SUPREME COURT OF SEYCHELLES

Reportable/ ~~Not Reportable / Redact~~
[2019] SCSC ..423
CS 73/2016

In the matter between

DANIEL MERITON — **Plaintiff**
(rep. by Mr. Gabriel)

and

1. RONNY ETHEVE — **1st Defendant**
(rep. by Mr. Chetty)

2. PUBLIC UTILITIES CORPORTATION — **2nd Defendant**
(rep. by Mr. Rajasundaram)

3. SARAH BASTIENNE — **3rd Defendant**
(rep. by Mr. Padiwalla together with Ms. Nicette)

Neutral Citation: *Meriton v Etheve & ors* (CS 73/2016) [2019] SCSC (30th May 2019).
Before: Nunkoo J
Summary: **Road accident- Engine failed-Sided backwards downhill and overturned. Employee of the PUC injured-Is the Employer vicariously liable. Meaning of scope of employment.**
Heard:
Delivered: **30th May 2019**

ORDER

The Defendant No 2 to pay SR 500,000 as damages for injuries and Rs 50,000 as moral damages with cost.

JUDGMENT

NUNKOO JUDGE

[1] The Plaintiff is claiming the following damages jointly and severally from the Defendants:

SCR 700,000.00 for injuries
SCR 100,000.00 as moral damages for trauma, anxiety, distress and lack of amenities.

[2] In his plaint he has averred that he was employed by the Pulic Utilities Corporation; the first Defendant is a "prepose" employed by the second Defendant to transport workers in the employment of the second Defendant , which is a parastatal company providing utility services in the country. The third Defendant was at all material times the owner of the vehicle S2143, hired on contract by the second Defendant and operated by the first Defendant.

[3] An accident happened on 7th February 2014 when the vehicle was being driven by Defendant Number One and the Plaintiff was sitting in the truck box on a heap of concrete blocks and weld mesh. At a particular spot, Dan Bernard, at Bel Ombre the truck overturned and the Plaintiff was stuck underneath. He was injured and had to be removed by the Fire Brigade. He stayed there for nearly half an hour. He was taken to hospital. He was admitted for a period of three months; his leg was broken in two different parts and he had injuries all over his bodies.

[4] The Plaintiff has averred that the accident was caused through the faute and negligence of the Three Defendants.

[5] The particulars of the faute and negligence are as follows:

a) The 1st Defendant failed to heed sufficiently or at all to the nature of the road he was driving,
b) The first Defendant failed to brake and did not give proper warning to the passengers seated at the back of the pick up.
c) The second Defendant is vicariously liable to the Plaintiff for the actions of the First Defendant who was a prepose of the Company.

d) The Third Defendant is liable as owner of the vehicle carrying the Plaintiff and which overturned thus causing serious injuries to the Plaintiff.

[6] **Defence of Defendant No.1**

The Defendant has admitted that the Defendant was stuck under the truck. He has averred that while the truck was going uphill it suddenly stalled and it stopped working and soon thereafter the truck started moving downhill in a reverse position..

He requested all the passengers to get off the truck and they did so, whereas the Plaintiff was trying to untie his bag from the frame of the truck. The Defendant has averred that he desperately and unsuccessfully tried to steer the truck downhill; the truck overturned some 75 metres away and landed sideways on its wheels. Plaintiff's leg was under one of the wheels.. He denies fault and has averred that the injuries sustained by the Defendant was due to his own fault as he failed to get out of the truck up when it had started going downhill.

[7] **Defence of Defendant No. 2**

The Second Defendant has averred that that whatever faute caused is amongst the first Defendant and the Plaintiff on hand and the owner of the vehicle on the other hand. The Second Defendant is not liable in law. Negligence is denied and everything that happened is between the driver and the other parties and the Second Defendant is not liable in any way.

[8] **Defence of Defendant no.3**.

The third Defendant was the owner of the truck S 23143, that was hired by Defendant No.2 and was driven by Defendant No. One. The third Defendant had given over control and authority over the first Defendant to the Second Defendant and that at the time of the accident there was a "lien de subordination et dependence" of the first Defendant towards the Second Defendant.

She has denied the particulars of the loss and damage and has averred that she is not responsible or liable to make good any damages.

