

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable/ Not Reportable / Redact**  
[2020] SCCA 18 December 2020  
SCA 38/2018  
(Appeal from CS 108/2016)

**ROBERT ERNESTA**  
(rep. by Mr. Frank Elizabeth)

**Appellant**

and

**CHARLES BASTIENNE**  
(rep. by Mr. Basil Hoareau)

**Respondent**

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**Neutral Citation:** *Ernesta v Bastienne* (SCA 38/2018) [2020] SCCA - (18 December 2020).

**Before:** Robinson, Tibatemwa-Ekirikubinza, Dingake JJA

**Summary:** Defamation – defences of justification, qualified privilege and publication in the public interest.

**Heard:** 4 December 2020

**Delivered:** 18 December 2020

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**ORDER**

Having failed to establish the defences of justification, qualified privilege and publication of a matter in the public interest, the appeal fails and is hereby dismissed. Consequently, the appellant is ordered to pay the respondent costs of this appeal. The order of the Supreme Court as to costs in the suit before it, to the effect that the Defendants are jointly and severally liable to pay the same to the Plaintiff, is upheld.

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**JUDGMENT**

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**TIBATEMWA-EKIRIKUBINZA JA**

**The Facts**

[1] Charles Bastienne (the Respondent) filed a claim for defamation within the Supreme Court of Seychelles against Robert Ernesta (the Appellant), an editor of a daily

newspaper called the *Seychelles Weekly* together with Printec Press Holding Pty Ltd (2<sup>nd</sup> Defendant in the suit before the Supreme Court).

- [2] The allegedly defamatory material was contained within an article titled “Nepalese businessman accuses Seychelles authorities of corruption”. The verbatim contents of the said article were as follows:

*“One Nepalese national, Mr. Pradhuma Kumar Deuja, who is the chair-person of United Manpower Agency in Nepal is making serious allegations of corruption within the Seychelles Government set up following his interactions with the Seychellois Ministry of Home Affairs at the time it was headed by Minister Charles Bastienne. United Manpower Agency’s business is to recruit Nepalese for employment abroad. They have been involved with the Seychelles Ministry of Home Affairs in providing security personnel for the prisons and Marpol Security through Ligi’s Agency directed by Mr. Martin Aglae.*

*Mr. Deuja avers that he has been cheated of considerable amounts of money by both Mr. Aglae and Minister Bastienne who he claims are the co-owners of Marpol security services. During his last visit to the Seychelles in October, he was requested to pay SR 122,500 to Ligi’s company as commission for the supply of 100 security personnel for the Ministry of Home Affairs which he paid to a lady he claims is Martin Aglae’s girlfriend. Mr. Deuja filmed the whole transaction and has made a video of it which he is now circulating.*

*Subsequent to the payment, he and Aglae’s girlfriend was taken to the Minister’s office where he alleges the money was given over to the Minister as well as other documents in relation to the personnel his company was going to send over to Seychelles. In attendance was one Mrs. Florianne Vidot.*

*Mr. Deuja alleges that Mr. Martin Aglae has been recruiting security personnel from other non-authorized recruitment agencies in Nepal and not from his agency as agreed. He states that his company is the only Government accredited company in Nepal to undertake the activities of providing security personnel to foreign countries. He has taken up a case against the Seychelles Ministry of Home Affairs*

*back in Nepal and as a result the Nepalese Government is undertaking an investigation in the matter.*

*Mr. Deuja has copied all relevant documents including the video recording to President Danny Faure in the hope that he takes appropriate action.*

*The allegations are of a very serious nature and will adversely affect the credibility of Seychelles Government if not dealt with accordingly.*

[3] The Respondent alleged that the above words were defamatory in their natural and ordinary meaning including the meaning that he:

- (i) Has been guilty of the offence of corruption in terms of Section 91 of the Penal Code;
- (ii) Is a corrupt individual and Minister;
- (iii) Has abused his office as a Minister to secure financial gains for his own benefit;
- (iv) Has defrauded one Mr. Pradhuma Kumar Deuja of considerable amounts of money;
- (v) Has failed to discharge his duties as a Minister in a professional and transparent manner; and/or
- (vi) As a person, Minister and/or politician, is dishonest and untrustworthy and he therefore be removed as a Minister.

[4] At the trial, the Respondent testified that he had never met the said Mr. Deuja or Martin Aglae's girlfriend. He also testified that the above article greatly embarrassed him in the eyes of the public, his Ministry, and even the members of his Church. He therefore claimed the sum of SCR 2,000,000 as damages.

