

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 10
(26 April 2023)
SCA 11/2021 and SCA
14/2021
(Arising in CS 73/2018)
SCSC 106

LAND MARINE LTD

(rep. by Basil Hoareau)

Appellant

and

ANTOINE EMMANUEL MADELEINE

(rep. by Ferley Etienne)

Respondent

And

ANTOINE EMMANUEL MADELEINE

(rep. by Ferley Etienne)

Cross-Appellant

and

LAND MARINE LTD

(rep. by Basil Hoareau)

Cross-Respondent

Neutral Citation *Land Marine Ltd v Madeleine* (SCA 11/21 & 14/21 [2023] SCCA 10
(26 April 2023)
(Arising in CS 73 /2018) [2020] SCSC 106

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikunbinza, JJA

Summary: Pleadings- sufficiency - delict – vicarious and personal - elements to be
proven

Heard: 14 April 2023

Delivered: 26 April 2023

ORDER

The appeal is allowed with costs. The cross-appeal is dismissed.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Robinson and Tibatemwa-Ekirikunbinza JJA concurring)

Background

- [1] The appellant, Antoine Madeleine, brought a claim in delict in the court *a quo* against Land Marine Limited, a company engaged in the importation, clearing and handling of goods and products. It was Mr. Madeleine's case that on 29 January 2016, he was treated as a suspect for the importation of drugs when he was arrested and brought by the National Drugs Enforcement Agency (NDEA) in their vehicle to warehouses at the New Port, Victoria and asked to identify pallets he had imported stored by his agent, Land Marine Ltd. Mr. Madeleine alleged that Land Marine Ltd had, among other things, "failed to clearly and concisely inform the NDEA of the particulars, number and description of [his] two pallets," as a result of which he had suffered arrest and detention, which caused him moral damages in the sum of SR1,000,000.
- [2] The learned trial judge acquiesced to Mr. Madeleine's claim and granted him damages in the sum of SR100,000.
- [3] From this decision, Land Marine Limited has appealed on four grounds, namely:
1. *The learned trial judge erred in law and on the evidence in relying on hearsay evidence in coming to the decision that the appellant had committed a faute in law.*
 2. *The learned trial judge erred in law and on the evidence in holding that the appellant had committed a faute in law, as the decision cannot be supported by the evidence.*
 3. *The learned trial judge erred on the evidence in holding that officers of the National Drugs Enforcement Agency (NDEA) had access to the tally sheet prepared by an employee of the appellant.*
 4. *The learned trial judge erred in law and on the evidence in awarding damages in the sum of SR 100,000 to the Respondent, as the amount of damages is extremely high.*
- [4] Mr. Madeleine has raised four grounds in his cross-appeal as follows:
1. *The Honourable Judge ought to have awarded the Respondent an appropriate amount of moral damage and Rs 100,000 is too low.*

2. *The Honourable Judge ought to have awarded compensatory damages.*
3. *The Honourable Judge ought to have awarded the Respondent the sum of Rs 1,000,000 a sum fair, reasonable and reflecting :*
 - a. *Damage to his reputation as a businessman upon his arrest and detention*
 - b. *Moral damages, including distress, humiliation, anguish and detention*
 - c. *Interest.*

The appeal

[5] At the hearing of the appeal, the Court was informed that ground 1 of Land Marine Limited's appeal was being abandoned. We have considered the remaining grounds raised by both parties in their appeal and cross-appeal, the Skelton Heads of Argument filed, and Counsel's oral submissions.

[6] The principal issue to be addressed is whether the learned trial judge had a proper basis for making the finding that “[*Land Marine Limited*], through its agents and or *préposés*, had committed an error of conduct which would not have been committed by a prudent person in the special circumstances and that this error amounted to a *faute in law* and has to be the subject matter of reparation by way of damages on the part of [*Land Marine Limited*].”

Submissions by Counsel

[7] As far as we can make out, it is Mr. Madeleine's case that the cause for his arrest and detention was the fact that a tally sheet prepared by Land Marine Limited seen by the NDEA had occasioned two pallets of goods belonging to him to be stored next to four other pallets containing drugs making him a suspect in their importation.

