SUPREME COURT OF SEYCHELLES

Not Reportable
[2022] SCSC 971
CS103/2021

In the matter between:

CLOUD INNOVATION LTD **Plaintiff**
(rep. by Mr. Rene Durup)

and

AFRICAN NETWORK INFORMATION CENTRE (AFRINIC) LITD **Defendant**

(rep by Miss Nisha Alleear)

Neutral Citation: Cloud Innovation Ltd vs African Network Info. Ltd (CS103/2021) [2022] SCSC 971

Before: Dodin J
Summary:
Heard: Written Submissions
Delivered: 28 October 2022

RULING

DODIN J

[1] This is a ruling in respect of a plea in limine litis raised by the Defendant to the application by the Plaintiff to grant a Writ of Injunction restraining and prohibiting the Defendant acting through its Board and/or its representative and/or propose in whatever capacity; from:

i) Terminating and/or suspending and/or revoking the membership of the Plaintiff as a Resource Member in the Defendant in any manner whatsoever, including of any refusal to accept and/or process the renewal of the membership of Plaintiff as a Resource Member for the year 2022; and

ii) Interfering in any manner whatsoever with the use of the Internet Number Resources distributed and/or allocated to and/or acquired by the Plaintiff pursuant to its membership as a Resource Member in the Defendant;

[2] The Plaintiff is a Seychelles IBC specializing in IP address management and delegating addresses to customers and operating worldwide including Seychelles and Defendant is a company incorporated in Mauritius providing regional internet registry ('RIR') for Africa and the Indian Ocean. The Plaintiff avers that by virtue of an agreement dated 23rd July 2013, which is subject to laws in other jurisdiction where the company is operating, between the parties, the Plaintiff is a resource member of the Defendant since 2013, paying it an annual membership in conformity and enjoying the following privileges and going concern:

(a) The Plaintiff is the third largest member of the Respondent and has been allocated over 6 million IP resources;

(b) The Plaintiff services a variety of sectors including, but not limited to, services for website, Fiber to home connections, mobile connections and VPNs;

(c) The operations of the Applicant are therefore fundamental to ensure internet connectivity to millions of end users across the world.

[3] The Plaintiff avers that the Defendant is threatening to terminate the said agreement thereby terminating membership of Plaintiff with Defendant and consequentially damaging the going concern of Plaintiff and moves the Court for the above remedies.

[4] By Order dated 12 November, 2021, the Court granted an interim injunction in the following terms:

(a) a Writ of Injunction, *pendete lite*, restraining and prohibiting the Respondent acting through its Board and/or its representative and/or preposé in whatever capacity, from:-

(i) terminating and/or suspending and/or revoking the membership of the Applicant as a Resource Member in the Respondent in any manner whatsoever, including of any refusal to accept and/or process the renewal of the membership of Applicant as a Resource Member for the year 2022;

(ii) interfering in any manner whatsoever with the use of the Internet Number Resources distributed and/or allocated to and/or acquired by the Applicant pursuant to its membership as a Resource Member in the Respondent.

[5] The Defendant raised a without prejudice defence maintaining that the Defendant does not submit to the jurisdiction of this Court in view of its contention that the courts of Seychelles does not have jurisdiction to hear this matter. The Defendant raised a plea in limine litis in the following terms:

1. *The Plaintiff has not satisfied the legal requirements for obtaining permission to effect service out of the jurisdiction and/or the Plaint has not been properly served on the Defendant.*

2. *In any event, this Court has no jurisdiction to hear and determine this matter against the Defendant, a Mauritian Company out of the jurisdiction, including, but not limited, to any matter in respect of the Registration Service Agreement dated 23rd July 2013, a (now expired) contract concluded in Mauritius, in respect of services offered in Mauritius and governed by the laws of Mauritius or of an order or orders made by the Supreme Court of Mauritius which is or are not executory in Seychelles.*

3. *The present matter may not proceed until and unless the Defendant's proposed application for setting aside the Ex Parte Order dated 17th December 2021 granting the Plaintiff permission to effect service out of the jurisdiction on the Defendant has been determined.*

4. *In the alternative, the Plaintiff has failed to make full and frank disclosure of material facts including but not limited to (i) the existence of prior and pending applications for interim injunctive relief before the Supreme Court of Mauritius materially similar to that sought before this Court (ii) the existence of a large number of applications between the same parties before the Supreme Court of Mauritius (including appeals); (iii) the Plaintiff's breaches of the Registration Service Agreement; (iv) contention of child pornography material being found on websites registered in the name of the Plaintiff.*

5. *In the alternative, the Courts of Mauritius have been first seized of the dispute(s) under the Registration Service Agreement and this Court ought to decline to exercise jurisdiction on the basis of forum non conveniens and/or lis alibi pendens.*