[9] **Evidence of the First Plaintiff**

The First Plaintiff testified he that he worked as a labourer with the PUC and on the day of the accident, that is on 7 February 2014, he was asked by the Supervisor to go on a trip at a certain locality known as Dans Bernard, somewhere at Bel Ombre. The vehicle was being driven by one Roy Hertel. They were carrying 100 concrete blocks when all a sudden whilst the vehicle was moving uphill it stopped and could not move ahead; instead it started moving backward. At that time those who were able to jump out did so whereas the Plaintiff could not as his leg got trapped between the blocks and the side of the lorrybox. The truck then turned sideways and his legs were underneath it. He testified as to his injuries and stated that his leg was broken in three places and had to stay in hospital for three months and had to stay at home for two years. All throughout his wife had to do everything for him like bathing him, nursing the injuries etc. He stated that he still has pain.

[10] In cross-examination by Learned Counsel for the First Defendant, he stated that during the time he was nor working he was receiving social security. He stated that truck was full with blocks and weldmesh. So they had to sit there on the blocks. He denied hearing the driver asking them to get out because of the speed at which the truck up was moving.

[11] He stated that as the truck was moving backward his body also leaned backward and his leg got stuck. He denied that it was because he was trying to get hold of his bag that he could not get out of the pick in time. He maintained that he was acting under the instructions of the team leader who was acting upon the instructions of the supervisor. He stated that he had no choice but to comply as at the PUC if he refused to comply he would get a report. So even when they carried the poles at the back of the pickup they could not do anything but comply.

[12] When asked by Learned Counsel for the Second Defendant as to why he sat at the back he replied that it was the Team Leader who asked all the workers to sit at the back. The Witness denied being negligent for having sat at the back of the truck.

[13] To a question from Learned Counsel for the Third Defendant he confirmed that he received instructions from the Team Leader and the Supervisor.

[14] **Evidence of Defendant No. One.**

He stated he was 54 and had over 33 years driving experience. He was employed as driver by Mrs Sarah Bastienne, the 3rd Defendant and the truck was engaged for six months by the PUC. On the day of the accident they carried poles for the PUC to Sans Souci and planted them. Around 11.30 am they finished and it was lunch time when the when the Supervisor, one Francis Valentin, of the PUC, gave an order to go and collect some blocks at UCPS and to bring these to his house at Dan Bernard, Bel Ombre. The truck was loaded with 100 blocks and two sheet of weldmesh. They were about 8 metres from the home of the Valentin when the engine failed; it was in the first gear. So at that point in time the trusck which was properly braked and in the first gear started sliding (trenne) backwards. The heels did not rotate; the truck was sliding on its wheels (glise). He denied being negligent.

[15] In cross-examination by Mr Rajasundaram for Defendant No2 the Defendant stated that the truck move at least som e 75 metres backward with all the brakes including hand brakes on. He stated to court that he could not disobey the instructions of the Supervisor.

[16] He admitted that the truck had a weight of well over three ton, with blocks and and six men on it plus the weight of the unloaded trucks and that there is a sign which does not allow trucks carrying over three tons to use that uphill road.

[17] He testified that he had been such trips for the staff several times.

[18] **Evidence of Defendant No. 2-**

He testified that he was an an electrical engineer working with the PUC for 14 years. As regards the accident he stated that after he learnt about the accident he went to the hospital. He also stated that it was the practice for the PUC to allow the trucks to be used by the staff for their personal use provided permission is obtained from the management. He also testified that an investigation was carried out and that the Supervisor Valentin was given a

warning. To a question why he was not dismissed on the spot for such a serious matter he said he could not reply as this is within the competence of the Human Resource officer.

[19] **Evidence of Defendant No. 3**

The Defendant testified that she was the owner of a truck S 2143 and in 2014 the PUC hired the truck for a long long term period. During that period the truck would remain with the driver that is Defendant No 1 and the PUC would call him early every morning to assign him his trips.

[20] In her cross examination by Learned counsel for the Defendant No 2 that is the PUC, the witness stated that the driver was receiving all his instructions from the PUC and she was not aware about the road licence as the driver never told her.

[21] She also stated that the driver did not have to inform her that he was carrying concrete blocks and weldmesh as per the instructions of the Supervisor of the PUC.

[22] The evidence clearly and undisputably establishes inter alia the following:

That on 7 February the Plaintiff was in the employment of the PUC ie Defendant No. 2

That on that day he was on the truck seated on a load of concrete blocks and the truck was going towards Barnard and the materials were for the personal use of one.supervisor at the PUC

That an accident happened as the truck started moving downhill in the reverse mode and that the Plaintiff fell down and was seriously injured.

[23] It is trite law that an employer is vicariously liable for the faute of his employees. We have to consider here on the face of the evidence if the driver was at fault? I have no doubt that the driver failed to drive properly and safely or at least he failed to stop the truck when it started moving backwards. He had the necessary distance and time for that . I say so after having visited the locus.

