IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 42 (19 August 2022)

SCA 69/2019

(Appeal from CS 33/2015) SCSC 950

In the matter between

PUBLIC UTILITIES CORPORATION **APPELLANT**

(rep. by Mr. S. Rajasundaram)

And

UNA ESTHER

LIAM ESTHER (a minor rep by its guardian by Una Esther)

MARIE-ANGE BRISTOL

NANET BRISTOL

MICHEL BRISTOL

JOSEPH BRISTOL ERLINE BRISTOL

(rep. by Ms. Alexandra Benoiton)

ERLINE BRISTOL **RESPONDENTS**

(rep. by Mr. Olivier Chang-leng)

Neutral Citation: *Public Utilities Corporation v Esther & Others* (SCA 69/2019) [2022] SCCA 12 (Arising in CS 33/2015) SCSC 950 (19 August 2022)

Before: Fernando-President, Tibatemwa-Ekirikubinza, Andre JJA

Summary: Appeal against a decision of the Supreme Court – art. 1383 (1) and art. 1384 of the Civil Code of Seychelles - Delictual action for electrocution – responsibility for *le fait des choses* – strict liability – inert objects – non-

pecunious (moral damages) under one head only – material loss – life expectancy - Act (Cap 33).

Heard: 9 August 2022

Delivered: 19 August 2022

ORDERS

The Court makes the following orders:

(i) The Appeal is dismissed and the judgment of the court a quo is upheld in its entirety.

(ii) Costs and interests are awarded to the respondents (to be calculated from the first day of judgment of the court a quo to date).

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising out of the notice of appeal filed on the 13 December 2019 by Public Utilities Corporation (PUC) represented by its Chief Executive Officer Mr. P. Morin, having office at Roche Caiman, Mahe (appellant), against Una Esther, Liam Esther (a minor rep by its guardian by Una Esther), Marie-Ange Bristol, Nanet Bristol, Michel Bristol, Joseph Bristol (First to Sixth respondents) and Erline Bristol (Seventh respondent), being dissatisfied with the decision of Chief Justice Mathilda Twomey (as she then was) given at the Supreme Court on the 7 November 2019 in Civil Side No. 33 of 2015 awarding a total sum of SCR 1,400,000 (Seychelles Rupees One million and Four Thousand only) against the appellant and dismissing the plaint against the 7th respondent (2nd defendant in the court a quo).

[2] The appellant appeals against the whole of the decision (both liability and quantum) upon the grounds of appeal set out in paragraph two of the notice of appeal and to be considered in detail below. The appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, the setting aside and reversal of the impugned judgment; that

the 7th Respondent be held liable for damages the quantum of which is to be ascertained by this honourable Court; that the award against the Appellant is dismissed in its entirety and for any decision that may meet the justice of this case and cost for the appellant at the trial and the Appellate Court.

[3] The first respondent is the surviving partner of the deceased. The second respondent is the child of the deceased, while the third, fourth, fifth, and sixth respondents are close family members of the deceased (three siblings and a mother). The seventh respondent is Erline Bristol, the aunt of the deceased, and was cited as the second defendant in the Supreme Court matter.

[4] All parties were duly represented in the court a quo.

BACKGROUND

[5] The First to the Sixth respondents are respectively the common law widow, son, mother, and siblings of one Alex Bristol (herein referred to as the deceased) who was electrocuted and died at Pointe Conan, Mahe on the 5 November 2014.

[6] As his *ayants cause*, they sued the appellant and the seventh respondent in delict for the first respondent's omissions in not repositioning a high voltage electricity line at the seventh respondent's house where the deceased had been working. They also averred, inter alia, that notification of the danger from the line was not made to the seventh respondent and the deceased and that the danger was in any case not mitigated in any way.

[7] In the original plaint (later amended) the suit was prosecuted against the appellant only. However, the appellant applied on the 20th September 2016 pursuant to sections 109 and 115 of the Seychelles Code of Civil Procedure to have the seventh respondent, the owner of the property, on which the deceased was killed, joined as a defendant, which application was granted.

[8] The appellant, Public Utilities Corporation (PUC) denied liability and averred that the seventh respondent and the deceased neglected to heed the presence of the high voltage line and contributed by their negligence to the accident. PUC further averred that the seventh respondent was solely responsible for the accident and that she had been repeatedly warned of the dangers posed by the line but had neglected to make the statutory payment for its relocation.

[9] The seventh respondent had denied responsibility for the deceased's death and averred that the fee for relocation of the pole had been paid on the 10 October 2014, but the appellant had neglected to relocate the line and pole despite repeated requests. She had further averred that the failure of the appellant to timeously relocate the high voltage line was the direct and sole cause of the death of the deceased.

[10] The matter was part heard by Nunkoo J, but on his departure the parties requested that the evidence be reheard and hence the case was reheard on the 1 March 2019 and judgement delivered on the 7 November 2019. (supra)

[11] It is against this decision that the appellant has appealed to the Court of Appeal.

GROUNDS OF APPEAL

[12] The appellant raises five grounds of appeal which are, *verbatim*, as follows:

> ***Ground No. 1:***
>
> *The learned Chief Justice has assigned a wrong interpretation of the word CUSTODY of the Electricity as if the custodian of Electricity for the purpose of finding liability and in the sincere opinion of the Appellant, there is a difference between the custodian of normal, standard things AND the Electricity in that the Appellant is wrongly defined as the custodian of Electricity while holding the Appellant liable for the accident caused to the deceased..*
>
> ***Ground No. 2:***

The learned Judge failed to appreciate the pleadings of the Appellant specially the averment of "contributory negligence" on part of the deceased while holding the Appellant solely responsible and liable and wrongly concluded the Appellant never pleaded contributory negligence; also failed to hold that there was contributory negligence on the wrong decision that there is no evidence as to how the deceased was electrocuted.