6. *In the further alternative, the Plaintiff has entered over a dozen applications before the Supreme Court of Mauritius relating to and/or arising out of the Registration Service Agreement including for interim injunctive relief, saisie-arret and alleged unfair prejudice. The Plaintiff has entered an ex parte application in this Court without making full and frank disclosure of those facts and the Plaintiff is engaging in an exercise of forum shopping with a view to litigate and/or relitigate matters already pending before the Supreme Court of Mauritius, which amounts to an abus de droit. The cases pending before the Supreme Court of Mauritius relate to the same parties as in this present purported matter.*[sic]

[6] The Defendant further pleaded that the Defendant does not submit to the jurisdiction of the Courts of Seychelles and any defence on the merits is reserved pending the determination of the Defendant's proposed application to set aside the *Ex Parte* Order dated 17th December 2021 granting the Plaintiff permission to effect service out of jurisdiction on the Defendant and/or the determination of the *plea in limine* as to jurisdiction.

[7] The Defendant moved this Court to dismiss the Plaintiff's claim for the reasons raised in this plea, with costs.

[8] In his submission on the plea in limine litis, learned counsel for the Defendant made the following submission:

"The Defendant submits that the courts of Seychelles have no jurisdiction over the Defendant. The matter before this Honourable Court is one that has already been admitted and disposed of by the Supreme Court of Mauritius. To institute proceedings with the same cause of action, the same subject matter between the same parties before this Honourable court after having already sought redress through multiple applications before another court in another jurisdiction is an abuse of process, an abus de droit and can only be considered as forum shopping on the part of the Plaintiff. It is, further, the Defendant's case that the present suit is res judicata because the same matter was fully and finally determined through the judgments of the courts in Mauritius. It is, yet further, a breach of the Defendant's right to a fair hearing for the Plaintiff to canvass issues which have been heard and determined in a previous case. This right to a fair hearing reinforces the principle of res judicata which is based on the principle that that there should not be multiplicity of litigation between the same parties on the same issue.

The principle of res judicata is embodied in Article 1351 of the Civil Code which provides as follows:

"Article 1351

1. 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

2. Paragraph 1 of this article shall also have effect in respect of proceedings to establish status, without prejudice, however, to the binding effect of uncontested declarations relating to civil status or to judgments which establish new status, such as a

decree of divorce, or to the actions to establish descent, to the extent that only certain specified persons are entitled to bring certain types of proceedings.

The rationale behind the res judicata principle was explained by the Court of Appeal in the case of Georgie Gomme v Gerard Maurel and Ors (SCA 06 of 2010).

It was held by Renaud J in the case of Pragrassen v Vidot [2010] SLR 163, with reference to Article 1351 of the Civil Code that "for plea of res judicata to be upheld there must be threefold identity of subject-matter, cause and parties between the first and second case." this is settled law in this jurisdiction which is consistently followed by our courts.

The Plaintiff and the Defendant in case before the Supreme Court of Mauritius and the present suit are the same. The question for determination is whether the two cases have the same subject matter and cause. The 2020 amendment to the Civil Code has resolved the difficulty which the word 'class' in Article 1351.1 had considered, but the jurisprudence on the matter is still important to consider.

On the basis of the above interpretation, the "subject matter" of a judgment (current Article 1351-1) is the equivalent of "la chose demandée" in the original French provision, which as per Blackwood's Wright translated version refers to "the claim must be...for the same thing". The subject matter is, therefore, what the plaintiff is claiming.

The Defendant therefore submits that, on the basis of the foregoing, the identity of the parties, the subject matter and the cause in the cases before the Supreme Court of Mauritius and this present case are in fact the same. The Defendant also urges that this Honourable Court take judicial notice of the judgment of the Supreme Court of Mauritius in case S.C.R No 5C/30/21 between the Plaintiff and the Defendant, whereby the Judge made the following remarks:

The question which begs to be asked and answered is whether in the light of the above enunciated and illustrated principles, the filing of the current Plaint by the Plaintiff is an abuse of process by the Plaintiff against the Defendant. The Defendant submits that in addition to pleading res judicata, in itself amounts to an abuse of process, the fact that the Plaintiff has gone to such lengths to circumvent the judicial system in Mauritius by seeking

orders in our jurisdiction which, if granted, would effectively reverse the decision of the Supreme Court of Mauritius, also amounts to an abuse of process. Furthermore, the Plaintiff's attempt to exploit this Honourable Court after the matte that was brought by the Plaintiff had already been adequately dealt with by a competent court, simply to have another bite at the cherry, is an abuse of process.

