

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

SCA 13/2020, 14/2020 and 16/2020  
[2022] SCCA 45  
(Appeal from CS 28/2016)

**Small Enterprise Promotion Agency**

**1<sup>st</sup> Appellant**

*(rep. by Mr. George Thachett)*

**Seychelles Civil Aviation Authority**

**2<sup>nd</sup> Appellant**

*(rep by Mr. S. Rajasundaram)*

and

**KANKAN Limited**

**Respondent and Cross-Appellant**

*(rep by Mr. Basil Hoareau)*

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**Neutral Citation:** *Small Enterprise Promotion Agency & Anor v Kankan Limited*  
SCA 13/2020, 14/2020 & 16/2020 [2022] SCCA 45 (Arising in CS 28/2016)  
(19 August 2022)

**Before:** Twomey-Woods, Tibatemwa-Ekirikubinza, Andre, JJA

**Summary:** Article 1725 of the Civil Code- lessor's liability for acts of third parties-plea of statutory immunity- plea in *limine* to be supported by material facts - doctrine of mitigation of loss not part of civil law of the Seychelles.

**Heard:** 5 August 2022

**Delivered:** 19 August 2022

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**ORDERS**

1. The appeal of the 1<sup>st</sup> Appellant, the Small Enterprise Promotion Agency fails.
2. The appeal of the 2<sup>nd</sup> Appellant, the Seychelles Civil Aviation Authority fails
3. The Cross-Appeal by KANKAN Limited succeeds on Grounds 1, 2 and 4. It fails on Ground 3.
4. KANKAN is awarded the full claim of damages in the sum of SR 968,490.00.2

5. As ordered by the Trial Court, Small Enterprise Promotion Agency, Seychelles Civil Aviation Authority and Heritage (Pty) Limited are jointly and severally liable to pay the above sum with interest at the court rate.
6. Costs of the appeal as well as the Cross-Appeal are awarded to the Respondent-KANKAN Limited.

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## JUDGMENT

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**DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA.**

### **The Facts**

1. The 1<sup>st</sup> Appellant Company (SENPA) rented a shop as a lessee from the 2<sup>nd</sup> Appellant [Seychelles Civil Aviation Authority (the SCAA)] at the Seychelles International Airport. The 1<sup>st</sup> Appellant's shop was adjacent to that of the Respondent.
2. The Respondent (Plaintiff at the lower court) – KANKAN Limited - is a Company involved in retail business of brand items including jewelry, hats among other things.
3. The Respondent alleged that on 04th June 2016, the 1<sup>st</sup> Appellant Company (Small Enterprise Promotion) hired Heritage (Pty) Limited<sup>1</sup> to carry out renovations of its premises which caused dust particles to damage KANKAN's merchandise which was on display for sale. KANKAN claimed damages from SENPA and from Heritage, damages caused by the negligence and *faute* of Heritage's workers or agents.
4. The Respondent also lodged a claim against the 2<sup>nd</sup> Appellant (Seychelles Civil Aviation) for damages arising from breach of contract. The Respondent stated that the Authority had breached their duty as lessor to ensure peaceful enjoyment of the property by Kankan as a lessee. This was through their failure to supervise the 1<sup>st</sup> Appellant while it renovated its premises.

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<sup>1</sup> The company was sued as a 3<sup>rd</sup> Defendant in the Trial Court. No appeal was lodged by the company.

5. The Respondent claimed damages in the sum of SR968,490.00 as well as 10 days' loss of business at the rate of SR93,142.00.
6. All the defendants denied the Respondent's claims. In particular, the 1st Appellant stated that their premises were entrusted to Heritage Limited, an independent contractor and that on the 04th June 2016 the entire premises of the 1<sup>st</sup> Appellant were under the absolute control of Heritage. Furthermore, the 1st Appellant denied that any of the Respondent's merchandise was affected by dust through the negligence and fault of Heritage's workers and agents. That the workers acted in good faith in the discharge of their duties.
7. The 2nd Appellant admitted that there were damages to the Respondent's merchandise but stated that it could not ascertain who caused the damage and what merchandise was on sale. Furthermore, the 2<sup>nd</sup> Appellant denied responsibility for controlling and supervising the work conducted by its tenants within their rented premises. That its responsibility was limited to being informed by a particular tenant of any work to be carried out and making sure that it was according to the plan submitted by that particular tenant.
8. Heritage Limited also denied the Respondent's claims and stated that when the renovations were carried out, the premises were properly secured and sealed off and that every precaution was taken to prevent any disturbance of the Respondent's premises. Heritage Limited also stated that the only works conducted was installation of shelves which did not produce any dust because the shelves were built offsite.
9. In their defence, the 1st and 2nd Appellants also raised pleas in *limine litis*. The 1st Appellant – Small Promotions Enterprise – raised the following pleas in *limine*:
  - (i) The Respondent's plaint was statutorily barred under section 12 of the Small Enterprise Promotion Agency Act (Act 15 of 2014) which provided that:

*“No liability civil or criminal shall attach to the Agency, a member of the Board or the staff of the Agency in respect of an act done or omission made in good faith in the*

*performance or purported performance of the functions of the Agency or such member as the case may be."*

(ii) Heritage Limited was an independent contractor who was in absolute occupation of the 1<sup>st</sup> Appellant's premises when the alleged *faute* occurred to the Respondent's merchandise. Therefore, there was no cause of action against the 1st Appellant disclosed in the Respondent's plaint. As such, the plaint ought to have been struck out under Section 92 of the Civil Procedure Code.

10. For the 2nd Appellant – Seychelles Civil Aviation Authority – the following plea in *limine* was raised:

(i) That the Respondent's claims were barred according to Section 19 of the Seychelles Civil Aviation Act, which provides that:

*"No liability civil or criminal, shall attach to the Authority or a member, officer or employee of the Authority in respect of an act done or omission made in good faith in the performance of the functions of the Authority or such member, officer or employee as the case may be."*

### **Ruling on the pleas in *limine litis***

11. The trial Judge (Vidot J) held that in terms of Section 75 of the Seychelles Code of Civil Procedure, parties are required to disclose material facts on which their case is based. The Judge found that there was no pleading to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were acting in the course of their functions as stipulated in Section 19 of the Seychelles Civil Aviation Act and Section 12 of the Small Enterprise Promotion Agency Act.

12. Furthermore, the Judge found that the 1st and 2nd Appellants did not demonstrate to Court that what was being done was part of their functions listed in the above-mentioned provisions of law. Consequently, the plea of statutory immunity by each appellant failed.

13. On the second plea in *limine litis* raised by the 1<sup>st</sup> Appellant, to the effect that Heritage Limited was in absolute control of the and therefore no cause of action against the 1<sup>st</sup> Appellant, the Judge noted *inter alia* that:

*“What was being argued was that the occupier of the premises is liable and not the owner. Counsel relied on Article 1797 of the Civil Code which provides that a contractor shall be liable for the acts of the person he employs. The work contract was produced as exhibit D3 and that contract according to Counsel was accepted without any challenge from the Plaintiff. The 1st Defendant provided a work schedule which the 1st Defendant had to be adhered to. Counsel for the 1st Defendant then referred to the case of Ekaterina Khvedelidze v Cecile Dell’Olivo SCA 18 of 2018, which makes reference (to the) necessity of existence of a "lien de subordination" between the person undertaking works and the party whose work was being undertaken. It also considers the relationship 'commettant" and "prespose" under the Civil Code, which applies to the relationship of employer and employee under paragraph 1 of the Civil Code; see Lucas v Government of Seychelles [1977] SLR 99.*

*Article 1384(1) of the Civil Code provides;*

*"A person is liable not only for the damage that he has caused by his own act but also the damage caused by the act of persons for whom he is responsible...."*

*Article 1384(3) provides;*

*"Masters and employers shall be liable on their part for damage caused by their servants for damage caused by their servants and employees acting within the scope of the employment"*

*What the 1<sup>st</sup> Defendant was essentially arguing was that there was no “lien de subordination" between them and the 3rd Defendant as they had no authority over the 3rd Defendant's employees. They state that the work was assigned to the 3rd Defendant and that they had no control over such works. So therefore they could not be made vicariously liable for the latter's alleged negligence, see Paton v Uzice [1967] SLR 8.”*

14. Furthermore, the Judge noted that when asked as to why the 1<sup>st</sup> Appellant did not supervise the works to ensure that there was no possibility of disturbance to the neighbours, Penny Belmont, then CEO of 1<sup>st</sup> Appellant answered: "*when somebody is given a responsibility. yes, it is a shop of SENPA, at the same time it is the shop of the SCAA and SENPA, yes, we were supposed to maybe have somebody there to check all, but we don't and we can't.*" The Judge held that the above did not suggest that all responsibilities regarding the renovation works was assigned to the independent contractor (Heritage Limited) which would have made the latter solely responsible. That the answer in fact suggested that the 1st Appellant was responsible for some oversight over the works. In that case, it could be argued that a lien de subordination did not exist.
15. The Judge was also of the opinion that the agreement marked Exhibit D1 (3) did not provide an exclusion clause that all damages or nuisance caused by the works will make Heritage Limited exclusively liable and that it will hold the 1st Appellant harmless against any suit or demand alleging damages caused by such works.
16. Therefore, on the premise of the foregoing, the Judge held that the plea in *limine* to the effect that no cause of action existed against the 1st Appellant failed.

