IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2021] SCCA 78 17 December 2021
SCA 42/2019 SCSC 294 (arising in CC 51/2015)

In the matter between

PUBLIC UTILITIES CORPORATION **Appellant**
(rep. by Somasundaram Rajasundaram)

and

CHELLE MEDICAL LIMITED **Respondent**
(rep. Kieran Shah, SC)

and

CHELLE MEDICAL LIMITED **Cross-Appellant**
(rep. Kieran Shah, SC)

And

PUBLIC UTILITIES CORPORATION **Cross-Respondent**
(rep. by Somasundaram Rajasundaram)

Neutral Citation: *Public Utilities Company v Chelle Medical Limited* ([2021] SCCA 78 17 December 2021 SCA 42/2019 (Arising in CS 18/2016) SCSC 294

Before: Fernando, PCA, Twomey, JA, Tibatemwa-Ekirikubinza JA

Summary: Faute – liability under Article 1382 distinguished from Article 1384- failure of pleadings to allege specific liability – decision ex facie pleadings and trial

Heard: 7 December 2021

Delivered: 17 December 2021

ORDER

(1) The appeal and cross appeal are dismissed and the decision of the court a quo upheld. (2) No faute or liability is imputed to the Respondent and Cross-Appellant. (3) No court fees are to be levied against either party. (4) All other costs are awarded against the Appellant.

JUDGMENT

TWOMEY JA

Background to this case

[1] PUC is a body corporate and under the Public Utilities Corporation Act is in charge of the production and distribution of electrical energy to all consumers in Seychelles and Chelle is a consumer of such energy and a manufacturer of medical appliances in premises at Le Rocher, Mahe Seychelles.

[2] PUC alleged in a plaint filed in 2015 that Chelle had tampered with the electricity meter o its premises "through technicians […] in electrical connections" causing a reduction in electricity charges. It further alleged that Chelle's actions were a "*faute* in law while [Chelle], its agents, servants [were] fully aware that no one except [PUC] …[was] allowed to accede to the electric meter, transformers and other associated apparatuses in the premises."

[3] In its particulars of *faute,* PUC avers as follows:

> *"Particulars of faute*
>
> *8.1 Illegally and unlawfully acceded to the Meter (No. 9599870) in the defendant's enclaved premises*
>
> *8.2 Tampering with the meter (No 9599870) without any lawful authority*
>
> *8.3.1 Tampering with the transformers inside the premises at the location of the meter*
>
> *8.4 Causing financial loss and suffering to the Plaintiff through the illegal tampering of the meter and the transformer with an ulterior motive."*

[4] In its prayers, PUC prayed inter alia for "a judgment against the defendant" in the following terms:

> *"(a) That the defendant's action amounts to a faute in law consequently, directing the defendant to pay the plaintiff a total sum of SR 5,931,823.92…"*

[5] After lengthy proceedings between the parties in this case and much evidence adduced, the Supreme Court, in a short judgment, decided on the face of a plaint that no cause of action against Chelle Medical Ltd (Chelle) had been made out by Public Utilities Company (PUC) and dismissed the Plaint. The present appeal is against this decision.

The appeal and cross-appeal

[6] PUC has filed five grounds of appeal, namely:

> *(1) The learned judge erred in her findings and failed to appreciate the legal aspect of faute committed by the Respondent and wrongly concluded that the Respondent is not liable for any faute.*
>
> *(2) The learned judge however recognises (vide paragraph 4 of the judgment dated 3 April 2019) that the Respondent did not raise a defence in limine litis or on merits and wrongly decided on her own, the matter in limine by herself (sic) and declared that the Respondent is not liable in law. The appellant submits that the decision of the honourable judge is a clear case of ultra petita.*
>
> *(3) The learned judge despite the clear absence of any specific pleadings in its defence dated 18 November 2015 on lack of no cause of action, (sic) outside the ambit of the defence proceeded to decide the matter on lack of cause of action (vide paragraph 5 of the judgment) while dismissing the Plaint.*
>
> *(4) The learned judge failed to properly distinguish the analysis on commission of faute between the tortfeasor and as "master or employer" and in any event in the absence of specific and unambiguous pleadings to that effect in defence, the learned judge's decision is erroneous.*
>
> *(5) The learned judge failed to appreciate the status of the defendant in terms of the alleged act of faute commissioned (sic) by the defendant, its servants, agents and without any rationale on this aspect, erroneously dismissed the Plaint.*

[7] Chelle has filed a cross-appeal with two grounds, namely:

> *(1) The reversal of the CT could have been done either by the appellant's personnel in reconnecting the electricity supply to the premises or by the licensed electrical engineer being an independent contractor for whom the*

Respondent (herein Cross-Appellant) cannot be vicariously liable for his act or omission.

(2) The Respondent's Directors and employees did not reverse the CT.

