

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC
CS 109/2018

MANETTE LABICHE
(rep. by Danny Lucas)

Plaintiff

and

FS MANAGEMENT TRADING
(rep. by Frank Elizabeth)

Defendant

Neutral Citation: *Labiche v FS Management Trading* (CS 109/2018) [2019] SCSC (24 June 2019).

Before: Twomey CJ

Summary: delict – contract - *non-cumul* – option between the two causes of action
damages for permanent disability of ankle

Heard: 18 March 2019 – 15 May 2019

Delivered: 24 June 2019

JUDGMENT

TWOMEY CJ

The Facts

[1] The Plaintiff, a Pool Attendant and employee by a hotel resort controlled and managed by the Defendant suffered a fall and sustained injuries to her ankle, legs and body. She claimed damages from the Defendant for its vicarious negligence in its performance, responsibilities and duties in respect of ensuring a safe place of work for her.

[2] The Defendant denied liability for the accident or that it had ever been the Employer of the Plaintiff.

The Evidence

The Plaintiff's evidence

- [3] The Plaintiff testified that she was 42 years old and that she had been unemployed for six years as a result of her accident on the defendant's premises. She stated that the Resort where she worked as a Pool Attendant was called The Four Seasons Resort. She explained that the Resort has buildings scattered over an extensive area and a bus would take workers from a drop off point to the various buildings in which they worked. She would go to the locker room near the drop off area and get dressed in a T-shirt, shorts and crocs before proceeding to her place of work.
- [4] On the day of the accident she finished work at 4.20 pm and was picked up by the staff bus near villa 5 in the Resort. There was some work being done on the speedbumps near the bus drop off point. There were trenches dug and the passengers were trying to get around the trenches. Her footwear (the crocs) were slipping on the red soil and she felt her ankle being twisted. She fell and with the impact of the pain she ended up sitting down. At the time there were workmen still working at the site. They had blocked the speed bump with wood planks on each side. There were no other signs or other structures put in place for the safety of the workers.
- [5] She had been very careful when negotiating the difficulties on the road. Other workers had also slipped but she was the only one injured. After her injury, there was no Nurse at the Resort to attend to her. She had thought that when she got home she would apply some ice and the injury would get better. However, the next day she could not walk at all on the foot. It was blue in colour and swollen. She attended Anse Boileau clinic and she was sent to Seychelles hospital for an x ray. The foot was then immobilised in plaster of Paris. She was put on medical leave for four months. During that time her Employer paid for her salary.
- [6] On 28 August 2013 they removed the plaster of Paris and found the foot blue. They applied a "back slab" cast. She had electric impulse therapy and then was on crutches for five months. Subsequently she underwent physio therapy for about a year and engaged in swimming. She continued exercises at home but the pain did not resolve. She attended

the orthopaedic clinic and continued for another five years. She developed pain in her lower back from the injury.

- [7] She continues to attend the clinic and is unable to do the things she used to enjoy such as jogging, cycling and even walking along the beach can hurt the soles of her feet.
- [8] A letter of demand was sent to her Employer on 4 June 2014 and in reply they stated that they were taking the matter up with their insurance company. A second letter was then sent to her Employer on 27 June 2019 asking them to expedite the claim. Her Employer submitted a written report to the Ministry of Labour and Human Resources Development pursuant to the Occupational Health and Safety Act outlining the details of the accident.
- [9] The Plaintiff testified that her injuries were as a result of the fall occasioned by the negligence of her Employer in not providing a safe stem of work. As a result of the accident she has not been able to work and is forced to live on SR 2,500 disability benefit monthly. She is a sole parent with two children and finds it hard to make ends meet.
- [10] She suffers pain and has to live with it every day. She claimed SR 750,000 for her pain and suffering. She could no longer engage in her sporting activities like tennis, badminton, jogging and cycling which she used to enjoy. She could not engage in fun activities with her children as she had to sit down for long periods of time. She could not work and claimed SR 309, 000 for economic loss. She had been earning an average of SR8, 000 a month at the time of the accident.
- [11] In terms of future economic loss she claimed SR780, 000 calculated from a minimum salary of SR5333 for a period of twelve years. She also claimed SR900, 000 for permanent disability.
- [12] She denied that her injuries were exaggerated, as were the damages she had claimed. With regard to her claim for future economic loss she maintained that she was unemployable.

