

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 44 (13 August 2021)
SCA 70 and 72 of 2019
(Arising in SC 94/2017 SCSC 1016)

In the matter between

ATTORNEY GENERAL
(*rep. by Stefan Knights*)

Appellant

and

ALAIN ST. ANGE
(*rep. by Kieran Shah, SC and Michelle Ebrahim*)

Respondent

And

ALAIN ST. ANGE
(*rep. by Kieran Shah, SC and Michelle Ebrahim*)

Cross-Appellant

and

ATTORNEY GENERAL
(*rep. by Stefan Knights*)

Cross-Respondent

Neutral Citation: *AG v St. Ange* [2021] SCCA 44 (13 August 2021) SCA SCA70 and 72 of 2019 (Arising in SC 94/2017 SCSC 1016)

Before: Fernando, PCA, Twomey, JA and Robinson JA

Summary: Article 1382 and the acts of moral persons –liability under Article 1382 and 1384 – when court of appeal can interfere with award of lower court

Heard: 5 August 2021

Delivered: 14 August 2021

ORDER

The appeal of the Attorney General is dismissed in its entirety; the appeal of Mr. St. Ange is allowed. In total the Government shall pay Mr. St Ange the sum of SR6,984,634.5 with interest as follows: a. in respect of hotel, travel and incidental expenses the Government shall pay Mr. St Ange the sum of SR 3,098,065.90, b in respect of loss of earnings, the Government shall pay Mr. St Ange the sum of SR 2,886,568.6, c. in respect of moral damages, the Government shall pay Mr. St. Ange the sum of SR 1,000,000. Costs in both courts are granted to Mr. St. Ange.

TWOMEY JA

Introduction

- [1] In an amended plaint filed in January 2017, Alain St. Ange, a former Minister of Tourism, Civil Aviation, Ports and Marine and Seychelles' candidate for the post of Secretary-General of the United Nations World Tourism Organisation (UNWTO) at the elections held in Madrid, Spain, in May 2017 claimed damages in the total sum of SR21,257,095.40 from the Government of Seychelles. He alleged that the Government had acted in bad faith and in a manner amounting to a fault in law when it withdrew its endorsement of his candidature three days before the elections, pledging instead its support for Zimbabwe's candidate.
- [2] The Government of Seychelles in its statement of defence averred that it withdrew its support of Mr. St Ange's candidature on "highest considerations of national interests", inter alia, in view of risks and sanctions that the country would face by the African Union as Mr. St. Ange's candidature had been submitted in contravention of the African Union's mechanisms and its Rules of Procedures on the Ministerial Committee on African candidatures. It added that it did not act in bad faith or "commit any fault in law or on facts whatsoever" and that the government had the prerogative to change a 'policy decision' as per the dictates of the contingencies of international relations.
- [3] In a decision delivered on 18 November 2019, the Supreme Court found in favour of Mr St Ange on the grounds that:
- "[the government of Seychelles] knowingly did an act that constituted a faute, aware of the injury that could be caused to the Plaintiff. At the time of endorsing [Mr. St Ange's] candidacy it was aware of its international obligations. A reasonable and responsible Government, appreciating the difficulties Seychelles would face in foreign relations, would have decided against the endorsement. In deciding to follow the route of endorsement, and as suggested by the evidence that it did so in exercise of its sovereignty, then it was negligent to withdraw the endorsement later on..."*
- [4] With regard to damages, the Court was of the view that Mr. St Ange had contributed to the losses he incurred although contributory damages were not alleged by the Government. Ultimately, the court reasoned that Mr. St Ange had not proved loss of

earnings as a minister, or as secretary-general of UNWTO or for cash he withdrew from his account for the election campaign, or fees for promotional, marketing and PR services and that he was therefore not entitled to damages for these alleged losses. The Court only granted some expenses for telephone bills amounting to SR8,561.15, some out of pocket expenses including airfares at SR 33,586.00 and some hotel accommodation expenses in the sum of SR52,249.16 and the sum of SR70,000 for inconvenience, embarrassment and stress, making a total of SR164,396.31.

The Appeals

[5] Both parties have appealed the decision of the Supreme Court. To avoid confusion, we refer to the parties by their names.

The Attorney General's appeal

[6] The Attorney General on behalf of the Government has submitted the following grounds of appeal:

- (1) The learned Mr. Justice Vidot erred in law by finding that the Republic of Seychelles is liable for a faute under Article 1382 of the Civil Code of Seychelles even though no direct action can be brought against the Republic under Article 1382 any person.*
- (2) The Court can only grant damages against the State where faute lourde is established.*
- (3) The learned Justice Vidot misinterpreted Article 35 of the Constitution by finding that the withdrawal of Mr. St. Ange's candidature to a United Nations World Tourism Organisation constituted a violation Mr. St. Ange's right to work.*
- (4) The learned Justice Vidot sitting as the sole judge in the civil jurisdiction of the Supreme Court could not make a determination that Mr. St. Ange's right to work under Article 35 of the Constitution was violated.*

Mr. St. Ange's appeal

[7] Mr. St. Ange has submitted nine grounds of appeal which may be conveniently summarised as follows:

- (1) The learned trial judge erred in finding that the Government of Seychelles did not act in bad faith in revoking the candidature of Mr. St. Ange.*

- (2) *The learned trial judge erred in finding contributory negligence on the part of Mr. St Ange in regards to the losses he suffered when the same was not pleaded in the statement of defence.*
- (3) *The learned trial judge erred in denying either of Mr. St Ange's claims for loss of earnings as Minister when he resigned the post or for earnings as Secretary-General of the UNWTO since these were claimed in the alternative.*
- (4) *The learned trial judge erred in not awarding reasonable expenses and compensation incurred by Mr. St. Ange during his campaign and for his promotional, marketing and PR services contracted in furtherance of his campaign.*
- (5) *The learned trial judge erred in making a minimal award for moral damages suffered by Mr. St. Ange and under all the circumstances the award for compensation was manifestly inadequate.*
- (6) *The learned trial judge erred in concluding that Mr. St. Ange had not addressed the plea in *limine litis* raised by the Respondent.*

Preliminary issues

The alleged findings in respect of the right to work of Mr. St. Ange by the Supreme Court

- [8] Before I consider the grounds of appeal relating to the liability of the Government, I have found it necessary to deal with grounds 4 and 5 of the Government's appeal as in my view they are marginal and largely irrelevant. These grounds seem to emanate from a typographical error in the court a quo's judgment and other paragraphs in which the right to work is mentioned by the learned trial judge whilst discussing the issue of "act of state" as a defence to an action in delict against the Government. Its context is important.
- [9] The issue of Mr. St Ange's rights was raised by Counsel for the Attorney General in closing submissions and related to a plea in *limine litis* relating to the plaint disclosing no cause of action. The plea reflects, first of all, a complete misunderstanding of the fact that the Plaint was grounded in delict. Counsel submitted as follows:

(12) The Defendant submits that for the basis of a cause the Plaintiff has to prove their elements...(sic)

- (15) *The Plaintiff has not proved that*
- (i) *he had a right to be a candidate to the UNWTO*
 - (ii) *that such right was violated by the Defendant and*
 - (iii) *that the Defendant was liable to pay damages”*

[10] It was in dealing with this issue, although it was not an issue that arose from the plaint, that Vidot J stated:

“(40) In support of the foregoing argument, Counsel for the Defendant cited the case of Rahmatulla (No.2) v Ministry of Defence & Anor; Mohammed & Ors v Ministry of Defence [2017] UK SCI, whereby the Supreme Court in England held that the Crown’s act of state is a prerogative act of policy in the field of international affairs, and the rules under this doctrine provide government with a defence to a claim arising from acts of state. The same sentiment was echoed in the United States in Techt v Huges, 229 N.Y 222, 247, 128 N.E 185, 193. The courts recognised that where such acts of state exist, the Court should refrain from intervening. It emphasized that these doctrines, which might be termed judicial non-intervention doctrines, call for less judicial inquiry into the actions of the executive and legislative branches in foreign than in domestic affairs.

