

SUPREME COURT OF SEYCHELLES

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**Reportable**  
**[2019] SCSC 379**  
**CS 97/2012**

**In the matter between:**

**TIMOTHY DU TOIT**  
*(rep by Mr. Charles Lucas)*

**Plaintiff**

**and**

**EUROPEAN HOTELS RESORT LTD**  
*(rep by Ms. Alexandra Benoiton)*

**Defendant**

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**Neutral Citation:** *Timothy Du Toit v European Hotels Resort Ltd (CS 236/2010) [2019]*  
SCSC 379

**Before:** Andre J

**Summary:** Claim of damages – Delict Articles 1382, 1384 of the Civil Code (ACP 33)-Breach of contract- Submission of no case to answer

**Heard:** 30<sup>th</sup> January 2019

**Delivered:** 17<sup>th</sup> May 2019

**ORDER**

**Motion on no case to answer upheld and Plaintiff dismissed with costs.**

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**RULING**

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**ANDRE J**

**Introduction**

[1] This Ruling arises out of a Plaintiff of the 20<sup>th</sup> June 2012 as filed on the 5<sup>th</sup> July 2012, wherein Timothy Du Toit (*“Plaintiff”*), prays for damages in the sum of Seychelles Rupees Five Hundred and Fifty Thousand (S.R. 550,000/-), with costs and interests, as against the European Hotels & Resorts Ltd (*“Defendant”*).

[2] The Defendant by way of statement of defence of the 16<sup>th</sup> October 2012 as filed on the 26<sup>th</sup> October 2012, denies the claim on the basis that the Plaintiff's loss and damages sustained was a result of the Plaintiff's own negligent acts albeit on humanitarian grounds and as an act of good faith, it paid for the Plaintiff's treatment. Alternatively, the Defendant avers that should the Defendant be found responsible for any or all of the Plaintiff's loss and damages as claimed that the claim is grossly exaggerated and that it has satisfied any liability on quantum towards the payment of the treatment overseas in the sum of South African Rand Fifty Four Thousand Four Hundred and Thirteen and Sixty Nine (SA 54,413.69).

### **Factual and procedural background**

[3] The Plaintiff *was allegedly* employed by the Defendant as the Operations Manager. On the 5<sup>th</sup> January 2010, there was a fire in a building belonging to the Defendant. The Plaintiff claims that he acted reasonably in all circumstances when in attempting to extinguish the fire. He climbed on the roof of the building and began spraying water. During the process of spraying water, the Plaintiff fell off the roof damaging his right heel bone (calcaneus fracture).

[4] After the alleged injury, the Plaintiff went to Seychelles Hospital where he was put in a plaster cast which plaster cast lasted for one week, after which, he was sent to receive medical treatment in South Africa all paid for by the Defendant.

[5] The Plaintiff alleges that the fall has led to permanent disability and he still endures pain and suffering. He, therefore, requests damages for pain and suffering valued at Seychelles Rupees One Hundred and Fifty Thousand (SR 150,000/-); loss and amenities valued at Seychelles Rupees Two Hundred Thousand (SR 200,000/-); permanent disability valued at Seychelles Rupees Two Hundred Thousand (SR 200,000/-); and an Order that the Defendant pay Seychelles Rupees Five Hundred and Fifty Thousand (SR 550,000/-) together with costs and interests.

[6] The Defendant in its defence denies that the Plaintiff acted reasonably in going on the roof to spray water onto the fire. Instead, the Defendant alleges that the Plaintiff acted

negligently and dangerously. The Defendant avers that despite the fact that it was not responsible for the Plaintiff's injuries resulting from his negligence, it nonetheless, as a gesture of goodwill, paid South African Rand Fifty Four Thousand Four Hundred and Thirteen and Sixty Nine (SA 54,413.69) for his medical expenses in South Africa. It is further averred, in the alternative, that if it is found to be liable to pay damages, the Plaintiff's claim is grossly exaggerated and furthermore, the Defendant avers that it has fulfilled any responsibility to pay damages because it paid for his medical treatment.

### **Evidence**

[7] The Plaintiff testified that on the 5<sup>th</sup> of January 2010, he climbed on top of the roof of a building on fire to spray water to extinguish the fire and in the process water went onto his feet causing him to slip and fell off the roof and broke his right foot. In cross-examination, he further testified that he also sprayed water on the sides of the roof in order to cool it down.

[8] The Plaintiff testified that his job description included the maintenance and protection of the property so he considered extinguishing the fire as part of his job description. In cross-examination, he further testified that he was not told to go onto the rooftop but when he decided to go on the roof his immediate superior Brune Lennox assisted him to get up.

[9] The Plaintiff testified that the Defendant sent him to South Africa for medical treatment one week after the incident where he had a successful operation, although he maintained that he was in a lot of pain. After staying in South Africa for one month, the Plaintiff came back to Seychelles and subsequently for a period of six months went to South Africa for check-ups every two weeks.

[10] The Plaintiff testified further, that his ankle is painful when it is cold and when he steps on the foot in the mornings. He also claimed that he has difficulty bending the foot to one side. Moreover, the Plaintiff testified that the accident has resulted in him not being able to wear shoes and he now wears flip-flops and sandals. In cross-examination, the Plaintiff revealed that he has not gone for further testing since 2010. He also testified that although he does not have to apply medication on the foot he occasionally takes painkillers.

[11] The Defendant upon closure of the case for the Plaintiff decided to make a Motion on a no case to answer subject matter of this Ruling.

### **Legal analysis and Discussion of evidence**

[12] Having illustrated the salient evidence pertinent to this matter, I shall now move on to the applicable law and its analysis thereto.

[13] After an examination of the evidence before the Court it is difficult to discern whether the damages being claimed by the Plaintiff are arising out of breach of the alleged employment contract or under delict. This distinction is important because “*it is not permissible to claim under both or to claim under delict when it is possible to claim under contract*” and this as clearly held in the case of **(Mangroo v/s Round Island Resort (CS22/2014) [2016] SCSC 91 (21 November 2016))**.

[14] The Defendant has denied that the Plaintiff was an employee save that it on humanitarian grounds paid for his treatment overseas. In any event, this Court notes that the Plaintiff has failed to bring contractual evidence to prove that he was an employee at the relevant time. The evidence before the Court suggests that there was a form of an employer/employee relationship between the Defendant and the Plaintiff, however, the nature of the relationship is unclear.

[15] As per the provisions of section 19 of the Employment Act (1995) the following is provided with respect to employment contracts:

(1) *A contract of employment may be a contract*

(a) *of continuous employment;*

(b) *for a fixed term;*

(c) *for the employment of a part-time worker; or*

(d) *for the employment of a casual worker.*

[16] Although not made explicit in the Plaintiff or the evidence, it warrants mention and consideration to point out that if the Plaintiff was employed by the Defendant as a casual worker, *Section 25 (1) of the Employment Act 1995 states that: (1) a contract for the employment of a casual worker is not required to be in writing.*

[17] On the other hand, delictual liability is governed by Article 1382 of the Civil Code (“Code”) of Seychelles which 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.”*

[18] The provisions of Article 1382 of the Code clearly outline three elements necessary to establish delictual liability namely, fault, damage and causality. As articulated in the case of **(Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA 33 para 32)**, *“liability of a Defendant under Article 1382 can however be absolved totally or partially. This is the case where there is an act exterior to the actions of the Defendant or by reason of the acts of the victim”.*

[18] Article 1384 of the Civil Code of Seychelles imputes liability to an employer as it states that:

*“1. 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.*

*3. Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.”*

[19] In the case of **(The Attorney General rep. Government of Seychelles v Jumaye (1978-1982) SCAR 348)**, Lalouette JA, articulated that in France, liability under Article 1384 of the French Civil Code is not based on *faute* (fault) but an, “*objective liability independent of faute*”. This means that, “*the victim of the damage must allege and establish only the causal role of la chose (the thing) by which the damage has occurred. Otherwise he benefits from a presumption of causality (responsibility) by the custodian although the custodian of the thing may be exonerated fully or partially if he can show that there existed natural events..., the intervening act of a third party or the act of the victim himself*” **(Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA 33)**.

[20] In the present suit, similarly, the Plaintiff failed to establish whether he is seeking damages under Article 1384 or under Article 1382 as the burden of proof is clearly different. Similarly, the Defendant did not refer to any provisions either Article 1384 or under Article 1382 in its defence. In the case of **(Confait v Mathurin (1995) SCAR 203)**, the Court of Appeal stated that parties are bound by their pleadings:

*“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 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 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.”*

[21] The Plaintiff argued that he considered extinguishing the fire as part of his job role. The question which arises thus, is whether the Plaintiff’s actions were within the scope of his employment as covered by Article 1384. The evidence is unclear as to whether the

Plaintiff's actions were indeed within the scope of his employment. The failure to produce a contract with a clearly defined job description makes it impossible for the Court to ascertain the nature of the Plaintiff's job obligations. According to his testimony, the Plaintiff was not asked to extinguish the fire. He volunteered to go on top of the roof and in the process fell and damaged his foot. I turn to the *Volenti non fit injuria* principle for useful insights into the legal position of a volunteer who encounters harm.

[22] It is important to note that the *Volenti non fit injuria* which is a common law principle although referred to in the case of **(Didon v Roucou Construction Company & Ors (CS90/2003) [2016] SCSC 624)**, in the case **(Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA 33)**, it was clearly stated that in delict cases civil law authorities are preferable to common law authorities, whereby the Court held that:

*“Although it is trite, we are minded to repeat that our laws relating to delict are contained in five Articles of the Civil Code (Articles 1382-1386). That Civil Code is derived from and to a large extent translated directly from the French Civil Code. We have developed our own jurisprudence but often refer to authorities or doctrinal writings from other civilist traditions such as Mauritius or France when we lack local jurisprudence on a particular issue. These jurisdictions have almost identical Civil Codes and therefore the underlying doctrines are the same. They are therefore better persuasive sources than legal systems from countries that do not share the same underlying doctrines”.*

[23] Simply put the *volenti non fit injuria* doctrine states that “[a] claimant who has assumed the risk of injury has no action if the injury occurs” **(Graham Gooch and Michael Williams, A Dictionary of Law Enforcement (2 Ed.) Current Online Version, Oxford University Press, 2015)**.

[24] In the light of the above enunciated common law principle in, **(Skipp v. Eastern Counties Ry., 23LJ(Ex.) 23 (1853)**, the Court held that if the Plaintiff acted when there is knowledge of danger then the case falls within the principle of *Volenti non fit injuria*.

Lord Bowen in (**Thomas v. Quartermaine CA (1887) 18 QBD 685**) - noted that *Volenti* is not the same as *scienti*; for a case to fall within *Volenti non fit injuria* (1), “*knowledge and perception of the danger,*” is not enough, there must also be, “*comprehension of the risk*” and (3) “*that knowledge under circumstances that leave no inference open but one, viz. that the risk has been voluntarily encountered, the defence is complete*” (**Reference to Simms v. Leigh Rugby Football Club Ltd [1969] 2 All ER 923**).

[25] In (**Osborne v. London & N. W. Ry. Co., 21 Q. B. D. 224 (1888)**), Lord Wills pointed out that the requirement that the Plaintiff must have knowledge of the nature of risk in order for the defence of *Volenti non fit injuria* to be applicable, “*goes far to make it hard for a Defendant to succeed for it is probable that juries would often find for the Plaintiffs on the ground that they had not full knowledge of the nature and extent of the risks*”.

[26] Noting the above principle in the light of the evidence before this Court, it is clear that the Plaintiff misapprehended the danger involved in going on top of the roof to extinguish a fire. The Plaintiff testified that he had received training in fire fighting (which was a three-day training course). The evidence reveals that the fall was attributed to water dripping on his feet causing him to slip. Unfortunately, this was entirely his own doing. The Plaintiff also testified that he went on top of the roof barefooted and he claimed that the roof was brand new and should not have been slippery. The Court is bound by the averments in the Complaint and the issue of whether he had misapprehended the danger was not raised, as such, it cannot be considered in this suit, although, it necessitates mentioning for future reference.

### **Conclusion**

[27] It is evident, therefore that based on the above analysis as illustrated that the Plaintiff has failed to adduce any evidence to support his claim for damages for pain and suffering and permanent disability either under contract or delict. No medical reports were produced by the Plaintiff, except his testimony that he is self-medicating on painkillers. Similarly, no evidence was adduced in relation to how the injury resulted in the loss of earning.

[28] Further, there is no evidence to show that the Plaintiff was required or asked to go on top of the roof as part of his job description either. Therefore the case falls within the principle of *Volenti non fit injuria* and the Plaintiff is not entitled to any compensation for his alleged injuries.

[29] Hence, it follows that the submission of no case to answer is upheld and Plaintiff is dismissed with costs in favour of the Defendant.

Signed, dated and delivered at Ile du Port on 17<sup>th</sup> May 2019.

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**ANDRE J**