Evidence of Doctor Chetty

[13] Dr. Chetty, a medical registrar in orthopaedic surgery at Seychelles Hospital testified that the Plaintiff first came to the hospital on 25 August 2013 complaining of pain in her right ankle. At the time she was not able to walk properly. The x ray carried out on the ankle did not show any obvious fracture and she was treated conservatively with a back slab to immobilise the joint.

[14] After two weeks, the back slab was removed and the Plaintiff was advised to start physical therapy to rehabilitate the joint. On October 28th 2013, she returned to the clinic complaining of pain and was sent for MRI and it was found that she had synovitis caused by the trauma.

[15] She continued reporting about pain and having difficulties walking. She also continued attending physiotherapy in 2014. She attended the spine surgeon on 21 August 2017 as she was suffering from pain and continued physiotherapy was again advised. In April 2018 still in pain, the Plaintiff saw Doctor Abdel who noted supination deformity in her foot when walking. He also reported a decreased sensation of the lateral aspect of the ankle, abductor foot weakness and weak power in the muscle.

Evidence of Suleman Athanasius

[16] Mr. Athanasius, a compliance officer with the Companies Registration Division, stated that FS Seychelles Management Ltd was a registered company operating under the business name of Four Seasons Resorts Seychelles. He produced the supporting documentation.

Evidence of Yanick Lucas

[17] Mr. Lucas, a Legal Officer with the Seychelles Licensing Authority, testified that a licence was issued to FS Seychelles Management Ltd to operate a hotel. The period of validity of the licence was from 2009 to 2022.

The Defendant's Evidence

Evidence of Bernard Kolsch

[18] The Defendant called Mr. Bernard Kolsch, the Director of Human Resource's at the Four Seasons Resort. It was his evidence that the Plaintiff was employed by Petit Anse Development Ltd. He explained that the Plaintiff was simultaneously employed by Four Seasons Development and Petit Anse Development Ltd but accepted that the business traded as Petit Anse Development Ltd. He further stated that 1% of the business traded as FS Management (Pty) Ltd. He testified that the Plaintiff had resigned from her position.

Submissions from the Plaintiff

[19] It is the Plaintiff's submissions that the Defendant did not contest the evidence led by the Plaintiff and that she has conclusively established her case in relation to her injury and damages suffered. The Defendant only raised the issue of the fact that it was not the Plaintiff's Employer but did not establish that fact. Further, the fact that the Plaintiff was employed by the Defendant was established by the documentation and evidence of the Registrar of Companies, the Licensing Authority, the Ministry of Employment and letters from the Defendant itself confirming their status as the Plaintiff's Employer.

Submissions from the Defendant

[20] It is the Defendant's submissions that the Plaintiff has not discharged its burden of proof. Relying on *Laporte v Fanchette* (2013) SLR 593, *Monthy v Seychelles Licensing Authority* CS 24/2012, *Emmanuel v Joubert* (1996) SCCA 49, *Suleman v Joubert* SCA 27/2010, it submits that the Plaintiff has to discharge both the legal and evidentiary burden of proof in this case as she was wont to but that she did not bring evidence of her contract of employment with the Defendant. It further submits that this was crucial as the Defendant has disputed that it was the Plaintiff's Employer.

[21] With regard to the issue of damages, it is the Defendant's submissions that the Plaintiff's claim is grossly exaggerated and not supported by the evidence adduced.

My observations and findings

The Defendant's liability

[22] The Plaintiff appears to have grounded her claim in the delictual responsibility of the Defendant but claims that the injury happened "in the course of her employment".

[23] In *Mangroo v Round Island Resort* (CS22/2014) [2016] SCSC 910 (21 November 2016) where an employee of a resort had fallen and injured himself on a pontoon operated by the his Employer I made the following observations:

"[19] I have examined the transcript of oral evidence together with the documentary evidence adduced. I have also studied the pleadings of the Plaintiff. I am unable to discern whether the Plaintiff is alleging that the claim arises out of a breach of contract or whether it is one arising from a delict. It is not permissible to claim under both or to claim under delict when it is possible to claim under contract.