### **The Evidence**

17. Regarding the merits of the case, KANKAN Limited who was the Plaintiff in the lower court presented the following evidence to support its case:
18. Claudine Savy (the Managing Director of KANKAN Limited) testified that together with her daughter Karine Dupouy, they are the Directors of the company. The company is involved in the retail business with several shops in Seychelles whereby they sell mainly "exclusive luxury" brand of clothing, jewelry, shoes and accessories which are mainly designed by Karine Dupouy and manufactured in many countries namely Mauritius and Italy. That their products are marketed under the brand name "KANKAN". The items are

exclusive in the sense that they are not massively produced. There is only limited edition of any item. So there are few of the same items that are manufactured at any one time.

19. Claudine Savy further testified that on 4th June 2016, she was informed of the incident of dust particles having settled in the shop at the airport by one of their employees at around 6.30 am. The employee was instructed not to touch anything. Mrs. Savy then went to the shop and found 'an amount of dust' everywhere. The dust had settled on the merchandise. She assessed that the only place that dust could have come from was the shop of the 1st Appellant as there were ongoing works being carried out.

She called representatives of the 2<sup>nd</sup> Appellant - Natasha Riazee and Lauraine Fred - who came and acknowledged that there was dust settled on the merchandise. Ms. Cecile Hoareau from SENPA was called as well. They decided to close shop in order to remove all items which they discerned were damaged. Photographic evidence was also captured.

That on the 8th June 2016, KANKAN's lawyer, Ms. Priscille Chetty and the 2nd Appellant's lawyer, Mrs. Samantha Aglae, came to verify the damage. However, Mrs. Aglae and Cecile Hoareau did not stay throughout to see the items that were damaged. Ms. Lauraine Fred from SCAA remained throughout and Ms. Frida Jupiter and Mr. Sumit who were employed by the Respondent counted the items. They were placed in boxes, sealed and Mrs. Savy as well as Ms. Jupiter signed on the box. That as a result of the dust that had settled in the shop, it remained closed for 10 days.

20. For the 1st Appellant, evidence in defence was given by Ms. Penny Belmont, the CEO of the 1st Appellant who stated that they obtained a shop at the international airport through a lease from the 2nd Appellant. The shop was adjacent to that of the Respondent. She stated that after getting permission from SCAA to carry out renovations, they passed on the responsibility to Heritage Limited and that it was the latter company who were entrusted with blocking and securing the area where the works were to be undertaken. However, during the course of the works they were notified of complaints by the

Respondent. She maintained that the 1st Appellant did not do any harm to the Respondent's shop.

21. The 2nd Appellant called 2 witnesses to support its defence. The first witness was Natasha Riaze who testified that on 4th June 2016, she was working as a Terminal Operations Officer with the Civil Aviation Authority. She acknowledged to have seen some dust on the computer, clothes and some jewelry in the Respondent's shop. She observed that there was a hole between the 2 shops from where the dust was coming from but it was small to allow passage of electrical cables. However, upon being shown the exhibited photos, Natasha agreed that there was a bigger hole. She also observed dust on shelves, display cabinets, the changing room and on the merchandise in the shop. She concluded that the dust in the changing room area was due to inadequate cleaning. She also observed dust on the exterior of the shutters of KANKAN's shop. However, she did not observe total damage of merchandise in the Respondent's shop. She submitted a report on what she had observed.
  
22. The second witness who testified on behalf of the 2<sup>nd</sup> Appellant was Mr. Joshua Marguerite, the Business Development Manager. He testified that he was notified of the incident on Saturday. He did not give details of the incident.
  
23. Heritage Limited called its Director, Mr. Bernard Port-Louis, who admitted to the fact that the 2<sup>nd</sup> Appellant hired the Company to renovate their shop around the 25th of May 2015. An agreement was signed between them on 24th May 2015 (exhibit D1(3)). One of the first requirements of the scope of work was to barricade and secure the area under renovation which they did. That the barricade was all the way from the floor to the ceiling, save for a little hole between the 2 retail shops where some cables would run through. Mr. Bernard maintained that everything was sealed off between the two outlets. He however stated that there was a little corridor between the 2 shops. Around the 2nd to 4th June 2016 they completed works that would essentially produce dust but around that time, they were putting up shelves. These had been manufactured off site. Such activity did not generate dust.



24. Having evaluated the evidence given by all the parties, the trial Judge addressed the issues arising under five categories.

25. The first category was *faute*. The Judge stated that after the Court conducted a locus at the business premises of the 1<sup>st</sup> Appellant and the Respondent, it was ascertained that a hole was left in the hoarding which caused dust from the 1<sup>st</sup> Appellant's premises to enter into the Respondent's shop. The Judge referred to the testimonies of Lauraine Fred and Natasha Riaze of the SCAA which corroborated Mrs. Savy's testimony that there was presence of dust in the shop. On the premise of these testimonies, the Judge highlighted the provision of Article 1382 which obliges a person who causes damage to another to repair such damage.

26. The second head addressed by the trial Judge was Vicarious Liability. The Judge held that Article 1384 (3) of the Code provides that masters and employers are strictly liable for damage caused by their servants and employees acting in the scope of their employment. This meant there is a presumption of fault of the employer for the acts of their employees.

27. The third issue resolved by the trial Judge was the liability attributed to each party.

*1<sup>st</sup> Appellant's liability (Small Enterprises Ltd.)*

The 1<sup>st</sup> Appellant's Liability arose from the fact that it owned a duty of care to ensure that the works carried out did not cause damage to the Respondent's merchandise. That Penny Belmont admitted in her testimony that if they had done a supervision of the works, she would have noticed the space in the ceiling and requested that the contractor places adequate and proper hoarding to safeguard the adjoining neighbors from experiencing any damage. She further added that had they done so, damages would not have occurred. The Judge held that such judicial admission satisfied provisions of Article 1356 of the Civil Code which is to the effect that a judicial admission shall be accepted against the persons who makes it and it may not be revoked unless it be proved that it resulted from a mistake of fact. (b) It shall not be revoked on the ground of a mistake of law.

*2nd Appellant's liability (The Civil Aviation Authority)*

28. The trial Judge held that what was to be considered in respect of the 2<sup>nd</sup> Appellant's liability is whether it was a party to the nuisance or damage caused. The Judge referred to Article 1725 of the French Civil Code (p1466) where it declares that a co-tenant is not a third party which would mean that a lessee is responsible if a co-tenant does anything that affects another co-tenant. That by virtue of the aforementioned provision, this made the 2<sup>nd</sup> Appellant vicariously liable for the acts of Heritage Limited.
29. Furthermore, the Judge held that Mr. Joshua Marguerite - the Manager of the Civil Aviation Authority - admitted that there was an obligation of the 2nd Appellant to ensure that the Respondent has peaceful enjoyment of its leased property and the obligation to supervise the works being carried out was under airport management.

**Quantum**

30. The Appellants submitted that the Respondent only gave the sale price of the items allegedly damaged by dust. However, no evidence of the cost price was given. They therefore submitted that in absence of such evidence, the court could not give an imaginary price to such items and make a judgement in favour of the Respondent.
31. On this aspect, the trial Judge held that it is indeed necessary that in order to recover from a Defendant, the loss sustained by the Plaintiff must be established through evidence. The Plaintiff has to prove the loss that they have suffered and the quantum thereof.
32. The Judge further held that in the circumstances of the present case, there was no requirement to prove the cost price of such items. The items were in a shop and so the Respondent only had to prove what the sale price would have been; the claim constituted the cost price as well as the sale price which included a profit. The Respondent produced a list of prices marked exhibit P6 and there was no objection to that list being admitted on the Record.

33. In effect, the judge disagreed with the Appellants' argument that the Respondent did not provide the cost price of the items and that their claims should be restricted to that cost only and not the profits. That in fact Article 1145.1 of the Civil Code provides that: *"the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter"*. Furthermore, paragraphs 1 and 2 of Article 1145 extend applicability of the provision to instances of breach of contract and the commission of a delict.

### **Mitigation**

34. Under this category, the Appellants argued that the Respondent should have mitigated its loss. The Respondent however insisted that the merchandise it sold was an exclusive KANKAN brand. If they were to clean and sell the clothes, the brand will go down and selling goods which have been damaged would tarnish the brand.

35. The trial Judge did not accept the above argument of the Plaintiff/Respondent and held that since most of the items produced before court had no damage at all, the Respondent could have mitigated its loss and sold the damaged items at a reduced price. The Judge noted that generally for the Seychellois market, the items sold by the Respondent had stiff prices and a local client would have enjoyed having an item at a reduced price and all that would be needed was a bit of cleaning of the item and in most cases the cleaning would have been very insignificant. The Judge stated that he was aware that there were some international brands that sell their slightly damaged items at a reduced price. That in any case, the Respondent testified that they normally had to clean the shops 4 to 6 times a day because of dust. This suggested that there was normally an accumulation of dust and items like jewelry have to be cleaned on a regular basis with a damp cloth.

36. Regarding the claim for loss of earning for the 10 days the shop remained closed, the Judge held that it was not maintainable. This is because the Respondent had already claimed for loss on the cost of items which included the actual cost of the items as well as the loss of profits on these items. That to permit the claim for loss of earnings due to

closure of business for those 10 days will in effect be duplicity of claims on the same items. Be that as it may, the Judge held that the loss of business earnings was not proved.

37. As a result, the trial Judge awarded the following quantum of the claims:

(i) A claim of 45% of items that were contained in boxes 1, 2 and 3. That amounts to SR193, 360.00.

(ii) 35% of the claim for hats found in bag no 4 amounting to SR35,000.00.

(iii) 35% of the claim for Box 5 that contained the bags which amounts to SR 26, 218.

(iv) 20% of the claim for jewelry amounting to SR27,685.00.