The issues raised in the appeal

[8] At the hearing of the appeal, the parties agreed that the main issues canvassed in their submissions for consideration by the Court were the following:

(1) Should the lack of a cause of action have been raised in the Defence as a plea in limine litis?

(2) Was it ultra petita for the learned trial judge to raise the issue?

(3) Did the Plaint disclose a cause of action against the Defendant?

[9] Each of the questions raised will be addressed in turn and the consideration of these issues will dispose of both the appeal and cross-appeal.

Should the lack of a cause of action have been raised in the Defence as a plea in *limine litis?*

[10] Counsel for PUC, Mr Rajasundaram, has submitted that it was unfair for so much time and expense to have been spent on a long trial when the adequacy of the pleadings could have been raised at a prehearing.

[11] Counsel for Chelle, Mr Shah, contends that it was not clear from the Plaint what the case against Chelle was and that in the circumstances it was hard to specifically address these issues in the Statement of Defence. He submits that in any case, the Defence prayed for a judgment dismissing the Plaint.

[12] The provisions of the Seychelles Code of Civil Procedure on this issue simply state that:

"Points of law
90. Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

Decision on point of law only

91.If in the opinion of the court the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just.

[13] The disposal of points of law before the trial on the merits of the case are therefore purely optional. I do agree with Mr Rajasundaram that the learned trial judge should not have embarked on a full trial when it was her view as indicated in her decision that the pleadings were lacking and did not disclose a cause of action. This resulted in protracted proceedings and unnecessary time wasting together with avoidable costs. This is unfortunate and I shall address the issue of costs in this context later in this decision.

Was it *ultra petita* for the learned trial judge to raise the issue?

[14] Mr Rajasundaram submitted that in the absence of a specific pleading in *limine litis* in the Defence as to the lack of a cause of action in the Plaint, the court was *ultra petita* in raising the issue itself and deciding it.

[15] Mr Shah has contended that the Defence had expressly denied any or all allegations of meter tampering and fraudulent actions by Chelle and that it had prayed for a dismissal of the suit. Mr Shah has relied on the authority of *Banane v Lefevre*[1] for the proposition that a court should not ignore a point of law even if it is not raised by the parties, if to ignore it would mean a failure to act fairly or err in law. He has also submitted, relying on *Public Utilities v Vista do Mar*[2] that if there is no cause of action or case to answer, the pleadings should be struck out.

[16] I note that section 92 of the Seychelles Code of Civil Procedure empowers the Court of its own volition to dismiss a claim which discloses no cause of action or if the pleading appears frivolous or vexatious. These provisions are worded similarly to Rule 3.4 of the Civil Procedure Rules of England[3]. Rule 3.4 (2) provides in relevant part:

"The court may strike out a statement of case if it appears to the court-
(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim

[1] (1986) SLR 110.
[2] (1999) SLR 77.
[3]The White Book, Supreme Court Practice, 1991.

(b) that the statement of case is an abuse of the court's process…"

[17] In the comment on the Rule, the authors of the White Book make the following observation:

> *Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous, or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence…*
> *Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case…"*

[18] In a similar vein, the court in the case of *Vista do Mar (supra)* reviewed Seychelles' jurisprudence on this issue. It stated, inter alia:

> *"The motion for striking out pleadings under section 97 of the Code of Civil Procedure has to be decided solely on the pleadings, and when the non-existence of a reasonable cause of action is not beyond doubt ex facie the pleadings, the pleadings ought not to be struck out. (See Albest v Stravens (1976) SLR 158 and Oceangate Law Centre v Monchouguy (1984) SLR 111) ..."*

[19] I agree with these authorities. I am of the view, therefore, based on our law, that a court can of its own volition raise the issue of pleadings and decide *ex facie* those pleadings whether a case discloses a cause of action and order its dismissal without either of the party having to raise the same.

[20] This ground of appeal is therefore without merit.

Did the Plaint disclose a cause of action against the Defendant?

[21] Mr Rajasundaram has submitted on this ground that a cause of action was made out in the Plaint as moral persons including companies can be sued directly under Article 1382 of the Civil Code of Seychelles and as supported by the authority of *AG v St. Ange.*[4] He also submits that it was made out in the pleadings that the series of actions by Chelle showed that it endorsed its technicians and employed electricians and that a *lien de préposition between a commettant and a préposé* was established. In that respect, he added, the learned trial judge was wrong to find that such a link did not appear in the formulation of the cause of action and that Chelle could not be sued directly as tortfeasor

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

but in its capacity as master of employee. Mr Rajasundaram also proffered the view that Paragraphs 7 and 8 of the Plaint disclose that it is the vicarious liability of Chelle that is pleaded.

[22] Mr Shah has contended that the authority of *St Ange* (supra) has no application to the circumstances of this case. That case dealt with the issue of whether the state as a moral person or an entity can be sued for its personal actions. In the present case, PUC is unclear as to whether it is Chelle who is personally responsible or vicariously for the acts of its agents. For the latter it would have to establish in its pleadings a link of subordination. As it has not done so, Mr Shah contends, the learned trial judge correctly pointed out that the *lien de préposition*- which has to appear in the formation of the cause of action- cannot be inferred.

