

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS04/2017**

**[2018] SCSC 33**

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**JULIETTE RUBY RITA MALVINA OF TAKAMAKA, MAHE, SEYCHELLES**

**PASCAL ROBIN MALVINA OF TAKAMAKA, MAHE, SEYCHELLES**

**TRACY LETISHA MALVINA OF TAKAMAKA, MAHE, SEYCHELLES**

Plaintiffs

Versus

**MARCEL ESAPRON OF PETIT PARIS**

First Defendant

**MR. REGINALD ELIZABETH, COMMISSIONER OF POLICE OF CENTRAL  
POLICE STATION, VICTORIA, MAHE**

Second Defendant

**THE ATTORNEY GENERAL OF NATIONAL HOUSE, VICTORIA, MAHE,  
SEYCHELLES REPRESENTING THE GOVERNMENT OF SEYCHELLES AS  
PER SECTION 29 OF THE CIVIL PROCEDURE CODE**

Third Defendant

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Heard: 19<sup>th</sup> day of July 2017

Counsel: Mr. N. Gabriel for Plaintiffs  
Mr. B. Hoareau and E. Chetty for first Defendant  
Mr. G. T. Thatchett for second and third Defendants

Delivered: 19<sup>th</sup> day of January 2018

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**RULING ON PLEA IN LIMINE LITIS AS RAISED BY THE SECOND AND THIRD DEFENDANTS**

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**S. Govinden J**

- [1] This Ruling arises out of a *plea in limine litis* as raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants “alleged preposés” of the first Defendant at all material times, and dated the 6<sup>th</sup> day of April 2017 as part of their statement of defence of the 6<sup>th</sup> April 2017.
- [2] The *plea in limine litis* as raised arises out of CivilSide No. 04 of 2017 filed by the three Plaintiffs above-referred (hereinafter referred to as the “Plaintiffs”), in a claim as children and “*ayant droits*” of one late Emmanuel Malvina who passed away accidentally on the 30<sup>th</sup> October 2014 on the Providence Highway (“deceased”).
- [3] In its *plea in limine litis* the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seek for the Plaintiff to be dismissed as against them on the following grounds:
- (i) Firstly, that the Plaintiff is prescribed under section 3 of the Public Officers Protection Act (Cap 24 of 1976) (“POPA”) as against the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants in that the alleged accident happened on the 30<sup>th</sup> October 2014 and the Plaintiff filed only on the 23<sup>rd</sup> January 2017, hence time barred in the light of the prescriptive period applicable at the time as per the POPA;
- (ii) Secondly, that the 1<sup>st</sup> Defendant was acting as self-employed part time mechanic with the Seychelles Police Force after his retirement from the Police Force and was not an employee of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the 30<sup>th</sup> October 2014. That the 1<sup>st</sup> Defendant pleaded guilty to the offence of causing death by dangerous driving contrary to and punishable under section 25 of the Road Transport Act in CR. No. 69 of 2014 before the Supreme Court on the 15<sup>th</sup> September 2016 in respect of the cause of action for the present Plaintiff. That in the said case, the 1<sup>st</sup> Defendant admitted to have caused the death of the rider of a motor bike S. 9032, the deceased, on the stated date and thereafter sentenced to one year imprisonment suspended for three years and a fine of SR.20,000/- and suspension of driving licence for one year. Hence, on that basis, there is no vicarious liability

for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as alleged in the Complaint and accordingly to cause of action as against them towards the Plaintiffs.

(iii) Thirdly, that the Complaint is bad in law for the non-joinder of the necessary party, SACOS Insurance Company, with whom the Government Vehicle GS 12611 was insured with a comprehensive Insurance Policy, having Certificate of Insurance No. 1254, Policy No. AMAMFLTOOOO05 commencing from the 15<sup>th</sup> July 2014 and expiring on the 14<sup>th</sup> July 2015.

[4] Both Learned Counsels as above-referred filed written submissions on behalf of their respective Plaintiffs and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as to their legal stance vis-a-vis the points of law as raised and of which contents have been duly considered for the purpose of this Ruling.

[5] The relevant factual background of the Complaint and hence arising *Plea in limine litis* is in essence as follows.

[6] A brief history of the facts of the case giving rise to the Amended Complaint (“Complaint”) as transpired on pleadings filed thus far, reveals that the Complaint alleges that the plaintiffs were at all material times the children and “*ayant droits*” of the deceased who accidentally passed away on the 30<sup>th</sup> October 2014 on the providence Highway.