38. Therefore, judgment was entered in favour of KANKAN and the Defendants were made jointly and severally liable to pay KANKAN a total sum of SR 282,863.00 with interest and costs.

39. Dissatisfied with the decision of the trial Judge, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants lodged separate appeals in this Court but were later consolidated. The Respondent – KANKAN Ltd - lodged a cross-appeal.

### **Grounds of Appeal**

40. For the 1<sup>st</sup> Appellant (Small Enterprises Promotion Agency-SENPA), the following are the grounds of Appeal:

*(1) The learned trial Judge erred in holding that the first plea in limine raised by the Appellant/1st defendant fails as the 1st defendant had not pleaded that they were acting in the course of their functions and that they acted in good faith under Section 12 of the Small Enterprise Promotion Agency Act, in that:*

*a. The 1st defendant was discharging its statutory functions and that there was no case for the Plaintiff that the 1st defendant was acting beyond their functions.*

*b. The qualified immunity afforded to the 1st defendant should have been rebutted by allegations of bad faith by the Plaintiff, which they failed in the pleadings.*

*(2) The learned trial Judge erred in holding that the 1st defendant was liable to the Plaintiff for the alleged damages caused by the works done by the 3<sup>rd</sup> defendant, in that:*

- a. The 3<sup>rd</sup> defendant, an independent contractor was in absolute occupation and control of the 1<sup>st</sup> defendant premises and works carried out as per the contract.*
- b. There was no lien de subordination between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant.*
- c. The 1st defendant was not responsible to have oversight of the works of the 3<sup>rd</sup> defendant.*

*(3) The learned trial Judge erred in holding that there were damages to the Plaintiff's merchandise, in that:*

- a. There was no evidence of any damages.*
- b. The Plaintiff's shop was prone to dust and in any case no evidence that the dust had caused any damages to exhibited merchandise,*
- c. There was no evidence that the exhibited merchandise was in fact displayed in the shop of the Plaintiff on the day of the incident.*

*(4) The learned trial Judge erred in holding that the Plaintiff's merchandise worth SR 282,863 sustained damages, in that:*

- a. The finding on quantum of damages was contrary to the finding on facts by the learned Judge.*
- b. There was no evidence that part of the exhibited merchandise was ever displayed in the shop of the Plaintiff or that it sustained damages.*
- c. There was no evidence as to the quantum of damages sustained by the Plaintiff*

**Relief sought:**

The 1<sup>st</sup> Appellant prayed that this Court varies the judgment of the trial court as per the grounds above and dismisses the Plaintiff.

**Grounds of Appeal by Seychelles Civil Aviation Authority – the 2nd Appellant**

*1. The learned Judge failed to appreciate that this Appellant was only a lessor of the premises thus no liability on its part as regards the faute while the 2nd and 3rd Respondent are the tortfeasors if at all there is faute established.*

*2. The learned Judge failed to appreciate and ignored the Plaintiff's averments of alternative claim that the damages of merchandise were caused by the negligence and faute of the 3<sup>rd</sup> Defendant (3rd Respondent) a contractor who carried out construction works but wrongly concluded the liability on the part of this Appellant.*

*3. The learned Judge grossly omitted to appreciate that this Appellant is neither an employer of the contractor, the 3rd Respondent nor does it have any legal nexus to be burdened with the liability in respect of the damages occurred. The learned Judge ought to have held that it was the 2nd and 3rd Respondents liable.*

*4. The learned Judge failed to give proper reasons as to how and why there is joint liability and in any event he further failed to apportion the quantum payable by the respective parties responsible for the damages.*

*5: The learned Judge failed to rationalize the quantum awarded in the sum of SR 282,863.00 and (his award) lacks logic (as to how he arrived at the sum) of the sum he arrived at in his Judgment.*

**Reliefs sought:**

1. The Judgment and award dated 30th January 2019 be set aside and reversed in its entirety and further the 2<sup>nd</sup> Appellant be exonerated from any liability.
2. Any decision that may meet the justice of this case.
3. Costs for this appeal as well as those in the lower court be granted.

**Grounds of the Respondent's Cross-Appeal:**

1. *The learned trial judge erred in law in holding that the Appellant had an obligation to mitigate its loss.*

2. *In alternative to the First ground above, the learned trial judge erred in law and on the evidence in holding that the Appellant had failed to mitigate its loss.*

3. *The learned trial judge erred in law and on the evidence in failing to award the Appellant damages for loss of earning for the ten days that the Appellant's shop remained closed.*

4. *The learned trial judge erred in law and on the evidence in holding that not all the items produced as exhibits were actually displayed in the shop.*

**Relief sought:**

To reverse the decision of the trial judge regarding damages and to award the Appellant all the damages prayed for in the Plaintiff.

**Parties' submissions**

It is noted that each party filed written submissions. To avoid unnecessary repetition, the submissions will be reproduced at the point where the Court will be resolving each ground.

**Court's consideration of SENPA's appeal**

**Ground 1**

41. The 1st Appellant's ground of appeal faults the learned Judge for dismissing the plea in *limine* to the effect that the suit instituted by KANKAN was statutorily barred by virtue of Section 12 of the Small Enterprise Promotion Agency Act.

42. Counsel for SENPA submitted that the action could not be brought against the SENPA on the basis that the party is provided with statutory immunity under section 12 of the SENPA Act which states that:

*"No liability civil or criminal shall attach to the Agency, a member of the Board or the staff of the Agency respect of an act done or omission made in good faith in the performance or purported performance of the functions of the Agency or such member as the case may be."*

43. Furthermore, counsel submitted that the Learned Trial Judge was wrong in applying a very restrictive interpretation to section 12 (supra) and thereby reached a wrong finding that the Appellant was not operating within its statutory functions when contracting for renovation works to be undertaken at the shop rented from SCAA.

44. It was also counsel' s submission that SENPA need not have pleaded that it was acting within its functions since KANKAN had not pleaded to the contrary. Counsel referred to Section 4 of SENPA Act and the testimony of the Chief Executive Officer of SENPA who testified as to the functions of SENPA and the purpose of maintaining a shop at the airport building. That the said witness was never challenged regarding the statutory functions of SENPA.

45. In reply, counsel for KANKAN supported the learned trial Judge's finding that the statutory immunity was not available to SENPA since it was not performing duties listed under Section 4 (supra).

46. A plea in *limine* consists of a point of law which has been pleaded or which arises out of the pleadings. It also has the potential of disposing the rest of the suit once successful. Therefore, a litigant who seeks to rely on a plea in limine is obliged to set out the points of law and material facts in the written statement of defence.

47. I have considered SENPA's written statement of defence filed in the trial Court and marked F1 in the Record of Proceedings. Paragraph 1 of the of the defence states as follows:

*"Points of Law:*

*1. It is respectfully averred that the plaint is statutorily barred against the 1st defendant under Section 12 of the Small Enterprise Promotion Agency Act (Act 15 of 2004) ..."*



48. The above excerpts of the 1st Appellant's defence shows that it pleaded the point of law it sought to raise in form of statutory immunity.

49. But as KANKAN's lawyer rightly pointed out, the above pleading did not state the material facts to which the statutory immunity was applicable.

50. **Section 75 of the Seychelles Code of Civil Procedure** provides that the statement of defence must contain a clear and distinct statement of the material facts. In **Leon v Volare**<sup>2</sup> and **Hunt v R**<sup>3</sup>, this Court emphasized that it is a procedural requirement that each party pleads the material facts on which it intends it rely. Material facts include the circumstances constituting the case to be advanced. In the present matter, SENPA pleaded in general terms that it had statutory immunity from being sued. It failed to properly particularise its averment of statutory immunity. The pleadings fell short of Section 75 because there was no averment that in carrying out renovation of the premises, SENPA was acting in the course of its functions, functions which can be inferred from the Objectives of the Act stipulated in Section 4 of the SENPA Act.

51. Consequently, I cannot fault the Trial Judge for dismissing the said plea *in limine*.

52. Thus, ground 1 of SENPA's appeal fails.

## **Ground 2**

53. Under ground 2, SENPA argued that the learned trial Judge wrongly held SENPA liable for the damage caused to KANKAN's merchandise yet it was Heritage (Pty) Limited which was in absolute control of the renovation works.

54. For this ground counsel for SENPA submitted that the learned Trial Judge misinterpreted the contract between SENPA and Heritage and came to a wrong finding that there was no exclusion clause for any liability to be assigned solely to Heritage.

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<sup>2</sup> (1988) SLR 122.

<sup>3</sup> (1987) SCAR 160.

55. Counsel argued that the evidence on record showed that they had no control of the premises for the duration Heritage carried out the renovation works. And furthermore, that Heritage was hired as an independent contractor. In support of the argument, counsel relied on the case of **Roucou Construction (Pty) Ltd v Dewea and anor**,<sup>4</sup> where this Court held that:

*"It is settled law that an independent contractor (unlike a servant) is one who is his own master in the sense that he is employed to bring about a given result in his own manner and not according to order or directions given to him as to how the work is to be carried out. In other words, an independent contractor is one who is not under the control or direction of someone else as to how the work entrusted to him is to be performed."*

56. In reply, counsel for KANKAN submitted that it did not sue SENPA on the basis of vicarious liability but on the ground of its failure to supervise Heritage Limited. That Mrs. Belmont admitted to this failure.