(41) I have accorded ample consideration to such principles. It is nonetheless my understanding that an act of state generally relates to activities of the executive with another state or collective states which in that case could be the AU albeit that it may take into account that there can be circumstances involving the state and an individual...

(42) ...The President is bestowed wide powers in state dealings in international affairs. However, that power is to my mind not absolute. We are all aware what happens when one is granted absolute power. This is why laws are necessary. How and why we exercise our right or powers matter.

(43) The decision to withdraw the endorsement was a policy matter. Despite that exercise of sovereignty, the state has an obligation as per the Constitution (Chapter III) to ensure the fundamental rights of its citizen. That act of state cannot override these fundamental rights. An example is right to work under Article 35...

(44) However, in the present case, the act of state has to be divorced from the Defendant's duty towards its citizen. Effectively the Defendant had given its endorsement of the Plaintiff's candidature. That can be interpreted as support for the Plaintiff's right to work. The endorsement letter was ensuring that right. In

withdrawing that endorsement, it was not promoting that right to work as provided for under the Constitution. It does not matter that the Plaintiff would not have won. The endorsement was almost on the border very much like a contractual obligation. The Defendant had to honour its commitment towards the Plaintiff. It decided to disregard its commitment to the AU as an exercise of its right to sovereignty. It could not have done the same to the Plaintiff and expect to be absolved of all responsibility. It is my opinion that the Defendant cannot in this instance rely on the defence of act of state.

...

(49) Mr. St. Ange had a right to right (sic) to seek election to the post of SG to the UNWO provided he met the necessary criteria and one of which was the endorsement of the Government and that right was violated. (Emphasis added)

- [11] Mr. Knights, Counsel for the Attorney General, has submitted that the ineluctable inference is that Vidot J found that the right to work under Article 35 of the Constitution was violated, given that this is the only right that reference is made to throughout the judgment. In the circumstances since this would have been a finding made only by the Constitutional Court Vidot J erred.
- [12] In response, Counsel for Mr. St Ange, Mr. Shah has submitted that Vidot J did not express the view that that the Government had actually violated Mr. St. Ange's right to work and in any event, the point is peripheral and not one central to his cause of action. Further, he submits, Mr. St. Ange had a right to participate in the UNWTO elections - a right that was separate from his right to work and that he satisfied the three criteria required for the purpose.
- [13] Without second-guessing the learned trial judge's intent in the reference to the type of rights he was referring to, I am not of the view that this issue has any bearing whatsoever on the present case. Vidot J was clearly considering the defence of an act of state trumping the committal of a *faute* against a citizen. He made no finding and did not grant any remedy for a breach of a constitutional right. The only relevant issue before the court *a quo* and before this Court is whether the Government committed a *faute* in respect of Mr. St Ange when they withdrew their endorsement of his candidature and whether it caused damage for which it is liable.

[14] I feel however that I must address the consternation or the making of heavy weather of the fact that judges sitting as sole judges in the Supreme Court or elsewhere might comment about the constitutional rights of litigants before them in any given case. It is my view that commenting on a breach of a constitutional right if it arises tangentially in a case is not a taboo subject or a matter that ought not to be broached.

[15] In the present matter and in similar other circumstances, such comments are not binding rulings of the court and do not result in a remedy being granted. In this sense, it does not matter that such views are expressed. It is only an application either under Article 46 or Article 130 of the Constitution for a remedy that necessitates a hearing before a bench of three judges of the Supreme Court sitting as the Constitutional Court and a decision on breaches of rights and remedies when these are appropriate.

[16] In any case, since these grounds are not germane to the case they are rejected outright.

Suing the Government of Seychelles as opposed to the Republic

[17] Mr. Knights has attempted to draw a distinction between the Republic and the Government of Seychelles arguing that the Government is wrongly sued in the present matter since it is only the Republic of Seychelles that can nominate or withdraw a nomination of a candidate to the UNWTO. He had submitted that there is a dichotomy between the Government and the Republic and that since it was the Government who was sued and not the Republic, Mr. St. Ange has no cause of action.

[18] Mr. Knight's submission on the alleged dichotomy was not supported by references to statute or authorities, and I will address it cursorily as it is semantic in this context. A distinction is sometimes drawn between when the President acts as the Head of the Government and when he acts as Head of the State on behalf of the executive. This distinction arises out of the historical context in monarchical countries where the monarch remains the head of State whereas the Prime Minister would be the Head of Government. In the Seychellois context, Article 50 of the Constitution defines the President as "the Head of State, Head of Government and Commander-in-Chief of the Defence Forces of Seychelles."

- [19] The role of the Head of State is seen as largely symbolic with the position-holder representing the country (the sovereign, democratic Republic of Seychelles as defined in Article 1 of the Constitution) in circumstances such as international affairs and when making appointments or bestowing recognition on behalf of the country. The role of the Head of Government, on the other hand is seen as a political position. Without being too scientific, the Government of the Republic is the current party in power, under the leadership of the President, which is responsible for the day-to-day running of the public affairs of the Republic for a term of office. Theoretically, then, when the President is acting as the Head of the Government, the President's decisions could very well be politically motivated by the incentives of the ruling party (or parties where there is a coalition) according to their political mandate. When the President acts on behalf of the Republic – signing a treaty, attending a UN summit or bestowing an honour on a noteworthy citizen – it is assumed that he is acting within the best interests of the State. When he appoints Cabinet members or addresses the National Assembly in the State of the Nation Address, it is assumed that he is acting as the Head of the Government.
- [20] However, this distinction is far from clear. Particularly because for the duration of its mandate, the Government has the full authority and resources of the Republic and so acts taken by the Government of Seychelles against its private citizens are backed up by the full coercive power of the state.
- [21] The Laws of Seychelles do not clearly distinguish between these two roles and although there may be a reason, time and place to make a full exposition of this distinction, this is not it as it is not properly before this Court, and it was not fully argued here or a quo. Suffice it to say as follows:
- [22] Article 1(2) of the Civil Code states that this Code shall bind the Republic. Article 66 of the Constitution makes it clear that “[t]he executive authority of the Republic shall vest in the President and shall be exercised in accordance with this Constitution and the laws of Seychelles” and that this shall extend to “to the execution and maintenance of this Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has power to make laws.”

[23] Furthermore, in the Second Schedule to the Constitution, at clause 3 it is specifically stated that “references to the functions of the office of the President shall be construed as references to the powers and duties of the President in the exercise of the executive power of the Republic and to any other powers or duties conferred or imposed on the President by or under this Constitution or any other law.” The President’s acts therefore as head of State and as Head of Government emanate from the same power, which is the executive power of the Republic.

[24] When a crime is committed, it is committed in violation of the laws of the Republic in its continuous state and not merely against the current government. It is correct therefore that the State prosecutes crimes against as the Republic. However, when a contract is entered into by the Government, or a delict is committed by the Government, the contractual or delictual liability arises against the Republic as a continuing entity represented by the Government. The only way that the Republic can act is if it were to act through the current position holders within the Government, primarily through the actions of the President or the Ministers. The Seychelles Code of Civil Procedure makes it clear that the Government can be made a defendant to a plaint by service on the Attorney General (see section 29 read with section 36 of the Seychelles Code of Civil Procedure). Moreover, section 165 further assumes that the Republic can be a party to a suit and would also be represented by the Attorney General. In either situation, therefore, the correct party to sue for acts against an individual that gave rise to a cause of action under the Civil Code of Seychelles whether arising through the President’s acts as Head of State or Head of Government would be through service on the Attorney General as was correctly done in this case. Therefore, I find no merit in State Counsel’s argument as currently posited before this Court.

