

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 155/2012**

**[2014] SCSC 63**

---

**BERARD FANCHETTE**

Plaintiff

versus

**THE ATTORNEY GENERAL**

Defendant

---

Counsel: Mrs. Amesbury for plaintiff

Ms. Confait for defendant

Delivered: 19 February 2017

---

**RULING**

---

Karunakaran J

- [1]** This is an action in delict. The plaintiff in this action claims the sum of SR1. 276 million from the defendant, the Government of Seychelles (herein represented by the Honorable Attorney General), for loss and damage, the former allegedly suffered as a result of a “fault” committed by the latter through the Family Tribunal. The defendant has raised a *plea in limine litis based on two points of law*, contending in essence, that:

- (i) The Plaintiff discloses no cause of action against the Defendant, the Government of Seychelles; and
- (ii) In any event, in terms of Section 78 (7) (a) of the Children Act Cap 28, “Members of the Family Tribunal” which include the Chairman, the Vice Chairman and such other member(s), and its Secretary, are not liable for anything done in good faith in performance of their judicial functions under the Children Act. The Family Tribunal in the instant matter was acting in good faith and in performance of its functions. And therefore, is immune from liability under the Children Act.

**(i) No Cause of Action**

According to Ms. B. Confait, Learned Counsel for the defendant, it is truism that Section 29(2) of the Seychelles Code of Civil Procedure stipulates that in all claims made against the Government of Seychelles, the Attorney General should be pleaded as defendant. However, according to her, this Section applies only to those actions which are brought against the executive arm of the Government. In the instant matter, since the alleged tort-feasor is the Family Tribunal, which being a judicial arm, the claim cannot be made against the Attorney General, who only represents the Executive arm of the Government being the principal legal advisor to the Government in terms of Article 76 (4) of the Constitution. The members of the Family Tribunal are not the executive or servants of the Government. Therefore, the government cannot be held vicariously liable for the acts of the Family Tribunal or its members. In the circumstances, Ms. Confait contended that the plaintiff does not disclose any cause of action against the Government so as to plead Attorney General as defendant in this case. Hence, she urged the court to dismiss the suit in limine.

**(ii) Immunity**

In any event, it is the contention of the State Counsel that it is evident from Section 78 (7) (a) of the Children Act Cap 28, all Members of the Family Tribunal and its Secretary, are not liable for anything done in good faith in performance of their functions under the Children Act. In support of her contention Learned counsel cited the authority of

*“Edmond Adeline Vs the Chairman of the Family Tribunal and others”* - Constitutional Case No: 3 of 2000, in which the Constitutional Court held that Section 78 (7) (a) of the Children Act, in which it was held by the Constitutional Court that Section 78 (7) (a) of the Children Act has granted the Members of the Family Tribunal a **“statutory immunity”** from proceedings like the instant one before this Court. Furthermore, in the absence of any allegation of bad faith being pleaded in the plaint, no fault can be assumed or ascribed to any judicial act of the Family Tribunal performed in the course of its functions. According to Counsel, it is therefore, immune from liability under the Children Act and the instant suit is therefore, not maintainable in law.

On the other side, Mrs. Amesbury, learned counsel for the plaintiff, submitted in essence, that although Section 78 provides immunity to the Family Tribunal it doesn't provide any immunity to the Attorney General representing the government against whom the present action has been brought. Mrs. Amesbury also attempted to distinguish the Constitutional case **“Edmond Adeline”** cited supra from the instant case in that the former case emanated from an alleged violation of a Constitutional right whereas the instant one emanated from an alleged “fault” under Civil Code. Hence, she contended that the finding of the Constitutional Court in **“Edmond Adeline”** on the question of immunity is not applicable to the present case, which is based on tortious liability. She also cited a number of decisions from other Jurisdiction relating to violation of human rights particularly, in respect liability and the quantum of damages awarded by Human Right Commissions elsewhere. Incidentally, I would mention that none of those decisions, with due respect to counsel, is relevant to the issue on hand, at this stage of the proceedings. Be that as it may, it is also the contention of Mrs. Amesbury that there were a number procedural irregularities committed by the Family Tribunal in the proceedings that rendered their decision invalid in law, which adversely affected the interest of the plaintiff. Hence, Mrs. Amesbury urged the Court to dismiss the plea in limine raised by the defendant and proceed to hear the matter on the merits.

- [2] I gave careful thought to the arguments advanced by counsel on both sides for and against the preliminary objection raised by the defendant on points of law. Firstly, on the question of non-disclosure of cause of action, I carefully perused the pleadings in the

plaint. As rightly submitted by Ms. Confait, Learned Counsel for the defendant, the plaintiff obviously, does not disclose any cause of action anywhere against the Government so as to plead Attorney General as defendant in this case. Even if we assume for a moment, that the government is vicariously liable for the “fault” if any, allegedly committed by the Family Tribunal to the detriment of the plaintiff, there is not a scintilla in the pleadings to show or even to indicate that the defendant is vicariously liable in damages for the fault committed by its servants in the course of their employment. Hence, I uphold the submission of the defendant’s Counsel that the plaintiff is liable to be dismissed since it does not disclose any cause of action against the defendant.