[8] Counsel for Land Marine Ltd., Mr. Hoareau, has submitted that Mr. Madeleine has not pleaded the material facts relating to the *faute* (fault) on the part of Land Marine Limited or its employees to sustain his action. He has also submitted that the particulars of the *faute*, are so brief and vague as not to state how and in which manner the company failed in its duties to cause harm and damage to Mr. Madeleine. He

submits that Mr. Madeleine merely averred that Land Marine Limited is vicariously liable without particularising the acts of employees or *préposés* acting within the scope of their employment which caused the harm and damage to him. In this respect, Mr. Hoareau contends that none of the witnesses could establish fault on Land Marine Limited's or its employees' behalf.

[9] Mr. Hoareau submits, therefore, that the finding by the learned trial judge that it was the NDEA's reliance on the information in the tally sheet indicating the ownership of the pallets that led them to the arrest and detention of Mr. Madeleine is fallacious as there is no evidence to support this. The NDEA was not called, and there is no evidence adduced to show whether they saw the tally sheet, whether there were pallets next to Mr. Madeleine containing drugs and whether the reason why Mr. Madeleine was brought to the New Port was as a result of information or misinformation given by Land Marine Limited. In the circumstances, he submitted, this Court sitting on appeal is empowered to discard the findings of fact by the trial court as the evidence does not support these. In this respect, Mr. Hoareau relies on settled authorities, namely *Searles v Pothin* (SCA 7 of 2014) [2017] SCCA 14 (21 April 2017), *Akbar v R* (SCA 5 of 1998) [1998] SCCA 37 (03 December 1998), *Beeharry v R* (SCA 28 of 2009) [2012] SCCA 1 (13 April 2012) and *Camille v Morin* (SCA 12 of 2016) [2018] SCCA 26 (30 August 2018).

[10] In response to these submissions, Mr. Ferley, Counsel for Mr. Madeleine, has submitted that the learned trial judge was correct in his findings since the pallets of goods by Land Marine "were tallied by [its] clerk and they were physically stored by [its] agents in such a way so as to give the impression that the pallets which were lying side by side in the warehouse consisted of one consignment." He submits that the evidence of Mr. Madeleine, as corroborated by his daughter is to the effect that the pallets were received by Land Marine and placed them in the container in the warehouse. They were responsible for sorting and identifying them. It is his submission that the witnesses for Land Marine Limited, namely Gustave Victor and Mary Lajoie, admitted that there was an error on the tally sheet which caused Mr. Madeleine's pallets to be placed next to four suspect pallets. Their failure to properly sort and identify the pallets led to Mr. Madeleine's arrest.

[11] Mr. Ferley further avers that when the employees committed the fault as outlined above, they acted within their scope of employment with Land Marine Limited thus rendering the latter vicariously liable in law.

Discussion

[12] Two matters arise for our determination. The first relates to the pleadings of the case, and the second relates to the findings of facts with regard to fault and causation in delict.

Pleadings

[13] Section 71 of the Seychelles Code of Civil Procedure provides in relevant part that:

“The plaint must contain the following particulars:

...

(d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action... (Emphasis added).

[14] The purpose of this provision has been stated in several cases to be that of putting the other party on fair notice of the case to be met and to define the issues on which the court has to adjudicate (see *Gallante v Hoareau* (1988) SLR 122, *Tirant & Anor v Banane* (1977) SLR 219). A corollary of this principle is that parties may only adduce evidence referred to in their pleadings even when not objected to as it does not have the effect of translating it into the pleadings or the evidence as parties are bound by their pleadings. They must not be allowed to depart from what they have pleaded, nor can the court make a case for the parties in the absence of sufficient pleadings to allow evidence to prove certain matters. (*Vel v Knowles* Civil Appeals 41 and 44 of 1988 (unreported), *Pirame v Peri* SCA 16 of 2005 (unreported), *Confait v Mathurin* (1995) SCAR 203, *Lesperance v Larue* (SCA 15 of 2015) [2017] SCCA 46 (06 December 2017 and *Finesse v Cesar* (SCA 47 of 2019) [2022] SCCA 21 (29 April 2022)). When we apply these principles to the circumstances of this case, we find that liability is not made out. We explain.

[15] With respect to the present case, the Plaintiff is clearly based on the vicarious liability of Land Marine Limited as stated in paragraph 12:

The act and omissions of the defendant's workers and employees, for which the Defendant is vicariously liable in law, constitutes a faute in law for which the Defendant is liable in law to the Plaintiff.