[25] The above discussion however, is useful in the discussions that will follow on the liability of moral persons.

The liability of the Government

[26] The other grounds of appeal raised by Mr. Knights are in respect of the government’s liability for fault.

Moral persons cannot be sued under Article 1382

[27] Mr. Knights submits, first of all, that under Article 1382 of the Civil Code only the *préposés*, (agents, officers, workers, servants) of moral persons can be sued for fault. He submits that Article 1382 refers to acts by human persons and that the State as the *commettant* (the principal) could only be vicariously liable under Article 1384 and then only if *faute lourde* (gross fault) was proven. He expresses the view that the new Civil Code by substituting the words “human act” for “act” makes this point pellucid. He has relied on several Mauritian authorities including *Boodhoo v The Government of Mauritius*¹, *Garage Bala and Sons Ltd v State*² and *Coothen v The Ministry of Housing and Lands and Others*³, for this proposition and has relied especially on the dicta of the Court in *Garage Bala* to the effect that:

“(23) *In municipal law, unlike in international law, one is precluded from bringing a personal action against the State per se. An action against the State may only be brought where one has been able to identify the servant or agent of the State whose act or omission gives rise to an action or where a statute specifically so provides.*”⁴

[28] Mr. Knights has in this context also advanced the theory that the State can do no wrong and is capable of fault only through its agents. Hence, as Mr. St Ange has only indicated that the acts of the Government amount to a fault in law and has referred to bad faith he must be imputing the liability of the Government under Article 1384. In Mr. Knights submission, since Mr. St Ange has either failed to distinguish which type of delictual action he brings his case under or has mixed the two types, he has failed to disclose a reasonable cause of action. He has further submitted that this is in line with this Court’s decision in *Civil Construction Company Ltd v Leon and Others*.⁵ I will come to this specific point later.

[29] Mr. Shah, in response, has submitted that everyone is bound by the law, including the Government and that to argue that an action may only be brought against the Government in their vicarious liability is contrary to our settled jurisprudence, and is in violation of

¹ (1995) SCJ 194

² 2011 SCJ 284

³ 2007 SCJ 125

⁴ *Supra*, fn 2.

⁵ (SCA 36/2016) [2018] SCCA 33 (14 December 2018).

the rule of law. Public bodies are not "above the law" and the ability to hold the Government accountable and to safeguard Citizens against arbitrary exercises of Government power is necessary in a democratic society.

[30] Mr. Shah's point is taken and I think that it is trite that everyone is subject to the rule law – even the State. It indeed would be difficult to explain why the State could be sued for breaches of contract but not for delict. The purpose of the Civil Code in its book dedicated to Obligations is to bind all to them. In this respect Mr. Shah's submission in respect of section 1 (2) of the Civil Code of Seychelles Act which provides that: "This Act shall bind the Republic." is noted. And just as Book III, Title XIII make provision for the liability of agents and their principals for contract, so does Title IV in respect of agents committing delicts on behalf of their principals.

[31] But I do not think that that is the point being raised by Mr. Knights. What I understand Mr. Knights to be saying is that a moral person, be it a company or the State, cannot be sued under Article 1382 as fault under that provision relates to a human act.

[32] However, I cannot agree with Mr. Knights - the point is this: Article 1382 is 'directional' of the moral person in the sense that the fault is inferred onto the person who commits the fault. Fault has to necessarily be committed through the act of a human being – just as the State and the Republic act through the President.

[33] In this regard, I would agree that Article 1384 must be read in conjunction with Article 1382. When an employee of a company or the State commits a fault in the course of their employment, both the employee and the State are responsible. The employee is responsible for his personal fault under Article 1382 whereas the State is responsible under Article 1384 vicariously. But that is where there is a *lien de preposition* (link of subordination).

[34] However, there are instances when fault can be imputed directly onto the State or onto a company. The President of a State or a director of a company are not employees of the State or of the company respectively. They act in a representative role and not in a subordination role to the State or the company. They are interchangeably the same personality or the embodiment of the State or company for this legal fiction so as to

permit victims of delict to be compensated as the whole purpose of liability for delicts is to ensure that no citizen is without a remedy when they are injured by the fault of another.

- [35] I am strengthened in my view by the following extract from JurisClasseur, which states that French jurisprudence has admitted that a moral person can be held liable for a faute committed by its ‘organs’ under Article 1382:

“Responsabilité encourue directement par la personne morale. - La jurisprudence admet que la personne morale encourt directement une responsabilité civile fondée sur l’article 1382 du Code Civil pour les fautes commises par ses organes (Cass. Civ. 28 nov. 1876: D.P. 77, 1, 65. – Cass. Civ. II, 17 juill. 1967, cite supra n.12).

La personne morale est donc responsable de toutes les fautes délictuelles, contractuelles dont elle s’est rendue coupable par l’intermédiaire de ses organes”⁶

- [36] In the best tradition of the Bar, Mr. Knights, to whom I am grateful, has also made available the following jurisprudence from Répertoire Dalloz which does not support his submission but rather bolsters the position I have taken above:

“22. Abandon de l'exigence d'imputabilité morale et la faute des personnes morales.

...

En effet, alors même que la jurisprudence a admis le principe de la responsabilité civile pour faute des personnes morales dès le XIXe siècle (V. not. Civ. 15 janv. 1872, DP 1872. 1. 165. - Civ. 28 nov. 1876, DP 1877. 1. 65), la doctrine s'est montrée beaucoup plus réticente à en admettre le principe autrement que comme « un anthropomorphisme dont la meilleure justification est la commodité » (le TOURNEAU, La responsabilité civile, 3e éd., 1982, Dalloz, no 1372). Outre les arguments tirés de la lettre de l'article 1382 du code civil (tout fait quelconque « de l'homme »), on a fait valoir que la faute de la personne morale s'accordait mal avec le caractère fictif de celle-ci et, en termes d'opportunité, qu'une telle solution présentait l'inconvénient de gommer la fonction de dissuasion de la responsabilité civile (V. FLOUR, AUBERT et SAVAUX, Droit civil, Les obligations, t. 2: Le fait juridique, 14e éd., 2011 t. 2, no 99).

23 la jurisprudence a définitivement admis le principe d'une responsabilité personnelle, sans qu'il y ait lieu de passer par le détour d'un lien de préposition au demeurant discutable (V. très nettement en ce sens, Civ. 2e, 17 juill. 1967,

⁶ Juris Classeur, Articles 1382-1383, ‘Responsabilité du fait Personnel’, La faute’ I. A. Paragraph 15

Gaz. Pal. 1967. 2. 235, note *Blaevoët*; *RTD civ.* 1968. 149, obs. *Durry*. - *Civ. 2e*, 24 mars 1980, *Bull. civ. II*, no 71) ...”⁷

[37] In addition, with regard to the imputation of liability, *JurisClasseur* provides:

«9. *On a parfois soutenu que les personnes morales, n'ayant pas de volonté propre, ne peuvent se voir imputer une faute. La personnalité morale serait-elle donc alors une cause de non-imputabilité ?*

