

## IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** A. Fernando (President) , M. Twomey (J.A), F. Robinson (J.A)]

### **Civil Appeal SCA 48/2017**

**(Appeal from Supreme Court Decision CS 47/2016)**

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Godfra Hermitte

Appellant

Versus

The Attorney General representing the  
Government of Seychelles

1st Respondent

Ernest Quatre, the Commissioner  
of Police

2nd Respondent

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Heard: 06 August 2020

Counsel: Mr. B. Georges for the Appellant

Mr. J. Chinnasamy for the Respondents

Delivered: 21 August 2020

### **JUDGMENT**

F. Robinson (J.A)

1. This is an appeal against the judgment of a learned trial Judge of the Supreme Court dismissing the plaint of the Appellant, Mr Godfra Hermitte in respect of claims against the Respondents, arising out of his previous employment with the Police Force of Seychelles, the Government of Seychelles.
2. For the sake of convenience, the first respondent (the first defendant in the case at first instance) is hereinafter referred to as the "*Government of Seychelles*" and the second

respondent (the second defendant in the case at first instance) is hereinafter referred to as the "*Commissioner of Police*".

### **The essential facts**

3. The essential facts are as follows —

- (a) In an amended plaint filed on the 16 January 2017, the Appellant claimed the sum of SCR 1,268,000 with interest and costs against the Government of Seychelles and the Commissioner of Police with respect to the termination of his employment with the Police Force of Seychelles.
- (b) The questions to be decided appeared to be contained in paragraph 7 of the plaint, which averred that: "**7. *The Plaintiff's contract of service and his service in the Seychelles Police Force was terminated as a direct result of fault of the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants, agents and employees which frustrated the said contract, acting during the course of their duties, between Plaintiff and the said Defendants and forced or left no option but the resignation of Plaintiff as an officer of the said Police Force***". Emphasis supplied
- (c) The particulars of *faute* were contained in paragraph 7 (i) to (v) of the plaint as follows —

*"i. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants frustrated the contract by:*

*a) Terminating Plaintiff's service with the Seychelles Police Force on the 20<sup>th</sup> of February 2016.*

*b) Transferring the Plaintiff from the Police Force to the Ministry of Home Affairs unilaterally.*

*ii. The 2<sup>nd</sup> Defendant withdrew all pertinent duties that should have been*

*performed by Plaintiff thereby rendering the Plaintiff idle and ineffective in office.*

*iii. The 2<sup>nd</sup> defendant grossly undermined the Plaintiff in the performance of his duties.*

*iv. The 1<sup>st</sup> and 2<sup>nd</sup> defendant did not disclose the reasons for the purported transfer of the Plaintiff from the Police Force to the Ministry of Home Affairs.*

*v. The transfer was unlawful and contrary to the Plaintiff's contract, the law, and Public Service Orders".*

- (d) The Government of Seychelles and the Commissioner of Police filed a defence on the 14 September 2016, denying the claims of the Appellant. Their defence averred that the Appellant voluntarily resigned from the Police Force of Seychelles.
- (e) At the trial at first instance, the testimony of the Appellant was to the effect that he was a police officer for thirty two years, rising to the rank of Assistant Commissioner of Police. In 2016, he was informed that he was to be transferred to the post of advisor to the Minister of Home Affairs. His consent was not sought prior. He was faced with a *fait accompli* and having considered the matter and concluded that this was a reorganisation of the Police Force of Seychelles designed to move him away from his chosen and dedicated career path, he opted to resign. His resignation was accepted.
- (f) Mr Anthony Derjacques, who appeared for the Appellant in the case at first instance, in his closing submissions, specified that the Appellant's action was grounded on *faute* under Article 1382 of the Civil Code of Seychelles. Counsel for the Government of Seychelles and the Commissioner of Police, in his closing submissions, and the learned trial Judge did not question the correctness of the

Appellant's premise that the plaint disclosed direct responsibility. I express my views as to its correctness below.