57. On record is a copy of an agreement concluded between Heritage (Pty) Limited and SENPA to carry out renovation works, Paragraph 4.1 of the agreement provides that:

*"The contractor shall carryout works properly and in accordance with the contract. The contractor shall provide all supervision, labour, materials, plant and contractor's equipment which may be required."* (Emphasis of Court)

58. Furthermore, the first item listed in the scope of work to be handled by Heritage was "To Block and secure Area."

59. In line with the above excerpt of the agreement, Mrs. Penny Belmont, the CEO of the Agency, testified that after SENPA was granted permission to carry out the renovations works, it passed on the responsibility to Heritage (Pty) Limited and it is the latter who were entrusted with blocking and securing the area where the works were to be undertaken. SENPA in effect argued that Heritage (Pty) Limited was an independent

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<sup>4</sup> SCA 09/2003.

contractor over whom they had no *lien de subordination* so as to make the Agency liable for the damage caused.

60. The law can hold a person liable for the wrongdoing of another. This is what is termed as vicarious liability and it is recognized under **Article 1384 (1) of the Civil Code** which provides that: “*a person is liable for harm caused by not only his own act but also for the harm caused by the act of persons for whom he or she is responsible or by things in his or her care.*”
61. In order to hold a master or principal or employer liable for the wrongful conduct of its servant or agent or employee respectively, it is important to carry out the control test. This test establishes the parameters for holding a party liable for the misconduct or negligence of another party. Where an independent contractor is involved, it is a general rule that the wrongs committed by the independent contractor cannot be attributed to the person who hired them because they are not subject to the command or control of the person for whom they execute a given task. In the case of **Confait v Mathurin**<sup>5</sup>, this Court held that persons are not liable for the negligence of their independent contractor.
62. In other words, once proved that Heritage was an independent contractor, SENPA cannot be liable under the doctrine of vicarious liability.
63. However, it must be noted that KANKAN did not sue SENPA under the principle of vicarious liability.
64. It is clear on a reading of the Complaint and more specifically Paragraph 9 (b) that KANKAN sued SENPA directly – for failure to ensure that works being done on its premises did not create a nuisance to the Plaintiff. It would follow that the operating legal principle is Article 1382 (1) of the Code which provides that: “*Every human act that causes harm (damage) to another requires the person by whose fault the harm occurred to repair it.*”

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<sup>5</sup> SCA 39/1994

65. Furthermore, during cross-examination, the CEO of SENPA admitted that although SENPA did not do the work because they had no requisite knowledge, and did not have the expertise to supervise the work, they had a duty to ensure that their neighbours were not disturbed. She stated further that SENPA's plan was "not to disturb them". Further still, she admitted that SENPA was supposed to have somebody at the site to check but they did not. She agreed with Counsel for KANKAN that had they done that, they would have seen the space through which dust emanated from the SENPA premises into the KANKAN shop and informed the contractor to block it. In finding SENPA liable, the Trial Judge referred to this as Judicial Admission thus: "Such judicial admission satisfies the provisions of Article 1356 of the Civil Code." The Article provides as follows:

*1356 (1) A judicial admission is the declaration that a party or a party's specially authorised proxy makes in the course of court proceedings.*

*1356 (2) (a) A judicial admission shall be accepted against the persons who make it.*

*1356 (3) (a) It may not be revoked unless it be proved that it resulted from a mistake of fact.*

*(b) It shall not be revoked on the ground of a mistake of law. (My emphasis)*

I therefore cannot fault the Trial Judge for his finding.

**66. Thus, ground 2 of SENPA's appeal fails.**

### **Ground 3**

67. It was the submission of counsel for SENPA that no evidence was adduced by KANKAN to support its claim for damages and that the Learned Trial Judge erred in finding that any of the merchandise produced in Court was damaged. Counsel contended that the items produced before Court displayed very minimal damage if at all, and indeed the Learned Trial Judge stated that: "*Many of the items produced before court had no damage at all, a large proportion had negligible damage and very few had serious damage.*"

68. In reply, Counsel for KANKAN submitted that the fact that dust was found on the items which were on display in the shop had been proved on the requisite standard - a balance of probabilities. And that this was not only through the testimony of Mrs. Savy - the Managing Director of KANKAN - and the Principal witness for the Plaintiff, but also through the testimony of Fred Lauren - an employee of SCAA.

69. I have carefully gone through the record of proceedings. The record shows that during the examination in chief, Mrs. Savy meticulously and elaborately explained the effect of the dust on her merchandise. Exhibits of various items were tendered in as evidence that dust had settled on the property which was displayed in the shop. Such exhibits included photographs taken at the shop after the alleged nuisance. The photographs were aimed at showing dust which had settled on various items in the shop. She also adduced various items in boxes marked 1-6 and testified to the unique kind of merchandise which would be damaged by dust. I note that during cross-examination by Counsel for the other parties, the witness remained unshaken and the cross-examination did not undermine the account the witness had given. From the record, one cannot say that the veracity of the witness was challenged or undermined.
70. Other witnesses also testified to having seen dust settled at the KANKAN shop. These witnesses included Natasha and Fred Lauren who were employees of the SCCA. Natasha testified during cross-examination that she had never seen that kind of dust in the KANKAN shop prior to the incident that caused the nuisance. Furthermore, she testified that after the incident, she has never seen the said amount of dust in KANKAN's shop again.
71. Ms. Lauren Fred – a Business Development Officer of SCCA – prepared a report regarding the incident. This report was admitted by trial court and marked exhibit P9B. In her words, she stated that dust was found basically on all the products in the shop except for the ones in the display cabinet. In the report, the dust was attributed to the fact that SENPA had not completely hoarded off the construction area and a hole through which the dust passed from SENPA's shop to Kankan's premises was visible.
72. The testimonies of Ms. Lauren Fred and Natasha corroborated Mrs. Savy's testimony that there was dust in KANKAN's shop.
73. Therefore, the issue of dust arising from SENPA's shop was proved on a Balance of Probabilities.

74. Indeed, the trial Judge concluded that some of the merchandise was damaged by dust and went ahead to assess an award for damages to KANKAN. Such was a finding of fact. It is trite that an appellate court will not interfere with a Trial Court's finding of fact, unless it can be said that based on the evidence on record, the *court a quo* could not have reasonably reached that finding. Another instance would be where a Trial Judge acted on a wrong principle of law. In other words, for an appellate court to interfere in the finding of a trial court, the finding must be clearly erroneous. This cannot be said of the finding of fact by the lower court in this matter that dust from SENPA's premises settled on the merchandise in the Kankan shop.

75. Thus, ground 3 of SENPA's appeal fails.

#### **Ground 4**

76. Ground 4 of SENPA's appeal challenged the quantum of damages awarded by the Trial Judge on the basis that there was no clarity as to how he arrived at the award and that there was no supporting evidence to back the award. This ground is similar to ground 5 in the appeal by SCAA and I will deal with it when while dealing with the appeal by the Authority.

### **Consideration of the appeal by Seychelles Civil Aviation Authority- the 2<sup>nd</sup> Appellant**

#### **Grounds 1 and 3**

77. Counsel for the 2<sup>nd</sup> Appellant addressed grounds 1 and 3 together. I will however address grounds 1, 2 and 3 together.

78. Counsel submitted that the involvement of the 2<sup>nd</sup> Appellant (hereinafter "SCAA") arose as a result of its being the lessor of the premises at which the plaintiff (KANKAN) and SENPA operated their shops.

79. One of the issues raised and extensively argued by Counsel for SCCA in the written submissions was that that KANKAN's amended plaint shows a misjoinder of causes of

action and thus contravenes Article 1370 (2) of the Civil Code which provides inter alia that:

*"When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. ... A plaintiff shall not be allowed to pursue both causes of action consecutively."*

80. It was further argued that the combination of causes of action of contract and tort is reflected in the lower court's Judgment which is beset with confusion and errors especially in the attribution of vicarious liability for the *faute* of the 3rd Respondent to the Appellant.

81. On another front, Counsel submitted that the Lessor is not required to warrant that the Lessee will be protected from breach of peaceful enjoyment caused by third parties unless *a lien de subordination* was established against SCAA and the independent contractor Heritage. That SCAA was not privy to the contract between SENPA and Heritage for renovation/construction works of the premises occupied by SENPA. That if at all *faute* was established, the purported tortfeasor was Heritage. Counsel submitted that SCAA was merely the owner of the property, namely the International Airport Departure Lounge and SENPA as well as KANKAN were tenants under respective Concession Agreements. The SCAA had no contractual relationship with Heritage and cannot therefore be held liable for the alleged *faute* of SENPA's contractor. That, in any case, Article 1797 provides that a contractor shall be liable for the acts of the person that he employs. That KANKAN should have sued the independent contractor as a sole tortfeasor.

82. Under ground 2, counsel submitted that the Learned Judge failed to appreciate and ignored the Plaint averments of alternative claim that the damages of merchandise were caused by the negligence and *faute* of the 3rd Defendant (now 3rd Respondent) a contractor who carried out construction works but wrongly concluded the liability on the part of this Appellant.

83. Counsel for the Appellant argued further that the combination of causes of action and omission by the Learned trial judge to contemplate attribution of liability for the purported alternative averments reinforces the inherent confusion which is noted at:

(i) Paragraph [3] of the Judgment where the learned Judge stated that: "The Plaintiff further or in the alternative that the Plaintiff's merchandise was damaged by a breach of contract by the 2nd Defendant or the Lease Agreement"[...] "Therefore the Plaintiff claims that as a result of the negligence of the 1st and 3rd Defendant and/or their agents or workers and/or breach of contract of the 2nd Defendant, the Plaintiff suffered loss and damage"

(ii) Paragraph [41] of the Judgment where the Judge stated that, "I have closely studied the pleadings, particularly the plaint, I find that it adequately avers faute and breach of contract from the 1st and 3rd Defendant and the 2nd Defendants respectively." and

(iii) Paragraph [43] of the Judgment where the Judge stated that, "The liability of the 2<sup>nd</sup> Defendant as averred in the Plaint is said to come through a breach of contract. That is that under the agreement they are obligated to ensure that the Plaintiff does not experience any nuisance and damage to its undertaking.