[5] Robert Ernesta (Appellant) and Printec Printing Holding (2<sup>nd</sup> Defendant) on the other hand refuted the claim. Appellant pleaded three defences, *to wit*, justification/truth, publication of a matter in the public interest, and qualified privilege. The gist of Printec's defence was that as a printery, it could not be expected to analyse every bit of the

material sent to it for printing for the purpose of determining what was defamatory and therefore ought not to be printed.

- [6] The Appellant also maintained that the article was factually correct in that Deuja had been cheated of considerable amounts of money by both Martin Aglae and Bastienne.
- [7] The trial judge, S. Nunkoo J., found in favour of Respondent and held that the article was defamatory. The reasoning given by the Judge was that Robert Ernesta was to a certain degree reckless in his approach to the news he received. He found that the Appellant had not cared to check Bastienne's version or to investigate the allegations made by the informer, Mr. Deuja, from other sources which a prudent journalist would have done.
- [8] Furthermore, the trial Judge held that the Appellant herein had failed to establish in the least the defence of justification or qualified privilege.
- [9] Judge therefore awarded Mr. Bastienne SCR 600,000 as damages on the premise that Bastienne had suffered trauma caused to him at his place of work, family and in society generally.
- [10] Dissatisfied with the Supreme Court decision, Robert Ernesta appealed to this Court on the following grounds:

### **Grounds of appeal**

- 1. The learned Judge erred in law and in fact when he concluded, "I am of the view that on a proper and thorough analysis of the evidence adduced he has failed to establish in the least the defence of justification/qualified privilege.**
- 2. The learned Judge did not consider all the defenses that were raised in his defence and written submissions.**
- 3. The learned Judge erred when he ordered the Appellant to pay SR 600,000 as damages jointly and severally with the 2<sup>nd</sup> defendant as the award is totally unjustified, grossly exaggerated and exceptionally excessive in all the**

**circumstances of the case. The award departs substantially from precedents in similar cases.**

### **Prayers**

[11] The Appellant prayed that this Court should reverse the judgment of the Supreme Court and allow the appeal. In the alternative, he prayed that the quantum of damages awarded should be reduced to a more realistic and credible figure.

### **Submissions of Counsel**

#### **Ground 1**

##### **Appellant's submission**

[12] The Appellant's counsel submitted that the Appellant had proven the defences of justification and qualified privilege to the requisite standard of a balance of probabilities and that the trial Judge had erred in law and fact in finding otherwise.

[13] It was also argued that the learned Judge only took a cursory look at the Appellant's defenses and dismissed them out rightly without, it would appear, further exhaustive consideration.

##### **Respondent's reply**

[14] In reply, the Respondent argued that the Appellant had not adduced any evidence to prove the alleged truth of the impugned article and had therefore failed to prove the defence of justification.

[15] With regard to the defence of qualified privilege, the Respondent argued that the Appellant could not rely on this defence since he had been actuated by malice in the sense that:

1. He caused publication of the article with a political motive given that he was a council/executive member for two political parties and the Respondent was a Minister in the Seychellois Government; and that

2. He focused his article on the Respondent and a one Mr. Algae, both of whom are politicians, and neglected to mention a one Ms. Vidot who was also part of the transaction alleged by Mr. Deuja.

[16] The Respondent did not specifically address the defence of ‘publication in the public interest’ but seems to have done so under their submissions on qualified privilege.

## **Ground 2**

### **Appellant’s submissions**

[17] The Appellant contended that the learned Judge did not consider all the defenses that he raised. It was argued that whereas the Appellant had raised three defences, *to wit*: justification, publication in the public interest, and qualified privilege, the learned Judge did not consider and make a decision as regards the defence of publication of a matter in the public interests.

### **Respondent’s reply**

[18] Counsel for the Respondent argued that the Appellant had failed to prove the defences in question, and referred to various parts of the record to augment his submission.

## **Ground 3**

[19] The Appellant’s counsel submitted that considering previous cases and precedents, the sum awarded to the Respondent as damages was exorbitant. Furthermore, that neither the learned Judge nor the Respondent showed justification for such an award.

### **Respondent’s reply**

[20] The Respondent argued that the trial judge had correctly relied on *Regar Publications v. Pillay*, a case that involved the defamation of a minister and which is therefore similar to the instant dispute. Furthermore, Respondent argued that as *Regar* was decided approximately 20 years before the decision of the Supreme Court, the trial Judge was

justified in factoring economic changes to award SCR 600,000.00, which would be functionally equivalent to the award of SCR 175,000 in *Regar*.