[24] I visited the locus. I noted that from the spot where the driver showed the lorry had stopped and looking downhill one would find that the road is narrow. On both sides there are shrubs and rocks. The road itself is well surfaced and would give a good grip to any vehicle.

[25] I also noted that there is a bend on the left downwards some 75 metres away. It was at this spot the lorry overturned because it could do the bend, which is almost 90 degrees. The decent was quite sleep. It is more than probable that the truck did not skid but rather it was on its wheels, rotating, but the driver lost control of the truck. I do not believe the witness when he said that the truck slided with the road surfaces as seen by me. To that extent I hold the driver responsible for the accident. It is impossible for a lorry to slide over such a long distance. I do not believe the 1st Defendant. To believe this mean that everytime a lorry with a similar load stopped had or has problems like the present driver wants the court to believe. It would mean simply that no such vehicle can stop as it would go backward.

[26] It is also on record that at the time of the accident it was lunch time and the truck was doing a trip for the supervisor of the PUC. The question is whether the Supervisor had the permission of the management to send the truck on a personal errand. The Plaintiff testified that such trips were usual. This was also confirmed by the witness from the Defendant PUC. He admitted that such trips were allowed by the PUC but consent had to be obtained. What is relevant here is that such trips were allowed. This was a current happening at the PUC. As regards this witness I must say he was hesitant and not convincing, to the extent that the court had to tell him to speak out clearly and in a straight forward manner. I do not hold him to be a credible witness.

[27] Had the Foreman and the Supervisor been made to give evidence this would have shed more light on the issue of permission for the said trip. It's a pity that they were not called. By either side. . Now I come to the crucial part of this case. Did the Supervisor have the authority from PUC to ask the Plaintiff to do the trip? There is no direct and conclusive evidence as to this fact. It is on record from the Plaintiff that at the PUC it was common practise for the truck to do private trips for the staff. The witness from the PUC did not deny this. He stated however that prior permissions of the management had to be obtained.

It is not conclusively said by him that such permission was asked and refused or simply refused by the supervisor. There was an investigation following the accident. . He could not say upon whose instructions that this was carried out. He just stated that the Human Resource Director dealt with that and a warning was given to him. Learned Counsel rightly said that he deserved dismissal on the spot. No record of any investigation or warning was provided to the Court. Further it would have been possible to have the Human Resource Director come and depone as to the investigation and the warning that was given to the Supervisor. This evidence borders on hearsay and the Court cannot rely on it. I have reasons to believe that the trip on that day was carried out with the full knowledge and tacit permission of the PUC.

[28] There was no police evidence as to the conditions in which the accident happened. A pickup which just starts sliding with all the load would certainly leave tyre marks. No evidence of any tyre marks was produced before the Court. There was no professional report of the mechanical defect if any that led to the engine stalling of a sudden. This would have shed light on the responsibility of the driver.

[29] The question at the end is: Will an employer be vicariously liable for damages sustained by an employee in a motor vehicle accident during their lunch break, when the employees were on a personal errand for their supervisor, when this is a known practice in the employ?

[30] Vicarious liability is provided for in Article 1384 of the Seychelles Civil Code. In its simplest, vicarious liability refers to a circumstance where someone is held responsible for the actions or omissions of another person. Thus, Article 1384.1 states that '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.'

[31] As regards the liability of Defendant No. 3 it is settled principle that the hirer cannot be liable for the negligent act of the driver or of the employees of the hiree ie Defendant No.2(.See *case Hoareau and ors vs Kojak Car Hire SLR 87.)*

[32] This form of strict, secondary liability arises in the context of employment. In this regard, Article 1384.3 provides:

> 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.'*

[33] Thus, in *Civil Construction Company Limited v Leon & Ors* (SCA 36/2016) [2018] SCCA 33 (14 December 2018) para 40, it was said that employers are strictly liable for the damage caused by their servants and employees acting in the scope of their employment. Thus, there is therefore a presumption of fault on the part of employers for the acts of their employees.

[34] To establish liability for damages, the article sets out various elements. Firstly, there must an employment relationship. Second, there must be damages caused by the employees. Third, this must occur in the scope of their employment. If it is a deliberate act, contrary to the express instructions of the employer, and is unrelated to the employment, then the employer will not be liable.

[35] In the present matter, the contentious element is whether the damages were caused in the scope of employment. This is a complex requirement, and various factors contribute to the complexity. For instance, the timing of the act ie whether it occurred while an employee was on duty; the nature of the act; the location; the tools involved etc.

[36] There is a dearth of case law on this requirement. In the few matters where it arose, it was not fully ventilated.[1] One matter where the requirement was dealt with frontally is *Banane v Government of Seychelles* (CS 358/2006) [2011] SCSC 110 (01 August 2011). This

matter concerned a claim for delictual damages against the Government of Seychelles for the shooting and killing of the deceased by a member of the National Guard. The Government denied liability, stating the perpetrator, though a member of the National Guard was not acting within the scope of his employment when he killed the deceased. The court said this:

'Merely stating that the Antoinne Benoit was off duty that evening and therefore whatever he did was outside his scope of employment, to me, is not convincing enough to exonerate the Defendant of liability when actually he used his 'tools of work trade' (loaded rifle) allocated to him by his employer (government) for his daily duties to shoot and kill apparently an innocent citizen at the place where he had always been assigned to work. If that is the basis of the Defendant's case (denial) then one would ask why and how Benoit gained entry to his place of work yet he was off duty and took possession of the rifle which should by this time have been under the custody of another officer on night duty. It defeats my understanding for one to claim that an officer was off duty when he is actually handling and operating a riffle, his main tool of work, especially one provided by his employer. It would be a different matter if he had stolen it. There is no evidence on record suggesting any report of loss or forceful snatching of a rifle from that residence.'

[37] In the above case, the court took several factors into account to find that the incident occurred within the employee's scope of employment. First, the riffle that the employee used to shoot the deceased was allocated to him by the Defendant. Second, the employee had access to his place of employment, and could access the rifle, he had not stolen it. Third, there was no evidence that the rifle had been stolen. In the court's view, these factors supported the finding that the killing had occurred in the scope of employment. The fact that he was supposedly not on duty at the time was not sufficient to oust the Defendant's liability.

[38] Another case which dealt with the scope of employment requirement, outside of work hours is *Jude Fanchette v Dream Yatch Charter (Seychelles) Ltd* [2015] SCSC 125. In this case, the Plaintiff had sued the Defendant after he fell off a ladder whilst climbing onto the

Defendant's boat. He had been repairing the boat for the Defendant during the day at the Naval Services Yard on Mahe, and having missed his transport back to Praslin, was to sleep on the boat and continue work on it the following day. The access to the boat was via a lightweight stepladder on wheels that was positioned next to the boat. The ladder toppled over when the Plaintiff was stepping across the short distance onto the boat. As a result of his fall, he suffered injuries to the head and neck.

[39] He claimed delictual damages, and averred that this injury occurred in the course of the Plaintiff's employment with the Defendant. The Defendant's position was that the accident was not within the course of the Plaintiff's employment as the injuries sustained at the premises of a third party, using a ladder of belonging to that third party and whilst not in an act of employment. In this regard, the court said:

The second question is whether the Plaintiff's injury occurred within the scope of his employment. It is true that the accident happened outside of work hours, whilst the Plaintiff was not actively engaged in work for the Defendant. However, he was accessing the Defendant's boat in order to sleep in it, as directed by the Defendant, and only as a result of undertaking the work for the Defendant. I am satisfied that the Plaintiff's injury was within the scope of his employment as he was staying on the boat at the Defendant's knowledge and direction. This is further bolstered by the fact that Mr. Boyer provided the Plaintiff with pillows and sheets for while he stayed on the boat.'

[40] The factors the court considered included (a) the fact that the Defendant had directed the Plaintiff to access the boat; (b) that the Plaintiff was accessing the boat to sleep in it and had been provided with sleep gear by the Defendant; (c) and that the reason for this access was due to doing work for the Defendant. The Defendant's knowledge and direction were paramount in this instance.

[41] From these two cases, it seems clear that the court had adopted a nuanced approach to the requirement of scope of employment. The fact that the incident occurred outside work hours or outside the work premises does not in itself mean that it did not happen within the

scope of employment. Depending on the facts, different factors may be considered, which include in certain instances, knowledge and direction by the employer.

[42] In the present matter, various factors are present which favour a finding that the accident occurred within the scope of employment. First, the employee was on a work vehicle, being driven by a fellow employee. Second, the employee's supervisor gave the instruction for the drive and drop off of the brick at his house so he had knowledge of this errand. Third, there was a practice at the employer of employees conducting personal errands for supervisors during lunch breaks, and this accident occurred within such a context.

[43] The accident thus occurred within the scope of his employment, thus satisfying this component of Art 1384.3.

[44] For all the reasons given above I find the Defendant No.2 vicariously liable for the acts of Defendant No. 1. I therefore order it to pay the sum of 500,000 as damages for injuries and SR 50,000 as moral damages.

[45] With costs.

Signed, dated and delivered at Ile du Port on 30 May 2019.

Nunkoo J