84. That on the one hand the KANKAN averred that SCAA was liable for breach of (an implied term) contract whilst on the other the Learned Judge made a determination that SCAA is vicariously liable for the alleged faute of SENPA or its independent contractor Heritage.

85. Furthermore, that at paragraph [44] of the Judgment the Judge stated that, "What has to be considered is if in the circumstances the 2nd Defendant was a party to the nuisance or damage caused? That while answering this question, the trial Judge erred in his interpretation of Article 1725 of the Civil Code, which provides that, the owner shall not be bound to warrant the tenant against any disturbance of his enjoyment caused by any acts of trespass of third parties, even if caused without claim of right upon the thing under hire, but the tenant may sue such parties in his own name". In counsel's view, the term "such parties" referred to in the Article 1725, includes any fault, on the part of SENPA as co-tenant, if proved to have troubled the peaceful possession of property. Thus, according



to counsel, Article 1725 deals with the *faute* of third parties who have no contractual relationship. In support of this view, counsel referred to the case of France, Cour de cassation, Chambre Civile 3, 23 Juin 2015, 14-13385 where the court found *inter alia*:

*“It follows from Article 1725 of the Civil Code that the lessor is not required to guarantee the lessee the trouble that third parties bring by way of fact to his enjoyment, without claiming any right to the rented thing; that the lessor thus incurs no liability when the disturbance of enjoyment is the consequence of an attack brought by a third party to the building itself.”*

86. It was further submitted that in addition to the above exemption or exception to liability, the case of **Hoareau v Hoareau**<sup>6</sup> states that, "Where a tenant causes damage to a neighboring property in the use of the leased property, this does not in itself render the owner (lessor) liable to the neighboring owner.

87. That in order to establish that the SCAA as the Lessor is liable, there has to be either a direct or vicarious responsibility for a breach of contract such that the breach was caused by the acts of a third party who were the agents, servants or *préposés* of the SCAA. That in this case, the evidence showed that the purported nuisance or *faute* was alleged to have been committed by either SENPA or Heritage both of whom are neither agents, within the ambit of Article 1984 of the Code nor were they servants or *préposés* of the SCAA. To support this line of argument, counsel relied on the authority of **Beoliere Aqua v Air Seychelles**<sup>7</sup>.

88. In reply to the Appellant, Counsel for KANKAN submitted that SCAA was not sued on the premise of vicarious liability for the *faute* committed by SENPA or the Independent Contractor. That SCAA was instead sued for having breached the lease agreement it had with its tenant-KANKAN. Counsel argued that since SCAA's officers admitted to not supervising the renovation works, it was liable for the damage caused to KANKAN's merchandise.

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<sup>6</sup> (1940) SLR 72.

<sup>7</sup> (2010) SLR 316.

89. Regarding the interpretation of Article 1725 (supra), counsel submitted that the provision has to be read together with Article 1719 of the Civil Code which provides that: *‘The owner, by the nature of the contract and without the need for any special stipulation, shall be bound to allow the tenant peaceful enjoyment during the period of the hire.’* Counsel argued that when read together, Article 1725 provides an exception to the general rule couched in Article 1719 that a landlord or lessor guarantees a tenant peaceful enjoyment of property. That once there is no peaceful enjoyment then the landlord can be held liable. That it was therefore on the premise of interference of the peaceful enjoyment caused by SENPA (a co-tenant) that the Authority became liable.

90. Counsel maintained the above submission in reply to grounds 2 and 3 of SCAA’s appeal.

91. Before I delve into whether the *faute* of Heritage and/or SENPA could in law be visited on SCAA, I must deal with the preliminary point raised by Counsel for SCAA i.e. that KANKAN’s amended plaint shows a misjoinder of causes of action and thus contravenes **Article 1370 (2) of the Civil Code**. This issue does not appear in the grounds of appeal presented in the Notice of Appeal. It must also be noted that the appellant did not raise this issue at the lower court.

92. It is trite law that a party is bound by their pleadings and so is the Court before which such pleadings are presented. Indeed, **Rule 54 (3) of the Court of Appeal Rules** provides that:

*Every notice of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of the appeal, specifying the points of law or fact which are alleged to have been wrongly decided. Rule 18(8) provides that an appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal. In line with the above rules, case law has firmly established that a party is*

*bound by its pleadings. An appellant cannot go outside the scope of the pleadings they filed in court. A party cannot seek relief outside his grounds of appeal.*<sup>8</sup>

93. This Court will therefore address only the arguments which elucidate the grounds of appeal appearing in the Notice of Appeal.

94. As already noted, counsel for SCAA argued grounds 1 and 3 together and the rest of the grounds separately. I will however address grounds 1, 2 and 3 together.

95. The essence of both Grounds 1 and 3 is that there was no (legal) relationship between SCAA and the contractor (Heritage). That the only relationships that SCAA had was that of a lessor of property to KANKAN on the one hand and SENPA on the other. That as a Lessor, SCAA had an obligation to ensure peaceful enjoyment of the leased property by KANKAN. Counsel submitted that SCAA was merely the owner of the property, namely the International Airport Departure Lounge and SENPA as well as KANKAN were tenants under respective Concession Agreements. But a Lessor is not required to warrant that the Lessee will be protected from breach of peaceful enjoyment caused by third parties unless *a lien de subordination* was established between SCAA and the third party, in this case Heritage. That SCAA was not privy to the contract between SENPA and Heritage for renovation/construction works of the premises occupied by SENPA. That if at all *faute* was established, the purported tortfeasor was Heritage. The SCAA had no contractual relationship with Heritage and cannot therefore be held liable for the alleged *faute* of SENPA's contractor. Consequently, the Trial Judge erred in visiting the *faute* and liability if any of the contractor on SCAA.

96. On the other hand, Ground 2 deals with the application of Article 1725 of the Civil Code under which the Judge based his finding that the SCCA was liable for the actions of SENPA.

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<sup>8</sup> See for example *Vijay Construction (Pty) Ltd vs. Eastern European Engineering Ltd (SCA 28/2020)* and *Nicette v Marimba (SCA 51 of 2019) [2022] SCCA 17*.

97. It is noted that in finding SCAA liable for interfering in Kankan's right to peaceful enjoyment of the property, the trial Judge based his decision on an interpretation of Article 1725. The Article provides that:

*The owner shall not be bound to warrant the tenant against any disturbance of his enjoyment caused by any acts of trespass of third parties, even if caused without a claim of right upon the thing under hire; but the tenant may sue such parties in his own name.*

98. The Judge however held that SENPA was not a third party and therefore, the Civil Aviation Authority was vicariously liable for the actions of SENPA.

99. Counsel for the SCAA argued that the trial Judge's interpretation of who qualifies as a third party was erroneous.

100. In reply to the appeal of SCAA, KANKAN did not only state that their claim was not based on vicarious liability but went further to submit that it was a claim based on the legal relationship between a lessor and lessee and specifically, **Article 1719** and **1725 of the Civil Code**. According to **Article 1719 (c)**: *"The owner, by the nature of the contract and without the need for any special stipulation, must allow the tenant peaceful enjoyment during the period of the hire."*

101. That in any event it could not be argued that Heritage who was the author of the fault acted as the preposes of SCAA who was but a lessor of property to SENPA. That what the plaintiff averred as against SCAA was a breach of the agreement for lease and this cannot be translated into a claim in delict and vicarious liability as envisaged under Article 1384 (1) of the Civil Code<sup>9</sup> which provides that: *"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."*

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<sup>9</sup> The Civil Code of Seychelles Act.

102. It is to be noted that in reply to this ground of argument, KANKAN in fact averred that their claim against SCAA was not based on vicarious liability, that SCAA had not been sued on the basis of *faute* committed by either itself or by Heritage. Rather, SCAA was sued for breach of the Lease Agreement. That as a Landlord, SCAA had failed to ensure KANKAN's enjoyment of the leased property. That SCAA had failed to control and supervise SENPA and Heritage in the manner Heritage conducted the work, SCAA failed to prevent SENPA and Heritage from causing nuisance and damage to KANKAN's merchandise.

103. Before addressing my mind to the application of **Article 1725**, I respectfully fault the trial Judge for erroneously linking the application of this Article to the doctrine of Vicarious Liability. The principle of Vicarious Liability is captured under **Article 1384 (1) of the Civil Code** which provides that: "*A person is liable for harm caused not only by his or her own act but also for the harm caused by the act of persons for whom he or she is responsible or by things in his or her care.*" On the other hand, **Article 1725** focuses on the lessor/lessee relationship and the obligations of a lessor to the lessee whose right to peaceful enjoyment of the property has been interfered with as will be explained before. The articles need not be read together.

104. My understanding of **Article 1725 (supra)** is that a landlord cannot be held liable for the tortious actions of third parties. A tenant whose rights or interests have been infringed upon by a third-party cannot sue the landlord but can sue the third party in its own name. The landlord can only be sued if it is proved that the entity which committed the tortious action was either an agent, servant or *preposé* of SCAA.

