

FORGET P. A. v. THE ICAC & ORS

2020 SCJ 89

Record No. 89866

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Philippe Alain Forget

Plaintiff

v.

- 1. The Independent Commission Against Corruption**
- 2. Mr Navin Beekharry**
- 3. Mr Gerard Bissessur**
- 4. Mr Moossa Taujoo**
- 5. The Commissioner of Police**
- 6. The State**

Defendants

INTERLOCUTORY JUDGMENT

This is a motion for the amendment of the respective second pleas of defendant no. 1 and defendants nos. 2, 3 and 4.

The motion is resisted by the plaintiff. Defendant nos. 5 and 6 are not objecting to the motion.

In his plaint with summons dated 23 June 2005, the plaintiff has averred that he was the Assistant General Manager of the Mauritius Commercial Bank since 1996 – a post which he was still occupying in 2005. He is a person of good character, honour and reputation and until 2003 enjoyed the esteem of his friends, relatives, colleagues and acquaintances both on a national and international level.

On 15 February 2003, defendant no. 1 started an investigation in an allegation of fraud which the Mauritius Commercial Bank (the MCB) had reported to the Financial

Intelligence Unit. As Assistant General Manager of the MCB, he collaborated fully with defendant no. 1 by regularly attending its offices over a period of four months to provide such information required by defendant no. 1.

On 17 June 2003 he again attended the office of defendant no. 1 where he was questioned for nearly eight hours after he was explained his constitutional rights.

On 23 June 2003, whilst he was at the office of defendant no. 1 for further questionings, he was informed that defendant no 5 had given instructions for his arrest for having allegedly committed an offence under section 19 of the Financial Intelligence and Anti Money Laundering Act 2002 (the FIAMLA). He was placed in a police cell at La Tour Koenig Police Station and was released after about four hours upon his undertaking to report to the District Court of Port Louis on the next day.

On 24 June 2003, he appeared before the District Court and was informed that defendant no 5 had given instructions for a provisional charge of *“Failing to report a suspicious transaction in breach of section 19(1)(a) of the FIAMLA”* to be lodged against him. He was released on bail upon furnishing the required sureties.

On 9 July 2003, the first provisional charge was struck out and a second one was lodged against him under sections 19(1)(a) and 14(1) of the FIAMLA. On 4 August 2003, the District Court upheld a motion of his Counsel that the provisional information did not disclose an offence known to the laws of Mauritius.

On 12 January 2004, defendant no. 1 published on its website *“a statement to the effect that investigations had been “concluded” in Mr Forget’s case”* and it was contemplating lodging a new charge of money laundering under section 3(1)(a) of the FIAMLA. According to the plaintiff, since that day he has been living in constant fear and anxiety of being arrested again and brought before a court to answer *“unfounded and false charges.”*

The plaintiff also averred that the matter of his arrest and of the allegations leveled against him was given immense and adverse publicity in the written press, the radio and on the internet.

The plaintiff further averred that he was unlawfully arrested and detained in a police cell under the orders of defendant no. 5 who had failed to ensure that the suspicions harboured against him were reasonable and well grounded and that his arrest and detention were warranted. Defendant no. 5 together with defendants nos. 2, 3 and 4 have acted negligently, recklessly and tortuously in arresting, detaining and subsequently charging him on the basis of facts which did not disclose any offence. In addition, *“the decisions to unlawfully provisionally charge, to arrest and to recommend the unlawful charges against [him] were taken either individually or jointly by the defendants.”*

As a consequence of the wrongful and unlawful acts and doings of all the defendants he has *“suffered enormous damage and prejudice, especially to his character, honour and reputation in Mauritius, in the banking sector both locally and internationally”* which he estimates at Rs 50 million which the defendants are bound in law, *jointly and in solido* to pay to him.

Following particulars of the plaint with summons supplied by the plaintiff, defendant no. 1 and defendants nos. 2, 3 and 4 filed separate pleas dated 11 June 2008 in which they raised a plea *in limine litis*.

On 9 September 2010, defendant no. 1 and defendants nos. 2, 3 and 4 amended, after the plaintiff withdrew his initial objection, their respective pleas *in limine litis* to include additional grounds of objection to the hearing of the plaintiff's plaint.

On 23 May and 29 June 2012, I heard arguments on the two pleas *in limine litis* raised respectively by defendant no. 1 and defendants nos. 2, 3 and 4. My ruling was the subject of a cross appeal by both the plaintiff and defendants nos. 1, 2, 3 and 4. On 8 December 2016, the Court of Civil Appeal upheld the appeal of the plaintiff and dismissed that of the defendants.