- (g) The learned trial Judge in a judgment delivered on 2 November 2017, dismissed the Appellant's plaint. He understood the Appellant's evidence to be that the Government of Seychelles' treatment of the Appellant had left him with no option but to resign. In that regard, he found that the Appellant's case was one between employer and employee, to do with his resignation and the termination of his contract of employment. He also found that the Appellant was pleading his case on *faute* on the basis of Article 1382 of the Civil Code of Seychelles. Therefore, he held the view that the Appellant had to choose his cause of action and could not go on two simultaneous causes. After that, the learned trial Judge considered the question whether or not the Appellant should have first applied to the Public Service Appeal Board. The learned trial Judge was of the view that the proper forum for the case was the Public Service Appeal Board and dismissed the Appellant's case.

### **The grounds of appeal**

4. The Appellant has appealed on two grounds —

*"1. The learned Trial Judge erred in ruling that the Appellant was obliged to choose his cause of action, and could not go on two simultaneous causes of action.*

*2. The Learned trial Judge erred in ruling that it was a well settled principle of law that a party to who a legal avenue is given must first exhaust this before coming to the Supreme Court".*

Ground 1 of the grounds of appeal

5. Ground one of the grounds of appeal took issue with the finding that the Appellant had to choose a cause of action and could not go on two simultaneous causes of action. Counsel for the Appellant contended that this finding was not determinant of the case because it was not used by the learned trial Judge to dismiss the plaint.
6. In support of his contention, Counsel contended that a plaint can contain several causes of action under section 105 of the Seychelles Code of Civil Procedure, and that a plaint may also plead both contract and delict: **Fisherman's Cove Limited v Petit & Dumbleton Limited** [1978] SLR 15, 16. In that regard, he stated that a person cannot bring consecutive actions in contract and delict under Article 1370 *alinéa* 2 of the Civil Code of Seychelles. Counsel argued that the plaint was more in the nature of a combination of contract and delict rather than two separate causes of action (such as one for breach of contract and one in delict) arising out of the same series of events which led to the Appellant resigning. He added that the plaint does not purport to bring the two actions consecutively.
7. Counsel next pointed out that the *principe de non cumul de la responsabilité contractuelle et délictuelle* applicable in France and Mauritius is applicable in Seychelles: **Mediterranean Shipping Company (Appellant) v Sotramon Limited (Respondent) (Mauritius)** from the Supreme Court of Mauritius [(Court of Civil Appeal)] [2017] UKPC 23 Privy Council Appeal No 0105 of 2015, citing *TFP International Ltd v Itoola* [2002] SCJ 147. He claimed that it was probably this principle which the learned trial Judge had in mind in his citation at paragraph 14 of the judgment.
8. Finally, Counsel then went on to state that the principle of *cumul d'actions* has no bearing in a case arising out of the termination of employment because, under the written laws of Seychelles, the Appellant had not been constrained to file in contract and had chosen to file in delict. Counsel suggested that had that been the case, the principle of *cumul d'actions* would have been sufficient to nonsuit the claim in delict. He asserted that the

Appellant chose to file in delict, and take his chances there. Therefore, in the view of Counsel, the Appellant's action was sustainable, since he was not constrained to file in contract.

9. Counsel for the Government of Seychelles and the Commissioner of Police grounded his submissions on Article 1370 *alinéa 2* of the Civil Code of Seychelles.
10. I address the contentions contained in the first ground of appeal under the heading "*the issue of electing a cause of action to pursue: Article 1370 alinéa 2 of the Civil Code of Seychelles*".