*Une telle opinion paraît aujourd'hui totalement dépassée, puisque l'on admet que la responsabilité civile de la personne morale puisse être engagée sur le fondement de l'article 1382 du Code civil en raison de son fait personnel (Cass. com., 27 nov. 1956 : *Gaz. Pal.* 1957, 1, p. 212. – Cass. crim., 5 avr. 1965 : *Gaz. Pal.* 1965, 2, p. 36. – Cass. 2e civ., 17 juill. 1967 : *Gaz. Pal.* 1967, 2, p. 235, note *Ch. Blaevoët* ; *RTD civ.* 1968, p. 149, obs. *G. Durry*. – Cass. 2e civ., 27 avr. 1977 : *Bull. civ.* 1977, II, n° 108. – *V. JCl. Responsabilité civile et Assurances, Fasc. 123 ou Civil Code, Art. 1382 à 1386, fasc. 123 ou Paygo-lock ImageNotarial Répertoire , V° Responsabilité civile, fasc. 123).**

On pourrait, il est vrai, considérer que, s'il en est ainsi, c'est parce que l'on a supprimé la condition d'imputabilité auparavant exigée pour la responsabilité civile de ces personnes. Mais il est difficilement niable que ces êtres moraux aient une volonté propre, distincte de celle de leurs membres, comme l'enseigne la théorie de la réalité des personnes morales. Et d'ailleurs, même si ces personnes ne sont que des fictions, il n'en est pas moins vrai que, par l'intermédiaire de leurs organes, elles expriment une volonté (imputabilité morale) et agissent conformément à cette volonté (imputabilité physique). La différence avec les personnes physiques est que cette volonté est collective et qu'elle ne peut s'exprimer et se matérialiser que par la médiation d'êtres humains.

Il en résultera seulement la nécessité d'apprécier l'imputabilité par rapport à ces êtres, véritables agents, auteurs effectifs des faits dommageables, puisque ce sont eux qui les ont décidés et accomplis, individuellement ou collectivement, pour le compte de la personne morale.

Ainsi, en admettant même qu'il y ait quelque artifice à fonder la responsabilité des personnes morales sur l'article 1382 – car elle est toujours engagée par le fait de personnes physiques, distinctes de l'entité collective (préposés, organes...) –, cela ne conduit pas pour autant à voir dans la personnalité morale une cause de non-imputabilité que la jurisprudence aurait supprimée en acceptant d'engager leur responsabilité pour faute personnelle. »⁸ (Emphasis added).

[38] Hence, it is now well settled under French law, that although there has been some initial reluctance on the part of French jurists, a *personne morale* may be liable under Article 1382 of the Civil Code. As the author above states, although it had been emphasised that a moral person does not possess a will proper, and one could not

⁷ Répertoire Dalloz, Responsabilité du fait personnel, Phillippe Brun, Octobre 2016, nos. 22- 23

⁸ *JurisClasseur Civil Code* > Art. 1382 à 1386, Fasc. 121-10: DROIT À RÉPARATION . – Responsabilité fondée sur la faute. – Imputabilité, 3 juin 2015

therefore impute fault to it, this view has been overtaken and civil liability can be engaged under Article 1382 by reason of a personal act. The difference from physical persons is that the will of the moral person is collective and can only be expressed and materialise through the medium of human beings.

[39] There exists, however, a further distinction between a moral person in public law and a moral person in private law. Paragraph 10 of the same extract from JurisClasseur states:

“La responsabilité des personnes morales publics (états, département, communes, établissements publics) échappe aux règles de la responsabilité civile et est soumise à celles du droit public.

Quand les personnes de droit public accomplissent un acte de gestion privé, les règles relatives aux personnes morales de droit privé leur sont applicables...

Les établissements publics à caractère industriel et commercial, les entreprises nationalisées ayant garde la structure des sociétés commerciales obéissent pour une large part aux règles gouvernant les personnes morales de droit privé.”⁹

[40] In this context, contrary to Mr. Knight’s submission, moral persons such as companies and civil societies can be sued under 1382 as they are moral persons of private law. As for moral persons in public law they are not subject to the rules of civil law unless they are engaged in an act of *gestion privé* (private administration/management). For acts in the sphere of public law, they are subject to different rules in a different court.

[41] It must be noted that in this regard French law is different to both Seychellois and Mauritian law because its court structure operates a different regime for moral persons when they are sued in public law. Such cases do not engage the jurisdiction of the civil courts but rather that of the Conseil d’État (the administrative court of France). In other words, moral persons are still liable but before a different court with different principles operating in the public law context. However, even in the Conseil d’État since the Arrêt Blanco¹⁰, in which a child was run down and injured by a wagon belonging to the state, *actes de puissance publique* are justiciable.

[42] Hence, as noted in French doctrinal writings no one escapes the scrutiny or operation of the law even for acts of the executive:

⁹ Ibid, paragraph 10.

¹⁰ Tribunal des conflits, du 8 février 1873

“Il ne faut pas conclure de là que tout acte du pouvoir exécutif inspiré par des considérations d’ordre politique et gouvernemental, soit par cela seul un acte de gouvernement contre lequel les citoyens n’auraient aucun recours d’ordre juridique. La compétence dépend de la nature des actes et non des mobiles qui les inspirent. L’acte d’administration fait dans un but politique ne cesse [34] pas pour cela d’être un acte d’administration et de relever du juge administratif. Si, par exemple, des mesures illégales ou entachées de vice de forme étaient prises, dans un but politique, à l’égard de magistrats inamovibles, d’officiers propriétaires de leur grade, de membres de la Légion d’honneur, de fonctionnaires auxquels la loi accorde des garanties particulières, les motifs politiques qui auraient inspiré ces mesures administratives n’en feraient pas des actes de gouvernement et n’empêcheraient pas qu’elles ne fussent susceptibles d’être déférées au Conseil d’État pour excès de pouvoir.”¹¹

[43] Whereas the common law and Seychellois law developed a system of administrative review to scrutinise the acts of Government for abuse and/or irrationality and to rule on the Government’s liability contractually and delictually in the civil courts, the review of acts of Government and/or their delictual or contractual obligations are subject to the jurisdiction of the Conseil d’État in France.

[44] As pointed out:

“England has a common law, to which the state is subject, and which the courts apply according to general and uniform principles. In France, the state and the public services are also subject to the law, but it is a special and autonomous law, which has its own principles, distinct and independent from private law. It is public or administrative law which governs the relations of public administration and individuals, as well as those between the various departments of administration.”¹²

[45] In Seychelles, since only our civil courts have jurisdiction for delictual acts of both ordinary citizens and the Government, the provisions of our Civil Code are applied

¹¹ Laferrière, *Traité de la juridiction administrative et des recours contentieux*, Paris, Berger-Levrault, 2ème édition, 1896, online <https://www.revuegeneraledudroit.eu/blog/2020/04/21/chapitre-ii-actes-de-gouvernement/>

¹² Raphael Alibert, *The French Conseil d’État*, : *The Modern Law Review* , Apr., 1940, Vol. 3, No. 4 (Apr., 1940), pp. 257-271, 257.

uniformly. Hence, there are several instances in Seychelles where the State/Government has been held liable for *faute*, so the present matter is not a novelty (see for example *Emmanuel v Joubert*¹³). In *Global Investments v Government*¹⁴, the court found that the provisions of Article 304 of the Seychelles Code of Civil Procedure were applicable to the Government of Seychelles, that it could be sued as a private individual and an injunction could be sought against it.

[46] Furthermore, section 29 of the Seychelles Code of Civil Procedure sets out the manner in which suits involving the government are to be brought. Section 29 (2) provides –

“All claims against the Government of Seychelles being claims of which the subject matter would have been cognizable by the Supreme Court of Judicature if the claim has been against a private individual may, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney General as defendant.”

[47] The law therefore clearly envisages that the State or Government, despite being a moral person, can still be liable.

[48] This ground of appeal is therefore dismissed.