Ground No. 3:

The decision of the learned Chief Justice in discharging 7th Respondent from any liability while holding this Appellant solely responsible is erroneous where the decision follows as a result of failure to follow the time line given to 7th Respondent in payment of charges towards the relocation of the electricity pole thus wrongly concluded as if the pole was relocated only after fatal accident thus decision ignored the time delay of the 7th Respondent for years together in the payment of the statutory charges.

Ground No. 4:

The learned Judge failed to appreciate the 7th Respondent's status as the owner of the building where the accident occurred and in discharging entirely, the 7th Respondent the learned Chief Justice completely omitted the wrong doings of the 7th Respondent and her contributions towards the cause of the accident.

Ground No. 5:

The learned Judge while awarding damages made arbitrary decision in the quantum allowed the Respondents 1-6 and in the premise of 3rd and 4th above, the learned Chief Justice ought to have decided to award damages due and payable by the 7th Respondent.

[13] The first to the sixth respondents raise a preliminary point. In their view, the grounds of appeal posed by the appellant are vague and the appeal should be dismissed under Rule 18 (30 and (7) of the Seychelles Court of Appeal Rules. It is the first to the sixth respondents' contention that the grounds do not deal with any specifics and invite the court to speculate about the submission being attacked and the documents being referred to. In support of this, the first to the sixth respondents rely on the authorities in *Chetty v Esther* (SCCA 44 of 2020) [2021] SCCA 12 (13 May 2021) and *Banane v Banane and Another* (SCA 5 of 2011) [2011] SCCA 4 (18 April 2011).

[14] On closer reading of the grounds, I am of the view that the grounds can be summarised as follows. To begin, the appellant challenges the finding of the judge in respect to 'custody'. They are of the view that the judge erred in her understanding of custody and thus erroneously found liability on part of the appellant. The second ground speaks to how the learned judge did not consider contributory negligence and it is the contention of the Appellants that they did in fact raise it. The third ground challenges the learned judge's 'failure to consider delays on part of the 7th respondent to pay the statutory fees for relocation of the pole', which according to the appellant, caused the delay in moving the pole. The fourth ground seeks to challenge the learned judge's findings on no liability on part of the 7th respondent. Finally, the fifth ground challenges the damages awarded on the premise that the 7th respondent should have been asked to pay damages too.

[15] Admittedly, the grounds are poorly drafted. However, they are not vague, as one can ascertain the legal issue in question. Whether the grounds have merit is another issue which this Court will engage with in the following paragraphs.

SUBMISSIONS OF PARTIES

APPELLANT'S SUBMISSION

[16] With respect to the first ground of appeal, the appellant submits that the learned Chief Justice (then) approached the rationale of defining the word custodian in a wrong manner. In their submissions, the Appellant aver that in Seychelles, electricity is generated and distributed to every home, office, business, industry, commercial complex and the streets

have got the electricity. However, such generation and supply does not make PUC the custodian of electricity. It is argued that the places referred to herein are controlled by the respective occupants, owners, persons in charge of the place and therefore such persons are the custodians.

[17] It is further submitted in the same light that if anyone gets electrocuted, however sad it is, the appellant cannot be liable and responsible for such electrocution and the consequential effects of such electrocution. According to the appellant, each incident of electrocution is to be weighed, assessed and verified on its own and through the mode of electrocution occurred to the individual. That if the appellant being the supplier and distributor of electricity, is directly negligent on matters such as unattended hanging wires; failure to attend to any complaints of loose live wires and other direct causes of electricity leakage, one could define and or attribute the appellant as being liable and or responsible.

[18] It is further submitted that while it is tragic and sad that Alex Bristol, the deceased, lost his life in electrocution, there is no direct failure on the part of the Appellant for the loss of his life. According to the appellant, it is also not the case that the appellant failed and or left unattended any incident of hanging wires for considerable period of time. Instead, electrocution took place with the contact of live wires fixed on the pole next to the house of the seventh respondent.

[19] In addition to the above, that the instant tragic accident occurred mainly due to the complete and sheer negligence of the deceased, a contractor who had been in contact with the overhead live wires of high voltage electricity.

[20] It is submitted by the Appellant that the leaned Chief Justice (then) had applied a complete wrong notion in defining the “thing” in custody. To assess and outweigh the Appellant’s submission on the application of the wrong notion by the Chief Justice (then) in relation to the issue of the “thing in custody”, this Court is invited to see the place of the accident; the nature of the accident and the other background attached to the said accident.

[21] It is submitted by the appellant that the live wires of high voltage electricity run overhead, attached to the fixed poles and distribute the electricity to the public throughout the nation at a safe level, above ground as defined under the safety standard measures and on particular pole at all material times remained nearer to the house under construction of the seventh Respondent and that the pole was there for many years. According to the appellant, there is no complaint whatsoever from any one that the overhead live wires were below the standard height. The Appellant avers that the deceased was not only a contractor and a close relative of the seventh respondent but he knew the fact that the seventh respondent herself chose to remove the said particular pole in view of its proximity to her house under construction and the fact that the pole was to be repositioned or relocated elsewhere. It is the contention of the appellant that the 7th respondent delayed her statutory payments for relocation which is the main cause of the sad accident and that this delay in payment of statutory charges was completely ignored by the court below.

[22] Further, the appellant submits that the overhead running cable that constantly carries high voltage electricity in the process of distribution of electricity supply cannot be attributed to themselves when a negligent person comes into contact with such live wires. In their view, such instances mean that the said person brought the risk upon himself. Moreover, it is the considered view of the appellant that the electrocution took place and cost the life of the deceased, in public domain where the definition of "thing in custody" as defined by the then Chief Justice does not fit the Article 1384. As such, the term "things in custody" is to be interpreted widely and cognisant of the background of the place of accident.