[20] Respondent also argued that based on the documented damage caused to the Respondent, the award was appropriate.

## **COURT'S CONSIDERATION**

### **Powers of the Court**

[21] Appeals before this Court are by way of re-hearing, and this Court is vested with the same powers as the Supreme Court of Seychelles and of the Court of Appeal in England for the purpose of the said re-hearing. (See ***Rule 31 (1) and (3) of the Seychelles Court of Appeal Rules; Section 12(3) of the Courts Act, Cap. 52; and Article 120(3) of the Constitution of Seychelles***)

[22] Importantly, this Court may dismiss an appeal if it considers that no substantial miscarriage of justice has occurred even though the point in question has been or may be decided in favour of the Appellant. (See the proviso to ***Rule 31 (5)*** of the Rules of this Court).

### **Ground 1**

[23] The essence of Ground 1 is that the learned trial judge erred when he found that the Appellant had neither established the defence of justification nor the defence of qualified privilege. The Appellant asserts that both defences ought to have succeeded based on the evidence availed and the law applicable.

[24] In Seychelles, the law on civil defamation is governed by English Law. In this regard, **Article 1383(3) of the Civil Code of Seychelles Act, Cap. 33** (hereinafter the '**Civil Code**') provides that:

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.

### **The defence of Justification**

- [26] The defence of justification (also termed ‘truth’) is that the words complained of as defamatory were true in substance and fact. *Halsbury’s Laws of England, para. 82 in Vol. 28 (Reissue)*
- [27] The Defendant bears the burden of proving the defence of justification. The Plaintiff does not have to prove that the defamatory matter was untrue. (**Gatley on Libel and Slander, 5<sup>th</sup> Edition, Sweet & Maxwell, 1960, at p. 154**)
- [28] I note that the impugned article was, for the most part, worded as a report of allegations made by a one Mr. Deuja rather than as a report of Mr. Deuja’s allegations as statements of fact. In light of this, the important question is whether in proving justification within the context of this case/appeal, the Appellant must prove the truth of the corruption itself, or only the truth of their having received information from Mr. Deuja about the Respondent’s alleged corruption.
- [29] To succeed as regards the defence of justification, the Appellant had to prove that the Respondent had indeed received the alleged bribe – not just that he had been informed by Mr. Deuja that the Respondent had received a bribe. What is defamatory are the statements to the effect that the Respondent had been corrupt; and the Appellant’s republication of those statements within the *Seychelles Weekly*, even as allegations and not statements of fact, constituted defamation.
- [30] According to the persuasive authority of *United Africa Press Ltd v. Zaverchand K Shah*, a decision of the Court of Appeal of East Africa ([1964] 1 EA 336) where the defamation is an allegation that the Plaintiff committed an offence, the standard of proof regarding the defence of justification to a defamation claim is generally higher than a mere preponderance of evidence, and “nothing less than clear evidence should suffice to establish an allegation of crime in justification of a libel.” This was followed by the Supreme Court of Uganda in *Monitor Publications Ltd v. Ricky Nelson Asimwe* (Supreme Court Civil Appeal No. 16 of 2015). In *Bater v. Bater* (8) ([1950] 2 All ER at



459), Lord Denning similarly stated that, “The more serious the allegation the higher the degree of probability required; but it need not in a civil case reach the very high standard required by the criminal law.”

[31] In the instant case, the impugned article accused the Respondent of conduct that, if proven, would amount to the offence of corruption contrary to Section 91 of the Penal Code Act.

[32] While the Appellant bore the burden of proving the defence of justification to the standard above described, he failed to do so. The trial judge in fact notes within para. 19 of his judgment that the Appellant’s informant, Mr. Deuja, never testified although counsel for the Appellant had indicated that he would. The other witnesses called by the Appellant did not help his case either.

[33] Additionally, the video recording allegedly showing the Appellant’s informant handing over money (as a bribe) to a one Mrs. Vidot did not contain footage of the same money being handed over to the Respondent later as alleged.

[34] The Appellant also failed to prove, at the very least, that the Respondent was a co-owner of Marpol Security Ltd – which a simple registry search might have confirmed or disproved.

[35] When substantiating the defence of justification, what has to be proven to be substantially true is the sting of the defamatory matter, not the substance of the entire document within which the libel lies. In this case, the sting of the libel lay in the imputation of corruption onto the Respondent himself, and it is the truth of that imputation that the Appellant failed to prove in substance.