The Defendant submits that the Courts of Seychelles have no jurisdiction to hear this matter as per the doctrine of forum non conveniens. The common law doctrine is one which permits a court to exercise its discretion to decline jurisdiction to hear a matter where the inconvenience to the defendant and witnesses strongly outweighs the convenience of the plaintiff. The exercise of such discretion is the consideration of whether Seychelles is the forum conveniens and involves the weighing of multiple factors including the nature of the claim, the legal and practical issues arising, availability of witnesses and their evidence and expenses: Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460. It is precisely the same test that has evolved in the power of the court to stay actions on the grounds that the forum chosen by the plaintiff is inappropriate for trial.

According to Spiliada, in ascertaining the most appropriate form, the court searches for the jurisdiction with which the case has its most real and substantial connection. The Defendant is a company incorporated under the laws of Mauritius and has no dealings or assets in Seychelles. The Registration Service Agreement entered into between the Plaintiff and the Defendant is one which is subject to the laws of Mauritius and executed in Mauritius. It should also be noted that the plaintiff applied for the Defendant to be served outside of the jurisdiction of Seychelles and that the Defendant in its Statement of Defence has refused to submit to the jurisdiction of the Supreme Court of Seychelles. The Mauritian courts have been seized first and the Defendant submits that it is therefore highly adequate and convenient that the jurisdiction of the Mauritian courts is seized instead of that of the Seychelles Courts. The Plaintiff cannot change jurisdictions and seek the relief it has been denied in the Supreme Court of Mauritius elsewhere solely because its previous applications have been dismissed. As a consequence, the Defendant urges this Court to declare that it has no jurisdiction to hear the matter and dismiss it in its entirety."

[9] Learned counsel for the Plaintiff submitted the following in reply:

"It is conceded that the Plaint before this Honourable Court is between the same parties and brought in the same capacities in comparison with the cases brought in the Mauritius Courts.

It is submitted that the present cased does not relate to the same cause of action as this case argues on different illegalities and irregularities conducted by the Defendant.

It is hereby submitted that the Plaint brought before this Honourable Court stems from different conducts attempted by the Defendant to violate the Plaintiff's right of action.

In the Present case the rights of action of the Plaintiff stems purely on a contractual service of agreement (Hereinafter the 'agreement') between parties. Therefore, it is submitted that the rights being sought to be enforced springs from different factual incidents.

In the case S.C.R No. 5c/30/21 the Supreme Court of Mauritius dismissed the appeal of the Plaintiff regarding an interim injunction on the basis that the Plaintiff was in fact protected by another Interim Order.

It is submitted that the determination on the Supreme Court of Mauritius did not act as a finality on the merits of the case.

That in accordance to clause 7(a) of the agreement the Supreme Court of Seychelles does have the jurisdiction to determine the injunction application on the contractual merits of the said agreement.

It is submitted that Plaintiff has always acted in good faith in order to attempt to preserve and protect its right under the said agreement. That based on various conduct of the defendant, the Plaintiff had to initiate multiple application of interim injunction to safeguard its right in maintaining the possibility on litigating this matter on its merits.

The Defendant has failed to substantiate how a determination of this court will reverse the decision of the Supreme Court of Mauritius. The case relied upon by the Defendant stems from a purported resolution of the Defendant whereas this cause of action is relying entirely on contractual obligations.

It is further submitted that based on the balance of competing claims the Plaintiff will suffer great injustice if it's not given an opportunity to have its competing rights under the agreement to be adjudicating upon its merits. The Defendant has on all occasion attempted to raise preliminary objections to halt any possibilities for the merits to be heard and adjudicated upon.

The Defendant further raises the plea regarding the jurisdiction of this Honourable Court in adjudicating on the merits of this case.

In accordance to clause 7(a) of the agreement, the performance of obligations derived under the agreement is subject to the jurisdiction to where the parties operate.

It is therefore submitted that the plaintiff is an International Business Company incorporated in Seychelles. That the Plaintiff operates its services in the said agreement in conjunction with laws of Seychelles.

In view of the above it is hereby submitted that:

(i) The plaint filed before this Honourable Court is not the same cause of action regarding the cases relied upon by the Defendants and therefore does not amount to Res Judicata.

(ii) The Defendant has failed on the balance on competing claims to showcase as to show how this claim amounts to an abuse of process. The Plaintiff in acting within its rights to enforce on the merits the obligations under the agreement which is subject to Seychelles laws.

(iii) The Defendant has wrongly guided the court to submit to English doctrine in determining the matter of jurisdiction. Further to that clause 7(A) of the

agreement gives jurisdiction of this Honourable Court to determine the civil rights and obligations under the agreement.

(iv) The preliminary Objections ought to be dismissed and the matter be heard on the merits.

