SUPREME COURT OF SEYCHELLES

Reportable
[2024] .....
CS 13/2022

In the matter between:

MAHE DESIGN AND BUILD (PTY) LTD **Plaintiff**
(rep. by Pesi Padiwalla)

and

LEONARDUS HOEVERS **Defendant**
(rep. by Alexandra Benoiton)

Neutral Citation:	*Mahe Design and Build (Pty) Ltd v Hoevers* (CS13/2022) [2024] ..... (14 February 2024).
Before:	Pillay J
Summary:	Reserving defence on the merits
Heard:	13th November 2023
Delivered:	14th February 2024

ORDER

[1] This Court cannot acquiesce to the demands of the Plaintiff.

[2] No order as to costs.

RULING

PILLAY J:

[1] On 25th October 2023 this Court delivered a Ruling following a plea in limine filed by the Defendants with regard to the jurisdiction of this Court to hear the matter. The Court further ordered the Defendant to file its Defence on the merits.

[2] At that point the Plaintiff objected to the Defendant being allowed to file its Defence on the merits.

[3] Learned counsel for the Plaintiff submits that the Defendant has already filed a Defence in the matter and it is on record. He submits that prior to filing the defence the Defendant had requested time to file the defence on three prior occasions. It is his submission that therefore the pleadings were completed by the time we heard the point of law. Learned counsel submits that the Defence that is before the Court does not comply with section 75 of the Seychelles Code of Civil Procedure (hereinafter referred to as "the Code"). He asks the Court to enter judgment because none of the averments in the plaint have been denied.

[4] Learned counsel submits that his position is supported by section 91 of the Code in that once the defence is filed, the party has raised a point of law and that point of law has to be disposed of at the trial but on the consent of both parties that point of law is disposed of prior to the actual hearing. He submits that merits reserved does not exist in law. He further submits that sections 91 and 92 of the Code supports his argument. He also referenced a case where judgment was entered against him as a result of his mistake in filing a defence with the merits reserved but could not trace the case in the reports.

[5] Learned counsel submits that the Defendant never moved the Court for an order to be permitted to file its Defence on the merits. He states he is unsure of the best way to proceed bar an application for leave to appeal the order.

[6] For her part, Learned counsel for the Defendant submits that there is a difference between a defence filed in the form of requesting the Court to allow a point of law to be determined at first while reserving the right to file a defence on the merits and a defence filed addressing on the points of law while remaining completely silent on the merits.

[7] It is her position that having taken complaisance of its rights of defence on the merits a distinction should be drawn. Learned counsel relied on the cases of **Herminie & Ors v Pillay & Ors**, as well as ***Gill v Gill*** of cases to support her position.

[8] On being questioned on the proper procedure to be followed given the circumstances Learned counsel for the Plaintiff submitted that the application before the Court is for the

Court to enter judgment for the Plaintiff. It was his argument that the Court order for the Defendant to file its Defence on the merits was ultra petita.

[9] First off, the Constitutional Court Cases relied on by Learned counsel for the Defendant in support of her arguments can be disregarded right off the bat in my humble opinion as Rule 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules makes provision that "*the respondent may before filing a defence to the petition raise any preliminary objection to the petition and the Constitutional Court shall hear the parties before making an order on the objection.*"

[10] There is no similar provision in the Code. Section 90 of the Code which deals with points of law provides as follows:

> *"Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."*

That the party can raise by "his pleadings any point of law" suggests that in contrast to Rule 9 of the Constitutional Court Rules the point of law has be a part and parcel of the pleadings and not filed separately.

[11] On a reading of sections 71 through to 96 of the Code pleadings include a plaint, a statement of defence, a counter claim, a request for further particulars to the Plaint, a request for further particulars to the defence or set-off but pleadings do not include motions and summons. What this means, and relevant to the matter at hand, is that any points of law raised had to be within the Defence.

[12] Moreover, section 75 of the Seychelles Code of Civil Procedure provides as follows:

> *The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.*

[13] It cannot be denied that the Defence as filed does not comply with section 75 of the Code. The Defence contains no statements of material facts and no distinct denials of the facts alleged in the Plaint. It is liable to be treated as an acceptance of the averments of the Plaintiff.

[14] However, as submitted by the Learned counsel for the Defendant, in ***Gill v Gill and Anor (MA162/2022) [2023] SCSC 66 (31 December 2020)*** Vidot J considered the failure on the part of the Respondents to have filed a response on the merits was not fatal to the case. His Lordship did remark that in this jurisdiction the accepted practice is for the merits of a suit to be addressed together with any pleas in limine. This Court is inclined to agree with the pronouncements in the case of ***Gill.*** It is noted though, there is no indication in the case of ***Gill*** that the Applicant objected to the procedure followed by the Respondent.

[15] In the matter at hand the Plaintiff only objected to the procedure followed by the Defendant after the Court had made an order for the Defence to be filed. Were it not for this fact, this Court would have considered ruling in favour of the Plaintiff in view of the Defendant's failure to file a defence on the merits inclusive of its points of law in line with section 75 of the Code, as well as the fact that there was no attempt by the Defendant to seek an opportunity to rectify their mistake in not addressing the merits in their Defence by way of an amendment. In circumstances where an opportunity is sought to rectify those laxities in the pleadings I would agree that it is not fatal as per ***Gill*** above. But in circumstances where the Defendant does not attempt to rectify but instead doubles down and insists that the procedure followed is correct this Court cannot assist it and exercise any discretion in its favour. However, in the present matter this Court rightly or wrongly in its ruling ordered the Defence on the merits to be filed. To now review that decision would be tantamount to this Court standing on appeal of its own decision which it cannot do.

[16] Section 150 of the Code provides that: *"The court may, after hearing both parties, alter, vary or suspend its judgment or order, during the sitting of the court at which such judgment or order has been given."*

[17] In the case of ***Adeline v Talma (SCA MA 36 of 2023) [2023] SCCA 54 (25 August 2023)*** it was held that: "A court being functus officio, in its strictest sense, means three things:

that it cannot rehear, review or vary its own judgment or order, except for when it is on appeal."

[18] The Appellant in the case of ***Antoine Alcindor v Christina Alcindor (SCA 33 of 2010) [2010] SCCA 4 (12 April 2012)*** argued that the learned trial judge was functus offico at the date of judgment in February 2010 and could not and had not the power to order a re-evaluation later in November 2010. The Court of Appeal allowed the appeal relying on Halsbury's Laws of England, Vol 26, 4th Edition Paragraph 556 that

> *"the Authorities are clear on functus officio in relation to:*
> *Amendment after entry of judgment or order*
> *As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after is has been entered either in an application made in the original action, or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality."*

The Court further referred to ***SDC v Government of Seychelles (2007) SCAR 3***

[19] Given that section 150 above was not invoked, this Court being functus on the issue of the Defendant filing its Defence on the merits, it cannot acquiesce to the demands of the Plaintiff.

[20] No order as to costs.

Signed, dated and delivered at Ile du Port on 14th February 2024

Pillay J