Particulars of Faute

- i. Failing to clearly and concisely inform the NDEA of the particulars, number, and description of the Plaintiff's two pallets.*
- ii. Failing to adequately provide the NDEA accurate information on the Plaintiff's imports.*
- iii. Failing to inform the NDEA as to who imported the other two pallets which were indeed imported by a third party, known to the Defendant.*
- iv. Failing to act to safeguard the interests of the Plaintiff, its client.*
- v. Acting to the detriment of the Plaintiff and causing his arrest and detention.*

[16] We have scrutinised the evidence. We are at a loss to understand what *actes fautives* are attributable to the workers of Land Marine Limited to give rise to vicarious liability. As will become apparent in our deliberations below, although the tally sheet prepared by an employee of Land Marine Limited contained an error in not clearly identifying the ownership of four pallets next to the two belonging to Land Marine Limited, there was no evidence adduced that this is what led to Mr. Madeleine being brought to the warehouse in the evening. Confusingly, Mr. Madeleine, in his evidence, constantly refers to the personal failures of Land Marine Limited and not to its employees.

[17] As pointed out above, Mr. Ferley has indeed submitted that Land Marine Limited's employees acted within their scope of employment with the company, thus rendering the latter vicariously liable in law. Making a statement in the Skeleton Heads or

submitting orally on the issue from the Bar do not, however, amount to evidence of the facts alleged. Such evidence must be pleaded and adduced.

[18] In addition, the court frowns upon the scattergun approach regarding personal and vicarious liability in delictual claims. The claimant must make it clear whether it is claiming under Article 1382 for personal liability or Article 1384 for vicarious liability in the way it sets out its pleadings.

[19] In the case of *Confait v Mathurin* (1995) SCAR 203, the Court of Appeal stated that:

“Where a party claims damages against another for damage caused to him by an act, he must state in his pleading where the damage is caused by the act of the other person himself or by the act of a person for whom he responsible. By Article 1384 of the Civil Code, a person is responsible for the damage which is caused by his own act or by the act of persons for whom he is responsible. The cases in which one person must answer for the acts of another are specified...where a party avers that the liability is based on the act of the other party himself, he should not set up a case at the trial based on liability for the act of a person for whom he is responsible. Where the case of the plaintiff is that the defendant is sued for the act of a person for whom the defendant is responsible, the plaintiff must aver by his pleadings and prove the relationship which gives rise to such liability unless such is admitted.”

[20] Given the obfuscation in Mr. Madeleine’s pleadings on this issue, Land Marine Limited’s ground of appeal in this respect has merit.

Fault and Causation

[21] We find it necessary at this juncture to cite the law of delict with respect to fault and causation:

“Article 1382

1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*

3. *Fault may also consist of an act or omission, the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.”*

[22] The above provisions are to the effect that three elements are necessary to establish a claim in delict: fault, causality and damage. When the first two elements are proven, liability is established.

[23] The evidence adduced by Mr. Madeleine was that on 29th January 2016, at around 6.15 in the evening, a tall man in a black suit whom he presumed worked for the NDEA came to collect him from his home at la Louise and made him embark in their vehicle. He was driven to the warehouse, namely Shed 1, at New Port, where he was asked whether he had *two stocks* and from where he had imported them. He entered the well-lit shed. There were a lot of pallets in the shed, and with his invoice in hand, he identified the two pallets belonging to him. The name of his store was on the pallets next to which were other pallets marked *Strong Export Services*. These were opened and he saw a carton of *tiger seal* being removed. He brought to the officers' attention that his invoice referred to only two pallets clearly marked Madeleine Store imported from U-Pol. He gave them the number for U-Pol, whom he thinks they phoned. He was then brought home.

[24] The learned trial judge does not refer to this evidence in his decision. Nor is there any evidence relating to why Mr. Madeleine assumes that Land Marine Limited is responsible for his being brought down in the NDEA car to the warehouse on the evening of January 29th 2016. The following extract from the transcription of his evidence-in-chief is worth repeating for the purposes of this appeal:

Question...Can you explain to the court why we are blaming Land Marine, when you are actually now saying Land Marine did not have the manifest?

Answer: If they did have the manifest, they [presumably NDEA] would have not come and take me up and that white guy would not have recounted four pallet with me.... (sic)

Mr. Derjacques [then Counsel for Mr. Madeleine]: My difficulty today in the case with this witness is that he does not say what he sees or hears, he speculates.

Court: This is your witness.

...

Question: Your goods came into the country; what do you expect a clearing agent to do vis a vis your goods and you?

Answer: Be responsible to take it to the container or the warehouse, place it in the warehouse.