[3] Coming back to the question of immunity from proceedings, I would like to restate the same principle I have formulated in the Constitutional Case of *Edmond Adeline* cited supra. In this respect, I note Article 119 of the Constitution reads thus:

(1) The judicial power of Seychelles shall be vested in the Judiciary which shall consist of

-

(a) the Court of Appeal of Seychelles

(b) the Supreme Court of Seychelles

(c) such other subordinate courts or tribunals established pursuant to article 137.

(2) The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

(3) Subject to this Constitution, Justices of Appeal, Judges and Masters of the Supreme Court shall not be liable to any proceedings or suits for anything done or omitted to be done by them in the performance of their functions.

(4) An Act establishing a subordinate court or tribunal referred to in clause (1) (C) may grant to the person exercising judicial function in the court or tribunal immunity from proceedings or suit to the extent provided in clause (3).

- [4] On the other hand, the Children Act, which established the Family Tribunal, has granted such immunity to the members of the Tribunal. Indeed Section 78 (7) of this Act reads as follows:

A member of the Tribunal and its Secretary-

*(a.) shall not be liable for anything done by any one of them in good faith in performance of their functions under this Act*

*(b) Shall be deemed to be public officers for the purposes of the Penal Code.”*

- [5] Therefore, it is evident that Section 78(1) of the Children Act has granted the members of the Tribunal including the Chairman, the Vice Chairman and such other member(s), and its Secretary which I would call, a “statutory immunity” from proceedings as approvingly envisaged under Article 119(4) of the Constitution.

- [6] On the other hand, the Constitution itself, in terms of article 119 (3) has directly granted a protection to the Justices of Appeal, Judges and Masters of the Supreme Court, which I would call a “Constitutional Immunity” from proceedings. Having said that, I should mention here that the said **statutory immunity** granted to the members of the tribunal is a qualified immunity, if I may call that, as such immunity operates only when they had acted in good faith in the performance of their judicial functions under the Act.

- [7] On the contrary, the Constitutional Immunity granted to the above Justices, Judges and Masters is an absolute immunity if I may call that as it is an unconditional one. In the instant case, Ms. Confait the learned counsel for the respondents rightly pointed out that this action is not grounded on the allegation that the Family Tribunal failed to act in good faith or on that it acted maliciously in the performance of its functions. I quite agree with her submission in this respect. In an action of this nature, obviously such allegation being a material fact that constitutes the cause of action it ought to have been pleaded. In the absence of any such pleadings, I find that the Family Tribunal is entitled to the statutory protection or immunity from proceedings in this matter, as the impugned order was made in the performance of its judicial functions under the Act.

- [8] Moreover, de hors the above findings, I hold that no action can be brought against the Family Tribunal in respect of any matter within its jurisdiction unless it is expressly alleged that it acted maliciously and without reasonable and probable cause in terms of Section 5(1) of the Public Officers Protection Act as long as its members exercises judicial functions under the Children Act. Consequently and logically too, it follows that the Attorney General also cannot be held liable in whichever capacity either directly or vicariously for an alleged act of a person, who has been granted by law immunity from proceedings. Accordingly, I conclude that this action is not maintainable against any of the defendant.
- [9] Although the above findings on the first two grounds, have in effect disposed of this suit, I would like to examine herein the assumed ground of vicarious liability as raised by the defendant for the purpose of appeal, if any, preferred by the plaintiff in this matter.
- [10] On the alleged vicarious liability of the Government, one should not attempt to misinterpret the term Government so as to encompass the meaning of “Judiciary” as such attempt would obviously undermine the very doctrine of the Separation of Powers and the basic structure of our Constitution, which has guaranteed an independent Judiciary. Whatever entities constitute the combination of the government, whether it is two-in-one or three-in-one, and the fact remains that Judiciary is a separate entity, independent from the Government and subject only to the Constitution and other laws of Seychelles. It is truism that any government in its executive mode is responsible and may be sued in relation to its affairs directly or even vicariously for the acts of its servants or employees. However, this does not mean that the government is responsible directly or otherwise for the judicial acts of the persons in the Judiciary. The double thinking of some judicial minds that the government in one sense is directly and in another sense vicariously responsible for the acts of the judiciary did not appeal to me in the least. The very concept of vicarious liability in my view is the antithesis of direct liability. They cannot coexist or at any rate be attributed to one and the same tort-feasor who cannot play a double role in the same cause of action. It is a very dangerous proposition to equate the judiciary to the executive and seek remedies before this court, as the former is the watchdog of the Constitution and rights of the citizens whereas the latter is a potential

intruder or violator thereof. Therefore, I find that the Government cannot be held vicariously liable for the actions of the Judiciary in matters of this nature.

**[11]** In view of all the above, the preliminary objections raised by the defendant is upheld. The suit is dismissed accordingly. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 19 February 2014

D Karunakaran  
Judge of the Supreme Court