105. Therefore, from a reading of Article 1725 (*supra*), one can confidently say that a lessor is not liable for the acts of a third party which interferes with a lessee's right to peaceful enjoyment of their lease. What the provision however does not do is define who a third party is. Nevertheless, commentaries and case law have breathed life into the provision and excluded a co-tenant from the definition of a third party. For example:

106. In Code Civil Dalloz - 102e edition - it is stated, in respect of Article 1725 of the French Civil Code, that:

*“4. Tenants. The fact by a tenant of exceeding the rights resulting from his lease cannot have the effect of having him considered as a third party within the meaning of art. 1725; it is therefore right that the trial judges declare the lessor liable to repair the damage resulting from the disturbance of enjoyment which results therefrom for a joint tenant.”*

107. Furthermore, in "Les Contrats Spéciaux **Special Contracts** by Phillippe Malaurice and Laurent Aynés ,2003 Edition" - it is stated - in respect of Article 1725, that:

*It is still necessary that the author of the disturbance in fact be a third party, that is to say a person for whom the lessor must not answer; is not a third party the agent of the lessor (e.g. a concierge). Nor does the lessor have to answer for the fact of one of his co-owners in the building. Extending the obligations of the lessor, the case law decides that he is responsible for the disturbance caused by joint-tenants. Or by a contractor. This rule applies to all leases. (Emphasis is mine)*

108. Further still, in Juris Classeur - Bail (En General), it was observed in respect of Article 1725, that:

*“3. By third party, we mean any person other than the lessor and those who derive their rights from him on the occasion of the thing leased. concierge, roommates, etc;*

*4. With regard to the caretaker, case law has decided that he is not a third party within the meaning of article 1725 of the Civil Code, which releases the lessor from the obligation of guarantee in the event of disturbance that the third parties bring by way of fact to the enjoyment of the lessee (Cass. Civ. III, 6 Nov. 1970: D.S. 1971, 250).*

*5. Similarly with regard to the joint tenant, a very abundant case law decides that he is not a third party within the meaning of article 1725.” (Emphasis is mine)*

109. And furthermore, the Court of Cassation in France, *Cour de cassation, Chambre Civile 3*, 22 mars 2018, 16-26344 rendered the following judgment:

110. The brief facts of the case were that a company “Coopération et famille” was the owner of a building in which three apartments were leased to Mrs. Z..., Mrs. A... and Mrs. X...; Mrs. X complained of excessive humidity in their dwelling and the tenants summoned the lessor to carry out work and to compensate them for their prejudice;

111. The Court held that, when the tenants hold their rights from the same lessor, the latter is bound to repair the damages resulting from the disturbance of enjoyment that they cause each other and that, consequently, the company “Coopération et famille”, was contractually bound to all the occupants of the building, is liable for the damage caused by water damage in the tenants' apartments, without there being any need to distinguish between damage originating in the private portions or in the common portions of the building. (Emphasis of Court)

112. In light of the said jurisprudence, SENPA is not a third party and SCAA can be liable for *faute* caused to KANKAN by SENPA, both lessees on the property. The particulars of SCAA's liability have been pleaded by Kankan as follows: failing to supervise works being done on its premises; failing to ensure that work being done on its premises did not create a nuisance to KANKAN; failure to take preventive measures not to cause any damages to KANKAN's merchandise; failure to conduct the works in a reasonable manner and failure to ensure that the dust particles arising from the renovation or construction works being conducted on the premises did not enter KANKAN's premises and cause damage to its merchandise.

113. It is noted that evidence was led to the effect that a lessee who wanted to renovate their premises would have to seek the permission of SCCA. Evidence was adduced to prove that indeed SENPA was cleared by SCAA before it commenced work on the premises. The testimony of Mrs. Savy was to the effect that SCAA as a matter of fact was expected to supervise such work and had in previous occasions done so. This testimony was corroborated by that of Mr. Joshua Marguerite, the director of the Authority, who stated

that the Civil Aviation Authority had an obligation to ensure that tenants enjoyed peaceful possession of the property and it was the duty of the Civil Aviation Authority to supervise the works being carried out. The trial Judge considered it as a Judicial Admission.

114. From the foregoing analysis, I hold that as submitted by Kankan, a landlord/lessor is answerable and liable to its tenant for any interference caused to their enjoyment of the premises by another tenant/lessee.

115. Therefore, grounds 1, 2 and 3 of SCAA's appeal fail.

#### **Ground 4**

116. I note that after finding in favour of the Plaintiff (KANKAN), the trial Judge held the Defendants jointly and severally liable to pay KANKAN the sum of SR 282.863.00 together with interest and costs.

117. Counsel for SCAA faulted the Judge for failing to give proper reasons for holding the parties jointly liable and for not apportioning the quantum payable by each of the parties. That the Judge erred in law in combining the causes of action and awarding KANKAN damages against the Appellants jointly and severally. He argued that it was unclear why the learned trial judge opted for joint and several liability against all the Appellants.

118. In reply, Counsel for KANKAN relied on the Supreme Court authority of **Savy vs. Mondon**<sup>10</sup> in which the court adopted the principle in the Mauritian case of *Cader v Valona and anor (1945) M.R 157* that:  
*if damage is caused by the faute of two or more tort-feasors each of these is liable for the whole amount of the damages to which the aggrieved party may show that he is entitled.*

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<sup>10</sup> [1963-1966] SLR 187.



119. He submitted that since it was not possible to precisely establish the extent that each Appellant contributed to the damage caused to KANKAN, it followed that all the wrongdoers be made jointly liable to pay the damages.

120. The principle of joint and several liability indicates that all parties against whom an award is made, are equally responsible. The Court usually evokes this principle in matters involving independent tortfeasors. In such instances, each of the tortfeasors will be held liable for the full extent of the plaintiff's injuries.

121. Having considered the above submissions, I find that the trial Judge applied a correct principle in making the Appellants jointly and severally liable in light of the circumstances of the matter before Court.

122. I therefore hold that ground 4 of the appeal.

## **Ground 5**

123. It was contended by counsel for SCAA that the Trial Judge awarded KANKAN a quantum of damages which was not supported by evidence and that his decision lacked logic as to how the amount was arrived at. In his view, the award was not proved to the required standard. That the Judge noted in his judgment the fact that, "*many of the items produced before court had no damage at all, a large proportion of them had negligible damage*" and *that he had serious reservations whether all the items produced in Court were actually displayed in the shop. At the locus visit, it was observed that at most, there were only 10 display stands for hats. The items produced in court exceeded what the shop could accommodate.*

124. Counsel submitted that since the alleged loss and damages was based on negligible dust and no expert evidence was led to substantiate or rationalize the quantum awarded which was manifestly excessive, this amounted to an erroneous estimate. That this warranted this Court's intervention to set aside the award.

125. Counsel also argued that as far as the law on damages in relation to delict and private nuisance is concerned, Article 1149 (2) of the Civil Code provided damages recoverable for a private nuisance as reflected in the facts of the present case. That Article 1149 (2) provides for material damages which the Respondent did not plead and prove. Therefore, the Judge erred in assessing damages which were neither pleaded nor proved.

126. In conclusion, the 2nd Appellant's counsel prayed that:

- (a) the Judgment and award dated the 30th January 2019 is set aside and reversed in its entirety.
- (b) The 2nd Appellant (SCAA) be exonerated from any liability;
- (c) Any decision that may meet the justice of this case;
- (d) Costs for this appeal and those in the lower court be granted.

127. I now return to the submissions of SENPA regarding quantum of damages wherein SENPA's counsel argued that the trial Judge was not clear as to how he arrived at the award and that there was no supporting evidence to back it.

128. In reply, counsel for KANAKAN maintained that damages were proved. Counsel in fact reiterated his submissions presented in ground 4 of SENPA's appeal to the effect that the Plaintiff proved their loss to the requisite standard.

129. It is trite law that an appellate Court may not interfere with a trial Judge's award of damages unless it is satisfied that in awarding the quantum, the Judge acted on wrong principles of law or that the amount is too high or too low as to make an entirely erroneous estimate of the damage to which the Plaintiff was entitled. [See: **Seychelles Breweries v Sabadin**<sup>11</sup>; **Confait & anor v Port-Louise and anor**<sup>12</sup>].

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<sup>11</sup> SCA 21/2004, LC 278.

<sup>12</sup> SCA 66 OF 2018 [2021] SCCA 39 (13 August 2021).

130. Damages are compensatory in nature and **Article 1149** of the **Civil Code** provides that in the case of delicts, the award of damages may take the form of a lump sum or a periodic payment.

131. In making the award, the trial Judge stated as follows:

*"It is indeed necessary that in order to recover from the Defendants the loss that they have been put to by the defendants, the plaintiff must establish that through evidence. The Plaintiff has to prove the loss that they have suffered and the quantum thereof. The burden of proof on the plaintiff. In considering whether the plaintiffs have discharged the required burden according to law, I remind myself of the words of Lord Goddard CJ in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177 that plaintiffs must understand that when they bring actions of damages it is for them to prove their damage, it is not enough to write down the particulars and so to speak, throw them at the head of the court, this is what I lost; I ask you to give me the damages. They have to prove it."*

132. Having cited the persuasive ratio by Lord Goddard, the trial Judge then held:

*"I find that in the present circumstance there was no requirement to prove the cost price of such items. These items were in a shop and the plaintiff only had to prove what the sale price would have been; that is, they claim the cost price as well as the sale price which includes a profit. The plaintiff produced a list of prices they had prepared (exhibit P6). There was no objection to that list being admitted as an exhibit. At the end of the day, what is pertinent is the sale price, not the cost price. Some of the items even had price tags on them.*

*The Defendants have argued that the Plaintiff did not provide the cost price of the items and that their claims should be restricted to that cost only and not the profits. I disagree this argument. In fact, Article 1145.1 of the Civil Code provides that "the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter ... It is therefore clear that the price would in effect be the sale price rather than the cast price."*

133. I do not find fault with the above reasoning of the trial Judge. He clearly explained the loss suffered by KANKAN and the evidence of the price list marked exhibit P6 which was adduced to prove the loss. In **Seychelles Breweries v Sabadin (supra)**, this Court emphasized that in determining the quantum of damages, the court must consider the evidence. In the present matter, the trial Judge duly considered the evidence of the price list as seen in the excerpt of his decision reproduced above. He did not arbitrarily exercise his discretion by awarding a speculative figure.