The State is only liable for faute lourde

[49] The thrust of Mr. Knight’s submission as I understand it is that the State can never be personally liable under Article 1382 (a point I have dealt with above) but only vicariously under Article 1384 and in that respect only if *faute lourde* on the part of the agent is committed. In this regard, it is essential at this juncture to bring to light the relevant parts of the pleadings of the parties. Mr. St Ange in his amended plaint averred as follows:

“(13) The Plaintiff avers that both his candidature and his withdrawal for the post of UNWTO Secretary-General was widely publicised both in local and international media.

(14) The Plaintiff avers that the Government of Seychelles’ abrupt withdrawal of the Plaintiff’s candidature mere days before the UNWTO elections and its

¹³ (1996-1997) SCAR 235).

¹⁴ Civ 337/1998, 7 April 1999.

decision to support Zimbabwe instead amounts to bad faith on behalf of the Government of Seychelles.

...

(16) Further, the Plaintiff avers that the acts of the Government of Seychelles amount to a fault in law for which the Government of Seychelles is liable to make good to the Plaintiff...

[50] In response to these averments, the Attorney General in his statement of defence avers:

“(13) The averments in paragraph 13 are denied as the facts averred therein are not within the knowledge of the Defendant and the Plaintiff is put to strict proof thereof.

(14) The averments in paragraph 14 are denied. The Government of Seychelles denies the Plaintiff’s averments of bad faith on the part of the Government and the Plaintiff is put to strict proof thereto. Further, the Government avers that it has exercised good faith, due diligence, reason, caution in its dealings with the Plaintiff’s candidature...The Government was exercising its highest political wisdom to safeguard the national interests from the potential international sanctions that would arise if the Zimbabwean candidate was not supported. The Government keeps the national interest as its foremost objective while supporting or withdrawing its support to individuals who seek to nominate themselves to the international positions.

...

(16) The averments in paragraph 16 are denied and the Plaintiff is put to strict proof thereof. The Government of Seychelles did not commit any fault in law or on facts whatsoever or at all towards the Plaintiff nor has it any liability towards the Plaintiff. In further answer to the plaint, it is averred that the Government merely carried out its duties as parts of the acts of state vis-vis the Plaintiff...

[51] I have reproduced these pleadings to highlight two facts (1) that it is only liability under section 1382 that can be inferred from the pleadings and (2) that the issue of “gross fault” (*faute lourde*) was never raised in the pleadings. I address the two issues together.

[52] Gross fault was also not raised in the evidence. It was only raised in closing submissions of Counsel for the AG but in the context of distinguishing between a *faute de service* which he submitted was justiciable and *faute de gestion* (acts of government or *puissance publique*) which in his estimation was not. In expanding on instances of *fautes de service*

which are actionable, Counsel relied on the case of *Attorney General v Labonté*¹⁵ for the principle that in cases of *fautes de service* a gross fault as opposed to a simple fault must be proved.

[53] Counsel for the Attorney General has submitted in a different context in this Court that *gross fault* was an issue in the court *a quo* because Mr. St Ange had alleged bad faith on the part of the Government. In Counsel's view, bad faith is a component of gross fault.

[54] First, I must observe that if bad faith is indeed a component of gross fault then this issue should have been addressed in the court below and Mr. St Ange given the opportunity to address it as a basic observance of the *audi alterem partem* rule. It cannot be gainsaid that for the Government to only raise the issue at the appeal stage would normally result in this Court not entertaining it.

[55] As this court stated in *Morin & Anor v Ministry of Land Use and Housing & Anor*¹⁶ relying on the authority of *Barclays Bank v Moustache*¹⁷, a final appellate court will not allow a party to raise an issue not pleaded at trial. In some exceptional cases and where there is no prejudice to the other party and where the issue has merit, the party will be allowed to proceed with the new issue. However, as Mr. St Ange has not raised any objection to the ground raised and as there is a lot of confusion on this point in our jurisprudence, I have found it necessary to deal with this important issue.

[56] On this issue, Mr. Knights has submitted that since Mr. St. Ange invoked bad faith on the part of the Government in his Complaint, it would necessarily mean that he is seeking to establish the elements of *faute lourde* which could only be engaged under Article 1384 which was not pleaded. He further submits that in terms of *Labonté*¹⁸ and *Payet v AG*,¹⁹ the *préposé* would have to be identified and mentioned in the caption. He has, as I have explained earlier, also submitted that in terms of the case of *Civil Construction Company Ltd*²⁰ by Mr. St. Ange failing in his complaint to distinguish which type of delictual action is

¹⁵ (2006-2007) SCAR 13

¹⁶ (SCA CP 2/2014) [2014] SCCA 32 (12 December 2014)

¹⁷ (1993 1994) SCAR) 134

¹⁸ *Supra*, fn 8

¹⁹ (1960) SLR 235

²⁰ *Supra*, fn 15

being brought or by mixing liability under Articles 1382 and 1384 he has therefore disclosed no reasonable cause of action.

[57] Mr. Shah, in response, has submitted that the Government's actions constituted gross negligence amounting to bad faith. He submits that bad faith, contrary to the Attorney-General's averments, is an element of fault under Article 1382 (3) of the Civil Code. Relying on *Estico v Fanchette & Ors*²¹ and the definition of bad faith in Ripert²² he submits that bad faith can be defined as: (i) acts intended to harm another, or (ii) acts that are harmful to another and arise out of negligence or imprudence imputable to the actor, or (iii) acts merely harmful to another if the harm is greater than ought to be tolerated (fault by implication). He further submits that *Desaubin v United Concrete Products (Seychelles) Ltd*²³ is authority that Article 1382 of the Civil Code of Seychelles does not contain an exhaustive definition of fault. Moreover, the law of delict is not hampered by the burden of proving a specific duty of care as in English law because Articles 1382 and 1383 of our Civil Code do not contain any limitations as to the class of protected (proximate) persons. Hence, every plaintiff who can prove fault, damage and causation can claim compensation (*Civil Construction Company Ltd*).²⁴ In this context, there is no principle of *faute lourde* in Seychellois jurisprudence.

[58] He further invites the court to appreciate that the principle of *abus de droit* can equally be distilled from the provisions of Article 1383(4), the basic principle of which provides that whoever abuses his legal right should be held liable for the consequences of such abuse. Relying on the case of *Raihl v The Ministry of National Development*,²⁵ Mr. Shah further submits that having deemed the endorsement of Mr. St. Ange at all times to be a risk worth taking and withdrawing the same at the eleventh hour was arbitrary, capricious, made in bad faith, and a clear abuse of their power (i.e. contrary to the judicious standard expected of the executive exercise of power).

²¹ (2014) SLR 453

²² Georges Ripert, *Traité de droit civil d'après le traité de Planiol*, 1–4, Paris: Librairie générale de droit et de jurisprudence. Note, D.P. [1907] I. 385.

²³ (1977) SLR. 164,

²⁴ *Supra*,

²⁵ (2010) SLR 6.

[59] At this point is necessary to bring to light the relevant provisions of the Civil Code with regard to delict:

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.

...

Article 1383 1. Every person is liable for the damage it has caused not merely by his act, but also by his negligent or imprudence.

...

Article 1384 1. A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.

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.

...”

[60] As I have stated previously, the provisions make a distinction between personal liability (1382) and vicarious liability (1384). With regard to the latter, the issue of the principal's liability and that of the agent's liability are subject to two distinct regimes. What unites them is the existence of a *lien de preposition* (link of subordination). One must indeed begin by characterising this bond of preposition because without it there is neither principal nor agent. As stated by the Cour de Cassation:

*“Le rapport de subordination d’où découle la responsabilité mise à la charge des commettants par l’article 1384, alinéa 3, du Code civil suppose de la part de ceux-ci le pouvoir de faire acte d’autorité en donnant à leurs préposés des ordres ou instructions sur la manière de remplir, fût-ce à titre temporaire et sans contrepartie financière, l’emploi confié”.*²⁶

²⁶ Cass. crim., 14 juin 1990, n° 88-87.396, solution constante.

