COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 13 (26 April 2023)
SCA 18/2021
(Arising in CS 94/2018) SCSC 245

In the matter between

Machinery and Equipment Limited **Appellant**
(rep. by Mr. Bernard Georges)

and

Cousine Island Company Ltd. **Respondent**
(rep. by Mr Basil Hoareau)

Neutral Citation: *Machinery and Equipment Limited v Cousine Island Co. Ltd* (SCA 18/2021) [2023] SCCA 13 (Arising in CS 94/2018) SCSC 245 (26 April 2023)

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

Summary: **1. Election of claims - interpretation of Article 1370 (3) of the Civil Code-** The provision does not bar simultaneous claims under breach of contract and delict, it bars consecutive claims or actions which give the Plaintiff opportunity to simultaneously enjoy remedies accruing from both contract and delict.

The principle of *non cumul de responsabilite* is no longer part of the Law of Seychelles

The law in Seychelles is to the effect that claims in both delict and contract can be pursued in the same plaint as long as one of them is pleaded in the alternative.

2. Vicarious Liability – Bringing a claim in delict based on the principle of vicarious liability does not bring the suit under the operations of the relegated doctrine of *non cumul de responsabilite.*

Heard: 13 April 2023

Delivered: 26 April 2023

ORDER

(i) The appeal is dismissed.

(ii) Costs awarded to the Respondent.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA. (Dr. M.Twomey-Woods JA, S. Andre JA concurring)

The Facts

1. This is an appeal from the decision and orders of the Supreme Court (Vidot J) in which he found in favour of the Respondent company in view of the Appellant's failure to properly install a Daikin Air Conditioning system at its premises.

2. The background facts as accepted by the lower court are that on 22nd December 2014, Cousine Island (Respondent company) entered into a contract with the Appellant company for supply, installation, commission, issue of a warranty and delivery of a Daikin air-conditioner. The contract price from purchase up to installation of the equipment was for a total sum of US$171,137.00.

3. It is common cause that at the time of entering into the agreement, the Appellant presented itself as a licensed, qualified and experienced mechanical, electrical and air-conditioning operator.

4. After the installation, on 4 December 2015, the Appellant issued the Respondent with a warranty certificate.

5. It was alleged by the Respondent that after the air-conditioning system was installed, it was discovered that it was not functioning properly. It broke down and required repair.

6. In May 2016 the Respondent formally informed the Appellant of the malfunction in the equipment and asked that necessary repairs or replacement of the system be carried out.

7. The Appellant requested for an additional fee to make the repairs which the Respondent was not inclined to make. The repairs were therefore made by a different company known as Cooling Plus Seychelles.

8. The Respondent company alleged that the malfunction/damage was caused by "the *faute* and negligence of the Appellant's workmen or employees, agents, servants, preposes whilst in the course of their duties and employment." That as a result of the malfunction, the Daikin system was badly damaged by corrosion, leakages and improper cooling. As a result, expensive furniture, paintings and highly priced items contained in the respondent's villa were at risk of being damaged.

9. That the Plaintiff/Respondent company commissioned a report from Daikin representatives in South Africa to determine the cause of the damage and the report confirmed that the Defendant/Appellant had been negligent and at faute in the preparation, installation, fitting and commissioning of the Daikan System.

10. Subsequently, the Respondent company sued the Appellant in the Supreme Court for orders that the money it spent on rectifying the faults be reimbursed. The Respondent company claimed a sum of US$81,030.74 and SR 480,000.00 as well as interest and costs of the suit.

11. I have to the extent necessary reproduced *verbatim* what was contained in the Plaint as will be seen below.

12. In its paragraph 8 of the plaint, it was averred that: "the defendant was, in their preparation, installation, fittings and commissioning of the system, liable for the losses, damages, expenses and costs sustained in that the Defendant was vicariously liable for the fault and negligence of its servants, employees, agents, prepossess whilst in the course of carrying out their duties under the employment of the defendant and is liable to the Plaintiff for all the losses, damage, expenses and cost sustained."