134. Therefore, Ground 5 fails.

### **Consideration of KANKAN's Cross-Appeal**

#### **Grounds 1 and 2**

135. Counsel for KANKAN submitted that ground 1 of the appeal has two aspects, namely that:

- (a) the doctrine of mitigation is not applicable in the Seychelles Civil Jurisdiction; and
- (b) if this court is not in agreement with the first aspect, the Defendants (present Appellants) did not plead the issue of mitigation.

136. As an alternative ground, Counsel in Ground 2 faulted the learned trial judge for coming to an erroneous conclusion that it had failed to mitigate its loss by selling the damaged items at a less price yet the evidence on record showed the impossibility of taking this course of action.

137. Counsel referred to the testimony of Mrs. Savy, a director of KANKAN Limited, where she explained that KANKAN is a high-end brand, selling luxury items and jewelry which are exclusively designed. It was for this reason that KANKAN did not sell the damaged items at a reduced price, as this would cause an adverse effect on her brand. Counsel argued that this would in effect aggravate the loss instead of mitigation.

138. In reply to the cross-appeal, both SENPA and SCAA's Counsel maintained that the Respondent had a duty to mitigate its loss more so because some of the items adduced as

exhibits had negligible damage or no damage at all. That the items which had negligible damage could be sold at a lower price.

139. I have carefully considered the arguments of the parties and the supporting authorities provided by counsel regarding grounds 1 and 2 of the cross-appeal. I note that the Cross-Appellant faulted the learned Trial Judge on three (3) aspects to wit:

- (i) that the failure of the plaintiff to mitigate loss was not pleaded by any of the parties;
- (ii) the principle of mitigation of loss is not applicable to French civil law (and consequently not part of the law in Seychelles) and
- (iii) mitigation of loss was impossible in the circumstances of the present case.

140. I will start with the first aspect which is in essence a preliminary point of law and has the potential to resolve the other two aspects. It was the argument of KANKAN's counsel that none of the Appellants had pleaded any material particulars to the effect that KANKAN had failed to mitigate its loss and therefore the learned trial Judge erred in making a finding that the Respondent had an obligation to mitigate its loss.

141. In support of the above line of argument, Counsel relied on **Section 75 of the Code of Procedure** which sets down the contents of a Statement of Defence as follows:

*The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.*

142. It was the argument of Counsel that failure on the part of the plaintiff to take reasonable steps to mitigate their loss is a material fact which must be pleaded by the defendant.

143. I have carefully read the pleadings of each defendant at the lower court and indeed none of them pleaded the issue of mitigation. Nevertheless, in his judgment, the Trial Judge stated that "*the Defendants argued that the Plaintiff should have mitigated their loss.*" He

then continued to say that “*I am of the view that the Plaintiff could have mitigated its loss and sold the damaged items at reduced price.*”

144. In this, the Trial judge erred for it is trite that Civil Justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. (See: **Elfrida Vel vs. Selwyn Knowles**<sup>13</sup>) And yet it is this that the Judge did: he based his decision on arguments in support of what was not pleaded.

145. I now move on to discuss the second aspect of the Appellant’s ground of appeal related to mitigation of damages to wit: the principle of mitigation of loss is not applicable to French civil law (and consequently not part of the law in Seychelles). Counsel supported his submissions with French Case Law as well as with Jurisprudence from Seychelles as will be seen below.

146. It is however prudent to begin with a re-statement of the principal statutory provisions which deals with *faute* in Seychelles to wit **Article 1382 and 1383** of the **Civil Code**. **Article 1382** *inter alia* provides that:

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.*

**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.*

147. In **Cour de Cassation, Chambre Civile 2, du 19 Juin 2003, 00-22-302** the French Cassation Court quashed a judgment of the Court of Appeal of Amien. In that case the Appellant - Mrs. X - was the victim of a road traffic accident. She claimed damages,

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<sup>13</sup> Civil Appeal No.41 & 44 of 1988.

including damages for loss of business caused as a result of not being able to continue a prosperous business.

The Court of Appeal of Amien rejected the claim of Mrs. X in respect of damage for loss of her business, on the basis that she could have caused the business, to be managed by a third party, whilst she unable to do so herself. The Court of Cassation quashed the judgment of the Court of Appeal on the principle of Article 1382 of the Civil Code and on the basis that the author of an accident must repair all the harmful consequences caused by his/her negligence and that the victim is not required to limit his/her damage in the interest of the person responsible. (My emphasis)

148. The same principle was applied by the Cassation Court of France in "**Cour de Cassation, Civile, Chambre Commerciale, 23 Septembre 2020, 15-18.898**". In that case, a company was the owner of a passenger boat. The boat was equipped with two engines and the Company replaced the injectors of the two engines with new ones. Consequently, the engines malfunctioned and could not be repaired. Since the Company was in liquidation, the Court of Appeal had ordered the Defendants to pay damage to the Liquidator in the sum of Euro 1,227,119.74 but dismissed the remainder of the claim of plaintiffs on the basis that the Plaintiff's Company should have undertaken the repairs of the engines as quickly as possible, i.e. in the shortest possible time. The Cassation Court quashed the part of the judgment dismissing part of the Plaintiff's claim on the basis of Articles 1641 and 1645 of the Civil Code and also on the principle known as "le principe de reparation intégrade du prejudice" (which is the principle of full compensation of damage caused).

149. After an expose of French Jurisprudence, Counsel relied on the authority of **Nanon vs Health Services Agency**<sup>14</sup> where this Court observed that:

*"The test of negligence applied by the Supreme Court of Seychelles in a series of cases in which it has relied on the Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 is an aberration and must cease. Bolam is an English tort law case. Seychelles'*

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<sup>14</sup> [2015] SLR 443, [2015] SCCA 47.

civil law is based on the French law and it is the law of delict that applies in negligence cases, ... (see Omath v Charles (2008) SLR 269).” (Emphasis mine)

150. The Court concluded that where an action is brought under the principle of “faute” in accordance with Articles 1382 and 1383 of the Civil Code of Seychelles, it would be an error to applying English law and principles to determine the outcome of the case.

151. Counsel also cited the authority of **Octobre vs Government of Seychelles**<sup>15</sup> where the Supreme Court held *inter alia* that:

*“ ... Since Seychellois civil law is based on French law, it is the law of delict that applies to negligence cases, (see Omath v Charles (2008) SLR 269). Cases such as Laurette v Government of Seychelles [2016] SCSC 560 are therefore decided per incuriam. As reiterated in Nanon & Anor v Ministry of Health Services & Ors (2015) SLR 443, the use of English medical negligence cases such as Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 by the Courts to found medical liability cases is an aberration and must be disregarded.” (My emphasis)*

152. Further still, Counsel cited **Section 5 (2) of the Seychelles Civil Code Act, 1976** which provides that:

**Nothing in this Act shall invalidate any principle of jurisdiction of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles.**

153. I am convinced by the argument of Counsel. And my conviction is made stronger by **Article 1383 (3)** which specifically excludes defamation thus: “*The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English law*”.

154. It follows that, had the Legislature intended that English principles apply to *faute* of any other nature, it would have legislated so.

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<sup>15</sup> [2016] SLR 599.



155. Having made a finding that the law of Seychelles does not place a duty on a victim of *faute* to mitigate their loss, it follows that the Trial Judge erred in his finding that the plaintiff could have mitigated their loss by selling the damaged items at a reduced price.

**156. Arising from the above analysis Ground 1 and 2 of the Cross Appeal succeed.**

157. Consequent from our discussion in regard to the issue of mitigation, the trial judge erred in reducing the damages claimed by factoring in the duty to mitigate loss.

158. But before arriving at a decision of this Court as to what should be awarded to Kankan, we must first interrogate the other factors which were considered by the Trial Judge before he arrived at the impugned figure. It is not only the “obligation to mitigate loss” that guided him in arriving at the impugned award. As will be seen under Ground 4, the Judge also stated that he had reservations as to whether all the jewelry adduced was on display. This takes us to Ground 4 of the Cross-Appeal.

#### **Ground 4**

159. Under Ground 4, Counsel faulted the learned trial Judge for holding that not all the items produced in court as exhibits were actually displayed in the shop because the said items exceeded what the shop could actually accommodate. He argued that in this, the Judge erred in law and the evidence.

160. The trial Judge stated as quoted below:

*“I have serious reservations whether all the items produced in court were actually displayed in the shop (on the day that dust entered the premises). At the locus I observed at the most 10 display stands for hats. What has been produced in court exceeds what the shop can accommodate. The pieces of garments produced as exhibits exceeded the capacity of the railing used for displaying such items. ... I also find that a large number of bags were produced, yet there wasn’t sufficient place to hold such large number of bags in the shop.... Again I have reservations as to whether all the jewelry produced was*

*on display. ...I shall give serious considerations to the above when calculating quantum to be awarded.*” (Emphasis of Court).