[23] Appellant further submits with regards to article 1383, that it has never been negligent and or imprudent on its part in terms of electricity issues. That the act of someone's contact with the live wire by his negligence respectfully cannot be equated to the appellant being negligent or imprudence with the wrong reasoning of the custodian.

[24] With regards to the second ground of appeal namely, gross failure by the lower court to apprise the issue of contributory negligence on the part of the deceased, it is submitted

that learned Chief Justice (then) remarked as if there is no pleading on contributory negligence. Reference was made to Document E1 of the brief (defence of the 26th October 2015) wherein reference to paragraphs 7 of the defence is made and it is submitted by the appellant that clearly plead contributory negligence and also reference is made paragraph 8 of the defence E2 in the brief which again it is submitted refers to contributory negligence. Reference is also made to Exhibit P9 namely, proof Bristol Construction owned by the deceased. In the latter, it shows that the deceased was a registered contractor and thus ought to have exercised serious caution while doing his work, knowing well that the overhead live wires were passing through near the construction site. Reference is also made to the cross-examination of the seventh respondent by the appellant in that respect which, according to the appellant, would suffice to show that the deceased had had knowledge personally as well in the capacity of the contractor.

[25] With respect to grounds 3 and 4 of the appeal, namely, alleged gross omission of viewing the seventh respondent's joint liability, it is submitted that the judgement of the court below portrays a picture as if the seventh respondent paid the relocation charges and as if there was a delay on the part of the appellant in the process of relocation of the pole. It is submitted that the real facts behind the delay of the seventh respondent for three years are completely disregarded. Whereas the appellant brings in the entire episode of the gross failure and serious omission of the seventh respondent in failing to pay the statutory charges.

[26] It is submitted that the court below has completely disregarded the uncontroverted evidence specially, documentary evidence in the inordinate delay caused by the 7th respondent Eurline Bristol on the payment of statutory charges on relocation of the pole with the high voltage electrical live wires. Reference is made to Exhibits D (1) 1 dated the 27th October 2011; Exhibit D (1) 2 dated 2.10.2014, Exhibit D (1) 5 PUC's, letter dated the 6th June 2014 addressed to the seventh respondent and also court has been invited to refer to the cross-examination of the seventh respondent pages 256-271 of the brief. It is submitted by the appellant that the cited evidence and behaviour of the seventh respondent would suffice to hold that she is solely responsible for the accident in terms of

the delay in her payments and allowing the deceased to work on her site (upper floor) without having the pole relocated. It is thus the Appellant's submission that the facts narrated and admitted facts would show that the court below has completely disregarded the weight of the significance of exonerating the Appellant from any liability.

[27] The appellant further submits that it never failed in any aspect from the inception of the request of the seventh respondent for the relocation of the pole by the sheer stubbornness of the seventh respondent brought the other respondents to this grief situation of having lost the member of the family.

[28] With reference to the last ground of appeal, ground five, the appellant submits that the court below erred in awarding the moral damages and pecuniary losses in an arbitrary manner despite having taken none of the significance of the rational in awarding the moral damages to the claimants.

[29] It is submitted that albeit taking into consideration on the issue of life expectancy in calculating the award, the court below ignored its own rationale and went ahead with the award of arbitrary sums. The appellant argues that the court below does not have unfettered latitude in assessing and awarding damages. The necessary and essential elements of the age, economical background past and current and other significant elements of the claimants were not analysed while arriving at the respective sums awards both moral and pecuniary damages.

[30] Following the above argument by the appellant, they further submit that the court below used its arbitrary method and awarded SCR 300,000.00 to the second Respondent which is erroneous.

[31] The award of S.C.R 100,000.00 each, to the respondents 4 to 6 being siblings of the deceased is also submitted to be highly arbitrary and lacks rational. It is submitted that all the said respondents are all independent in their own lives and the claims of grief, anxiety are certainly exaggerated and ended up in escalated sums of award of S.C.R 100,000.00 each. It is submitted that the court on its own concluded that the family of the said respondents together with the deceased as a close-knit family and there is no substantial

evidence to that effect. It is thus submitted that the court below attached emotional weight over the death of the deceased and that a mere statement that the deceased would have lived for certain number of years and assessed the life expectancy is far-fetched, according to the appellant.

[32] Based on the above submissions, the Appellant prays this Court to reverse the impugned judgment and reverse the same by allowing this appeal in favour of the Appellant.

RESPONDENTS' SUBMISSIONS (FIRST TO SIXTH)

[33] With respect to liability, the first to sixth respondents submit that it is an accepted fact that the deceased's death was a direct result of being electrocuted by coming into contact with the high voltage line, owned and operated by the appellant. That it is not in dispute that the appellant is the custodian of the electricity lines. On this issue, and how it pertains to the Appellant's liability, her ladyship in the court a quo gave consideration and detailed analysis to the relevant applicable law and facts for para [59] onwards of her judgement. Reference is made to the case of ***Sui v Pubic Utilities SSC 2002*** which first to the sixth Respondents submit is settled authority for the principle that a person who owns an electricity supply line has a duty to take reasonable precautions to protect the public form danger. Further, a person who owns an electricity supply line has the obligation to maintain it and remove it once it is no longer in use.