***The issue of electing a cause of action to pursue: Article 1370 alinéa 2 of the Civil Code of Seychelles***

11. The relevant provisions of the written laws are as follows.
12. Section 105 of the Seychelles Code of Civil Procedure deals with joinder of causes of action and provides —

*"Joinder of causes of action*

*105. Different causes of action may be joined in the same suit, provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities [...]."*

13. Article 1370 *alinéa 2* of the Civil Code provides —

***"1370 (2) — When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However, if a law limits the liability in either of the two causes of action, the***

*plaintiff shall be bound to pursue the cause of action, to which that law relates. A plaintiff shall not be allowed to pursue both causes of action consecutively."* Emphasis supplied

14. The first ground of appeal takes issue with paragraphs 13 and 14 of the judgment, which reads —

*"[13] A plaintiff must choose his cause of action. He cannot go on two simultaneous causes of action.*

*[14] The following is apposite:*

*"Lorsqu'il existe une obligation contractuelle la faute est définie en fonction de l'organisation des relations voulues par les parties et non en fonction des règles de la responsabilité délictuelle. Cette règle dite du **non cumul** traduit donc la primauté de la force obligatoire du contrat. Le principe date d'un arrêt de la chambre des requêtes de la Cour de Cassation du 21 janvier 1890. La responsabilité contractuelle doit jouer dès lors que le dommage est lié à l'exécution du contrat [...]. Il n'en est pas de même lorsque le dommage n'est pas lié à l'exécution du contrat.*

*De la même façon que l'article 1382 ne peut être invoqué dans les rapports contractuels, "les dispositions de l'article 1384 al 1 ne peuvent être invoquées dans le cas d'un manquement commis dans l'exécution d'une obligation résultant d'une convention dont il ne saurait être fait l'abstraction pour apprécier la responsabilité engagée" (Cass Civ. 2 26 mai 1992). Verbatim*

***Non-cumul de la responsabilité contractuelle et délictuelle: French law  
and Mauritian law***

15. The principle of *non-cumul de la responsabilité contractuelle et délictuelle* as obtained in France and applied by the Mauritian Courts had consistently held that where damage resulted from a breach of contract, it was not open to the plaintiff to base an action in tort: see the Judicial Committee of the Privy Council in the case of **Mediterranean Shipping Company**, *supra*. In **Mediterranean Shipping Company**, *supra*, the Privy Council authoritatively reaffirmed the doctrine and jurisprudence whereby parties linked in contract, must ground any claim that they may have against each other based on contractual liability and not in tort.
16. The following extracts from **Mediterranean Shipping Company**, *supra*, with respect to the position of French law concerning the principle of *non-cumul de la responsabilité contractuelle et délictuelle* will assist a better understanding of the issue —

*"French law*

17. In 1984 Tony Weir, writing in the *International Encyclopaedia of Comparative Law, Volume on Torts (Vol X1)*, on “Complex Liabilities”, Chapter 12, p 27, para 52, described the position in French law as follows:

“A contractor may not treat as a delict the breach of any obligation contained in the contract; tortious liability can exist only where contractual liability does not; the rule is not concurrence but incompatibility. The Court of Cassation has said on many occasions ‘que les articles 1382 et suivants ne sont pas applicables lorsqu’il s’agit d’une faute comprise dans l’exécution d’une obligation résultant d’un contrat.’ Legal writers are almost unanimous that this is the positive law and a clear majority



*approve of it, though some would prefer the distinctions in the regulation of the two regimes [contract and tort] to be diminished or abolished. It has been suggested that a contractor may be sued in delict if his breach was deliberate or criminal or an abuse of rights; Savatier has contended that concurrence is admissible unless the only harm complained of is the failure to receive the promised performance. But the overwhelming view is that concurrence is quite excluded.”*

[...].

*19. It has been recognised that to describe the principle as “non-cumul” is potentially misleading, but most legal writers appear to agree about its effect, although there are exceptions. Prof Legier, the editor of Encyclopédie Dalloz, V<sup>o</sup> Responsabilité Contractuelle (1989), p 2, para 5, described it in this way:*

*“Principe dit du non-cumul - Ce principe, dont la dénomination n’est pas suffisamment claire, interdit à la victime, non seulement de cumuler ou de combiner les deux régimes de responsabilité, mais encore de choisir l’un ou l’autre. Si les conditions de mise en jeu de la responsabilité contractuelle sont réunies, ses règles doivent s’appliquer, sinon il convient de se référer à celles de la responsabilité delictuelle.”*

