

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , B. Renaud (J.A), F. Robinson (J.A)]

Civil Appeal SCA 12/2014

(Appeal from Supreme Court Decision CS 155/2012)

The Estate of the late Berard Fanchette
Represented by its executrix Juliana
Gretel Tirant

Appellant

Versu
s

The Attorney General
Herein representing the Government of
Seychelles

Respondent

Heard: 03 May 2018

Counsel: Mr. Joel Camille for the Appellant

Miss Brigitte Confait for the Respondent

Delivered: 05 June 2018

JUDGMENT

F. Robinson (J.A) **The background**

1. A judgment in the present appeal was delivered, on 11 May, 2018, by the President of the Court of Appeal of Seychelles, F. MacGregor, who dismissed the appeal, with Justice Renaud agreeing. I was also of the opinion that the appeal should be dismissed on the stipulation that I will give my reasons in a separate judgment.
2. I now give reasons.

3. This is an appeal against the judgment of a learned Judge of the Supreme Court, who dismissed the plaint, dated 30 November, 2012, filed by the plaintiff, the late Mr. Berard Fanchette, against the defendant. In that plaint, the plaintiff prayed for a judgment ordering the defendant to pay to him the sum of one million two hundred and seventy six thousand rupees as damages for *faute* allegedly committed by the defendant.
4. The defendant pleaded in *limine litis* that the plaint against it should be dismissed. The defendant's objection in law is as follows —

"[t]he Plaint discloses no cause of action against the Defendant. In line with section 78 (7) (a) of the Children Act Cap 28, "*A member of the Tribunal*" which includes the Chairman and/or Vice Chairman and such other member(s), "*and its secretary*", are not liable for anything done in good faith in performance of their functions under the Children Act.

The Family Tribunal acting in good faith and in performance of its functions is therefore immune from liability under the Children Act."

This objection in law must be considered in terms of two aspects. Firstly, Miss Confait argued that, since the alleged tortfeasor is the Family Tribunal, which is part of the judiciary, a branch of the Government of Seychelles independent of the Executive, the plaintiff's claim cannot be brought against the Attorney General, who is the principal legal advisor to the Government of Seychelles, in terms of Article 76 (4) of the Constitution of the Republic of Seychelles. She went on to argue that, because the members of the Family Tribunal are not the servants of the defendant, the defendant cannot be held vicariously liable for the acts of the members of the Family Tribunal. As for the second aspect of the objection raised by Miss Confait, concerning the question of the immunity from liability of the Family Tribunal, in terms of section 78 (7) (a) of the Children Act, she contended that its liability could only be established if *bad faith* was expressly averred in the plaintiff's plaint and proved.

5. Mrs. Amesbury, who represented the plaintiff in the Supreme Court, did not agree. Her

response, in essence, was that the plaint should be read as disclosing a cause of action against the defendant and not the Family Tribunal. Moreover, she contended that, even though section 78 (7) (a) of the Children Act provides immunity from liability to the Family Tribunal, it does not provide any immunity from liability to the defendant against which the present action is brought.

6. In light of the allegations in the plaint and the submissions of Miss Confait and Mrs. Amesbury, the learned Judge upheld the objection in *limine litis* and dismissed the plaintiff's plaint for the following reasons —

(1) In the view of the learned Judge —

"... the plaint obviously, does not disclose any cause of action anywhere against the Government so as to plead Attorney General as defendant in this case. Even if we assume for a moment, that the government is vicariously liable for the "fault if any, allegedly committed by the Family Tribunal to the detriment of the plaintiff, there is not a scintilla in the plaint to show or even to indicate that the defendant is vicariously liable in damages for the fault committed by its servants in the course of their employment".

(2) As to whether it was imperative for the plaintiff to expressly aver *bad faith* in his plaint, the learned Judge was of the view that —

"[...] this action is not grounded on the allegation that the Family Tribunal failed to act in good faith or on that it acted maliciously in the performance of its function [...] In an action of this nature, obviously such allegation being a material fact that constitutes the cause of action it ought to have been pleaded. In the absence of any such averment, I find that the Family tribunal is entitled to the statutory protection or immunity from proceedings in this matter, as the impugned order was made in the performance of its Judicial functions under the Act".

Moreover, the learned Judge went on to say —

"[...] no action can be brought against the Family Tribunal, in respect of any matter within its jurisdiction, unless it is expressly alleged that it acted maliciously and without probable cause, in terms of section 5 (1) of the Public Officers Protection Act".