[7] It is further averred by the Plaintiffs that at the material time the 1<sup>st</sup> Defendant was a mechanic employed by the 2<sup>nd</sup> Defendant and the latter employed by the 3<sup>rd</sup> Defendant represented by the Attorney General’s Chambers.

[8] In essence, Learned Counsel Mr. G. T. Thatchett submitted in support of the plea in limine litis as raised at paragraph [3] (i) (ii) and (iii) (*supra*) of this Ruling on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in a gist as follows.

[9] That the 1<sup>st</sup> Defendant filed his defence admitting the accident but denying liability. Further, that the 1<sup>st</sup> Defendant further contended that he was employed by the Government of Seychelles and not by the 2<sup>nd</sup> Defendant.

- [10] That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their defence admitting the accident by denying their liability towards alleged loss and damages as per above-mentioned objections (re: contents of paragraph 3] (supra).
- [11] As to the first objection, it is submitted that according to the Plaintiff the alleged accident occurred on the 30<sup>th</sup> October 2014 but the Plaintiff is seen to be filed before the Registry of the Supreme Court on the 13<sup>th</sup> January 2017 more than 26 months after the death of the deceased.
- [12] That section 3 of POPA as it stood at the time at the date of the accident provided that “3. *No action to enforce any claim in respect of (a) any action to enforce any claim in respect of- (a) any act done or omitted to be done by a public officer in the execution of his office; (b) any act done or omitted to be done by any person in the lawful performance of a public duty; or (c) ..... shall be entertained by a court unless the action is commenced not later than six months after the claim arose.*
- [13] The Authorities of (*Jenna Danielle Forte & 5 others v/s The Commissioner of Police & the Government of Seychelles (CS. No. 25/2015)*) is cited on the point in issue in that the right of action accrues when the essential facts manifest themselves. That the death of the deceased occurred on the 30<sup>th</sup> October 2014. That is the Plaintiffs were not having a cause of fault and resultant damages as on that date against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, there cannot be any cause of action against them as on the 15<sup>th</sup> September 2016 being the date of the plea of guilty of the 1<sup>st</sup> Defendant.
- [14] It is further submitted in that light, that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are public officers and any action against the Defendants, has to be initiated within the statutory period of 6 months prescribed under section 3 of POPA. That in the instant case, the alleged accident occurred on the 30<sup>th</sup> October 2014 and the Plaintiff filed on the 13<sup>th</sup> January 2017 namely more than 26 months after the death of the deceased.
- [15] It further emphasized by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that Chapters IV of Title XX of the Civil Code (“Code”) provides for the grounds upon which prescription is interrupted or suspended and the Plaintiffs’ case does not fall under any of the provisions of the relevant Articles of the Code interrupting and or suspending prescription. That the plea of guilty

of the 1<sup>st</sup> Defendant could not give rise to fresh cause of action as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

[16] With respect to the recent amendments of the POPA namely Act No. 2 of 2017 , it was argued by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that it stands amended with effect from the 3<sup>rd</sup> April 2017 in that the period of six months is substituted with five years. Copy of the Official Gazette attesting to same was enclosed as proof of publication status). In the same regards, the provisions of section 25 (2) of the Interpretation and General Provisions Act (“IGCPA”) was referred to in support of the contention that an Act comes into operation on the date on which it is published in the Gazette *"unless otherwise provided for in the Act itself"* and that would imply to my mind retrospective effect of laws if any) in line with the provisions of Article 2 of the Code.

[17] It is thus submitted that the amendment to POPA has no relevancy to the current cause of action as filed on the 13<sup>th</sup> January 2017 prescribed as per the law on the date of the accident/cause of action arising namely six months therefrom.

[18] With respect to the second plea in limine litis [paragraph 3 (ii) refers], it is submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that at the time of the accident the 1<sup>st</sup> Defendant was acting as a self-employed part time mechanic with the Seychelles Police Force after his retirement for the Police Force and was not an employee of the 2<sup>nd</sup> Defendant or 3<sup>rd</sup> Defendant on the 30<sup>th</sup> October 2014, the date of the accident. Further, that the 1<sup>st</sup> Defendant pleaded guilty to the offence of causing death by dangerous driving as referred hence admitting to have caused the death of the deceased by driving recklessly and at a speed in a manner which is dangerous to the public in GS 12611 on a road and crossing over to the opposite lane while going towards Victoria overtaking two vehicles in front of him. That further, prior to sentencing in mitigation it is revealed that the 1<sup>st</sup> Defendant is a pensioner who has no occupation hence submitting that there is no merit in the contention that the 1<sup>st</sup> Defendant who is past all possible employable age, that he was employed by the Government of Seychelles.