*20. Similarly, Dalloz, Droit Civil: Les Obligations, 11th ed (2013), (edited by Prof Terré, Prof Simler and Prof Lequette) contains the following passage, which appeared also in earlier editions (p 884, para 876):*

*“Jurisprudence. La jurisprudence, après avoir hésité, s’est prononcée, en principe, contre le ‘cumul’ des responsabilités. Elle a décidé que les dispositions des articles 1382 et suivants sont sans application lorsqu’il s’agit d’une faute commise dans l’exécution d’une obligation résultant d’un contrat.”*

21. The authors add:

*“On a parfois proposé d’admettre le cumul des responsabilités en cas de faute intentionnelle d’un contractant, le dol permettant alors l’application des règles délictuelles ... Des partisans du ‘cumul’ ont prétendu que les règles ordinaires de la responsabilité contractuelle ne jouent pas en cas de dol, celui-ci faisant naître une responsabilité délictuelle. Le raisonnement est inexact: en cas d’inexécution dolosive, les règles de la responsabilité sont certes différentes, mais cela ne tient pas à ce que la responsabilité cesse d’être contractuelle. Comment le cesserait-elle, puisqu’il y a toujours inexécution du contrat?”*

*It is a telling question.*

*Mauritian case law*

*23. The structure of the Mauritian Civil Code relating to contract and tort follows closely the provisions of the French Civil Code as it was before the reform of French contract law in 2016, and the influence of French law is reflected in Mauritian case law”.*

17. With respect to the Mauritian case law, I also read from **Sotromon Ltd. v Mediterranean Shipping Co. Ltd.** 2013 SCJ 135 (the judgment in the case at first instance) at pp. 2 and 3 —

*"Now, it is well settled by our case law that the principle of «non-cumul de la responsabilité contractuelle et délictuelle» derived from French law is also applicable in Mauritius. In Kinoo v. Currumthaullee and Anor [1977 MR 363] the Court made it clear that a plaintiff cannot have recourse to “cumul” in such a way as to recover damages both under a contract and in tort, nor can he proceed by means of a hybrid action in which case he would be asking the court “to apply in turn the rules governing in contract and the rules governing actions in tort, according to what set of rules best serves his purpose”.*

***The «principe du non-cumul» in France appears to have evolved into a «principe du non-option» as borne out in Répertoire Civile Dalloz Responsabilités Contractuelles Note 5:***

*«Principe dit du non-cumul. – Ce principe, dont la dénomination n’est pas suffisamment claire, interdit à la victime, non seulement de cumuler ou de combiner les deux régimes de responsabilité, mais encore de choisir l’un ou l’autre. Si les conditions de mise en jeu de la responsabilité contractuelle sont réunies, ses règles doivent s’appliquer, sinon il convient de se référer à celles de la responsabilité délictuelle. Il arrive que le demandeur ait intérêt à se prévaloir d’un régime plutôt que de l’autre, par exemple, la responsabilité délictuelle peut lui offrir une prescription plus longue ou lui permettre d’échapper à une clause restrictive de responsabilité. En sens inverse, dans d’autres cas, la responsabilité contractuelle s’avère plus avantageuse, notamment par le jeu d’une obligation de sécurité ou de renseignements qui incombe à l’autre partie. **Mais une jurisprudence abondante et bien assise n’autorise pas la victime à choisir les règles qui lui sont les plus favorables. D’après la Cour de cassation, «les***

**articles 1382 et suivants du code civil ne peuvent pas être invoqués à l'appui d'une demande tendant à la réparation d'un préjudice résultant, pour l'une des parties à un contrat, d'une faute commise par l'autre partie dans l'exécution d'une obligation contractuelle»».** (Emphasis added).

*Our courts have followed the above principle as obtains in France and have consistently held that where damages result from a breach of contract, the plaintiff should base his action in contract and not in tort. Vide TFP International Ltd. v. S. Itoola [2002 SCJ 147], The Hong Kong & Shanghai Banking Corporation v. Mamad Safii Sairally [2002 SCJ 227]*

[...]