[34] Reference is made to article 1384 of the Civil Code with specific emphasis on the responsibility for things in one's custody. The first to the sixth respondents in that light argue that the appellant owed, at all material times, a duty of care to its customers. That in ***Public Utilities Corporation v Elisa [2011] SCCA 36***, it was held: *"the statutory obligation of PUC particularly as the national supplier of water, carries with it a duty and standard of care in respect of which we find they failed."* In that case, the plaintiff sued PUC, the public body established for the purposes of providing potable water to customers in Seychelles, for providing him with sub-standard and likely dangerous water. The Facts of that case it is submitted is akin to the facts of the current case as far as the duty of care is concerned, and that the electrocution would not have occurred but for the

appellant's negligence and imprudence in failing to fulfil their duty, or in failing to ensure that it posed no risk to the health and safety of any person.

[35] The first to the sixth respondents also refer to article 1148 of the Civil code with specific reference to the exonerating factors which could exclude liability of the appellant namely, force majeure, the act of the plaintiff himself; a *cause etrangere* which normally unforeseeable so that the damage was unavoidable and could not be imputed to him and submits that none of the above are applicable to the appellant.

[36] On the issue of contributory negligence as pleaded by the appellant, the said respondents submit that if contributory negligence is pleaded as a defence, a defendant is required to give particulars of it. The case of ***Jumaye v government of Seychelles (1979) SLR 103*** is cited in support. It is the submission of the first to the sixth respondents that, the appellant failed to properly particularise their averment of contributory negligence, nor were they able to provide any conclusive evidence to support their claim. Reference is made to paragraph [70] of the impugned judgment in that respect and to the case of ***Tirant v Banane (1977) SLR 219.***

[37] In addition to the above, the first to the sixth respondents argue that there was no evidence that the seventh respondent exposed the deceased to any risk or electrocution by permitting the building work to go ahead when the house was near to the electricity line. Reference is made to paragraph [71] of the impugned judgment in that regard.

[38] It is also the submission of the first to the sixth respondents that her ladyship in the court a quo was correct in concluding, after careful analysis of the instructive French jurisprudence at paragraph [73], that the seventh respondent had no control or effective custody over the high voltage line and electricity pole, nor could she be responsible for the consequences of damage they caused. It is submitted further that this conclusion is supported entirely by the case law and jurisprudence discussed under liability and thus her ladyship in the court a quo cannot be faulted in her finding that the appellant was wholly and solely responsible for the death of the deceased.

[39] Lastly, on the issue of damages, the first to the sixth respondents submit that the appellant termed her ladyship's award as 'arbitrary', but failed to substantiate the claim satisfactorily, or at all, to warrant this Honourable court's interference with the award and that the defendants' evidence in the present case in respect of their pain and suffering was not challenged.

[40] The first to the sixth respondents have referred this court to article 1149 (2) providing that damages are recoverable for any injury or loss of rights of personality and it also states that these include rights which cannot be measured in money such as pain and suffering. Reference has been made to the court of appeal case of ***Laporte v Fanchette [2013] SLR 593*** wherein it was held at paragraphs [17-18] that:

> *[17] "It is clearly the plaintiff in a civil suit who has the burden of proving on the balance of probability that he suffered damage as a result of the defendant' action. He could only bring such evidence by recounting the pain he suffered which he did. The Court cannot ascertain such damage in any other way. No expert can tell us what and how much mental pain, suffering or distress a person is experiencing. Awards in this case can only be made by the trial Judge assessing the credibility of a plaintiff's evidence and appraising the mental injury related. It is a subjective assessment. The respondent's evidence was not challenged. He was neither cross-examined on the issue of moral damage nor quantum….*
>
> *[18] It is indeed a principle of French law that the trial judge has sovereign discretion in assessing moral damage and the Court de Cassation has even dispensed with the need for the claimant to show proof of specific prejudice morale; see Comm. 22 octobre 1985. Bull.civ., IV No. 245 Societe Genberale Mecanographie v Societe Sainte-Etienne Bureau. It is also true that damages should be compensatory and not punitive: Francourt v Didon (2006) SLR 186 and it is obvious that monetary damages could never repair injury to one's feelings."*

[41] It is further submitted that the Court de Cassation has even dispensed with the need for the claimant to show proof of specific prejudice morale: ***See Comm. 22 Octobre 1985.***

Bull.civ., IV No. 245 Societe Generale Mecanographie v Societe Sainte-Etienne Bureau.

[42] It is the submission of the first to sixth respondents that the appeal should be dismissed in its entirety and the order of the Supreme Court maintained in whole with costs.

RESPONDENT'S SUBMISSIONS (SEVENTH)

[43] In answer to the first ground of appeal, it is submitted that a careful reading of sections 5 (1) (a) and 71 of the Public Utilities Corporation Act as read in line with Article 1384 of the Civil Code; it is irrefutable; it is submitted that the appellant has custody of electrical supply lines and apparatus and it therefore liable for any loss and damage which is caused as a result.

[44] It is further submitted that even from an evidential standpoint, it is apparent that it is the appellant who is responsible for electrical wires and poles. It is uncontroverted that the seventh respondent had been battling with the appellant for years to move the electrical pole, which was close to her house and ultimately led to the death of the deceased. The reason why she had to contend with the appellant was that even if the electrical pole was on her land, she could not move it without the consent of the appellant, who was the owner and operator of the pole.

[45] It is further submitted that in this instance, the danger of the electrical wires which caused the death of the deceased was one that was apparent for many years. Despite its obvious dangers, the appellant continued to insist that the seventh respondent pay to move the pole. The sum it requested was too expensive and the seventh respondent was simply unable to afford to do so. That it was only after years of negotiation that the price was reasonably reduced and the seventh respondent made payment approximately 10 days later, namely on the 10 October 2014. This was 26 days prior to the passing of the deceased on the 5 November 2014. It is the failure of the appellant, knowing that the wires posed a safety hazard, to timeously move the electrical pole, which was under its control, which directly led to the death of the deceased.