[19] It is further submitted in the alternative with respect to the second plea in limine litis that the 1<sup>st</sup> Defendant was self-employed as part-time mechanic with the Seychelles Police after his retirement and was not an employee of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and even if

assuming that the 1<sup>st</sup> Defendant was under the control or supervision of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that at the time of the accident there was no vicarious liability for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants due to the negligent, reckless and dangerous acts of the 1<sup>st</sup> Defendant hence relevancy of the provisions of Articles 1383 and 1384 (3). The former with respect to liability of every person for the “*damage caused not merely by his act, but by his negligence and imprudence and that the driver of a motor vehicle which by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable excepted in instances of sole negligence of the injured party or the act of a third party or an act of god external to the operation or functioning of the vehicle..*”

- [20] It is submitted in respect of the facts of the case as revealed on the pleadings that the 1<sup>st</sup> Defendant is solely liable for his negligent acts as per the above-cited provisions of the Code and not the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant (on the assumption of their being “preposés”) hence the prayer for the Pleint to be struck out as against the Defendants under Section 92 of the Civil Procedure Code (Cap 213) as the Pleint does not disclose any reasonable cause of action as against the Defendants ex-facie the pleadings.
- [21] The last *plea in limine litis* refers to the non-joinder of the SACOS hence the Pleint being bad in law on that basis in view of the existence of a Policy of Insurance as above referred [paragraph 3] (supra).
- [22] It is to be noted at this juncture that the 1<sup>st</sup> Defendant did not file any submissions to the *plea in limine litis*.
- [23] The Plaintiffs on their part vehemently objected to the *plea in limine litis* as raised and submitted in essence that the deceased death arose as a result of being hit by a police vehicle owned by the 3<sup>rd</sup> Defendant and that the 2<sup>nd</sup> Defendant was the employer of the 1<sup>st</sup> Defendant .
- [24] With reference to the POPA limitation period, Learned Counsel Mr. Gabriel submitted in a gist that the relevant POPA provision with respect to six months limitation applicable to suits against public officers have been amended in April 2017 (supra). The principle of “*La peine la plus douce*” applicable in criminal cases was according to the Learned

Counsel to be applied similarly in civil cases in line with the Amendment hence retroactive effect in favour of the Plaintiffs.

[25] In the alternative, it is submitted, that the first Defendant pleaded guilty to the charge on the 15<sup>th</sup> September 2016 (supra) and that that as a result the cause of action would then start on this date and the six months limit would begin also on that date and would only end on the 15<sup>th</sup> March 2017.

[26] Having given a brief summary of facts and submissions leading to the Plaint and current motion I will now move on to address the legal standard and its analysis thereto.

[27] Now, this Court notes foremost that the points of law raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are threefold [paragraph 3] refers (supra), and each stands on their own and should any one of them be upheld then the whole case will be disposed of hence the redundancy of the other remaining grounds as a result.

[28] For the purpose of this Ruling, I shall however, treat the first and the second points of law as raised together since they are interrelated in terms of the “*alleged responsibility and liability of the Defendants*”. I will treat the two points of law (consolidated) in line with the objection that the Plaint is prescribed under Section 3 of the POPA.

[29] The provisions of Section 3 of the POPA as at the time of the filing of the Plaint provides thus:

“3. *No action to enforce any claim in respect of-*

*(a) Any act done or omitted to be done by a public officer in the execution of his office;*

*(b) Any act done or omitted to be done by any person in the lawful performance of a public duty; ...*

*Shall be entertained by a court unless the action is commenced not later than six months after the claim arose.”*