*This matter was also considered at length in Austral v Air Abdool Hamid Ismael Hurjuk [2010 SCJ 202], where the appellate court explained the rationale for the principle of “non-option” to be found in Précis Dalloz Droit Civil Les Obligations 5<sup>e</sup> Edition by François Terré, Philippe Simler and Yves Lequette at paragraph 835:*

*«835. Jurisprudence. La jurisprudence après avoir hésité, s’est prononcée en principe, contre le «cumul» des responsabilités. Elle a décidé que les dispositions des articles 1382 et suivants sont sans application, lorsqu’il s’agit d’une faute commise dans l’exécution d’une obligation résultant d’un contrat. Indépendamment des raisons théoriques tirées de la nature différente des fautes contractuelle et délictuelle, cette solution s’explique par le fait que le régime de la responsabilité contractuelle est généralement moins favorable à la victime que*

*celui de la responsabilité délictuelle (limitation, par exemple, de la réparation au dommage prévisible). Si le créancier pouvait, à son gré, invoquer la responsabilité délictuelle, ces limitations deviendraient lettre morte. Enfin, le principe même de la force obligatoire du contrat condamne le cumul des responsabilités: lorsque les parties ont décidé, par exemple, qu'il n'y aurait pas de responsabilité dans tel ou tel cas, permettre cependant au créancier d'invoquer alors la responsabilité délictuelle, ce serait, en quelque sorte, l'autoriser à violer le contrat, en tournant les clauses conventionnelles relatives à la responsabilité»". (Emphasis supplied.)*

### **Seychellois law**

18. Given the above, the question which arises for consideration is whether or not the principle of *non-cumul de la responsabilité contractuelle et délictuelle* as obtained in France and applied by the Mauritian Courts, is applicable in Seychelles. With respect to this question in issue, I read from A. G. Chloros, Codification in a Mixed Jurisdiction, at page 121 —

#### **"14. COINCIDENCE OF CONTRACT AND DELICT**

*One of the most intractable problems is the question of choice between an action in contract and an action in delict when the facts may give rise to either or both. This is known as cumul des responsabilités, on which the Code is silent. There may, in fact, be very good reasons why a plaintiff may prefer, if he has a choice, to sue in tort rather than in contract and vice versa. [...]. In this connexion, French law has not adopted any distinct solution though the traditional answer is that the action in contract excludes the action in tort. It is clearly unfair to imply the*

*considerable theoretical discussions and case law which have kept this part of the law in a state of flux, into the law of Seychelles. For that reason, the Code now expressly resolves the controversy in article 1370 §2. The rule is that the plaintiff has a choice of actions but, if the law limits liability in respect of one action, the plaintiff is bound to sue thereunder [...]"*.

19. It is clear that the approach followed by the Seychellois Courts is contained in our law. Article 1370 *alinéa* 2 of the Civil Code of Seychelles grants a person the right to base his action either in contract or in tort, when the person has a cause of action which may be founded either in contract or in tort. It is also settled by the Seychellois courts that Article 1370 *alinéa* 2 of the Civil Code of Seychelles does not constrain a person, who had sustained damages as a result of a breach of the conditions of a contract, to ground his action in contract only, when that person has a cause of action which may be founded in either contract or in tort and does not provide that a person cannot plead both causes of action in contract and in tort in the same action as long as they are pleaded in the alternative: see **Multi Choice Africa Limited v Intelvision Network Limited and Anor** SCA 45/2017 (delivered on the 9 April 2019)<sup>1</sup>.
20. Article 1370 *alinéa* 2 of the Civil Code of Seychelles prevents a person from pursuing both causes of action in contract and in tort, when a person has a cause of action which may be founded either in contract or in tort, consecutively or cumulatively. In other words, a person cannot have recourse to "*cumul*" in such a way as to recover damages both under contract and in tort.
21. My analysis of the above doctrine, authorities, Article 1370 *alinéa* 2 of the Civil Code of Seychelles, our rules of pleadings and having regard to the spirit of justice and fairness, leads me to the inevitable conclusion that the principle of *non-cumul de la responsabilité contractuelle et délictuelle* derived from French law, which is also applicable in Mauritius, is not applicable in Seychelles. I find that the principle of *non-cumul de la*

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<sup>1</sup> In that case, Mr Hoareau, conceded that in respect of Article 1370 (2), one was precluded from pleading both causes of action in contract and in delict in the same suit as long as they were in the alternative.