[36] Therefore, the Appellant did not adduce sufficient evidence to discharge their burden of proving that the Respondent had received a bribe. They did not, in fact, adduce any evidence to show that the Respondent was one of the owners of *Marpol Security*, the company at the heart of the scandal.

[37] The Appellant therefore failed to establish the defence of justification and in this regard, the appeal must fail.

### **The defence of qualified privilege**

[38] The defence of qualified privilege is a public policy defence to defamation by which a person who would otherwise be liable for defamation asserts that they, in good faith and without any improper motive, made a [defamatory] statement in execution of a duty (legal or moral) to make that statement to a person that had an interest in receiving it. (*Halsbury's Laws of England, paras. 109 and 113 Vol. 28 (Reissue)*)

[39] In *Reynolds v. Times Newspapers Limited and Others* [2001] 2 AC 127, Lord Nicholls, citing *Adam v. Ward* [1917] A.C. 309 at 334, notes within para. 144 that [qualified] privilege in the context of defamation exists where “the person who makes the communication has an interest or duty to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.” He notes that the duty may be legal, moral, or arising from social circumstances, and there must be reciprocity of duty and interest as regards the communication. Lord Nicholls further notes that what is privileged is the occasion, and not the communication itself.

[40] However, *Reynolds* also laid down the principle that the requisite standard for considering whether a matter was privileged in the context of journalistic work is “responsible journalism,” a standard which the media themselves espouse (para. 49 of *Reynolds*). The standard of responsible journalism has also been accepted and incorporated into Canadian jurisprudence in *Grant v. Torstar Corp.* 2009 SCC 61, wherein McLachlin, CJ. states that:

A defence that would allow publishers to escape liability **if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest** represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society.

[41] Therefore, a Defendant who fails to meet this said standard of responsible journalism will not be able to avail themselves of the defence of qualified privilege.

[42] *Reynolds* also enumerates the following ten factors as some of the matters to be taken into account in determining whether a communication published in the context of journalism is protected by qualified privilege or not:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

[43] The above factors are a non-exclusive set of factors that may be taken into account. It has been noted, however, that they are not a checklist and they need not all be decided in favour of either party (See *Economou v. De Freitas* [2016] EWHC 1853 (QB)). What is important is for the Court to have regard to the circumstances of the case and thereby reach a considered decision.

[44] No doubt, the allegations made against the Respondent were of a very serious nature, being allegations of corruption, abuse of office, and fraud. I equally have no doubt that the matter itself was one of public concern given that it involved an officer of the Government (a Minister) and the conduct of public affairs (i.e. the enlisting of security services for the prisons).

[45] As to the source of the information on which the impugned article is founded, I note that the informant was Mr. Deuja himself, who claims to have been asked for a bribe and who further claims that he paid the same and witnessed its being handed over to the Respondent. The informant therefore, on the face of it, had direct information regarding the allegation. While he may have had an axe to grind with the persons he claims to have defrauded him, that would not of itself suggest strongly that he was making the whole story up. It might very well be that having been 'defrauded', the said informant was so livid that he decided to expose the whole transaction regardless of the fact that it exposes his own corruption as well.

[46] It is true that the Appellant did not seek the Respondent's comments prior to publishing the impugned article, and that the same article does not contain the gist of the Respondent's side of the story. Does this omission withdraw the defence of qualified privilege from the Appellant? Having regard to the totality of the circumstances, I believe so.

[47] In his judgment, the trial judge extensively reproduces the portion of the trial transcript covering the Appellant's cross examination (para. 22 of the judgment) by which he admitted that:

1. He did not contact the Respondent to find out his side of the story prior to publishing the impugned article because he "believed [he] had enough for a start;
2. He did not see it fit to contact the Respondent; and
3. He only had his informant's word that the Respondent had been corrupt, without any additional corroboration.