The hearing of the case was, after a few postponements for various reasons, fixed to 22 June 2018. On that day, learned Senior Counsel appearing for defendants nos. 1 to 4 moved to file on behalf of defendant no. 1 and defendants nos. 2, 3 and 4 respectively a *“Proposed Second Amended Plea.”*

The proposed amendments to the respective amended pleas dated 9 September 2010 of defendant no. 1 and defendants nos. 2, 3 and 4 are as follows:-

Defendant no. 1

By deleting paragraph 11 and substituting therefor the following:

“11. The Defendant No. 1 denies paragraph 17 and avers that:

- (a) the investigation, in which Plaintiff was interviewed, also involved or which mainly involved The Mauritius Commercial Bank Ltd of which the Plaintiff was the General Manager;*
- (b) the Director of Public Prosecutions advised prosecution against The Mauritius Commercial Bank Ltd only; and*
- (c) The Mauritius Commercial Bank Ltd was found guilty of the offence in breach of section 3(2) of FIAMLA 2002 and is now appealing against the said judgment”.*

By adding after paragraph 15 a new paragraph 15A to read:-

“15A. Defendant No. 1 further avers that it acted upon reasonable cause inasmuch as there was evidence tending to suggest that The Mauritius Commercial Bank Ltd, of which the Plaintiff was the General Manager, had committed offences under the FIAMLA 2002.”

By deleting paragraphs 16 and 17.1 and substituting therefor the following:-

“16. Defendant No.1 denies the contents of paragraphs 27, 28,29,30,31 and reiterates the averments set out in the preceding paragraph.

17.1 Defendant No.1 denies the contents of paragraph 32 and reiterates the averments set out in paragraph 16 above.”

Defendants Nos. 2, 3 and 4

By adding after paragraph 9 the following new paragraph:-

“9A. Defendants Nos. 2, 3 and 4 further aver that they acted upon reasonable cause inasmuch as there was evidence tending to suggest that the Mauritius Commercial Bank Ltd of which the Plaintiff was the General Manager, had committed offences under the FIAMLA 2002.”

By deleting paragraph 13 and substituting therefor the following:-

“13. Defendants Nos. 2,3 and 4 are not aware of the contents of paragraph 26, more especially that they, as the then Commissioner and Assistant Commissioners respectively had acted together with the Defendant No 5 in the manner described by Plaintiff or in any other manner whatsoever. Defendants Nos. 2, 3 and 4 further aver that:

- (a) the investigation, in which Plaintiff was interviewed, also involved or which mainly involved The Mauritius Commercial Bank Ltd of which the Plaintiff was the General Manager;*
- (b) the Director of Public Prosecutions advised prosecution against The Mauritius Commercial Bank Ltd only; and*
- (c) The Mauritius Commercial Bank Ltd was found guilty of the offence in breach of section 3(2) of FIAMLA 2002 and is now appealing against the said judgment.”*

By deleting paragraphs 14 and 15.1 and substituting therefor the following:-

“14. Defendants Nos. 2, 3 deny the contents of paragraph 32, and reiterate the averments set out in the preceding paragraph.

15.1. Defendants Nos. 2, 3 and 4 deny the contents of paragraph 32 and reiterate the averments set out in paragraph 14 above.”

The plaintiff is objecting to the proposed amendments on the grounds that the new averments will not help to determine the real issue in controversy between the parties and the amendments are being made at a very late stage.

Learned Senior Counsel for the plaintiff submitted that the proposed new averments are irrelevant to the case that the defendants have to meet and will not assist in determining the real controversies between the parties. These are whether the defendants acted in a professional manner and in good faith (i) in the way they treated the plaintiff; (ii) in causing him to be arrested; (iii) in causing to be lodged against him provisional charges which had no evidential basis and did not disclose an offence; and (iv) in causing damaging information concerning the plaintiff to be posted on the website of defendant no 1. It was also submitted that if the proposed amendments are allowed the defendants will have a second line of defence which is irrelevant to the case.

On the issue of undue delay, learned Senior Counsel for the plaintiff submitted that defendants nos. 1, 2, 3 and 4 are seeking to further amend their respective amended pleas eleven years after filing their respective initial pleas to the plaint dated 23 June 2005 without any justification for the delay.

It was also submitted that great prejudice would be caused to the plaintiff if the amendments are allowed at this stage of the proceedings, inasmuch as 14 years after the plaintiff has lodged his claim for damages against the defendants, the hearing of the case on its merits has not yet started. In addition, the amendments if granted, will unduly protract the trial of the case. Besides, so added learned Senior Counsel, the defendants would seek to adduce a whole set of evidence in support of their new averments which to all intents and purposes would be irrelevant to the case they have to meet. Moreover, if the court considers that issues, such as the investigation also involved the MCB and its conviction are relevant to the defendants' case, the plaintiff may well decide to await the outcome of the appeal of the MCB against its conviction. Consequently, this will further protract the plaintiff's case. At the end of the day, so submitted learned Senior Counsel, the issue which this Court has to decide, in determining whether or not to allow the defendants' motion, is whether the new averments and the evidence which ultimately the defendants will adduce in support

thereof are relevant to the case the defendants have to meet. In so deciding the court should also bear in mind the complaints of the plaintiff against the defendants as disclosed in his plaint with summons.