*responsabilité contractuelle et délictuelle* derived from French law has no bearing on this case.

22. As suggested by Counsel for the Appellant, it appears that the learned trial Judge had in mind the principle of *non-cumul de la responsabilité contractuelle et délictuelle* in his citation at paragraph 14 of the judgment. Based on my holding at paragraph 21 hereof, I conclude that the learned trial Judge erred in applying the principle of *non-cumul de la responsabilité contractuelle et délictuelle* as obtained in France in this case. I find that the learned trial Judge should have applied his mind to Article 1370 *alinéa* 2 of the Civil Code of Seychelles, our jurisprudence and our rules of pleadings.
23. In light of my finding contained in paragraph 21 hereof, I also find that the submissions of Counsel for the Appellant, contained in paragraph 15 of his Heads of Argument, which are repeated in part at paragraph 8 hereof, are flawed and do not arise for consideration.
24. Counsel for the Appellant in his first ground of appeal and Heads of Argument submitted that, in any event, the learned trial Judge's finding on concurrency of tort and contract was not determinant of the case because it was not the basis for the learned trial Judge's dismissal of the action. On a very close reading of the judgment, it appears that the learned trial Judge had dismissed the action because the Appellant did not file before the Public Service Appeal Board. The learned trial Judge stated at paragraphs 18, 19 and 20 of the judgment —

*"[18] It is a well settled principle of law that a party coming to the Supreme Court for any remedy or relief already provided for must have exhausted any other avenue open to him a priori.*

*[19] I find it relevant to reproduce the following in terms of the jurisdiction of the Public Service Appeal Board, from the **Director of Social Security Fund v Public Service Appeals Board** (Civil Side No. 162 of 2010) [2011] SCSC 46 (28 July);*

*"The Constitution provides an unfettered access to the Public Service Appeal Board by those with complaints, relating to the areas set out in the Constitution, regardless of any existing avenue under any other law or instrument. In the result, I reject the claim that the Respondent acted with procedural impropriety in entertaining the complaint it did. The Respondent was well within their jurisdiction to entertain the complainant's complaint."*

*[20] In the light of the above, I cannot entertain the plaint which is therefore dismissed."*

I mention that the issue which arises in the grounds of appeal and the Heads of Argument, from his finding was whether or not the Public Service Appeal Board was the only forum for the Appellant to take his complaint, which is addressed in the second ground of appeal.

25. Rule 31 (3) of the Seychelles Court of Appeal Rules 2005, enabled under Article 136 (1) of the Constitution of the Republic of Seychelles, provides —

*"31 (3) The Court may draw inferences of fact, and give any judgment, and make any order which the Supreme Court ought to have given or made, and make such further or other orders as the case requires".*

26. I have tried to no avail to understand what the plaint was conveying. Counsel for the Appellant in his Heads of Argument and oral submissions tried his utmost to convince us that the plaint professed to combine contract and delict arising out of the same series of events which led to the Appellant resigning from the Police Force of Seychelles and did not purport to bring the two actions consecutively. It is not even clear whether or not there were more than one causes of action pleaded. Counsel for the Appellant also submitted explicitly that the Appellant chose to file in delict. At the hearing of the appeal, Counsel was at a loss to understand what the plaint was trying to convey. I observe that



Counsel for the Appellant, in his Heads of Argument and oral submissions, respectfully conceded the point that the plaint was unhappily drafted, and that this may lead to confusion.

