(7)

IN THE SEYCHELLES COURT OF APPEAL

EKATERINA KHVEDELIDZE **APPELLANT**

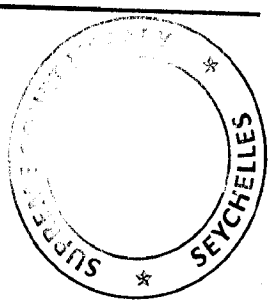
VERSUS

CECILE DELL'OLIVIO **RESPONDENT**

SCA18/02

[**Before:** *Ayoola P, Silungwe & Matadeen JJA]*

Mr. F. Ally for the Appellant
Mr. C. Lucas for the Respondent



JUDGMENT

(Delivered by Silungwe, JA)

The appellant and the respondent were defendant and plaintiff, respectively, before the Supreme Court. Both are neighbours and proprietors of adjoining parcels of land. The respondent instituted proceedings against the appellant vicariously for the acts of her "agents" acting on her instructions as her proposés for damages suffered by her as a result of blasting operations within the vicinity of her (respondent's) house. Her claim comprised the following heads:-

(a)	damage caused to the plaintiff's house	SR100,000.00
(b)	moral damages	SR 70,000.00
(c)	quantity surveyor's report	SR 2,500.00
(d)	engineer's report	SR 2,500.00
	Total	SR175,000.00

The appellant denied the respondent's claim and pleaded that the blasting operations had been carried out by an independent contractor for which she (the appellant) was not liable in law.

After trial, the Supreme Court upheld the respondent's claim and gave judgment in her favour for SR94,117 with interest and costs. It is that judgment that is the subject of this appeal.

As to liability, the pith of the appellant's appeal is encapsulated in the following (paraphrased) ground:-

> "the trial judge was wrong to find liability established against the appellant in that the blasting operations which allegedly caused damage to the home of the plaintiff and to her in person were lawfully carried out on the appellant's land by a licenced independent contractor over whom the appellant had no control...

At the outset, it is unmistakable that the decisive issue for consideration and resolution is whether the blasting operations had been carried out by the appellant's agents acting on her instructions or by her proposés or by an independent contractor.

The facts set out hereunder are common cause. The appellant had undertaken a hotel project at Soleil D'or on her land neighbouring the respondent's residence. In furtherance of that project, she entered into a contract with a company called Allied Builders Ltd whereby the latter was mandated to construct the hotel at the site. As Allied Builders Ltd had no blasting licence, blasting operations were subcontracted to one Carly Faure who undertook the said operations. As a consequence of such operations, the respondent's house developed cracks and a portion of its floor collapsed.

Article 1384(1) and (3) of the Civil Code reads (in so far as it is relevant to this matter):-

> "1384(1) A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible..."
>
> (3) Masters and employers shall be liable on their part for the damage caused by their servants and employees acting within the scope of their employment ..."

Arguing the appeal on behalf of the appellant, Mr. Ally draws attention to the case of **General Insurance Company of Seychelles Ltd v Mandelson (1978) SLR 41** in which it was held at 43-44 that the principles governing the general relationship of *"commettant"* and *"proposé"* under the French Civil Code continue to apply to the relationship of "employer" and "employee" under paragraph 1 of Article 1384 of the Civil Code; and that the essential condition for a person to be the "employer" of another is that he must have authority over his "employee" and there must be a "lien de subordination" stemming from the latter to the former. See also **Lucas v Government of Seychelles (1977) SLR 99** and **Azemia v Government of seychelles (1977) SLR 187.**

However, Mr. Lucas for the respondent claims that the appellant did have control within the ambit of Article 1384 under the principle of vicarious liability as she had contracted with Allied Builders to carry out building and blasting works, which in turn, had subcontracted blasting works to Mr. Carly

Faure. As such, continues Mr. Lucas, there was in existence a "lien de subordination" : **Paton v Uzice (1967) SLR 8.**

It is apparent from Mr. Lucas' submissions that he reckons that for the respondent to have succeeded in the matter, it was enough to show that, since the appellant had contracted with Allied Builders to carry out building and blasting works and the latter had subcontracted blasting works to Mr. Faure, she had control over them in terms of Article 1384.

On the contrary, it was incumbent upon the respondent to do more in order to succeed. She had to show that Mr. Faure was subject to the direction, control and supervision of the appellant in respect of the blasting operations. Evidently, no such evidence was adduced, which leaves an ominous lacuna in the respondent's case. On the evidence adduced before the trial court, there was clearly nothing to show that there had been a lien de subordination between the appellant on the one hand and Allied Builders on the other. That Allied Builders were an independent contractor is clearly born out by evidence. Given that there was a contractual relationship between Allied Builders and Mr. Faure, no such relationship existed between the appellant and Mr. Faure. It follows that the appellant can hardly and/or reasonably be said to have been responsible for the actions of Mr. Faure in the matter. In any event, Article 1797 provides that a contractor shall be liable for the acts of the person that he employs.

Mr. Lucas' criticism that the appellant should have joined the independent contractor lacks merit. If anything, it would have been more expedient for the respondent to sue the independent contractor as a sole tortfeasor.

For the reasons we have given, the appeal is allowed and the judgment is set aside with costs in favour of the appellant both in this Court and in the Court below.

Delivered at Victoria, Mahe, this 11th day of *April* 2003