13. Again, under the heading "*Particulars of Negligence and Faute*", I have reproduced verbatim what I consider necessary for the resolution of the appeal. The plaint opens with the sentence: "The Defendant's employees, servants, agents, preposes whilst in the course of the duties and employment with the defendant, failed …" It then lists various "fautes/failures" by the defendant from (a) to (f), and (h) to (l). It is only in paragraph (g) that the plaint seems to specifically speak about the defendant as opposed to it workers etc. The paragraph reads as follows: "given that the Defendant represented itself as an experienced air conditioning operator and expert, knew or should have known that in order for it to issue a warranty to the Plaintiff, commissioning should have been forwarded to Daikin technicians and or carried out by approved Daikin personnel".

14. The Appellant denied the respondent's claims and in its statement of defence maintained that it had properly installed the air conditioner. Apart from the averments of fact made by the Plaintiff which the defendant admitted, the defendant entered denials in regard to all the averments of the plaintiff which blame on it.

15. The defendant however did not, in its defence, challenge the averments which linked the defendant to the people who performed the installations.

16. The Appellant also raised a *plea limine* to the effect that the plaint revealed no cause of action because of having pleaded both vicarious liability and primary liability.

17. In dismissing the *plea limine*, the Supreme Court judge held that although the plaint revealed an action both under contract and delict, that did not cause any confusion in the mind of Court. This is because although there was a contract between the parties, the cause of action being pursued was *faute* under delict. That the Respondent had elaborately listed the particulars of negligence and faute in the plaint. Therefore, the fact that there was an agreement did not necessarily restrict the cause of action to contract.

18. Regarding the merits of the case, the Supreme Court Judge found in favour of the Respondent. He held that according to **Article 1383-1** of the **Code**, a person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence. That as a professional, the Appellant had to exercise such trade with the skills that the trade dictates. The Judge found that the work performed by the Appellant was not fully to the standard required.

19. Dissatisfied with the trial Judge's decision, the Appellant appealed to this Court. Although the Notice of Appeal contained 5 grounds, the Appellant informed court that only grounds 1 and 2 would be argued. The rest of the grounds were abandoned. The grounds on which the appeal was argued were:

1.The findings of the learned judge that the Respondent did not have to elect whether its suit was in contract or tort is wrong in law.

2.The learned judge erred in finding that a case had been made out by the Respondent when it is clear the pleadings disclosed both direct and vicarious liability as against the Appellant.

Reliefs sought:

i. An order setting aside the judgment of the Supreme Court, allowing the appeal.

ii. an order that the matter be set down before the Supreme Court so it can be heard afresh.

Ground 1.

The findings of the learned judge that the Respondent did not have to elect whether its suit was in contract or tort is wrong in law.

Appellant’s submissions

20. Counsel for the Appellant based his arguments on Article 1370 (3) (a) of the Civil Code of Seychelles Act which provides that: A person who has a cause of action founded either in contract or in delict may elect which cause of action to pursue.

21. He conceded that the said provision, as this Court has found in the case of **Godfra Hermitte v The AG and Ernest Quatre, the Commissioner of Police,**[1] did away with the French doctrine of *non-cumul de la responsabilités contractuelle et délictuelle.* That therefore, when a contractual relationship exists between parties but the facts give rise to possible claims in either delict and contract, a plaintiff can elect to bring a claim in delict. It was also conceded that as held in **MulitiChoice Africa Limited vs Intelvision Network Limited and Another**[2] **-** the law allows a claim to be brought in the alternative. A plaintiff can bring a claim in delict and in the alternative, claim in contract, as the Respondent in this case had done.