(v) Furthermore and finally,

a. The plea in limine relying on 'Res Judicata' and 'Abuse of Process' is not based on litigation between the parties in our jurisdiction and the defendant has not provided any jurisprudence that supports our courts in relying on cases between the same parties in foreign countries and

Also, the defendant is relying on foreign judgments which have not been registered at the Registrar General (as required under Section 54(1) of the Mortgage and Registration Act) and which have not been tendered into evidence in this case and are therefore not Exhibits to be relied upon. The Court ought not to rely on the non-exhibited foreign judgments as the procedure and the standards required to be admitted

[10] Essentially the two issues that are to be determined by this court are (1) Whether the Seychelles Court is the most convenient forum for the matter to be litigated and (2) whether this matter is res judicata or an abuse of process.

[11] Convenience is weighed, using a multi-factored test that includes elements such as: (1) the connection between the plaintiff's claim and the forum, (2) the connection between the defendant and the forum, (3) unfairness to the defendant by choosing the forum, (4) unfairness to the plaintiff in not choosing the forum, (5) involvement of other parties to the suit such as location of witnesses, and issues of comity such as reciprocity and standard of adjudication and respect of each jurisdiction and the decision of its courts. The court must balance convenience against the plaintiff's choice of forum. In other words, if the plaintiff's choice of forum is reasonable, the defendant must show a compelling reason to change jurisdiction. If a transfer would simply shift the inconvenience from one party to the other, the plaintiff's choice of forum should not be disturbed.

[12] In the Canadian case of *Club Resorts Ltd. v. Van Breda (and Charron) 2012 SCC 17*, the Supreme Court of Canada reviewed the wide range of factors considered in the case law which included

(a) the comparative convenience and expense for the parties and their witnesses, in litigating in the local court or in any alternative forum;

(b) the substantive and procedural law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the legal system as a whole.

All these factors are pertinent in determining whether Seychelles is the appropriate forum as maintained by the Plaintiff.

[13] The Singapore case of Siemens AG v Holdrich Investment Ltd [2010] SGCA 23 provides commonsense guidance in determining the proper forum or jurisdiction. The Singapore Court of Appeal held that the test involved identifying the most appropriate forum, and not the weighing of the sheer number of factors for and against a certain jurisdiction. The Court should also begin by considering the location of the defendant. The Court need not be satisfied that the jurisdiction chosen by the Plaintiff is clearly the only or most appropriate forum by far. The Plaintiff only need to show that on balance there is sufficient connection and the forum is adequate to try the matter at hand.

[14] In this case, it is not contested that there has been litigation between the same parties in the Courts of Mauritius. It appears therefore that initially, the Plaintiff accepted the Mauritius Court as the most convenient forum to hear and resolve the issues between the parties. Secondly, the Defendant contends that the agreement entered into between the Plaintiff and the Defendant was governed by the laws of Mauritius. The Plaintiff has not addressed this fact directly in its pleadings or in submission. The Plaintiff only stated "*That in accordance*

to clause 7(a) of the agreement the Supreme Court of Seychelles does have the jurisdiction to determine the injunction application on the contractual merits of the said agreement."
However, clause 7(a) of the agreement reads as follows:

> *"The parties, each, represent and warrant that it has full power and authority to enter into the present agreement and perform all the obligations listed down herein.*
>
> *(a) It shall perform its obligations in compliance with all legal provisions (regulations, directives, legislation) existing in the jurisdiction wherein it operates as well under the laws of the Republic of Mauritius which shall govern this agreement."* [Emphasis mine]

[15] A careful reading of this clause (7(a)) shows that the intention of the parties was that they should abide by the laws of the jurisdiction in which they operate but the agreement is governed by the laws of Mauritius. Hence it is more probable than not that any dispute in respect of the contract established by the agreement should be resolved under the laws of Mauritius.

[16] Further to the above, it is not in dispute that the Plaintiff had pursued a case before the Mauritian Court in respect of the same agreement and between the same parties. Although the Plaintiff maintains that the issues in contention are different it shows that even the Plaintiff either interpreted clause 7(a) as the jurisdictional clause governing the agreement and as such the laws of Mauritius are the applicable laws. The only connection with Seychelles appear to be that the Plaintiff is registered as an international business company under Seychelles law. Otherwise all businesses seem to be conducted overseas. Location of office of the Plaintiff alone does not suffice to establish jurisdiction particularly where the agreement itself provides for the jurisdiction under which law the agreement shall be governed. In any event, for the injunction to be effective a remedy, it has to be enforced in Mauritius as the Defendant does not have any operational activities in Seychelles whatsoever.

[17] Having given due consideration to the above I find in favour of the Defendant's plea in limine litis that Seychelles does not meet the threshold to be the proper forum for this matter. Consequently I do not need to consider the issue of res judicata.

[18] As consequent to the above finding, the interim injunction granted by this Court on the 12 November, 2021 is voided with immediate effect.

Signed, dated and delivered at Ile du Port on 28 day of October 2022.

[redacted]

Dodin J

Judge of the Supreme Court

SEAL OF THE SEYCHELLES SUPREME COURT