- [61] In the overwhelming majority of cases, the subordination link will be characterised by the presence of an employment contract because it implies the existence of a bond of subordination. It should be noted in this regard that the professional independence enjoyed by the doctor in the actual exercise of his art is not incompatible with the state of subordination resulting from a contract for the hiring of services binding him to a third party, a salaried doctor is therefore indeed a *préposé*.
- [62] The vicarious liability of the principal is based on Article 1384, alinéa 3. Like any vicarious liability, it is objective and strict, that is to say, ‘no-fault liability’. No-fault liability simply means that there is no need to prove fault on the part of the principal. On the other hand, it is necessary to prove a fault on the part of the direct author of the damage, that is to say of the agent, committed in the performance of his duties. It is those cases that demand a pleading in the facts to that effect in the Pleint as was pointed out by the court in *Civil Construction Company Ltd.*²⁷
- [63] In the present case, the pleadings of Mr. St Ange as quoted above, reveal that he was suing under Article 1382 which I have already explained he was entitled to do given the circumstances of the present case. It is not necessary to plead any particular article of the Civil Code because pleadings are on facts and the law will be inferred from the facts as pleaded.
- [64] Mr. Knight’s submissions therefore with respect to Article 1384 and *faute lourde* are irrelevant apart from the jurisprudential discussion it has generated.
- [65] To bring clarity to this area, I state that the proof of *faute lourde* in actions for delict involving agents of the State does not form part of our law. Mr. Knight’s submissions in this respect are illustrative of what must not be done when citing comparisons with other countries having similar legislative provisions in a different context. One must always compare like with like in the use of persuasive authority. I respectfully add that the same mistake was made by Domah JA in *Labonté*, when he expressed the view that:

²⁷ Supra, fn

“where a fault in service delivery between private parties [is brought either] brought under article 1384 or in a contract based on the fault of an agent – insurance, travel, car rental, hotel etc. – such an action against the State may only lie where the plaintiff is prepared to run an extra mile. That additional hurdle comprises showing that the fault committed by the officers in exercising their judicial, medical, police, social duties was characterized by bad faith, abuse of power or gross negligence in the performance of their official duty. French law terms it ‘une faute lourde’²⁸

[66] *Labonté* has not been followed as I have already said it is not a concept arising from the law of this jurisdiction. It is a concept used in the Conseil d’État and in Mauritius. With respect to medical negligence brought under Article 1384 in Seychelles, the correct law is that as laid out in *Nanon & anor v Ministry of Health Services & Ors*,²⁹ *Octobre v Government of Seychelles*,³⁰ and *Hertel v Government of Seychelles*.³¹

[67] It must be noted that even in the Conseil d’État, the approach has been to incrementally shy away from the concept of *faute lourde*. In cases where the responsibility of the government is involved what began as “the state can do no wrong”, developed into having to prove *faute lourde* and which has now been whittled down to *faute simple* in most circumstances to meet the principle of equal treatment.³²

[68] In the Mauritian context, the distinction between *faute simple* and *faute lourde* has developed largely because of special legislation that refers to Article 1384. According to Goran Georgijević,³³

"Administrative tort liability ...in Mauritian law is also governed by Article 1384 of the Mauritian Civil Code. The abovementioned article applies to the principal, i.e. public administration, and the agent, i.e. an employee of the public administration ... However, there is an important specificity of the administrative tort liability of the State as principal for the faults committed by its employees: the State will be liable in tort only in the event of serious fault of its agent, and this fault is sovereignly appreciated by judges. The State will not be liable in case of

²⁸ Supra, parag 18

²⁹ (2015) SLR 443

³⁰ (2016) SLR 599

³¹ ((2016) SLR 633

³² See Carol Harlow, *Administrative liability: a comparative study of French and English Law* PhD thesis, (1979) London School of Economics and Political Science.

³³ Lecturer, Université de Maurice and Law Reform Officer of Mauritius.

simple negligence or recklessness on the part of its agent. This is clearly stated in the judgments of the Supreme Court of Mauritius in Transpacific Export Services Ltd v. The State of Mauritius & Anor 2016 SCJ 407, Transpacific Export Services Ltd v. The State & Anor 2018 PC 28, Senarain M. v. The Commissioner of Police & Anor 2019 SCJ 72, and Mario Alain Chung Ching Ah Sue v. The State of Mauritius 2015 SCJ 110."³⁴(Emphasis added)

[69] The specificity referred to above is the special legal regime operating in Mauritius which developed over time to create a hybrid approach to State liability which marries common law rules to the French tradition:

“22. Une étude comparative de la responsabilité administrative bouscule les repères habituels de la comparaison entre droit civil et common law. Alors que les règles qui régissent en France la responsabilité administrative sont essentiellement d’origine jurisprudentielle, la state liability du droit anglais est une matière de droit écrit, régie par des textes de lois (statutory law). Telle n’est pourtant pas la seule différence entre les systèmes français et britannique, la matière s’étant développée de manière très différente dans les deux pays. Alors que le droit administratif français se caractérise par une importante autonomie au regard du droit civil, tant sur le plan matériel que procédural, le droit anglais se caractérise par un rattachement de la matière au droit civil et par une compétence des juridictions ordinaires, peu importe la nature publique de l’une des parties.

*23. Au carrefour de deux logiques opposées, le droit mauricien de la responsabilité administrative oscille ainsi entre deux approches qui ne sont guère conciliables. Les actions en responsabilité contre l’État mauricien sont régies par des textes législatifs directement inspirés du droit britannique (le State Proceedings Act et le Public Officers’ Protection Act, en vigueur à Maurice depuis 1953 et 1957) et tous les procès en responsabilité, civile ou administrative, sont jugés devant les mêmes juridictions, tel que c’est le cas au Royaume-Uni. Une hybridation de la matière résulte cependant de la manière dont la responsabilité administrative d’origine britannique est reliée à la responsabilité civile d’origine française et de l’application originale de concepts tels que la faute lourde par les juridictions mauriciennes.”*³⁵

³⁴Goran Georgijević, Mauritian Tort Law (2018), Legislation Review file:///C:/Users/user/Downloads/Annals_2020-4e-184-203.pdf

³⁵ See Jonas Knetsch, La réception du droit français de la responsabilité à Maurice, *Revue internationale de droit comparé* (2017) 69, 91.

- [70] The hybridised approach taken by Mauritius is specific to it partly because of its “special laws” which have a direct bearing on the delictual liability of the State such as the State Proceedings Act which does not form part of Seychellois law.
- [71] Hence in Mauritius under the State Proceedings Act, the State can only be liable in delict for the acts of its *préposés* and can be sued for damages for the ‘faute’ committed by its *préposés* by virtue of Article 1384 of the Civil Code. In this context, like Seychelles, there is a necessity for the pleadings to show the lien de preposition between a *commettant* and a *préposé* (See for example *Gunoory v. the State of Mauritius & the Commissioner of Police* ³⁶).
- [72] Since all proceedings involving liability for delict whether civil or administrative are judged by the same court as in the United Kingdom, Mauritius has imported the French administrative concept of *faute lourde* for acts of the State.
- [73] But as I have said, this is not Seychellois law. We have not imported the concept of *faute lourde* from the administrative court of France into our civil courts and our law makes no distinction between the standard of fault required for natural persons and moral or juridical persons.
- [74] In the present matter, the series of events leading to the endorsement by the Government of Mr. St. Ange and following its withdrawal, are clearly set out. The endorsement itself had to come from the State, as an entity, and not any particular individual, servant or agent. Necessarily, the State being a moral person, the physical endorsement had to be effected by a physical person representing the State, but the required endorsement had to be on behalf of the State.
- [75] If we are to determine that the State can be held liable, the fault element, can be either negligent or intentional. The Government knowingly and imprudently endorsed the Respondent’s candidacy in circumstances where it had not only already endorsed an AU candidate, but it knew that by virtue of AU practice and obligations, there should be only one candidate from the AU. The Government was, by endorsing Mr. St Ange, acting against this practice, and it was made aware that the AU could impose limitations on any

³⁶ 2015 SCJ 388.

efforts by Seychelles to put forward candidates for international positions in the next five years. It did so anyway, citing the exercise of sovereignty as the motivation.