[46] In answer to the second ground of appeal, it is submitted that whilst it is correct that the appellant made references to its amended statement net of defence dated 27 February 2018, to the deceased being contributorily negligent to the cause of his death, it never specifically pleaded that any award which may be made against it, be reduced as a result of their contributory negligence. Contributory negligence is only a partial defence of quantum, as implied by the word 'contributory'. That in the amended defence, the appellant also stated that the seventh respondent was contributorily negligent with the deceased, thus confusing the matter further.

[47] In the same light, it is further submitted that in fact, in its prayers, the appellant prayed for the plaint to be dismissed, or for the seventh respondent to be held liable. It did not pray that any award made against it be reduced for contributory negligence by the deceased or the seventh respondent. Parties is submitted are bound by their pleadings and indicated in the case of ***Patrick Walter V Tania Hoareau [2020] SCCA 36*** and the learned judge would have acted *ultra petita* to award otherwise, hence why she stated that it had not been pleaded for.

[48] In response to the third ground of appeal, it is submitted that the answers to grounds one and two are replicated and that it is further submitted that, the inability of the seventh respondent to move the pole earlier than she did was not for want of trying. That as soon as the appellant revised the price to a reasonable amount, she made a payment. Such was her financial difficulty in making that payment which she had to request that it be deducted from the proceeds of the loan she took for her house.

[49] In reply to the fourth ground of appeal, it is further submitted that the seventh respondent committed no wrongdoing, nor could she be faulted for the death of the deceased.

[50] Finally, in answer to the fifth ground of appeal, it is submitted that the answers to preceding grounds are repeated and further that; it is submitted that the award of damages were clearly no arbitrary and was based on the evidence of the first to the sixth respondents' testimonies as to how the loss of the deceased affected them and what he meant to them. In that regards reference is made to article 1149 (2) and the case of

Chanyumwai v Seychelles Yaccchy Cub [2018] SCSC 205, (quoted with approval in Jean Charles Artaud v Laxmanbhai & Co (Seychelles) Limited [2019] SCCA 21) Pillay J described moral damages as damages that:

> *"are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrongdoer. Moral damages are not punitive in nature but are designed to compensate and alleviate the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar harm unjustly caused to a person."*

[51] Also, the case on ***Michel & Ors v Talma & Anor [2012] SCCA 36***, is cited wherein it was held that it is a difficult task to determine the exact amount of moral damages that should be rewarded to a suffering applicant. For the court to place a price on the suffering of an individual is extremely challenging and thus, it was a matter to be determined on a case to case basis.

[52] It is submitted in the light of the above, that if one looks at the awards made by the learned judge, they are not outside past jurisprudence on the awards of damages to persons who have lost a loved one as a result of negligent actions of another. One would argue that the awards are actually quite modest and could have been justifiably higher. As a result, the seventh respondent submits that the damages were not arbitrary.

ANALYSIS OF THE GROUNDS OF APPEAL

[53] The grounds of appeal shall be treated separately under the different heads as they appear.

GROUND ONE

[54] The appellant submits that the Learned judge erred in the interpretation of 'custody' as contemplated under Article 1384 and therefore wrongly found that the appellant is the custodian of electricity. In essence, the appellant faults the Learned judge in her

interpretation of the term custody within the meaning of Article 1384 (1) of the Civil Code.

[55] It is the submission of the Appellant that while they *generate* and *distribute* electricity, they are not the custodian of electricity when it has arrived at its end user, i.e. in homes, at businesses and the streets. In addition to this, it is their contention that if anyone is electrocuted, they should not be held liable for that save when it is in respect to unattended wires; failure to attend loose wires and other direct causes of electricity leakage. There is no authority relied on by the Appellants in support of these averments.

[56] The respondents, on the other hand submit that the Appellant is the custodian of the thing that caused harm to the deceased. They rely on ***Sui v Public Utilities SSC 2002*** as settled authority that a person who owns an electricity supply line has a duty to take reasonable precautions to protect the public from danger. Based on the custody by PUC, it is the contention of the Respondents that a duty of care on part of PUC is owed to customers. Accordingly, the Respondents submit that the Appellant failed to act diligently and expediently on the issue brought to their attention by the consumer and rely on established authority in this regard from ***PUC v Elisa [2011] SCCA 36.***

[57] The submissions by the Appellant are not only shocking, but irresponsible coming from a statutory body who is responsible for electricity, an important commodity in our society. What makes it even more shocking is that the commodity is dangerous and must be managed with the highest standard of care by the Appellants. I am therefore in agreement with the Respondents on their submissions on custody and duty of care thereafter.

[58] I will also take the opportunity to engage with the position of the learned Chief Justice Twomey (as she was then) as brought about in her judgment. To begin, it is easily established and uncontested that the high voltage line and electricity pole belong to the Appellant.[1] Further to this, the learned Chief Justice went on to draw in on the Public Utilities Act of 1986 and the Energy Act of 2012. Section 5 (a) of the Public Utilities Act states:

[1] Paragraph 59.

"5. (1) the functions of the Corporation shall be -

(a) the supply of electricity;
(b) the supply of water;
(c) the provision of sewerage;
(d) such other functions as may be conferred on the Corporation by any other Act or by any regulations made under this Act."

[59] On the other hand, section 71 of the Energy Act provides that:

"Any electrical supply lines, meters, fittings, works or apparatus belonging to an operator and lawfully placed or installed in Dr on any premises whether or not it is fixed to any part of such premises shall-

(a) remain the property of, and may be removed by the operator;"

[60] Both these provisions were relied on by the Learned Chief Justice in the Supreme Court and I agree with her findings on this as setting the basis on which she can state that the Appellant is the custodian of the thing which caused the death of the deceased.[2]

[61] Further to this, the Learned Chief Justice accepted the use of Article 1384 (1) by the aggrieved parties to establish liability. The provision reads as follows:

"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."