27. I commend Counsel for the Appellant for doing his utmost to convince us of the Appellant's position. Nonetheless, in the light of the legal principles stated above, I cannot accept his contention that the averments contained in the plaint met the test of Article 1370 *alinéa* 2 of the Civil Code of Seychelles. The Appellant was simply required to plead the two causes of action in the alternative under Article 1370 *alinéa* 2 of the Civil Code and not have recourse to a combination of contract and tort as suggested by his Counsel. Thus, I hold that the Appellant's pleadings did not meet the test of Article 1370 *alinéa* 2 of the Civil Code of Seychelles.
28. I mentioned in paragraph 3 (f) hereof that I will express my views as to the correctness of the premise that the Appellant's action was grounded on *faute*. Counsel for the Appellant submitted in his Heads of Argument that the Appellant chose to file in delict and to take his chances there. As mentioned above, it is not clear that this was the case. The learned trial Judge and Counsel for the Government of Seychelles and the Commissioner of Police were of the view that the Appellant was pleading his case on *faute*. Counsel for the Appellant also stated in his Heads of Argument that the wording of paragraph 7 of the plaint could conceivably lead to the assumption that vicarious liability was being pleaded in respect of the Government of Seychelles and the Commissioner of Police for the acts of their "*servants, agents and employees [...] acting during the course of their duties*" and reinforced the assumption that the claim was in delict. As mentioned above, Counsel for the Appellant was at a loss to understand what the plaint for his own client was conveying.
29. It is important that I stress that the grounding of the cause of action against the Government of Seychelles and the Commissioner of Police is not the same. The cause of action against the Government of Seychelles is based on Article 1384 *alinéa* 3<sup>2</sup> of the

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<sup>2</sup> "Article 1384

[...]

Civil Code of Seychelles (vicarious liability), whereas against the Commissioner of Police it would be based under Article 1382<sup>3</sup> of the said Code (direct liability). In **Ernesta v Commissioner of Police** (2002) SLR 92 Perera CJ adopted the view that, having regard to the provisions of the Constitution, the Police Force Act of Seychelles and various authorities, the Commissioner of Police is a *préposé* of the Government of Seychelles. It is also settled in our jurisprudence that the plaint must clearly disclose whether direct or vicarious responsibility is being alleged: see **Confait v Mathurin** SCA 39/1994.

30. It is a well-settled principle that law does not have to be pleaded. Nonetheless, it was essential for the plaint to aver in what capacity the Government of Seychelles and the Commissioner of Police were being sued. The Government of Seychelles can only be vicariously liable for the wrongdoings of its *préposés*. Therefore, it should be sued in its capacity as employer for the *fautes* committed by its officers who would be its *préposés* for any tortious acts or omissions which they may have committed in the discharge of their duties. Therefore, the *lien de préposition* of employer and *preposés* and the *fautes* of the *préposés* in the discharge of their duties are essential requirements and must be

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*3. Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable".*

<sup>3</sup> "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".*

specifically pleaded or satisfactorily apparent from the wording of the plaint to articulate an action within the ambit of Article 1384 *alinéa* 3 of the Civil Code of Seychelles: see **Monthy v Seychelles Licensing Authority & Ano** (SCA 37/2016) [2018] SCCA 44 (delivered on the 14 December 2018).

31. I find it necessary only to state some examples to show that the plaint did not disclose a cause of action against the Government of Seychelles and the Commissioner of Police in delict —

- (a) the plaint appeared to express that the cause of action relied on by the Appellant against the Government of Seychelles is its direct liability (*faute*) under Article 1382 of the Civil Code of Seychelles;
- (b) it was also glaring that, with respect to the Government of Seychelles, there was no averment of any *lien de préposition* to the effect that it was the employer of the Commissioner of Police;
- (c) it was also glaring that, with respect to the Commissioner of Police, there was no averment to the effect that he was the author of any act or omission while acting as the *préposé* of the Government of Seychelles;
- (d) in addition, as pointed out by Counsel for the Appellant, paragraph 7 of the plaint could conceivably lead to the assumption that vicarious liability was being pleaded in respect of the Commissioner of Police for the acts of his "*servants, agents and employees [...] acting during the course of their duties*".