[23] Relying on the case of *William & Anor v Abel & Anor,*[5] Mr Shah further submits that that case following French jurisprudence is authority for the proposition that the employer/principal is only vicariously liable where it is established that the employee/agent did not act outside his functions, that is, that he was not on a frolic of his own but was acting on the instructions of his employer/principal.

[24] I have scrutinised the pleadings and it is apparent that a scattergun approach for liability was used by the Plaintiff with regard to the liability of Chelle. The relevant pleadings as I have set out in Paragraphs 2- 4 of this judgment demonstrate the obfuscation of whether it is Chelle who is directly sued under Article 1382 or vicariously under Article 1384. This is the point that PUC seems to be missing. It must either state in its pleadings whether Chelle, as an entity is liable for personal actions or vicariously for the actions of others.

[25] This Court is not asking that the dispositions of the law relating to delict be set out in the pleadings but rather that there is clarity in whose acts caused the damage. In other words, the pleadings must make it clear under which provision of the law the case is being brought given the different heads of action available in delict. This is important so as to notify the defendant as to the nature of the suit he is defending. It is also important as Article 1382 dealing with delictual responsibility arising out of one's personal action

[5] CS 112/2017) [2021] SCSC 83 (26 March 2021)

provides for liability of a person for damage caused to another by that person's own act or omission. Delictual liability, in that case, is established by proving the damage caused, the *faute* of the person causing the damage and the causality link between the two.

[26] On the other hand, Article 1384 provides inter alia for the delictual liability of a person for damage caused by the act of persons for whom the first person is responsible. Article 1384 (3) importantly establishes a presumption of fault on employers/principals for the acts of their employees/agents. Hence once it is proved that damage has been caused by the act or fault of a person in the employment/agency of that employer /principal, acting within the scope of that person's employment/agency, the strict liability of the latter operates. As pointed out by Mr Shah, the only exception in these circumstances would be evidence that the employee/agent was on a frolic of his own.

[27] The components for proving each cause of action are sharply contrasted and a choice must be exercised by the plaintiff.

[28] Section 71(d) of the Seychelles Code of Civil Procedure provides that a plaint must contain:

> *"a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".*

[29] That is certainly not the case in the pleadings before this Court. In the case of *Civil Construction Company Limited v Leon & Ors,*[6] a similar issue arose and this Court referred to the case of *Confait v Mathurin*[7] in it found that parties are bound by their pleadings, the purpose of which is to give notice of its case to the other party. The Court went on to state that:

> *"Where a party claims damages against another for damage caused him by an act, he must state in his pleading where the damage is caused by the act of the other person himself or by the act of a person for whom he responsible. By Article 1384 of the Civil Code a person is responsible for the damage which is caused by his own act or by the act of persons for whom he is responsible. The cases in which one person must answer for the acts of another are specified…where a party avers that the liability is based on the act of the other party himself, he*

[6] (SCA 36/2016) [2018] SCCA 33 (14 December 2018).
[7] (1995) SCAR 203.

should not set up a case at the trial based on liability for the act of a person for whom he is responsible. Where the case of the plaintiff is that the defendant is sued for the act of a person for whom the defendant is responsible, the plaintiff must aver by his pleadings and prove the relationship which gives rise to such liability unless such is admitted."

[30] This court cannot make the point any clearer. In the circumstances, I cannot fault the learned trial judge on this issue. This ground of appeal therefore cannot be sustained.

The Cross-Appeal

[31] The cross-appeal is based on the merits of the evidence and as this appeal is decided solely on points of law and requires no consideration of the merits of the case, there is no necessity to make any finding thereon. No fault is imputed on Chelle in any way.

The Costs of the Case

[32] Costs are ultimately in the discretion of the court but the general principle is that a successful party should not be deprived of costs. In the present case, as I have found that there was no necessity on the part of the learned judge to hold a trial having decided on the case *ex facie* the pleadings, the issue of costs falls to be determined. It is logical that given these special circumstances the fees for appearance at the hearings numbering twenty over the course of 4 years cannot be charged to either party. Neither are responsible for the protracted proceedings. No attendance fees are therefore to be levied but party costs are ordered against the Appellant.

Orders

[33] In the circumstances, the following orders are issued:

(1) The appeal and cross-appeal are dismissed and the decision of the court a quo upheld.
(2) No faute or liability is imputed to the Respondent and Cross-Appellant.
(3) No court fees are to be levied against either party.
(4) All other costs are awarded against the Appellant.

Signed, dated, and delivered at Ile du Port on 17 December 2021.

Dr. Mathilda Twomey, JA

I concur

Anthony Fernando, President

I concur

Dr. Lillian Tibatemwa-Ekirikubinza, JA