Question: Who identifies your goods as yours or your company...

Answer: It is the manifest that is received by Mahé Shipping.

Question: Received by whom from Mahé Shipping?

Answer: Land Marine and then the Land Marine gave it to his workers for them to work on it.

...

Question: On that day you are saying that Land Marine did not properly identify your two pallets

Answer: Yes.

Question: ...Paragraph 12 [of the Statement of Defence] says "NDEA requested Land Marine to open the warehouse" ...NDEA did not ask them which pallets were required for inspection and they allege... that NDEA had their own copy of the manifest.

Answer: It was all a lie as they would not have gone to Mahé Shipping for them to ask for whom that pallet belonged to, so they are lying.

...

Question: What should have Land Marine informed the NDEA...

Answer: They should have informed the NDEA to who, the pallet belonged or else I would not have been picked up at my home during the night...(sic) (Emphasis added)

[25] Mr. Madeleine further testified that the manufacturer and shipper of the products he purchased in England was U-Pol Ltd. The export from the United Kingdom was done by Cresta Shipping Agency who had sent him a Bill of Lading, his invoice and the packing list. This manifest was provided to him by DHL. The handling in Seychelles was carried out by his Seychelles agent; that is, Mahé Shipping and Land Marine Limited received his goods and stored it in their warehouse until it was released into his custody.

[26] Mr. Derjacques's remark that his client is speculating is particularly telling. We have scrutinised the evidence adduced in this case but find no evidence that either it was because of the misidentification of the particulars in the manifest or the tally sheet by Land Marine Limited, its employees or *preposés* that led the NDEA to call to Mr. Madeleine and to bring him down to the warehouse. There is absolutely no evidence that the NDEA saw the tally sheet or manifest.

[27] It is trite that a trial court is precluded from deciding a case on mere assumption, conjecture or speculation. In the case of *Aithal v Seychelles Breweries Ltd* (CS 52 of 2004) [2006] SCSC 26 (29 September 2006), Perera J makes reference to the Mauritian case of *Bhuddo v Hurry* (1958) M.R. 113, in which a lorry carrying a load of sugar canes overturned as it went over a rut on the road, and a labourer seated on top of the canes was killed. The Court, dismissing the claim, stated "we are asked to say that the mere fact of the lorry going into the rut and overtaking amounts to imprudent or negligent driving. We cannot do so". The Court further stated that in French Law, the precise nature of the "faute" must be proved and the burden of proving it lies on the plaintiff. Mere conjectures and presumptions are not sufficient.

[28] It would appear, therefore, that the learned trial judge is plainly wrong in his assessment of the evidence and in his ultimate finding that:

"[24]...The Plaintiff's pallets were tallied by clerk of the Defendant and they were physically stored by agents of the Defendant in such a way so as to give the impression that all the pallets which were lying side by side in the warehouse consisted of one consignment. The Tally Sheet was then placed on a table by the tally clerk for her supervisor's consideration. The NDEA who had access to the pallets and the Tally Sheet subsequently, in their zeal to

arrest a suspect for the unlawful importation of a controlled drug, came to the conclusion on these facts that there were grounds to suspect the Plaintiff of the offence of importation of a controlled drug. It was only after the arrest of the Plaintiff and further inquiries following that they discovered that the arrest took place on the wrong assumption that the pallets were that of the Plaintiff, after which they released him without charge. By then, the damage was done.

[25] Accordingly, I find that the Defendant, through its agents and or préposés, had committed an error of conduct which would not have been committed by a prudent person in the special circumstances and that this error amounted to a faute in law has to be the subject matter of reparation by way of damages on the part of the Defendant.”

[29] For the reasons we have outlined above, we are unable to agree with the trial judge’s finding that a claim for delict was made out against Land Marine Limited either personally or vicariously. We do not find that Mr. Madeleine discharged the legal burden on a balance of probabilities to show that the acts of Land Marine Limited were *fautive*, causing him damage.

[30] Given our finding on liability, the issue of the quantum of damages as raised by both parties does not, therefore, come up for determination. In the circumstances, we find that the appeal by Land Marine Limited has merit and is allowed.

Orders

[31] In the result, we make the following orders:

1. The cross-appeal is dismissed.
2. The appeal is granted with costs.

Signed, dated and delivered at Ile du Port on 26 April 2023.

Dr. M. Twomey-Woods, JA.

I concur

F. Robinson, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA