IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), M. Twomey (J.A),J. Msoffe (J.A).

Civil Appeal SCA 29/2013

(Appeal from Supreme Court Decision 31/2007)

Seychelles Broadcasting Corporation — Appellant

Versus

Andre Beaufond — 1st Respondent

Security Protection Services Ltd. — 2nd Respondent

Heard: 21 August 2015

Counsel: Kieran Shah (SC) for Appellant
Bernard Georges, together with Vanessa Gill for Respondents

Delivered: 28 August 2015

JUDGMENT

M. Twomey (J.A)

1. This is an appeal against a decision given by Renaud J on 25th July 2013 in which he found the Appellant liable both for the defamation of the Respondents and for the abuse of its rights under article 1382 and 1383 of the Civil Code of Seychelles. In the event he ordered the Appellant to pay the Respondents the sum of SR75, 000 in damages.

2. The Appellant has appealed the decision on the following four grounds:

> 1. The learned judge was in error in not coming to a finding about what words were actually spoken and considering whether the said words were defamatory in view of the fact that there was no tape nor an agreed transcript of the interview given by the 1st Defendant produced to the court.

2. The learned trial judge did not consider the defence of good faith raised by the Appellant (the 3rd Defendant) adequately, and was in error to find that it had abused its right to report on the matter.

3. The learned trial judge was in error to find that the case of delict under article 1382 and article 1383 of the Civil Code of Seychelles had been made out.

4. The award of R75, 000 as damages against the 3rd defendant is manifestly high.

3. The following facts of the incident giving rise to this claim are not disputed: a noxious substance was released in the banking hall of Barclays Bank at Independence Avenue, Victoria, Mahé causing a lot of discomfort to persons present there. The incident took place on 27th July 2006, three days before the presidential elections in Seychelles. At the time of the incident the first Respondent was in the service of the 2nd Respondent and acting in the course of his employment.

4. The rest of the facts are hotly disputed. The Appellants averred in their plaint that a defendant to the original plain, one André Kilindo, then the Commissioner of Police, in an interview aired by the Appellant on the same day, falsely and maliciously and with the intention of denigrating the Respondents and bringing them into ridicule accused the Respondents of having deliberately discharged the noxious substance. The said André Kilindo denied the allegations, stating in his defence that he had made statements in the public interest, in good faith and that those statements had not been actuated by malice. The Appellant in its statement of defence stated that it had sought a report from the Commissioner of Police on the incident which it had broadcasted "in good faith with no intention of being malicious or derogating anyone to being ridiculed." The Respondents were put to strict proof of their allegations.

5. At the trial which began on 11 February 2008, one of the defendants, the said Commissioner of Police was called on his personal answers. He testified that he had stated in the interview with the Appellant that the investigation as to the release of the noxious substance was ongoing, that it was not clear whether the Respondents had released tear gas and if so that it had not been done accidentally. He stated that his main aim was to calm an already tense pre-

election atmosphere. The Respondents called only one witness, the 1st Respondent. He deponed as to the facts that he had alleged in his plaint and was vigorously cross examined. The Respondents then sought several adjournments on the basis that they had other witnesses to call or that the witnesses had been called but were not in attendance. These witnesses never materialised. The Respondents on several occasions sought further adjournments on the basis that that their counsel was otherwise engaged. They finally closed their case on 20th July 2011, three years, 5 months and 9 days after the first hearing of the matter.

6. We are not impressed by the laxity of the Respondents in prosecuting their claim. We are even less impressed by the fact that that the behaviour was condoned. We are of the view that this failure is much to blame for the poor decision in this case which lacks both factual and legal merit.