In reply learned Senior Counsel for the defendants nos. 1, 2, 3 and 4 argued that, true it is that the averments in the proposed amendment to paragraph 11 of the plea of defendant no. 1 and 13 of the plea of defendants nos. 2, 3 and 4 are in respect of events which occurred subsequently to the plaintiff's plaint. He however argued that these new averments are material to the defendants' case.

Learned Senior Counsel fairly conceded that the proposed new paragraphs 15A and 9A contain a new defence i.e. that the defendants acted upon reasonable cause. Learned Senior Counsel added that the proposed amendments to the defendants' plea, if allowed, would assist the court in determining whether the defendants acted upon reasonable cause.

Learned Senior Counsel for the defendants also conceded that his motion for amendment has been made at a late stage, at the brink of trial and he has no valid reasons to explain the delay. Learned Senior Counsel also fairly conceded that the issues raised in the proposed amendments and the defence of reasonable cause could have been pleaded in the defendants' plea dated 2008. He, however, pointed out that he stepped into the case at quite a late stage and firmly believed that the defendants should avail themselves of a defence which is provided for under the Prevention of the Corruption Act. He added that the hearing of evidence has not yet started. The discretion of the Court in matters of amendment of pleadings is wide and the motion to amend should be allowed. The plaintiff will not suffer any injustice and will have full opportunity of amending his reply to the defendants' plea, if that is indeed required.

I have considered the nature of the proposed amendments in the light of all the pleadings. I have also considered the submissions of both learned Senior Counsel and the authorities cited.

On the issue of delay, I take note of the explanations of Mr R. Pursem, Senior Counsel that he stepped into the case quite recently. Upon reviewing the defendants' pleas he realised that certain matters and defence which the defendants ought to have

initially pleaded were not to be found in their respective pleas and these shortcomings ought to be cured now by a motion to amend. In that respect, I bear in mind the following statement of the Court in **Permal Ramsamy v. Lutchmee Devi Ramsamy & Ors** [[2006 SCJ 142](#)]-

“It is settled that the Court has a wide discretion to grant or refuse an amendment. Such discretion, however, should be exercised upon an assessment of where the justice of the case lies, and should be allowed if it will resolve the real controversy between the parties, provided that it will not cause any prejudice to the adverse party. On the other hand, amendments should not be refused solely because they have been made necessary due to infelicitous drafting, or the mistake of a party applying for leave to make them.”

As regards the first ground of objection, it is apparent from the plaintiff’s pleadings that defendant no. 1 started an investigation in an allegation of fraud which the MCB had reported to the Financial Intelligence Unit. It is also apparent from the answers to particulars provided by the plaintiff that he was interviewed in connection with the fraud, subject matter of the investigation. He provided information, supplied certain documents, gave statements to defendant no 1. At paragraph 28(a) of his pleadings, he averred that he was “...publicly aligned as one of the culprits involved in what was internationally known as the “MCB/NPF” affair...”

In their respective amended pleas dated September 2010, defendants nos. 1 to 4 have averred that an investigation was started on or about 15 February 2003 on the MCB. It is not disputed by the plaintiff that at the material time he was the Assistant General Manager of the MCB. As is also apparent from the plaintiff’s pleadings, his complaints against the defendants were, *inter alia*, that he was unfairly treated. He was unlawfully arrested and unlawfully detained in a police cell.

In view of the above, I am unable to agree with the submissions of learned Senior Counsel for the plaintiff that the new averments and defence which the defendants are now seeking to introduce in their “proposed second amended pleas” dated June 2018 are immaterial and unrelated to the defendants’ case and will not help in determining the real matter in controversy between the parties.

I bear in mind the well-established principles relating to amendment of pleadings as set out in a number of cases. I also bear in mind the nature of the

proposed amendments, the stage at which it is being made, the fact that the trial has as yet not started and the relevance of the proposed amendments to the issues to be determined. I am of the view that the amendments sought should be granted.

I accordingly, in the exercise of my discretion, grant the motion for amendment.

In view of the delay in making the amendment, I order that defendants nos. 1 to 4 bear the costs of the day.

I further order that this case be mentioned before the Master and Registrar on 30 June 2020 for defendants nos. 1, 2, 3 and 4 to file their respective second amended pleas and for the plaintiff to consider whether to amend his reply to the second amended pleas of defendants nos. 1 to 4 before the case can be fixed for continuation.

**N. Devat
Judge**

22 May 2020

For Plaintiff	:	Mr U.K. Ragobur, Attorney-at-Law Mr H. Duval, Senior Counsel together with Mrs L. Churitter- Kistnareddy, of Counsel
For Defendants Nos 1 to 4:	:	Mr S. Sohawon, Attorney-at-Law Mr R. Pursem, Senior Counsel together with Mrs A. Rangasamy Parsooramen, of Counsel
For Defendants Nos 5 & 6:	:	Chief State Attorney Mrs P.V. Ramjeeawon Varma, Principal State Counsel together with Mr M.Y. Alimohamed, Temporary State Counsel