

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**  
[2020] SCCA ...  
SCA37/2017

In the matter between

**JOHN TALMA**  
*(rep. by Joel Camille)*

**Appellant**

and

**1. ROBERT ERNESTA** (proprietor)

**2. ROBERT ERNESTA** (editor)

**3. WEEKLY PUBLICATIONS** (publisher)

*(rep. by Clifford Andre)*

**4. PRINTEC PRESS HOLDINGS PTY LTD** (printer)    **Respondents**  
*(rep. by Guy Ferley)*

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**Neutral Citation:** *Talma v Ernesta & Ors* (SCA37/2017) [2020] SCCA 21 August 2020  
**Before:** Fernando PCA, Twomey JA, Tibatemwa-Ekirikubinza JA  
**Summary:** defamation - bare denial  
**Heard:** 5 August 2020  
**Delivered:** 21 August 2020

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**ORDER**

The Court upholds the learned trial judge's finding on the issue of damages. The appeal on this point is therefore dismissed but as it successful on other issues, the Appellant is granted the costs of the case.

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**JUDGMENT**

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**TWOMEY JA**

- [1] The Plaintiff (now Appellant) in the court a quo claimed in defamation against the Defendants (now Respondents) for an article in Seychelles Weekly in which the Appellant alleges that by way of innuendo the Defendants meant and were understood to mean that he had deliberately made political propaganda statements in favour of President James Michel in regards to pensions paid and received by pensioners in a non-political programme aired on prime time television.
- [2] In his Complaint, the Appellant stated that the comments relating to him were untrue, misleading, constituted a most serious defamation against his character, good name and reputation, and published in order to damage his good name and reputation in the eyes of the public at large.
- [3] The Defendants' statement of defence was a bare denial with an averment that the Appellant was offered a right of reply to the published article which was not taken up.
- [4] In his evidence in court, the Appellant stated that he had never participated in the programme as claimed but in a different one and that the statements as published were false, that as result of the publication his children and friends had shunned him and that when he went on the road people teased him. He had worked in government as a public figure for over twenty years and was well known in the community of Bel Ombre where he lived. He had never said that the pension paid by the government was enough but rather that he would support persons seeking more money.
- [5] In the decision of the court a quo, the trial judge found that since the Appellant had admitted making the alleged statement in a programme other than the one reported in the article, there was no defamation. He stated:

*“In effect the Plaintiff [was] admitting to the facts as appeared in the article, albeit that he appeared in a different programme than the one quoted in the article and thereafter the author gave his opinion in respect of that statement. Therefore, the Plaintiff cannot claim that the article defamed him and caused injury to his credit and reputation.”*

- [6] Further, the learned trial judge also found that no valid defence had been raised by the Defendants but “[d]espite the fact that in its Statement of Defence the Defendants failed

to plead a valid defence, a defence of justification was established through court testimonies without objections” and dismissed the Appellant’s plaint.

[7] The Appellant has filed four grounds of appeal against this decision, which are to the effect that the learned trial judge erred in law, and on the facts in not finding that the words published by the Respondent amounted to a defamation of the Appellant’s reputation and that the finding of justification was *ultra petita*.

[8] It is the Appellant’s submission that he did not utter the words as published and did not do so on the programme as reported. It is also his submission that it is undisputed that the Appellant was shunned by his children and the public. He also submits that he adduced unchallenged evidence to the effect that he was defamed and this is not supported by the finding of the learned trial judge that the defamation was not proved. He further submits that the Respondents did not put up a defence to the defamation.

[9] The Respondents’ submissions are to the effect that the words published were justified and that in any case the Appellant had not discharged the burden of proof in relation to the Plaint. They have also submitted that the Appellant was offered a right of reply which he did not take up.

[10] Article 22 of the Constitution guarantees the freedom of expression subject to restrictions for the protection of the reputation, rights and freedoms or private rights of persons. The law of defamation attempts to balance the freedom of speech and the protection of an individual’s right to his reputation. The law of defamation of Seychelles is, however, nebulously and negatively defined as not being governed by our laws of delict:

*“Article 1383 (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.”*

[11] It was held in *Kim Koon v Wirtz* (1976) SLR 101 that the law of defamation applicable in Seychelles is the law in force in the United Kingdom on 31 October 1975.

[12] Similarly, in *Biscornet v Honoré* (1982) SLR 455, Sauzier J stated that given the enactment of the Civil Code and its coincidence with the independence of Seychelles:

*"In cases of defamation therefore it is the English law in force when the Civil Code of Seychelles 1975 was enacted which applies..."*

[13] Our laws of defamation are therefore unfortunately frozen in time and any statutory or jurisprudential developments in the English law are inapplicable to our jurisdiction.

[14] In *Esparon v Fernez and anor* (1980) SLR 148, 149, Sauzier J set out the principles of our 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 ...*

- 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."*

[15] Dodin J in *Pillay v Pillay* (CS 15/10) [2013] SCSC 68 (16 October 2013) gave a further exposition of our law as follows:

*"There are five essential elements that a plaintiff must prove to establish defamation: (1) The accusation is false; (2) it impeaches the subject's character; (3) it is published to a third person; (4) it damages the reputation of the subject; and (5) that the accusation is done intentionally or with fault such as wanton disregard of facts or with malicious intention..."*

*Allowable defences against defamation are justification which includes the truth of the statement, fair comment which is determined by whether the statement was a view that a reasonable person could have held, absolute privilege when the statements were made in Parliament or in court, or they were fair reports of allegations in the public interest and qualified privilege, where it is determined that the freedom of expression outweighs the protection of reputation, but does*

*not amount to the granting of absolute immunity. A defamatory statement is presumed to be false unless the Defendant can prove its truth.*