7. When parties go to sleep on their cases and then try to resurrect themselves from their deep self-induced coma everyone is wrong footed including the trial judge. The following frank exchange from the transcript of proceedings illustrates the point:

> "Court: We have so far dealt with Mr. Kilindo's personal answers on the 11th February 2008 and also on that day evidence of Mr. Beaufond. Have we finished with that?
>
> Mr. Georges: I do not remember.
>
> Mr. Esparon: We had.
>
> Court: Finished with cross-examination completely?
>
> Mr. Esparon: Yes.
>
> Mr. Georges: Mr. Beaufond finished?
>
> Mr. Shah: Have the proceedings been typed?
>
> Court: Yes you did…Mr. Georges you finished because you informed court on the 16th when it was fixed for continuation that your next witness who is the person who was in

the bank in custody of the canister that brought discharge (sic) is on the outer islands and has not been able to arrive and he is a crucial witness."

8. That so called "crucial witness" was never called. We shall not mince our words. There were neither factual nor legal grounds to found a decision in favour of the Respondents in this case. To cut a long story short, the Respondents, that is, the Plaintiffs in the suit below did not bring evidence to support their claim. Mr. Beaufond's averments and testimony was contested. It was not corroborated in any way. All that is before the court are the Plaintiff's (now Respondents) and Defendant's (now Appellant) version of what was allegedly said. We have neither the allegedly defamatory broadcast not a transcript of the broadcast.

9. We have in previous decisions quoted the maxim that he who avers must prove. The rule applicable to proving the discharge of obligations under article 1315 of the Civil Code is applicable to all obligations, including the delict of defamation and that of abuse of right. It does not suffice to aver something and testify to these averments. We have before cited the case of *Re B* [2008] UKHL 35 in which Lord Hoffman using a mathematical analogy to explain the burden of proof. He stated:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

10. In the case of *Gopal & Anor v Barclays Bank*(2013) Vol 11 SLR 553, Msoffe JA on much the same issue stated:

> "This principle of law is supported by both French law and English law. It is a principle which is well cherished in both jurisprudences".

He went on to add:

"Cross and Tapper on Evidence (12th ed) at 124 defines "evidential burden" as:… the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue ….

Yet again, at page 18, paragraph 19 Halsbury's [Laws of England (4th ed)] says something on the standard of proof to this effect:

"To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a Judge or Jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof."

11. We therefore have no hesitation in finding that ground 1 of this appeal succeeds. Not only was the Respondents' case not made out on the facts but they failed to prove an essential ingredient of the delict of defamation - that there was publication of the defamatory statement. Their failure in this respect is twofold: they failed to bring any proof of the content of the alleged defamatory statement and they also failed to prove that the statement was published.

12. In *Bouchereau v Guichard* (1970) SLR 33 , Souyave CJ confirmed the basic ingredients necessary to prove a case of defamation in Seychelles including the fact that publication is a prerequisite to a claim for defamation. Mr. Shah for the Appellant has submitted that English law, which is applicable to Seychelles in cases of defamation requires every word of the libel to be set out in the declaration in order that they judge might decide if they constitute a ground of action. He relied on the words of Abbott CJ in *Wright v Clements* (1820) 3 B.& Ald. 503, 506. We agree.

13. This is confirmed by *Esparon v Fernez and anor* (1980) SLR 148in which Sauzier J succinctly described the law of defamation as follows:

"Under article 1383 of the Civil Code of Seychelles, defamation is governed by the principles of English Law. The following are the relevant principles for this case:

1. A man commits the tort of defamation when he publishes to a third person words containing an untrue imputation against the reputation of another.

2. Words which impute to the plaintiff the commission of a crime for which he can be made to suffer corporally by way of punishment are actionable without proof of special damage.

3. A man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive."

14. He expanded on the law of defamation in *Biscornet v Honoré* (1982) SLR 451, stating that what the plaint must contain in a case of defamation are the words complained of, the date on which they were published and the names of persons to whom they were published. They are material facts which must be pleaded and proved. We could not put it any better. We are even at this late stage unaware of the actual words complained of by the Respondents. We are therefore unable to understand how the trial judge was able to come to a finding that one of the defendants "accused the 2nd plaintiff on prime television of deliberately and for political reasons of discharging a noxious gas in the banking hall of Barclays Bank." There simply is no evidence for any such finding. No case of defamation was made out in this case.

15. We now turn to the third ground of appeal which concerns a finding of abuse of right by the trial judge. Here again we remain perplexed both on the facts and the law as to how such a finding could have been made. The Respondents based this claim on both the delict of defamation and on an abuse of the Appellant's "right to report on the matter" under Articles 1382 and 1383 (3) (see plaint dated 22nd January 2007 and submission of plaintiffs dated 5th October 2012).

16. Mr. Georges for the Respondents was at pains in this appeal to submit that couched in the provisions of the Civil Code is the delict of the abusive exercise of a right. He relied for his submission on a passage in Amos and Walton's "Introduction to French Law (Clarendon Press, 3rd en P. 219-220). The authors state:

"...French writers have endeavoured to create an extensive and generalised theory of abuse of right...[L]aw is for the benefit of the community and not for the advantage of the

individual and there is an abuse of rights whenever a right is exercised in a manner contrary to the social interest. In contrast with this objective test, other writers favour a subjective one, based on the intention to inflict harm... The courts have declined to consecrate categorically either the one theory or the other. In practice, they do not search for the subjective intention to do harm, but infer from that the commission of acts consistent with no other intention."

17. We agree with Mr. Georges that there is a general delict of abuse of rights. But the operative word here is 'general." In French law the *Loi du 29 juillet 1881 sur la liberté de la presse* deals with the specific abuse of the right of freedom of speech. In Seychelles the abuse of the right to freedom of speech is dealt with in article 1383 (3) of the Civil Code.

18. Can one bring an action both in defamation but also under the doctrine of *abus des droits* (abuse of rights) in Seychelles in cases where damage is caused by the abuse of the freedom of speech? The Respondents submitted that they were relying on delict under Articles 1382 and 1383(3) for their action. We reproduce below *in extenso* the provisions they relied on, if only to demonstrate the fallacy of their argument:

"Article 1382

1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.

3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

4. A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

5. Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.

Article 1383

1. Every person is liable for the damage it has caused not merely by his act, but also by his negligent or imprudence.

2. The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable unless he can prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.

3. The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English law. (emphasis ours)

19. It is obvious from a close and logical reading of the provisions above that defamation (the abuse of the freedom of speech) is a subset of delicts provided for in our Civil Code. There was therefore as submitted by the Appellant a duplication of the cause of action in this case. It is therefore not permissible to base a plaint on both defamation and abuse of right under the provisions of article 1382 and 1383. We are supported in this view by a passage from Terré, Simler and Requette, Droit Civil, Les Obligations, (10ème edition Dalloz) at p 746 - 748 which sets out the jurisprudence of the Cour de Cassation in Ass. Plé., 12 juill. 2000 in which the Court stated:

"les abus de la liberté d'expression prévus et réprimés par la loi du 29 juillet 1881 ne peuvent être réparés sur le fondement de l'article 1382 du Code civil."

Subsequent Cassation decisions in 2005 and 2008, excluded from this blanket ban of abuses of the freedom of expression under article 1382 those cases which resulted from intentional abuse or for personal damage to the individual and to corporate entities and in

circumstances not covered by the *Loi du 29 juillet 1881*. The authors conclude that:

"Mieux vaudrait, décidément, metre un terme à cette étrange aventure jurisprudentielle."

20. We, on the other hand do not need to embark or engage in jurisprudential adventures on this issue. We choose to follow the latin maxim and the widely accepted rule of interpretation that *generalia specialibus non derogant* (the provisions of a general statute must yield to those of a special one). The provisions of article 1382 deal with damages arising from the abuse of rights in general. Article 1383(3) specifically deals with damages arising from the abuse of the right of freedom of expression.

21. Having ruled that a case for defamation was not made out, it would at this stage be purely academic to consider the other grounds of appeal. We will not venture to do so. We therefore allow the appeal with costs.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on28 August 2015