161. Counsel for KANKAN argued that the above finding was not supported by any evidence. That although the judge visited the locus, there was no evidence adduced to establish that not all the items produced in court were on display in the shop on 4 June 2016. Counsel submitted that Mrs. Savy was never cross-examined about that “fact” - whether all the items produced in court were on display. When Mrs. Savy testified before the court she mentioned that items in Exhibit P5 and P6, were on display in the shop on 4 June 2016. Counsel argued that it is trite law that a party's failure to cross-examine a witness on a particular issue amounts to a tacit acceptance of the witness's evidence-in-chief. In advancing this argument, counsel relied on the text by Adrian Keane on The Modern Law of Evidence, 4th edition, pages 153-154, where it is stated that:

162. *“[A] party who has failed to cross- examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence in chief or impeach his credit by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness's evidence on that matter. A cross- examiner who wishes to suggest to the jury that the witness is not speaking the truth on a particular matter must lay a proper foundation by putting that matter to the witness so that he has an opportunity of giving any explanation which is open to him.”*

163. On the basis of the above text, Counsel submitted that the learned trial judge erred in coming to the finding that not all the items produced in court were on display in the shop.

164. Furthermore, counsel submitted that since the Appellants did not plead or raise an issue regarding excess items produced as exhibits, the trial Judge's impugned finding amounted to formulating a case for the Appellants which made him descend into the arena. That in **Elfrida Vel vs Selwyn Knowles**<sup>16</sup>, this Court stated that:

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<sup>16</sup> Civil Appeal No 41 and 44 of 1998.

*"... civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. Counsel submitted that although the Judge was in the quest of finding an equitable solution, it was not open to him to adjudicate on issues which had not been raised in the pleadings."*

165. In conclusion, counsel reiterated the prayers that the trial Judge's decision be reversed by awarding the full amount of the damages claimed.

166. In reply, counsel for SENPA objected to the above submission and stated that Mrs. Savy's evidence in respect of the items exhibited in Court was challenged. Counsel referred to page 239 of the Record of Proceedings detailing the cross-examination of Mrs. Savy. Counsel maintained that during the cross-examination, Mrs. Savy was tasked to explain the contents of photograph P3 taken on the day the tort occurred. Counsel intimated/argued that because the photograph referred to showed an empty display window, there was no item displayed on the day the *faute* occurred and it would thus follow that there was no evidence to back up the claim for damaged goods. I however note that when tasked to explain the contents of photograph P3, Mrs. Savy stated that at the time the photo was taken, the items had been removed from the display window to show the amount of dust that there was. It was for this reason that no items were captured in the photograph.

167. I am of the view that in respect of the above contentions, the record of proceedings has to be read as a whole. The record bears other photos apart from Photo P3 which were adduced in evidence backing KANKAN's claim that its merchandise was damaged by dust from the renovation works. Therefore, singling out one photo showing an empty display window is not sufficient to persuade Court to believe the Appellants' arguments that KANKAN did not adduce evidence to back its claim. And the explanation given by the witness under cross examination is plausible. It is also clear from the record that at no time did Counsel for SENPA follow up that "exchange" by putting it to the witness that as a matter of fact, not all the merchandise she had brought into court as exhibits had been in the shop on the day of the alleged *faute*.

168. Therefore, the trial Judge erred in stating that he had *serious reservations whether all the items produced in Court were actually displayed in the shop* and as a result reduced KANKAN's claim for damages.

**169. Ground 4 succeeds.**

170. In light of my findings under Grounds 1 and 4, it is clear that in arriving at the award, the trial Judge factored in what he wrongly perceived as a duty to mitigate loss (an error of law) as well as "his reservation that not all items produced in court were actually displayed in the shop." It necessarily follows that these are the factors which led him to reducing the award from what was claimed by the Plaintiff as representing the cost of the damaged items.

171. He therefore should have awarded KANKAN the full amount of the damages which were pleaded and proved.

**Ground 3**

172. Under ground 3, counsel for KANAKAN faulted the learned trial judge for declining to award KANKAN damages arising from loss of business earnings for the ten days that KANKAN's shop remained closed.

173. Counsel submitted that the Judge ought to have awarded damages for loss of earnings for the ten days that the Respondent's shop remained closed since he declined to award the total damages for damage caused to the goods.

174. I note that in declining to award KANKAN loss of business earnings for the ten (10) days, the trial Judge reasoned as follows:

*"I find that the claim for loss of earning for the 10 days that the shop remained closed as not maintainable. This is because the Plaintiff is already claiming for loss on the cost of items which as stated include the actual cost of the items which as stated include the*

*actual cost of the items including the loss of profit on these items. To make a claim for closure of business for those 10 days will in effect be making a second claim. However, the loss was also not proved.”*

### **The law on loss of business earnings**

175. According to the **Cambridge Business English Dictionary**, loss of business earnings refers to a situation in which a person or company makes less money than expected as a result of an unexpected event.

176. **Article 1382 of the Civil Code** entitles a party who suffers damage to receive compensation for all prejudice suffered.<sup>17</sup>

177. Furthermore, **Article 1145 of the Civil Code** provides that, the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived.

178. Damages are the direct probable consequences of the act or omission complained of. Such consequences among other things include loss of business earnings comprising of loss of profits.

179. By taking into account the loss of profits, the goal of full compensation and putting the wronged party back in the financial situation or position in which it was had the unlawful act not occurred is achieved.

180. Since the remedy of loss of business earnings/profits by its very nature involves a prospective aspect, the Court has to carry out a balancing act in making such an award so that the victim is compensated for the loss but at the same time makes no profit.<sup>18</sup>

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<sup>17</sup> Seychelles Breweries v Sabadin SCA 21/2004, LC 278.

<sup>18</sup> Jacques v Property Management Corporation (2011) SLR 7.

181. In the persuasive Ugandan Supreme Court decision of **Robert Coussens v Attorney General**<sup>19</sup>, it was held at page 6 that where future loss cannot assuredly be proved, the court has to make a broad estimate taking into account all the proved facts and the probabilities of the particular case.

182. Furthermore, in safeguarding the victim from making a benefit out of the wrong suffered, the Court is guided by the following conditions:

- (i) There must be a reasonable degree of certainty that profits would have been earned but for the occurrence of the unlawful act. The criteria used to ascertain this condition includes considering the track record of business profits earned over a certain period prior to the occurrence of the act.
- (ii) There must be a causal link between the loss and the tortious action. If there is any intervening act which destroys the causal link, then the remedy fails.
- (iii) the estimated amount must be reasonably probable.

183. The evidence on record shows that KANKAN in its amended plaint prayed for loss of business earnings for ten days at a sum of SR 93,142.00. During cross-examination, at page 88 of the Record of Proceedings, Mrs. Savy – the director of KANKAN – was tasked to explain how the said sum was arrived at. She stated that she counted the number of days starting from 1<sup>st</sup> January prior to closure of the shop until 9<sup>th</sup> January when it was re-opened and the sales which could be made per day. That she then divided the sales by the number of days to get the average daily sales. During cross-examination, Counsel for SENPA put it to Mrs. Savy that the sum of SR 93,142.00 she quoted as daily revenue made by KANKAN was not correct.

184. I note that apart from the testimony given by Mrs. Savy, no other evidence or business records were adduced to support the testimony. It is for this reason that the Appellants objected to the prayer for loss of business earnings on the premise that it was not proved. The trial Judge declined to grant the prayer for loss of business earnings on the premise that it would amount to a double recovery. However, as stated above, once damage is

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<sup>19</sup> SCCA No. 8 Of 1999.

caused, the victim is entitled to full compensation including the loss of profit. Thus, the fact that the trial Judge awarded KANKAN for the damaged items did not bar the court from going ahead to assess and making an award for loss of business earnings. The claim for damaged goods and loss of business earnings are independent claims.

185. Be that as it may, without documentary evidence of books of transaction showing how much profit KANKAN made over a period time prior to the unlawful act, it is difficult to ascertain what KANKAN could have lost as business earnings. Mrs. Savy who testified on behalf of KANKAN as its director was in position of tracking the performance of the Company but she did not assist court in arriving at a correct estimate by failing to produce any records. I hold therefore, that KANAKAN failed to discharge its burden and did not prove its claim for lost business earnings.

186. I also take note that Counsel for Kankan submitted that *“the Judge ought to have awarded damages for loss of earnings for the ten days that the Respondent’s shop remained closed since he declined to award the total damages for damage caused to the goods.”* The Court has now awarded the Cross Appellant full damages (for damaged goods) in the sum of SR 968,490.00 based on the fact that the Trial Judge applied wrong principles in arriving at the impugned figure.

**187. Following the above analysis, I hold that ground 3 of the Cross-Appeal fails.**

188. On the whole, save for failure of ground 3, I hold that the Cross-Appeal succeeds on the other grounds.

## **CONCLUSION AND ORDERS**

189. In conclusion, I hold as follows:

- (i) The appeal of the 1<sup>st</sup> Appellant, the Small Enterprise Promotion Agency fails.
- (ii) The appeal of the 2<sup>nd</sup> Appellant, the Seychelles Civil Aviation Authority fails
- (iii) The Cross-Appeal by KANKAN Limited succeeds on Grounds 1, 2 and 4. It fails on Ground 3.

**ORDERS**

190. KANKAN is awarded the full claim of damages in the sum of SR 968,490.00.

191. As ordered by the Trial Court, Small Enterprise Promotion Agency, Seychelles Civil Aviation Authority and Heritage (Pty) Limited are jointly and severally liable to pay the above sum with interest at the court rate.

192. Costs of the appeal as well as the Cross-Appeal are awarded to the Respondent-KANKAN Limited.



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Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

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Dr. Twomey-Woods, JA.

I concur

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Andre, JA.

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