The appeal

7. Claiming as the executrix of the estate of the plaintiff, the late Mr. Berard Fanchette, the appellant has, in the Memorandum of Appeal, raised five grounds of appeal challenging the findings of the learned Judge. At the hearing of the appeal, Mr. Camille acknowledged the issue that is relevant for our determination. Whether the plaint disclosed a reasonable cause of action against the defendant, now the respondent?
8. Mr. Camille, in his skeleton arguments offered on behalf of the appellant, that restated the arguments offered before the Supreme Court in relation to reason (1) above, submitted that the learned Judge erred when he held that the plaint did not disclose a reasonable cause of action against the respondent. In relation to reason (2) above, Mr. Camille challenged the finding of the learned Judge that *bad faith* must be expressly averred in the plaint, so that it disclosed a reasonable cause of action against the Family Tribunal.

The first issue:

9. **Was the learned Judge wrong to hold that the plaint did not disclose a reasonable cause of action against the respondent?**
10. As shown above, Mr. Camille and Miss Confait have raised issues that need to be considered exclusively in light of the appellant's plaint. The plaint avers as follows under the relevant paragraphs and in the prayer —

"2. The Defendant has by statute also set up, administers and operates a Family Tribunal, which is entrusted with jurisdiction and powers to determine custody, maintenance, access and care of minor children.

[...]

7. The Plaintiff further avers that the acts of the Defendant (his imprisonment) amounts to a "faute" in law for which the Defendant is liable and which has caused loss and damage to the Plaintiff.

PARTICULARS OF LOSS & DAMAGE

[...]

WHEREFORE the Plaintiff prays this Honourable Court to order the Defendant to pay the sum of Seychelles rupees one million two hundred and seventy six thousand together with interest and costs.

[...]".

11. The plaint is brought against "*The Attorney-General Herein representing the Government of Seychelles c/o National House, Victoria*" styled as the "*Defendant*". The contention of the appellant, through Mr. Camille, is that the plaint should be read as disclosing a cause of action against the respondent and not the Family Tribunal. A cursory look at the plaint shows that the proposed cause of action against the respondent is based on *faute simpliciter*. There are, in the plaint, in relation to the respondent, averments to the effect that it is the author of the acts for which it is allegedly liable. Therefore, no cause of action could be said to have been disclosed against the Family Tribunal. I state that immunity from liability under the written law is enjoyed by the members of the Family Tribunal and its secretary in terms of the written law. In that regard, no cause of action could even be said to have been disclosed against the members of the Family Tribunal who are not, ex facie the contents of the plaint, alleged tortfeasors. It is pertinent to note that the plaint does not aver that the respondent (the Government of Seychelles) is being

sued in its capacity as *commettant*. It is trite law that, since the Government of Seychelles can only be sued as a *commettant*, the averment of a *lien de préposition* is required to disclose the exact cause of action under Article 1384 (3) of the Civil Code of Seychelles Act and to show that the Government of Seychelles is in a relationship of *commettant* in relation to those said to have committed the wrongful acts to the prejudice of the victim. In terms of Article 1384 (3) of the Civil Code of Seychelles Act, the Government of Seychelles shall be liable for damage caused by its servants and employees acting within the scope of their employment. Thus, it is clear that the issue as to whether the respondent (Government of Seychelles) is vicariously liable does not arise in the present action. In light of the above, I agree with the **conclusion** of the learned Judge that the plaintiff does not disclose a reasonable cause of action against the respondent (the Government of Seychelles). In view of my finding and the fact that the plaintiff is so infelicitously drafted, I shall not consider the question as to whether the proposed cause of action should have been brought against the members of the Family Tribunal.

The second issue:

12. **Was the learned Judge wrong to hold that *bad faith* must be expressly averred in the plaintiff so that it disclosed a reasonable cause of action against the Family Tribunal?**
13. In light of my finding in relation to the first issue, I find that the finding of the learned Judge in relation to the issue of the immunity from liability of the "*Family Tribunal*", in terms of the written law is clearly unsupported by the plaintiff. Accordingly, it is my view that the issue as to whether the learned Judge was wrong to hold that *bad faith* must be expressly averred in the plaintiff, so that it disclosed a reasonable cause of action against the "*Family Tribunal*" does not arise for consideration in the present appeal.

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 05 June 2018