[62] In explaining Article 1384 (1), the Learned Chief Justice relied on both Seychelles and French jurisprudence which explains the relevant Article. Below is an extract from the judgment:

"[64] In a series of cases in France, the courts held the custodian or guardian of things responsible for damage they caused under Article 1384-1. In the first instance, when a tugboat's boiler exploded and killed an employee (Cour de cassation

[2] Paragraph 60.

chambre civile 16 juin 1896, arrêt Teffaine), secondly when an uncovered shipment of resin caught fire and destroyed adjoining property (127. Cass. civ., 16 Nov. 1920, 1920 D. Jur. I 169 (note Savatier), 1922 S. Jur. I 97 (note Hugueney) and thirdly, when a truck driven by a department store's deliveryman ran over a young girl (Jand'heur v. Les Galeries Belfortaises, Judgment of 13 fevr. 1930, Cass. ch. reun.D.1930.1.57 note Ripert, S.1930.1.121 note Esmein) the owners and custodians of these things were held responsible.

[65] In the Seychellois case of The Attorney General rep. Government of Seychelles v Jumaye (1978-1982) SCAR 348, Lalouette JA stated that in France, liability under Article 1384 was not based on faute (fault) but on "objective liability independent of faute". ***Hence, in such cases, the victim of the damage had only to allege and establish the causal role of the chose (thing) by which the damage has occurred. Otherwise, he benefits from a presumption of causality (responsibility) by the custodian. The custodian of the thing may be exonerated fully or partially only if he can show that there existed natural events (e.g. vis major), the intervening act of a third party or the act of the victim himself leading to the accident.***

[66] In applying these principles to Seychellois law, the first sentence of Article 1384 constitutes the legal basis of a general and autonomous strict liability for all things. In such cases, the claimant must only prove that the thing caused him damage or an injury under Article 1384. Under that provision, the person who is the custodian of the thing is liable unless he can prove liability by an act exterior to the thing in his custody. "Custody" is defined by case law as "powers of use, control and management of the thing" (Connot c Franck Ch reun 2 Dec 1941, S 1941 I 217).

[67] I am therefore in agreement with the Plaintiffs' and Second Defendant's submissions on this point. ***Having found therefore that the First Defendant, the PUC, was the custodian of the pole and high power voltage line that caused the death of the Deceased, the First Defendant can however be partly or totally exonerated if it can show that there was an intervening act, either by a third party or the act of the victim himself leading to the accident****."* (bolded for own emphasis)

[63] I am in agreement with the Learned Chief Justice and I do not see any reason to vary her findings in this respect or the well-established jurisprudence which she relied on. It was incumbent upon the Appellant to prove that there was an intervening act *vis major*, a third party or the victim himself. On this, I note that it has been raised in the next few grounds and therefore I will address it below.

[64] Having found no error in the interpretation and application of both the law and jurisprudence relevant in this case, I find that ground one has no merit and is hereby dismissed.

GROUND TWO

[65] In the second ground of appeal, the Appellant submits that the Learned Chief Justice failed to consider contributory negligence as pleaded by the Appellant. It is the contention of the Appellant that the contributory negligence was in fact pleaded under paragraphs 7 and 8.5 of their Amended Defence.

[66] I take note that the Learned Chief Justice said the following:

> *"[46] As regards the contributory negligence of the Deceased and /or the Second Defendant, although this is alluded to in the evidence there is no such pleading in the First Defendant's defence and consequently is not a matter the court can entertain. In the Court of Appeal case of Vandagne Plant Hire Ltd v Camille [2015] SCCA 17, it was emphasized that contributory negligence should be first raised as an issue in the pleadings before the Court may pronounce itself thereon."*

[67] However, later in the same judgment, the Learned Chief Justice said:

> *"[68] The First Defendant in its Amended Defence has pleaded that the Deceased and /or the Second Defendant were contributorily negligent and "invited risk jointly and severally themselves, resulting in the accident." It has specified that the Deceased ought to have taken note of the live high voltage electricity line and that the Second Defendant should not have allowed work on her land before the line had been relocated."*

[68] Therefore, the acknowledgment of the plea of contributory negligence in the above-quoted paragraph became an antecedent to an engagement on contributory negligence in the following paragraphs of the judgment.[3] While initially the Learned Chief Justice stated that there was no contributory negligence pleaded, she went on to accept that it was and engaged with the defence. I therefore do not agree with the submissions of the Appellant that the Learned Chief Justice did not consider contributory negligence.

[69] Notwithstanding the above, the Appellant also submits that the victim, who is now deceased, was contributorily negligent as he ought to have exercised serious caution while doing his work in face of overhead live wires. It is also the submission of the Appellant that the deceased invited his own death by being negligent. It is to be noted that the Appellant has neither relied on any authority in case law to support these averments, nor presented the necessary evidence in the Supreme Court to substantiate negligence on part of the deceased.

[70] The Respondents on the other hand, rely on ***Jumaye v Government of Seychelles*** **(1979) SLR 103** and submit that where contributory negligence is pleaded, the defendant must give particulars. It is the contention of the Respondents that the Appellant failed to particularise the partial defence with the necessary evidence.