22. Counsel however argued that the position as enunciated above does not mean that the principle of *non-cumul* was entirely done away with – that the principle partly still exists within Seychelles jurisdiction. In counsel's view, by suing the Appellant in vicarious liability as opposed to direct liability, the Respondent's claim is not covered by Article 1370. (3) (a). That the two claims cease to have the same foundation. That whereas contract calls for direct responsibility - the defendant being directly liable for having breached a contract – under vicarious liability, the defendant's liability is based on the actions of other people. So you have one claim which is that a number of people did certain things for which X is liable. And on the other claim, X is directly liable for not having done something, or for having done something negligent. That therefore, the two claims are not the same foundation. The factual matrix is the same, but the foundation of claim is different.

23. Counsel passionately argued that by bringing an action against the Appellant under the doctrine of vicarious liability, "the Respondent changed the cause of action from one

[1] SCA 48/2017
[2] SCA 45/2017

against the Appellant in its personal capacity to one against the Appellant in its vicarious capacity." That Article 1370 (2) is no longer applicable to prevent the application of the principle of *non cumul* because the causes of action are not similar. That the principle would continue to apply and the Respondent would be constrained under the *residual* principle of *non cumul* to bring its action in contract as that was the clearest pathway for it.

Respondent's Submissions

24. The Respondent started by raising a point of law in that Counsel for the Appellant was making submissions on a ground outside the grounds he had filed in the Notice of Appeal. This was in contravention of Rule 18 (8) of the Seychelles Court of Appeal Rules. The rule provides that: The 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.

25. The ground of appeal filed was that the finding of the learned judge that the Respondent did not have to elect whether its suit was in contract or tort is wrong law.

26. But the Appellant argued in his submissions that a plaintiff is not allowed to bring an action in contract together with an action in vicarious liability, even when the claim in contract is in the alternative. That the cause of action in tort by way of vicarious liability was contrary to article 1370 (2) because it was caught by the principle of *cumul de responsabilité*.

27. On the merits of the case, Counsel for the Respondent submitted that it is clear from a reading of Article 1370 (2) that its intention was to depart from the principle of *non cumul de responsabilite*. That the operating word in the article is "cause of action" and not "founded" as argued by the Appellant's Counsel. And cause of action refers to the factual situation.

Courts' Consideration.

28. I will start off with the preliminary point of law raised by the Respondent in regard to Rule 18 (8) of the Seychelles Court of Appeal Rules, 2005. It was the submission of the Respondent that the arguments presented by Counsel for the Appellant in support of Ground 1 contravened the said rule. Rule 18 (8) provides that:

> The 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.

29. In line with the above rule, case law has firmly established that a party is bound by its pleadings.[3]

30. In arguing Ground 1 Counsel for the Appellant begun by conceding that Article 1370 (2) and case law has done away with doctrine of *non-cumul de la responsabilités contractuelle et délictuelle.* The Appellant conceded that when a contractual relationship exists between parties but the facts give rise to possible claims in either delict and contract, a plaintiff can elect to bring a claim in delict. He also conceded that the law allows a claim to be brought in the alternative and that a plaintiff can bring a claim in delict and in the alternative, they can claim in contract, as the Respondent in this case had done.

31. The Appellant however went on to argue that as soon as the Respondent chose to pursue his claim against the Appellant through vicarious and not direct liability, the Respondent brought himself back into the ambit of the doctrine of *non-cumul de la responsabilités contractuelle et délictuelle.*

32. In reply to the contention of Counsel for the Respondent company, the Appellant's Counsel stated that he had not gone beyond the limits of ground 1. The essence of his reply was that as a matter of fact, his arguments were merely to support his contention that in the particular circumstances of this case it was necessary for the Respondent to

[3]E.g. Confait & Anor v Port-Louis & Anor (SCA 66/2018) [2021] SCCA 39; Re Ailee Development Corporation and the Companies Act 1972 (SCA 13/2008) [2010] SCCA 1; Sheryl vs Derreck Marimba SCA 51/2019.

choose whether to proceed in contract or delict. Counsel argued further that in any event, Article 18 (8) had a proviso which granted court discretion as follows :

> 18 (8)The 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:
>
> Provided that nothing in this sub-rule shall restrict the power of the Court to make such order as the justice of the case may require.
>
> 18 (9)Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the ground set forth by the appellant:
>
> Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.