32. I reproduce the following instructive extracts from **Monthy v Seychelles Licensing Authority & Anor**, *supra* —

[36] Section 71 (d) of the Seychelles Code of Civil Procedure provides: "71 The plaint must contain the following particulars: ...  
(d) a plain and concise statement of the circumstances constituting

*the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;”.*

*[37] We may for that purpose consider the principles that obtain in England under Order 18, r 7 (1) which reads as follows:*

*"Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits" (Order 18, r. 7 (1).*

*This rule involves and requires four separate things:*

- (i) Every pleading must state facts and not law.*
- (ii) It must state material facts and material facts only.*
- (iii) It must state facts and not the evidence by which they are to be proved.*
- (iv) It must state such facts concisely in a summary form."*

*[38] "The word "material" means necessary for the purpose of formulating a complete cause of action, and if any one "material" fact is omitted, the statement of claim is bad.' (Bruce v Odhams Press Ltd. [1936 1 KB at p. 697]). The same principle would apply to the defence.*

*[39] It is also useful to bear in mind the object of pleadings as laid*

down in Odgers' *Principles of Pleading in Civil Actions in the High Court of Justice, Twenty-Second Edition (1981)* by D. B. Casson and I. H Dennis at page 88:

*"The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain its object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules,... The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method, they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at trial. But each must give his opponent a sufficient outline of his case."*

33. In **Gallante v Hoareau** [1988] SLR 122, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

*"the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action"*.

34. Ground 1 of the grounds of appeal is accordingly devoid of any merit.

Ground 2 of the grounds of appeal

35. The second ground of appeal challenges the dismissal of the action because the Appellant did not file before the Public Service Appeal Board. The learned trial Judge found that the Public Service Appeal Board was the proper forum for the Appellant to take his complaint. Counsel for the Appellant contended in his Heads of Argument that the Public Service Appeal Board is not the only forum for the Appellant to take his complaint. He relied on Article 146 (6) of the Constitution of the Republic of Seychelles, which provides —

*"A complaint made under this article shall not affect the right of the complainant or other person to take legal or other proceedings under any other law".*

Article 146 of the Constitution of the Republic of Seychelles deals with the functions of the Public Service Appeal Board. He also relied on **Maurice Morin & ors v Andre Kilindo and the Government of Seychelles** Civil Side No. 20 of 2004 (delivered on the 20 September 2005) in support of his contention. In **Maurice Morin and others**, *supra*, eleven senior police officers who had their employment terminated by the Police Force of Seychelles filed a successful action in delict before the Supreme Court against the Government of Seychelles and the Commissioner of Police .

36. Counsel for the Government of Seychelles and the Commissioner of Police contended that the learned trial Judge was correct to find that the Appellant was constrained to file a complaint to the Public Service Appeal Board.
37. I have considered the submissions of both Counsel with care. I agree with Counsel for the Appellant that the learned trial Judge erred in finding that he could not entertain the Appellant's claim because the latter had not first exhausted the Public Service Appeal Board remedy which he may have had. As Counsel for the Appellant correctly submitted,

Article 146 (6) of the Constitution of the Republic of Seychelles could hardly mean that, in order to open the door to other litigation, an aggrieved person must first make a complaint to the Public Service Appeal Board. A literal reading of the Article leads simply to the conclusion that one is not constrained to file a complaint before the Public Service Appeal Board, but can file elsewhere.

38. I accordingly reject the contention submitted on behalf of the Government of Seychelles and the Commissioner of Police with respect to this ground.

39. I allow ground 2 of the grounds of appeal.

### **Decision**

40. Section 92 of the Seychelles Code of Civil Procedure provides: "*92 The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer [...]*". I order accordingly.

41. Thus, I uphold the decision that the plaint should be dismissed but for the reason that the plaint discloses no reasonable cause of action against the Government of Seychelles and the Commissioner of Police. The appeal is dismissed in its entirety.

F. Robinson (J.A)

**I concur:.** .....

A.Fernando (President)

**I concur:.** .....

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020