[71] Turning to the Learned Chief Justice's finding on the submissions of contributory negligence on part of the deceased, she was of the view that:

> *"[70] There is no evidence adduced as to how the Deceased was electrocuted. I cannot therefore find that he contributed negligently to his own death. He may, for instance, have tripped while walking and carrying an object that came into contact with the line."*

[72] In essence, the learned Chief Justice refused to find any contributory negligence on part of the deceased given that the Appellant had not adduced any evidence to show with

[3] Paragraphs 69 to 76 of the judgment.

some precision how the deceased was electrocuted. To my mind, this is because where the alleged tortfeasor pleads contributory negligence, the burden of proof shifts to them to show how the victim contributed to their own harm. I state this on the premise of the authority in ***Jumaye v Government of Seychelles* (1979) SLR 103** as submitted by the Respondents, which says that if contributory negligence is pleaded as a defence, a defendant will have to give particulars of it. In addition to this, the authority in ***Tirant v Banane* (1977) SLR 219** states that for a defence of contributory negligence to be substantiated, a defendant must *prove* that the plaintiff failed to take the care a reasonable person would have taken for their own safety and that such a failure was a contributory cause of the accident. Therefore, a mere averment cannot be sufficient to move the court to find contributory negligence.

[73] There is nothing on the record that indicates or shows how the deceased was electrocuted to warrant the partial defence of contributory negligence to succeed. In fact, all the appellant argued in the Supreme Court and before this court that the deceased, being a skilled and registered contractor, ought to have exercised serious caution. I do not agree that this should be enough to move any court to find contributory negligence. Proving contributory negligence on a balance of probabilities must be accompanied by the necessary evidence. While I may accept that as a contractor, he ought to have known the dangers of live wires, it does not automatically mean he was negligent because we are not presented with any evidence of the precise circumstances of the victim's death.

[74] I, therefore, find no error in the lower court's finding on this point of contention. As such, there is no merit to the second ground of appeal.

GROUND THREE

[75] In the third ground of appeal, the Appellant argues that the Learned Chief Justice failed to consider the delay in payments by the seventh respondent, which in turn caused the delay in moving the pole that caused harm to the deceased. It is the submission of the Appellant that the Learned Chief Justice disregarded how failure to timeously pay the statutory fees by the 7th Respondent contributed to the harm caused to the deceased.

[76] On a closer reading of the judgment, I take note that the Learned Chief Justice stated the following in respect to the statutory payment:

> "*[71] There is another element in this case which is a cause for concern and has led the Court to further consideration. The Second Defendant did everything in her power to have the pole moved. She negotiated the price of repositioning the pole over a decade so that she could afford it. I am in this respect unable to agree with PUC that it is the owner of the land who should have the responsibility for moving dangerous high voltage lines, which are its property. I would agree that where a landowner for aesthetic reasons requires the repositioning of a pole that poses no danger, the cost for that repositioning should be borne by the landowner. However, I cannot agree that PUC should pass the cost of repositioning dangerous high power lines and poles onto landowners on which they are situated. As custodians and guardians of the thing that, by reason of its very nature, poses a risk to persons, it is PUC's responsibility to ensure that the thing complies with health and safety guidelines. The logic of this argument is supported by the fact that impecunious landowners remain exposed to risks that pecunious landowners otherwise would not, as the latter would have the means of paying for the relocation of a dangerous line or pole."*

[77] I find no fault in the way the Learned Chief justice reasoned and I consider her findings in this regard to be satisfactory. Indeed, PUC bears the responsibility of ensuring electricity poles comply with safety guidelines as the law dictates in both the Energy Act and Public Utilities Act. At the same time, the statutory fees are indeed questionable where the moving of poles ought to be done for safety purposes.

[78] It is to be noted that the late payments were also due to the fact that PUC itself has been exorbitant in their pricing, to which the seventh respondent would ask for revising of such fees. I wish to qualify the term 'exorbitant' in these circumstances.

[79] In 2011, the seventh Respondent made an application for the removal of the electricity pole from within her yard. At that time, she was quoted SCR 26,097.50. This translates to

approximately SCR 27,556 in 2020 factoring in inflation over the years.[4] This was reduced two more times to SCR 19,002.50 (approx. SCR 20,137 in 2022) and the final amount of SCR 12,900.13 (approx. SCR 13,672 in 2022). Using recent National Bureau of Statistics data, these amounts charged by PUC are far above the average monthly earnings which is approximately SCR 14,965 for 2021. I imagine that significantly limited means, often stretched to meet competing needs in the household, stopped the seventh Respondent from paying these exorbitant amounts, hence her appeals on the fees on two occasions. Even when the final amount was quoted, it is on record and in evidence that she had to borrow the money from the Development Bank of Seychelles.

[80] I do not agree with the position of PUC that the seventh Respondent, a person who was of little means (*as evidenced by her taking out a loan for said payment*) must be contributorily negligent for failing to pay said amounts. Exorbitant amounts to that end. To allow the argument of PUC to hold in this instance, means this Court will endorse that low-income households with little to no means to meet the payment required by PUC, for PUC to perform their statutory duty to keep our community safe, they must remain subjected to electricity poles whose placements are dangerous. Further to this, and in instances where such poles cause tragic accidents, the same low-income households must be held to be contributorily negligent. This is akin to punishing low-income households for simply having no means, while the statutory body which bears the duty to ensure electricity poles are safe for all in our community is cushioned from full liability. It is against this understanding that I reject the assertions of PUC.

[81] I agree with the Learned Chief Justice in her findings as quoted above in paragraph 77, and agree that the seventh Respondent cannot be held contributorily negligent, for she did all she can in the circumstances. Therefore, there is no merit to ground three.

GROUND FOUR

[4] Sincere gratitude to the Research and Statistics team at Central Bank of Seychelles for the calculations which are on own file.

[82] The Appellant submits that the Learned Chief Justice in the lower court failed to consider the liability of the seventh respondent given that the pole was on the seventh respondent's property where the electrocution accident occurred. Having found no merit in ground three, I cannot find merit in ground four for the afore-mentioned reasons. Although the electricity pole was on the seventh respondent's property, the duty to move it to a safer location remained with PUC as the owner of such and in the face of the necessary payments having been made.