- [30] The provisions of the POPA after amendment by Act No. 2 of 2017 and *assented to by the President on the 22<sup>nd</sup> day of March 2017 and published in the Official Gazette on the 3<sup>rd</sup> April 2017.*
- [31] As rightly pointed out by Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in this matter, our case law is very rich and clear in terms of precedents on the subject matter namely, the “locus standi” under section 3 thereof and the most salient case law has been duly cited in the matter of (*Jenna Danielle Forte & 5 Others v/s the Commissioner o Police & Government of Seychelles C.S. No. 25/2015*).
- [32] Without having to recite the *ratio decidendi* in the Jenna Daniel Forte case which reflects the current legal position of our Courts on the subject matter, suffice to state that albeit it is a question of evidence to determine whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were employers of the 1<sup>st</sup> Defendant at the time of the accident causing the death of the deceased, the fact remains that the Plaint as filed cites the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Defendants and employers hence arising the *plea in limine litis* as to the section 3 of POPA thus point to be determined as a preliminary issue rather than after hearing of the merits of the case.
- [33] As clearly cited ruled in the case of (*Joseph Labrosse v/s Seraphin Allisop and Government of Seychelles (CS. No. 285 of 1996)*), wherein the Supreme Court quoted the case of (*Gemma Contoret v/s Government of Seychelles, SHDC & Another (CS No. 101 of 1992)*), “*the Government exercises its executive functions through its Ministers and public officers. It is therefore clear that this section limits any action either against the Government or a public Officer when the claim is based on the act of a public officer ..... The action against the 1<sup>st</sup> Defendant therefore is prescribed as it has not been filed within six months after the alleged claim arose.*”
- [34] The same Ruling vis-à-vis applicability of the limitation period of section 3 of POPA was further reiterated in the matters of (*Joseph Labrosse v/s Government of Seychelles (Civil Appeal No. 11 of 1998)* and *Atkinson & Ors v/s Seychelles Government & Ors (2002) SLR 39*).
- [35] The gist of the point of law as consolidated basically involves the question as to when is a cause of action accrued for the purpose of applicability of section 3 of POPA.



[36] In that respect the Court shall refer to the matter of (*Attorney General v/s Ray Voysey and Ors (SCA No. 12 of 1995)*), whereby it was held by the court of Appeal on the very issue that, “*Fault is defined by article 1382 (2) as 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. When a party claims a right of action under article 1382 (1) the two elements of the cause of action are fault and damage which must have been caused by the fault alleged. It is thus clear that the earliest time an action in delict can be maintained is that earliest point in time when fault and damage co-exist.*”

[37] Further commenting on the purpose of fixed prescription periods, the Court of Appeal further held that:

“... *Whereas the reasons for prescription are to protect the Defendant from the risk of stale demands of which he may be ignorant and which he may not be able to meet because of changed circumstances and the handicap he may suffer, due to lapse of time, in establishing a defence. In our view the statutory period of prescription, artificially fixed, conclusively presumes that a Defendant is in need of protection. Such presumption does not permit of rebuttal.*”

[38] It was further held that:

“*Normally, a right of action accrues when the essential facts exists and, barring statutory intervention, does not arise with the awareness, for instance , of the attributability of the injury to the fault of the other party unless there has been a fraudulent concealment of facts. The date of manifestation of damage may be specifically made the commencement of a right of action.*”

[39] The Court of Appeal continued to hold that:

***“Existence of facts essential to the accrual of a right of action must be distinguished from the evidence of such facts. It is evidence that accrual of a right of action cannot be dependent on inability to obtain evidence of facts relating to the right of action. There is no statutory provision that confers power on the court in this Jurisdiction to postpone the accrual of a right of action by reason of ignorance of the plaintiff of material facts relating to the cause of action. In the result, we are unable to agree with the view held by the Learned Judge that ‘the cause of action would have arisen depending on the disclosure’ by the Government of the cause of the crash. We are of the view that earlier opinion expressed by him that ‘the delictual rights of the heirs became time-barred’ represented the correct position.”***

(Emphasis mine)

