Savy Insurance Company Limited dated 19th day of July 2016, which gave consent for the substitution of the Plaintiff; and (ii) a Letter of Subrogation from Berjaya to H Savy Insurance Company Limited dated 29th day of April 2014. Moreover, the record indicates that Second Defendant filed an affidavit in reply on 25th day of May 2017 and, that on 21st day of June 2017, Third Defendant filed an answer to Plaintiff's Application to Amend.
- [10]. Having given a brief summary to the salient facts leading to Application I will now move on to address the legal standard and its analysis thereto.
- [11]. As an initial matter, Defendants have raised a procedural objection, arguing that Plaintiff has improperly filed its Application to Amend because the enjoining affidavit is defective, as it is sworn by Plaintiff's attorney (Mrs. Burian) herself. While the text of Sections 115 entitled "Application to add or strike out parties." and 146 entitled "Amendment of pleadings" **do not indicate that an affidavit is required**, it appears from Defendants' arguments that the filing of such an affidavit is common practice in the Seychelles. The Court also notes, however, that several Supreme Court decisions indicate that Judges may have a certain amount of discretion in addressing an improperly sworn affidavit.
- [12]. In the latter regards, I refer to the case of ***Krishnamart & Company v/s Opportunity International (2007) SLR 73***, wherein an application was dismissed due to a defective affidavit, but where the Court acknowledged three cases where courts had seemingly found that they had a certain amount of latitude in addressing a defective affidavit and not dismiss it outright). In that regards I note more particularly the Court in Krishnamart's reference to the case of (***Mrs Mersia Chetty v/s Krishna Chetty CS No. 417 of 2006***), wherein the Court stated that: "merely not being supported by an affidavit is not enough reason to warrant a dismissal of a motion especially where the grounds to be argued in the require

no evidence and are, for instance, purely matters of law. A motion drawn in the prescribed form and in general terms sufficiently setting out the grounds on which it is made would suffice where no evidence is required. (See: **Odongokara & ors v/s Kamanda & Or (1968 E.A. p. 210)**”).

- [13]. Additionally, the Court notes that an application to amend under section 115 and an application to amend pleadings under section 146 are unlikely to constitute incidental demands under sections 122 of the Seychelles Code of Civil Procedure which require the filing of an affidavit. (See *N. Stephan Kinsella, A Civil Law to Common Law Dictionary, 54, La, L. Rev. (1994)*) (defining an incidental demand as “reconvention, cross-claims, intervention, and the demand against third parties”).
- [14]. In addition to the text of Sections 115 and 146 not requiring an affidavit, in the present case, it is not clear why such an affidavit would be required, given that the nature of the amendments are not really evidentiary.
- [15]. Nevertheless, without addressing the issue of whether the Court may proceed with a defective affidavit on such applications, the Court observes that Plaintiff also submitted its motion *viva voce* on 8th day of July 2016, when it stated: “I am seeking leave from the court to file an amended plaint and copy of the plaint has already been filed. The changes is as follows is to substitute the plaintiff by replacing Beau Vallon Bay Resort.” Accordingly, considering that the text of sections 115 and 146 does not provide an affidavit requirement, the Court is satisfied that whatever alleged irregularity found in the documents submitted by way of written motion is neutralized by the oral motion in Court.
- [16]. With respect to the remaining matters, the Court finds that Plaintiff’s Application to Amend raises issues regarding two inter-connected areas more particularly, firstly, applications to substitute plaintiffs and strike out defendants under section 115 of the Code and secondly, amendment of pleadings under Section 146 of the Code.
- [17]. With regards to the first above-mentioned interconnected area, namely the **Substituting and Striking Out Parties**, under Section 115 of the Code, it is provided in no uncertain terms that:
- “any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion, or at the trial of the action in a summary manner.”
- [18]. It is practice to allow amendments at any stage of the proceedings, “in order that the matter in controversy may be determined so long the defendant could be compensated in costs and would not be unduly prejudiced.” (See *Confait v Morgan & Anor., [1989] SLR 267*). Pursuant to Section 113, however, the Court can only substitute the proper party as plaintiff only if that party consents.

[19]. During the various proceedings in regard to the Plaintiff's Application to Amend, however, Defendants discussed the substitution of a plaintiff through the standard set-forth in section 108 of the Code. It provides that:

“Where a suit has been commenced in the name of the wrong person as plaintiff, or where it is doubtful if it has been commenced in the name of the right plaintiff, the court may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person with his consent to be substituted or added as plaintiff upon such terms as the court thinks just.”