GROUND FIVE

[83] The essence of the fifth ground of appeal is to challenge the Learned Chief Justice's computation of damages payable to the Respondents one to six and failed to factor in what ought to have been paid by the seventh Respondent. The latter limb of the ground fails in the absence of any success in the third and fourth grounds of appeal to contributory negligence (supra). As such, I will address only the first limb of ground five.

[84] The Appellant submits that the court below erred in awarding moral damages and pecuniary loss in an arbitrary manner. It is the contention of the Appellant that the lower court 'ignored its own rationale and went ahead with the award of arbitrary sums'. The Appellant opines that the court below does not have any unfettered latitude in assessing and awarding damages, and that factors such as age, economic background of the past and current were not analysed while arriving at the amounts of moral and pecuniary damages. The Appellant particularly disputes the reasonableness of awarding damages to the child of the deceased and the siblings of the deceased. In the case of the former, an amount of SCR 300,000 for pecuniary loss and SCR 200,000 in moral damages. The siblings of the deceased got SCR 100,000 each in moral damages. The Appellant disputes that the siblings of the deceased were a close-knit family, as no evidence was brought to this effect. More so, and in view that the siblings are all independent and living their own lives, the claims of grief and anxiety are exaggerated.

[85] It is important to note that the Learned Chief Justice relied on several authorities which explain different kinds of damages and computation of such.[5] She relied on the authority of ***Government of Seychelles v Rose*** **(2012) SLR 364**[6] and went further to distinguish the circumstances of this case from that of ***Davidson and ors v Surf and Cerf Properties and ors*** **(unreported) CS 41/2014**, in that the former had prayed for amounts more than those decided in ***Davison***.[7] Notwithstanding the above, the learned Chief Justice admits, following a careful analysis of the relevant case law,[8] that there is generally no uniform approach to calculate the amounts in respect to life expectancy of the deceased.[9] Following this, the computing of how much each would be entitled to was undertaken, taking into account the circumstances of this case.

[86] The relevant paragraph for the second respondent where analysis of damages was undertaken reads as follows:

> *[97] With regard to the Second Plaintiff, the minor infant son of the Deceased, he is represented by his mother and guardian, the First Plaintiff who claims a global sum of SR 600, 000 for moral damages and loss of dependency and another SR 300,000 for loss suffered in relation to his father's life expectancy. The same difficulties I have expressed in relation to this claim with respect to the First Plaintiff's claim apply to the Second Plaintiff's pecuniary loss.*
>
> *[98] With regard to his pecuniary loss, I have no means of computing this loss without any evidence being brought. I therefore make an arbitrary award of SR 300, 000, which I find reasonable in the circumstances.*
>
> *[99] With regard to his non-pecuniary loss, he has without doubt suffered grief, pain and distress. He will have to live without the love and tenderness of his father. I therefore award him SR 200, 000 for moral damage.*

[87] For the fourth, fifth and sixth respondents, the Learned Chief Justice found that:

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[5] Paragraphs 81 – 90.
[6] Paragraphs 82-83.
[7] It is also to be noted that on appeal, the honourable Justices found no fault in *Davison* decided in the Supreme Court.
[8] Paragraphs 94-95.
[9] Paragraph 96.

> *[101] The Fourth, Fifth and Sixth Plaintiffs are the siblings of the Deceased and testified in respect of the closeness they had with him and their grief at his passing. The evidence suggests a close-knit family and I have no doubt that the Plaintiffs suffered moral damage. I award them SR 100,000 each.*

[88] The analysis and findings of the learned Chief Justice in this respect are neither flawed nor unreasonable. It is clear from the analysis of relevant case law, coupled with the circumstances of the case, that the Respondents suffered loss. On one end, a child has lost their parent with whom they would have received love and care. On the other end, the siblings lost a person who was an important figure in their lives as a source of both moral and material support. The evidence of the close-knit family is a finding that the trial judge saw fit to draw in and I am not willing to interfere with it in the absence of anything to counter it.

[89] The amounts which the Learned Chief Justice arrived at are not only justifiable under the guidance of case law, but also reasonable in the circumstances. Therefore, ground five has no merit.

DECISION

[90] Having found no merit to each of the grounds of appeal as raised by the Appellant, the appeal is dismissed and the relief sought cannot be granted. The judgment of the lower court is thus upheld in its entirety.

[91] In addition to the above, I find it necessary at this juncture to exercise the powers vested in this Court under Rule 31 (3) of the Court of Appeal Rules to make an order for interest to the sum payable by the Appellant to the first, second, third, fourth, fifth and sixth Respondents. There are mainly three reasons for this order. First, it is that interest was pleaded in the lower court and I opine that it ought to have been granted. Second, I take note of the time elapsed since the date of the judgment in the Supreme Court, time in which the first to the sixth respondents have had to deal with the unfortunate memory of

the loss they have suffered. Third, and finally, is the amount of time that has elapsed since the death of the victim. As such, I make an order for interest in the sum payable to the first, second, third, fourth, fifth and sixth respondents and to be calculated from the first day after the judgment of the Supreme Court to this day.

ORDER

[92] As a result, the appeal of this Court orders as follows:

(i) The appeal is dismissed and the judgment of the lower court is thus upheld in its entirety; and

(ii) Costs and interest in the sum payable to the first, second, third, fourth, fifth and sixth respondents and to be calculated from the first day after the judgment of the Supreme Court to this day.

_____

S. Andre, JA

I concur

_____

Fernando, President

I concur

_____

Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated, and delivered at Ile du Port on 19 August 2022.