- [16] I am guided by these principles with respect to the instant appeal.
- [17] The first issue submitted by Counsel for the Appellant is the error in the finding of the learned trial judge that the Appellant had admitted the published words. A reading of the transcript of proceedings makes it clear that the words as published were not uttered by the Appellant. The publication was only part of what was uttered and contextually gave the wrong inference to the reader. The finding of the trial judge therefore that the words as published were admitted cannot be sustained. It is my view that based on the principles above the defamation was proved by the Appellant.
- [18] That being the case, the next question to be answered is whether the Respondents have put up a defence. In this respect, the central issue is whether in the law of defamation of Seychelles a right of reply as pleaded is a defence to defamation. The right of reply or right of correction is comprised in the procedure of “an offer to amend”.
- [19] It must be noted that the English Defamation Act of 1952 contained the little used defence of unintentional defamation. The 1996 Defamation Act replaced this defence with the defence of “offering to make amends”, a procedure permitting a defendant in an action for defamation to make a written offer to publish an apology or correction and pay damage to the plaintiff. Given our own legal provisions (*supra*), the English 1996 Act is clearly inapplicable to Seychelles.
- [20] The specific defence of right of reply as pleaded in the Defendant’s Statement of Defence is therefore not available in our law as it stands.
- [21] With regard to the defence of justification I accept that it is indeed a defence under our law. However, with respect, I cannot accept the learned trial judge’s finding that, although, the defence of justification was not pleaded, it was “established through court testimonies without objections”. It is trite that courts cannot grant relief not sought in pleadings (*Vel v Knowles* (1998-1999) SCAR 157, *Barbé v Hoareau* (114 of 2000) [2007] SCSC 46 (31 December 2006), *Léon v Volare* (2004-2005) SCAR 153). If they

do, they are acting *ultra petita*. In *Charlie v Francoise* (1995) SCAR 49, 53-54, the Court of Appeal stated:

*“The system of civil justice does not permit the Court to formulate a case for the parties after listening to the evidence and to grant a relief not sought by either of the parties that such evidence may sustain without amending the plaint. In the adversarial procedure the parties must state their respective cases on their pleadings and the plaintiff must state the relief he seeks on his plaint.”*

[22] Robinson J spelt out these principles in further detail in *PTD Limited v Zialor* (SCA 32/2017):

*“We reiterate that the allegations in every pleading must be, “(i) Material. (ii) Certain”. With regard to materiality —*

*“[t]he fundamental rule of our present system of pleading is this: “Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party 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 brief as the nature of the case admits” Order 18, r. 7 (I.)*

*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”.*

*“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 applies to the defence. See Monthy v Seychelles Licensing Authority & Another (SCA 37/2016) [2018] SCCA 44, which referred to Order 18, r. 7 (1) for guidance. Order 18, r. 7 (1) is essentially similar to section 71 (d) of the Seychelles Code of Civil Procedure.”*

[23] Hence, the fact that the Statement of Defence did not contain a specific averment with respect to the defence of justification is a bar for evidence of the same to be led at the trial and on that basis justification is not a defence that ought to have been considered by the learned trial judge. It would be patently unfair and a breach of the fair hearing rights

of the Appellant to have been ambushed by the material facts upon which the Respondent were to rely on and to enable him to know the case which he had to meet.

[24] Having found that the defamation was proved, the issue of damages arises. This issue was considered by the trial judge who found that the Appellant had failed to prove damages and that his averment of his financial hardship as a result of the defamation was not corroborated in any way as he did not call any other witnesses. The Court also found that the Appellant had not satisfied it that he had been shunned by his children or family.

[25] The question that arises in the instant case is whether there is any basis for this Court to overturn the findings of fact by the learned trial Judge that on the available evidence the claim of damages was not proved by the Appellant on a balance of probabilities. It is my view that the issue of damages in this case is, however, not one solely based on facts but also on law. I give reasons.

[26] In *Talma v Henriette* (CS 338/1996) [1999] SCSC 12 (28 October 1999) Perera J (as he then was) stated:

*“English law recognizes four types of cases which are actionable per se, without proof of special damages. They are:*

- 1. Where the words impute a crime for which the plaintiff can be made to suffer physically by way of punishment.*
- 2. Where the words impute to the plaintiff a contagious or infectious disease.*
- 3. Where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication.*
- 4... [W]here the words impute adultery or unchastity to a woman or girl (Emphasis added).*

[27] As set out above, the law of defamation as existed in the English law of defamation in 1975 comprised the principle of presumed damages. These damages are available per se, that is without proof of special damage in the specific categories detailed by Perera J. The Appellant in the instant case was a petitioner at the time of publication, that is, a private person, although, he had been a public servant with over twenty years' service in the Department of Social Services. As a private person, he fell outside the social

categories enumerated above and it was incumbent on him to prove the damages as these could not be presumed.

[28] The duty of an appellate court is to consider the decision of the trial judge and determine whether he has made an error of law. Where there is an error of law, it is the appellate court's duty to say so. It is trite that an appellate court does not rehear the case and accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse (See *Searles v Pothin* (Civil Appeal SCA 07/2014) [2017] SCCA 14 (21 April 2017)). Hence, an appellate court should not interfere with findings of fact unless compelled to do so.

[29] On the particular issue of damages, I do not find that the learned trial judge erred in law and I accept his finding of fact that damages were not proved in this case.

[30] In the circumstances, this Court upholds the learned trial judge's finding on the issue of damages. The appeal on this point is therefore dismissed but as it successful on other issues, I grant the Appellant the costs of the case.

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

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Twomey JA

I concur

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Fernando PCA

I concur

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Tibatemwa- Ekirikubinza JA