- [48] I am in agreement with the learned trial judge that the Appellant was imprudent in going ahead to publish the impugned article without proper verification of the underlying allegations and at the very least, ought to have contacted the Respondent for his comment on the matter so that his side of the story would be captured by the article. This was indeed contrary to responsible journalism.
- [49] This is not to say, however, that a failure to seek a comment from the subject of a potentially defamatory communication will always preclude reliance on the defence of qualified privilege. Indeed, *Reynolds* notes that this will not always be necessary. The totality of the circumstances must be considered.
- [50] I find that given the totality of the circumstances and the fact that the Appellant only had the uncorroborated word of his informant, Mr. Deuja, and did not even bother to confirm whether *Marpol Securities* was co-owned by the Respondent, it was incumbent upon him to seek the Respondent's comment and side of the story prior to the publication. Failure to do so renders the Appellant reckless. Consequently, he has not met the *Reynolds* standard of 'responsible journalism' and is therefore not entitled to rely on the defence of qualified privilege.
- [51] I do not, however, agree with the learned trial judge that the Appellant ought to have held a face-to-face meeting with Mr. Deuja, the informant. I do not see the reason for such a rule and have no doubt that information obtained electronically or otherwise may be just as true or false as information obtained face-to-face with the informant. I would therefore lay down no such rule. The fact that the Appellant had not had a face-to-face meeting with Mr. Deuja is not therefore a factor I would use to hold that the Appellant had not exercised due diligence befitting responsible journalism or had not verified the story in question prior to its publication.
- [52] Having concluded that the Appellant is not entitled to rely on the defence of qualified privilege because he has not met the *Reynolds* standard for responsible journalism, it is not necessary to decide whether or not he was actuated by malice in publishing the

impugned article. Proving malice would defeat an existing defence of qualified privilege and since none exists here, the issue is moot.

## **Ground 2**

[53] At trial, the Appellant raised three defences, *to wit*: justification, qualified privilege, and publication of a matter in the public interest. Ground 2 alleges that the defence of publication of a matter in the public interest was not considered by the trial judge.

[54] However, the defence of publication of a matter in the public interest, or as it was until recently known, *the Reynolds Defence*, is a subset of the defence of qualified privilege. In fact, the UK House of Lords declined, in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 (HL), to develop ‘publication of a matter in the public interest’ by journalists into a separate defence apart from the defence of qualified privilege. Instead, it was held that the defence of qualified privilege could be extended to publications made by journalists in the public interest, as long as those journalists had been responsible in their reporting.

[55] I therefore find that in dealing with the defence of qualified privilege, the learned trial judge also dealt with the defence of publication of a matter in the public interest.

[56] Having re-examined and resolved the same defence under Ground 1 above and concluded that the Appellant is not entitled to rely on the defence of qualified privilege, this Ground fails as well.

## **Ground 3**

[57] Since the Appellant neither established the defence of justification nor the inter-related defences of qualified privilege and publication of a matter in the public interest, it follows that he would be liable in damages.

[58] Ground 3 challenges the quantum of damages awarded by the trial judge, and asserts that the award was “totally unjustified, grossly exaggerated, and exceptionally excessive

in all the circumstances of the case” and that it departs substantially from precedents in similar cases.

[59] It is trite law that damages are awarded as a matter of discretion by the Court. An appellate court will only interfere with a lower Court’s award of damages if the trial court acted on a wrong principle or the award was so manifestly low or high that it has to be altered. (*Regis Ah-Kong v. Conrad Benoiton and Marie-Rose Benoiton* (Civil Appeal SCA 03 of 2016 at para. 4)).

[60] I will begin by examining whether the award of the damages in issue departs substantially from similar cases decided in the past.

[61] The learned trial judge awarded damages of SCR 600,000 (para. 45 of the judgment). He did so with reliance on *Pillay v. Regar Publications (Pty) Ltd and Others* (1997) SLR 125, a case that similarly involved the defamation of a Government Minister and in which the sum of SCR 175,000 was awarded as damages. The learned trial judge rightly revised the award in *Pillay* upward to account for inflation and the rising cost of living given that *Pillay* was decided over two decades ago. I therefore find that the award of SCR 600,000 does not substantially depart from the similar precedent of *Pillay v. Regar Publications (Pty) Ltd and Others* (1997) SLR 125, having regard to the long passage of time and the economic changes that have transpired since then. The other precedents referred to, such as *Laporte v. Fanchette* (2013) SLR 593, were dissimilar and therefore distinguishable.

[62] I would further award the Respondent costs of this appeal as against the Appellant only and costs of the suit before the Supreme Court as against the Appellant and the 2<sup>nd</sup> Defendant jointly and severally.

### **Consequential orders**

[63] In the circumstances, this appeal fails on all grounds

[64] Consequently, I would order as follows:

1. The Respondent is awarded general damages in the amount of SCR 600,000;
2. The Respondent is awarded costs of this appeal;
3. The order of the Supreme Court as to costs in the suit before it, to the effect that the Defendants are jointly and severally liable to pay the same to the Plaintiff, is upheld.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020



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Tibatemwa-Ekirikibinza JA

I concur

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Robinson JA

I concur

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Dingake JA