[76] Mr. Shah has also cited numerous examples of negligence, bad faith or abuse of right by the Government. They are instances of the errors of conduct as envisaged in Article 1382 (3) and (4). I do not see therefore how this court can fault Vidot J in respect of his findings of fact or law on this issue and find therefore that the Government of Seychelles was liable under Article 1382. The Government's grounds of appeal in this regard are therefore dismissed.

Quantum

Preliminary matters

[77] Several grounds of appeal have been advanced by Mr. Shah in this respect. It must be noted that no separate submissions were filed by the Government on the issue of quantum as relying on *Labonté*,³⁷ Mr. Knights submitted that as neither bad faith had been established nor a *préposé* identified capable of being negligent or committing a *faute lourde*, no damages were payable.

[78] Before the different awards for damages are considered, I must deal with the issue raised by Mr. Shah concerning the finding by Vidot J that Mr. St. Ange was contributorily negligent for the injury suffered. Mr. Shah has submitted that this issue was not raised in the Government's Statement of Defence, and that therefore the defence of contributory negligence, was not available to it. As stated by the court in *Tirant v Banane*,³⁸ in civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise he cannot at the trial give evidence of facts not pleaded nor can these be raised on his behalf by the trial court. I agree. Vidot J did not apportion contributory negligence by Mr St. Ange in his ultimate finding and it is hard to gauge to what extent this issue would have clouded his mind in the award of damages but I agree that this point must be taken into consideration by this court.

[79] Mr. Shah has also submitted that Vidot J's finding that the plea in *limine litis* raised by the Government in respect of Mr. St Ange's pleadings not disclosing a cause of action

³⁷ Supra fn 15

³⁸ (1977) SLR 219)

was not addressed by Mr. St. Ange is incorrect. I agree that the plea was in fact dealt with in Mr. Shah's closing submissions as borne out by the record but as I have already found that this issue had no relevance to the crux of this case I do not see any need to go into more detail about it.

Hotel, Travel and incidental expenses

[80] I confess that the issue of damages has greatly troubled me, more so given the extraordinary circumstances of this case.

[81] With respect to the campaign for election, Mr. Shah has submitted that all the hotel, travel and incidental expenses incurred by Mr. St. Ange should be recoverable as evidence of their expenditure was led in this respect and not seriously contested. Out of a total of €225,000 (at a rate of SR 15.33 to the €), Vidot J awarded only the sum of SR52,249.16 (€3,408.30).

[82] It is trite that an appellate court should not interfere with the damages awarded by a lower court, even if it would have arrived at a different result. Only in exceptional circumstances will an appellate court overturn the trial judge's analysis as to the quantum and type of damages awarded.

[83] In *Philoe and Another v Ernesta*³⁹, the Court of Appeal stated that the general principle is that the assessment of damages is pre-eminently a matter within the discretion of the trial judge and an appellate court must be reluctant to upset such assessment unless there was a considerable disproportion in the quantum of damages awarded and /or such damages have been awarded on an improper basis or for a wrong purpose."

[84] In *Government of Seychelles v Rose*,⁴⁰ this Court also stated that in line with the decision in *Ventigadoo*⁴¹ the Court when considering the adequacy or otherwise of an award for damages by an inferior court it would have to be convinced that (i) the trial court acted on some wrong principle of law; or (ii) the amount awarded was so high or so very small as

³⁹ (unreported) SCA 17 of 2004

⁴⁰ (2012) SLR 364

⁴¹ *Government of Seychelles v Ventigadoo* (2008-2009) SCAR 1

to make it, in the judgment of the Appeal Court, an entirely erroneous estimate of the damage to which the plaintiff was entitled.

[85] The crucial question for this Court is whether or not there is basis for interfering with the total award of SR 164,396.31 awarded to Mr. St. Ange by the Supreme Court. Without hesitation my answer to this question must be in the affirmative.

[86] While I can understand that Vidot J might have entertained difficulties in terms of ascertaining whether all the money claimed and supported by receipts were solely in respect of expenses incurred by Mr. St Ange, it must be noted that they occurred in the period from the end of December 2016 to early May 2017. Vidot J did not find the expenses had not been proved but had difficulty with the fact that Mr. St Ange had not shown how “such sums of money [were] used during the campaign”. In fact, Mr. St Ange produced invoices and receipts and called witnesses including Minister Lousteau-Lalanne and the employees of the PR companies with respect to the bills generated for promotional, marketing and PR Services. There is no indication that their evidence was rejected.

[87] It is trite that he who asserts must prove but it also true that the law does not exact an extra burden beyond a balance of probabilities. Articles 1319, 1320 and 1322 of the Civil Code of Seychelles are clear on the above point. Article 1319 in particular provides that:

“An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns. Nevertheless, such document shall only have the effect of raising a legal presumption of proof which may be rebutted to the contrary. Evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.”

[88] Had the Government of Seychelles’ adduced evidence in rebuttal of the documentary evidence and witness evidence of Mr. St Ange then the decision of Vidot J in rejecting the same would have been understandable. It was not seriously contested that Mr. St. Ange had campaigned tirelessly. His evidence as accepted by the learned trial judge was to the effect that he was involved in rigorous campaigning and visited numerous

countries namely Spain, India, Uganda, London, Thailand, Egypt and Germany. He had recruited services of promotional marketing, publication and administration companies such as PR Media and the Indian Ocean Times. This had resulted in securing appearances with Richard Quest on CNN and Allen Bolton on Sky News. He was also interviewed by the BBC.

[89] While accepting that these events did in fact happen, the invoices and receipts produced are not accepted by the learned trial judge because in his estimation “there was no evidence of any agreement between the parties and the costs of such services” and this after finding that there was an oral agreement between Mr. St Ange and both companies who had issued invoices to Mr. St. Ange.

[90] It is our law that damages are awarded to cover the loss sustained by a claimant (see Article 1149 of the Civil Code). Once the trial judge accepted that reasonable expenses were incurred for the campaign he necessarily had to compensate Mr St Ange for the same. Further, the disbursement of funds by Mr. St. Ange occurred with the endorsement of the Government and with the expectation by Mr. St. Ange that they would be paid for by the Government. This has been corroborated by both Ministers Lousteau-Lalanne and Larose. The Government has not adduced rebuttal evidence that the spend was spurious or that Mr. St. Ange overstayed in hotels, or even that he was on a frolic of his own.