- [40] The same principle of interpretation as to the accrual of a right of action subject matter of section 3 of the POPA was considered and endorsed in the cases of *(Voysey)*(supra), in the case of *(Yvon Camille v Government of Seychelles (SCA No. 57 of 1998))*, *(Lorraine Lewis v/s The Government of Seychelles (Civil Side No. 17 of 2000))*; *(Roderick Larue v /s Osman Legaie & Attorney General, (Civil Appeal No. 19 of 2011))* and *(Jusheila Cecile Madeleine v/s Land Transport Agency represented by CEO & Attorney General representing the Government of Seychelles (Civil side No. 67 of 2013))*.
- [41] Having set out the very clear and unambiguous position of our case law on the subject, it is abundantly clear as rightly submitted by Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the right of action accrues when the essential facts manifest themselves and that in this case it was on the 30<sup>th</sup> of October 2014 upon the death the deceased and it is on that very day that the Plaintiff’s cause of fault and resultant damages accrued and with respect to the arguments of Learned Counsel of the Plaintiffs, not on the date of the Judgement of the Supreme Court 15<sup>th</sup> September 2016 upon plea of guilty of the 1<sup>st</sup> Defendant and subsequent sentence. To my mind the verdict and sentence of the Court upon admission of liability of the 1<sup>st</sup> Defendant was simply for the purpose of determining whether the death was caused by a crime contrary to the Road Transport Act as per charge on which the 1<sup>st</sup> Defendant pleaded guilty.

- [42] Further, any circumstances of negligence and or imprudence of the 1<sup>st</sup> Defendant as per the facts of the case in the cited Criminal matter(supra) would simply be evidence of facts relating to the right of action and not vice versa hence the non-justification of the delay in filing of this instant action by the Plaintiffs almost 23 months after the date of the accrual of the alleged cause of action in tort against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in vicarious liability under the section 3 of POPA prior to its amendment and in existence at the time of the accident giving rise to cause of action.
- [43] The other issue which remains to be decided in the same breath, is whether the Amendment is to supersede the “*old un-amended provision in the circumstances of this case*” and in line with the provisions of the IGPC with respect to enforceability of amended and or repealed laws.
- [44] Section 3 of POPA was amended by Act No. 2 of 2017 and published in the Official Gazette on the 3<sup>rd</sup> day of April 2017 and those are undisputed facts.
- [45] Section 25 (2) clearly provides on “*Commencement of Acts*” that, “*An Act comes into operation on the date on which it is published in the gazette, or, if it is provided that the Act is to come into operation on some other date, on that date.*”
- [46] Having carefully scrutinized the provisions of the POPA as amended I have found no exception legislated as to the retrospective effect of the amended Section 3 of POPA which extends the limitation period to five years instead of six months. On that basis the arguments of Learned Counsel for the Plaintiff “*does not hold good*”, for the intention of the legislator is transpired in the Act as published but “*not undue and untenable inferences of law by the interpreters of the amended law*”. If that trend was to be adopted by the Court, I will venture to state that it would be not only usurping on the balance of power as far as legislating laws is concerned but also reading into the law “what we want to have and hear as individual citizens” rather than “interpreting the law as is”. In this case, should the legislator have intended to have the amended section 3 of POPA to apply retrospectively they would have done so expressly and not leave it to litigants to speculate which finally brings me to the maxim of “*dura lex cedlex*”.

[47] On the above basis therefore, it is hereby ruled on the first and second *plea in limine litis*(as consolidated) as analysed at paragraphs [26] to [46] of this Ruling (supra), that the Plaintiffs failed to initiate their alleged action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants “*alleged preposés*” of the First Defendant within the statutory limitation period of six (6) months as prescribed under Section 3 of the POPA as at the date of the arising of the cause of action and that is the 30<sup>th</sup> of October 2014 and not 13<sup>th</sup> September 2016 9for reasons as explained) (supra).

[48] It follows, therefore that the first and second *plea in limine litis*(as consolidated) as to the filing of the Plaint of the Plaintiffs being out of time contrary to Section 3 of the POPA, is hereby upheld accordingly and the Plaint is accordingly dismissed with respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

[49] As indicated earlier, since the point of law on prescription disposes of the alleged cause of action as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then I consider in the circumstances the other point raised at paragraph [3] (iii) of this Ruling to be redundant in all the circumstances of this case **(AS REGARDS THE DEFENDANTS) but FOR THE PURPOSE OF CLARITY** on the issue as raised with regards, “*of a Plaint being bad in law for non-joinder*”, I wish to refer to the provisions of Sections 109, 110 and 112 of the Seychelles Code of Civil Procedure (Cap 213), wherein it is clearly provided that, “*no cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it...*”

(Emphasis mine).

[50] In the end result, the Plaint is dismissed as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the matter shall proceed as against the first Defendant accordingly (subject to amendments should the Plaintiffs wish to do so).

Signed, dated and delivered at Ile du Port on 19<sup>th</sup> day of January 2018.

S. Govinden  
**Judge of the Supreme Court**