33. Counsel prayed that in the event that his arguments as to the merit of the case did not satisfy the Court, the Court may be pleased to exercise their discretion provided in the proviso to Section 18 (8).

34. In reply, the Respondent submitted that Rule 18 (9) dealt with cases where the Court itself raised an issue and was not applicable to the matter before the Court where the Appellant himself was raising a ground not raised in the Notice of Appeal.

35. I am in agreement with Counsel for the Respondent that the submissions did not speak to the ground as had been formulated. The Court understood the ground to mean that the learned judge was wrong in his decision that the Respondent did not have to make an option. The arguments of Counsel in effect argued a ground not raised in the Notice of Appeal. In this, the Appellant contravened Rule 18 (8) and on this basis alone, the Court can dismiss the ground.

36. I nevertheless, now move on to what would be the merits of the arguments of Counsel. It

is clear that the argument of Counsel for the Appellant juxtaposes contract on the one hand with vicarious liability on the other hand rather than contract on the one hand and delict on the other. He then goes to submit that the foundation of the two claims is different and it follows that Article 1370 (2) which did away with the doctrine of *non-cumul de la responsabilités délictuelle and contractuelle* would not apply, because it only applies where the two causes of action in delict and in contract are based on the same foundation.

39. It is my considered view that the interpretation attached to the Article by Counsel for the Appellant is flawed. The word founded must be read together with either contract or delict. The cause of action may be 'founded' in contract. The cause of action may be 'founded' in delict. One cannot say that a cause of action is founded in vicarious liability – vicarious liability cannot be referred to as a cause of action. Vicarious liability is but a three party doctrine that permits the extension to employers etc., liabilities for wrongs committed in the course of their duty on behalf of the employer. The rationale behind the doctrine of vicarious liability is to provide victims of wrongdoing with an adequate remedy, since the employer is more likely to have the means to adequately compensate the victim, provided there is sufficient connection between the wrong committed and the employment relationship in question. In the matter before Court, the Respondent made a choice – to go in for delict. How he proves his claim in delict, whether based on direct or vicarious liability is not regulated by 1370 (3)).

A choice to pursue one's rights on the basis of vicarious liability does not change the fact that the cause of action is in delict. A cause of action refers to the facts that enable a person to bring an action against another. A cause of action is the technical legal name for the set of facts which give rise to a claim enforceable in court.

40. **In light of the above reasons, ground 1 is dismissed.**

Ground 2

The learned judge erred in finding that a case had been made out by the Respondent when it is clear the pleadings disclosed both direct and vicarious liability as against the Appellant.

Appellant's submissions

41. For this ground, the appellant's counsel submitted that a plaint must specify clearly in what capacity a person is being sued in delict whether in personal capacity as the perpetrator of a fault, or vicariously for the fault of another for whose actions the principal is responsible. The first action lies under article 1382 of the Civil Code; the second under article 1384.

42. That the distinction is to enable the Appellant to know what case it is to meet. Counsel extensively quoted the holding in **Confait v Mathurin**[4] where this court stated that:
"*Where a party claims damages against another for damage caused him by an act, he must state in his pleading where the damage is caused by the act of the other person himself or by the act of a person for whom he is 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 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 Respondent 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.*"

43. Counsel contended that agents of the Appellant could not, by the nature of the law of agency, have been employed by the Defendant (and thus would not come into the ambit of article 1384(3)).

[4] (1995) SCAR 203.

44. That as none of the persons was identified by name or by occupation and allocation of duties within the contract signed by the parties. And yet Article 1384(3) as well as 1384(2) and (4) of the Code apply strictly to three categories of relationships i.e. employer-employees, parents- children and teachers- pupils. On the other hand, under Article 1384(1), the *lien de subordination* has to be established between a principal and the person for whom he is responsible (the préposé).