[91] I take into account that there may have been some excesses (for example in phone bills or other expenses) that benefitted Mr. St Ange personally and were not exclusively attributable to the campaign but I cannot refuse to award damages even if it is hard to ascertain a correct figure. An arbitrary but reasonable award that takes into account a discount for expenses that may have covered matters outside the campaign is the only method of calculating these damages in the circumstances. I believe a 10% discount would allow for the exclusion of personal expenses not attributable to the campaign. Mr. St. Ange is therefore entitled to €202,500 under this head, less SR52,249.16 which is what was awarded by Vidot J. The rate of €15.33 to the Seychelles rupee will be applied as that was its value at the time making the amount due under this head in rupees as SR 3,052,075.90

Loss of earnings

- [92] Mr. St Ange had claimed compensation for both future loss of earnings as Secretary-General of the UNWTO and/or as Minister for Tourism had he been able to continue in that post but neither was allowed as the learned trial judge found that he could not benefit under this head. The court was of the view that there had been neither guarantee that he would have won the post of Secretary-General nor that there had been an absolute need for him to resign as Minister in order to successfully campaign.
- [93] During the hearing of the appeal before us, Mr. Shah has not insisted in pursuing the claim for loss of future earnings as Secretary-General but has submitted that what is certain, is that Mr. St. Ange would have continued as a Minister until the end of the term of office of the Government. He submitted that that in this respect one could say there was certainty of Mr. St. Ange's loss of earnings as a Minister.
- [94] This approach has saved the court the time and effort to consider the law relating to *per te de chance* (loss of chance) and the difficulty in apportioning damages thereunder.
- [95] With regard to loss of earnings as Minister for the duration of the Government's mandate, I am of the view on a close scrutiny of the evidence especially in terms of the testimony of Mr. Taleb Rifai, the past Secretary-General of the UNWTO, that the campaign for election could not have been successfully achieved without the full-time engagement of Mr. St. Ange. It is clear that it would have been impossible for him to share the burden of the duties of a ministerial post while campaigning for the UNWTO post. This is also supported by the evidence of Minister Lousteau-Lalanne. Vidot J's decision for not granting this head of damages was that Mr. St. Ange had taken the decision himself to resign. In my view although this is true, there is equally evidence that Mr. St. Ange's decision was taken with the support of the Government as it endorsed his bid for the UNWTO post and recognised that his campaign would entail time and effort away from his ministerial duties and amount to dereliction of the same. Vidot J does not indicate why he rejects this evidence. Withdrawing the endorsement meant that Mr. St Ange's chances of securing the post at the UN were negated and the loss of a ministerial salary. Compensation is therefore due at least under the latter.

[96] Mr. St Ange claimed SCR 9,000,000 as his future loss of earnings for the three years remaining as Minister of Tourism. This figure has not been broken down. Using Mr. St. Ange's payslip (Exhibit 64) and allowing for a monthly net salary of SR 45,818.55 for three years together with gratuities, I find that this would generate the sum of ((SR45,818.55 x12 x 3) SR1,649,467.8 + (25% x SR 549822.6 x 3) SR 412,366.95 + (50% x SR1,649467.8) SR 824,733.9)) SR 2, 886, 568.6. These are reasonable in the circumstances and are granted by this court.

Moral damages

[97] Vidot J granted SR 70,000 for moral damages out of SR 4,000, 000 claimed, finding that Mr. St Ange was stoic in the face of the international embarrassment and humiliation and that neither evidence for psychological nor for emotional pain and suffering had been adduced. Mr. Shah has submitted that such evidence was adduced and the sum awarded for moral damages is manifestly inadequate.

[98] Evidence was led with respect to the shock, embarrassment, humiliation and emotional distress suffered by Mr. St. Ange when the news of the Government's revocation of its endorsement for him were delivered by a mere phone call two days before the elections were to take place in the lobby of the hotel in Madrid where he had just arrived for the elections. He testified that he broke down and cried. He had spent months working so hard. He had despite his distress to take calls from international dignitaries and the press who were stunned by the news. He felt humiliated, betrayed and unfairly treated. He said his world had crashed around him. He still had to take a press conference and was physically sick afterwards and his daughter had to sit up with him all night. Arriving in Seychelles he again had to face the press at the airport and undergo the same humiliation and embarrassment.

[99] In the face of such powerful evidence from Mr. St. Ange corroborated by other witnesses, I am unable to see how Vidot J came to the finding that there was no evidence of psychological, emotional pain or suffering. This is indeed one of the instances when this court must interfere in terms of *Ventigadoo*⁴² "correct an entirely erroneous estimate of the damage to which the plaintiff was entitled".

⁴² Supra, fn 40.

[100] The difficulty in assessing moral damages has been appreciated many times by this court. “*Comment monnayer les larmes*” (how does one put a price on tears) is the phrase used by the court in *Michel & Ors v Talma & Anor* (2012) SLR 95. There is no comparable case in Seychelles. This case is one of its kind, stands on its own and is not one that is likely to ever occur again. In the circumstances, I have looked at compensation awarded in defamation cases as the most appropriate comparator for awards for humiliation, embarrassment, stress and inconvenience. In this context I also have to bear in mind this Court’s approach in *Rose*⁴³ that in awarding damages, the circumstances of each case have to be taken into account and due consideration also taken of the rate of inflation and the socio-economic situation reflected in the increase in the cost of living,

[101] I also find the court’s approach court in *Derjacques v Louise*⁴⁴ and *Préa v SPPF*⁴⁵, that the assessment of damages must take into account inter alia, the plaintiff’s position and standing, the mode and extent of the injury, and the whole conduct of the defendant as relevant. In *Ramkalawan v Parti Lepep (formerly The Seychelles Peoples Progressive Front) & Anor*⁴⁶ the court also stated that the higher the plaintiff’s position, the higher the damages.

[102] *Ramkalawan* concerned a defamation to the leader of the opposition made in 2006 for which he was awarded SR100,000. In *Pillay v Regar Publications (Pty) Ltd and Others*,⁴⁷ a case that similarly involved the defamation of a Government Minister the sum of SCR 175,000 was awarded. That is over twenty-four years ago. In the most recent case of *Ernesta v Bastienne*⁴⁸ for defamation this Court upheld the award made by the Supreme Court in the sum of SR 600,000 for a Minister.

[103] Using these cases as a guide although bearing in mind that the present case is not a defamation case, but also bearing in mind the extent of the pain and suffering suffered by Mr. St Ange which included physical manifestations, loss of face, humiliation and

⁴³ Supra fn 39.

⁴⁴ (1982) SLR 175

⁴⁵ *Préa v SPPF* (2007) SLR 108

⁴⁶ (2017) SLR 323

⁴⁷ (1997) SLR 125

⁴⁸ (SCA 38/2018) [2020] SCCA 37 (18 December 2020)

embarrassment including in the national and international press, I am of the view that an award of SR1, 000,000 would be appropriate in the circumstances.

[104] No order was made in respect of Mr. St. Ange's costs which Mr. Shah has also submitted was unfair in the circumstances. No explanation is given as to why that was the case. It is trite that costs follow the event. Mr. St. Ange won his case and should therefore have been allowed his costs. I grant him costs in both courts.

Order

[105] I therefore Order as follows:

1. The appeal of the Attorney General is dismissed in its entirety.
2. The appeal of Mr. St. Ange is allowed.
3. In total the Government shall pay Mr. St Ange the sum of SR6, 984,634.50 with interest as follows:
 - a. In respect of hotel, travel and incidental expenses the Government shall pay Mr. St Ange the sum of SR 3,098,065.90
 - b. In respect of loss of earnings, the Government shall pay Mr. St Ange the sum of SR 2,886,568.6.
 - c. In respect of moral damages, the Government shall pay Mr. St. Ange the sum of SR 1,000,000
4. Costs in both courts are granted to Mr. St. Ange.



Dr. Mathilda Twomey JA

I concur

A. Fernando, President

I concur

F. Robinson JA

Signed, dated and delivered at Ile du Port on 13 August 2021.