[20] It is not clear, however, that Section 108 is the appropriate Section for evaluating the Plaintiff's request to be substituted as Plaintiff. The standard set-forth in Section 108 appears to be directed at a Court's "*sua sponte*" decision to substitute or add a Plaintiff, not a Plaintiff's application to be substituted. The purpose of the requirement of a *bona fide* mistake in section 108 frames the standard or parameters through which a Court may, if it so determines, substitute a Plaintiff. Indeed, Section 108 effectively provides that where a Court determines that the suit was commenced in the name of the wrong person, a Court may substitute or add a plaintiff if: (i) it is satisfied that the suit has been commenced through a *bona fide* mistake and if (ii) it is necessary for the determination of the real matter in dispute.

[21]. An analysis of the relationship between Sections 108 and 115 support this interpretation. Whether a party is substituted or added by motion through Section 115 or "*sua sponte*" through section 108, it is the Court that has the obligation to determine that consent is present. With respect to the consent element of section 108, it is more coherent for the Court to have to ensure that the party it is ordering to be substituted or added consents to such an Order, as consent is less readily presumed where a party is being added or substituted by way of Court Order. On the other hand, if a Plaintiff makes a request to substitute or add a party through section 115, such consent to participate in a suit would presumably tend to be more implicit. This is perhaps the reason why there is no direct consent requirement in section 115, but that one has to find it elsewhere in section 113. What is more, section 113 does not state that a party must prove consent; it simply states that consent must be demonstrated through a writing. It follows therefore that under section 113, like in section 108, it is the Court that is required to verify that this obligation is satisfied. Accordingly, the standard set-forth in section 108 should not be read as imposing an obligation on the Plaintiff, but a circumscription of the Court's authority to act.

[22]. In the present application in light of the above analysis as to the form of consent required under section 113 of the Code, I find that the consent of Berjaya has been established, as per the Subrogation Agreement attached to the Application namely at its paragraph 4 thereto, which states *inter alia* that:

“We hereby appoint you, your officers and agents and their successors severally our agents and attorneys in fact with irrevocable power to receive or collect any

and all such claims and to begin, prosecute, compromise, arbitrate or withdraw at your expense of any or and all legal proceedings before any tribunal and to execute in our name any documents which may be necessary to carry into effect the purpose of this agreement”,

I consider that with respect to the Application under Section 115 of the Code, the consent requirement under section 113 has been established.

- [23]. With regards to the second above-mentioned interconnected area, namely **the amendment of pleadings**, it is hereby observed that although adding or substituting a plaintiff will tend to have an effect on the formulation and/or substance of a plaint, the Court finds that the amendments submitted by Plaintiff does not substantially convert the character of the suit. Section 146 of the Code, entitled “Amendment of pleadings.” provides that:

“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.”

- [24]. Moreover, no amendment which seeks to “convert a suit of one character into a suit of another and substantially different character should be allowed.” (*See Morin v Pool [2002] SCSC 3*).
- [25]. In the current Application, Defendants maintain that because the original Plaint is based on subrogation and assignment, the proposed amendment changes the cause of action. The Court disagrees. While it may be argued that the proposed amendment changes the character of the suit, the Court finds that it does not do so substantially, as required by the holding in *Morin*. The original Plaint and the proposed amendment both concern the same accident, the same allegation that the Defendants are liable for the accident, and the same claim for damages hence effectively the same cause of action. Accordingly, the Court finds that Plaintiff’s request to amend the pleadings should be granted in the peculiar circumstances of this case.
- [26]. Before I take leave of this matter, I wish to observe that based on the pleadings on records thus far, this Ruling has not at this stage addressed “**the viability of the alleged subrogation agreement**”, which issue may come to the fore during the hearing of the main case as referred to by Learned Counsels at the hearing of this Application and which entail the legal and evidentiary analysis as to its applicability under Seychelles Insurance law.
- [27]. It follows, therefore, that I allow the Application and order that the Plaint be amended to substitute Berjaya as the Plaintiff and amendment of the Plaint to strike out the third Defendant as per copy of Amended Plaint of the 17th day of January 2016. Learned Counsel is to proceed with the formalities for filing of same with the Registry of the Supreme Court accordingly

Signed, dated and delivered at Ile du Port on 31st day of October 2017.

S. Govinden
Judge of the Supreme Court