45. Counsel submitted that the plaint did not define the nature of relationship between the people who carried out the alleged faulty installation and the Appellant. That since the plaint lumped together all the categories, this rendered it impossible for the Appellant to know which persons it is accused of being responsible for as employees, and which not (presumably as preposes)

46. That it was nowhere clearly pleaded what the link is between the Appellant and the various persons for whom it is alleged to be responsible for. It is nowhere pleaded in what capacity the Defendant is responsible for each of the various persons in the execution of the contract.

47. That whilst it is not absolutely necessary to identify a person for whom another is alleged to be vicariously liable, a pleading aimed in a scattershot manner at making a number of unidentified persons, each of whom may have had specific duties over a long contractual period, falls foul of the principle enunciated by this Court in **Confait v Mathurin,** that acts of a person in a vicarious liability case must be clearly and distinctly set out.

48. Furthermore, counsel submitted that proof of vicarious liability requires more than just a statement that unnamed employees, servants, agents and preposes of the Appellant carried out sub-standard work without specifying which particular employee, servant agent or préposé carried out which part of the work. This was a crucial element in order to establish the *lien de subordination* which is required to be established by a Respondent when vicarious liability is pleaded. Without proving what the link between the Appellant and the manufacturer or supplier of the system, it is not possible for the Respondent to rely on the

fact that there was a link of subordination between the two. In support of this submission, counsel relied on this Court's decision in **Public Utilities Corporation v Chelle Medical Limited & Ors**[5] where the Court stated that:

"The Court is not asking that the dispositions of the law relating to delict be set out in the pleadings but rather that there is clarity whose acts caused the damage."

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 the relationship which gives rise to such liability unless such is admitted."

49. That it is not clear from the plaint as to whether it is a plaint couched against the Appellant purely in its vicarious capacity.

50. In conclusion, counsel prayed that the matter be remitted to the Supreme Court for rehearing.

Respondent's Submissions

51. In reply to the submissions of Counsel for the Appellant, the Respondent raised a preliminary point – the Appellant was arguing a ground different from what had been raised in the Notice of Appeal. The Appellant was contravening Rule 18 (8) already articulated under Ground 1.

52. Counsel submitted that a reading of the ground shows that the Appellant was challenging the plaint for bringing claims against the Defendant, on the basis of both vicarious as well as direct liability. That the Respondent could not, in law, base its suit on both vicarious and direct responsibility for faute. That however, in his submissions, Counsel for the appellant was challenging the pleadings for not pleading the material facts relating to the issue of vicarious liability. And yet the ground did not raise any issue about the lack of pleadings.

[5] [2020] SCCA 78.

Consideration by the Court.

53.A reading of Ground 2 shows that the Appellant faulted the trial Judge for finding in favour of the Respondent when it was clear from the Plaint that the Respondent brought its case in both personal and vicarious capacities.

54.However, the essence of the Appellant's submissions is that the Respondent's plaint did not plead the elements necessary for proof of a claim based on vicarious liability. This contravened Rule 18 (8) Supra in that the appellant was, without the leave of the Court relying on a ground not set forth in the Notice of Appeal.

55.A second challenge with the submissions of Counsel, pointed out by the Respondent, is that the Appellant was arguing for the first time (on appeal), an issue which he did not raise at the lower court – that the plaint did not plead the requisite elements of vicarious liability.

56.It is trite that an appeal deals with allegations that a Trial Judge erred either in law or in fact or both. Consequently, on appeal, a party is prohibited from raising a ground based on a matter they did not raise in the court below and which necessarily was not adjudicated upon.

57.**Based on the above preliminary points, ground 2 is dismissed.**

Conclusion and Orders

58.Having held that both grounds of the appeal fail, the appeal is hereby dismissed with costs to the Respondent company.

59.Consequently, the judgment and orders of the lower court are upheld.

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DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA.

I concur _____

Dr. M. Twomey-Woods, JA

I concur _____

S. Andre, JA

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