*[20] In regards to this particular case, the law relating to delicts in Seychelles can be summarised as follows: Under Article 1382 of the Civil Code a person who causes an event to happen, and who is at fault, is liable for it. Article 1383 provides that liability is also established where conduct manifests itself in the form of an omission. Such misconduct can occur where the defendant acts in breach of a statutory duty or the rules of conduct derived from the general principle of *neminem laedere*. Article 1384 (1) provides that a person is liable for damage caused by things in his custody.*

...

*[22] If the claim for damages is based on the existence of a contract, Article 1147 of the Civil Code, which establishes a presumption of fault, applies. Hence, a person who has committed a breach of contract is bound to pay damages, unless excused by *force majeure*, or where he has not performed his obligation correctly and in time."*

[24] In *Mangroo* (supra) I went on to find that an employee is entitled contractually to a safe place of work whether this is specified or not in the contract of employment. This is because of the provisions of the Occupational Safety and Health Act, specifically that it is the duty of every Employer to ensure, in accordance with the Act and any other written law, the health, safety and welfare at work of all his employees.

[25] In terms of the Plaintiff's claim in the present case it appears that it is the delictual liability of the Defendant that is invoked and not its contractual liability. Paragraph 3 of the Plaintiff states:

“The accident and resulting injuries occurred due to the negligence and faute of the Defendant, whether by himself, his agents, preposés, employees or authorised persons.”

[26] In any case both contractual and delictual liability cannot be invoked as the principle of *non cumul de responsabilité* operates in Seychellois law as I stated in *Mangroo*. In *Pool v Souris* (1996-1997) SCAR 23, in a similar situation where the Plaintiff seemed to have invoked both a contractual and a delictual remedy, the Court of Appeal found that where the Plaintiff disclosed two causes of action arising from the same set of facts, the Plaintiff should be invited to elect one of the causes of action. When this does not happen it may be clear from the pleadings and the evidence which of the two causes of action the Plaintiff proceeds under.

[27] In the present case, the fact that the particulars of *faute* and negligence are set out makes it clear that the Plaintiff is proceeding under delict and the vicarious liability of the Defendant for the *faute* of its servants and employees, that is, the workmen employed to carry out the work on the premises.

[28] In this respect, it must be noted that the Defendant has not disputed that work was being carried out on its site and that no proper safety precautions were put in place to prevent the Plaintiff slipping on the wet clay as she made her way around the trench being dug by workmen employed by the resort. This evidence was not challenged in any way.

[29] Whether the Defendant was the Plaintiff's Employer thus becomes immaterial. What must be shown is that the Defendant owned, operated or controlled the site where the accident happened.

[30] The evidence adduced by the Plaintiff in the documentary evidence produced and the testimony of Suleman Athanasius and Yanick Lucas are conclusive that FS Seychelles Management Ltd (the Defendant) was a registered company with a business licence to operate a hotel. The licence is valid to 2022. I find therefore that the Defendant did control and operate the hotel and is therefore liable vicariously for the fault of workmen on its premises occasioning injury to persons on the premises, namely the Plaintiff who was authorised to be there. It is also not denied that no warning signs were in place nor a safe alternative provided to the Plaintiff to get around the trench in the road. The fact that she slipped is also not denied. In the circumstances I find the Defendant liable for the accident.

The injury to the Plaintiff and the damages due

[31] It is trite that only an act causing damages that can be repaired. That damage must be existing, direct and certain (See Articles 1147 and 1150 Civil Code of Seychelles). Article 1149(2) of the Civil Code further provides that damages for injury, loss of rights to personality, pain and suffering, aesthetic loss and the loss of any of the amenities of life may be claimed for injury sustained.

[32] In *Barbe v Laurence* (CS 118/2013) [2017] SCSC 408 (17 May 2017), I stated that broadly speaking there are three types of damages in cases of delictual harm: corporal damage, material damage and moral damage. I explained that the corporal damage or injury is the bodily injury caused to the victim and that such damages are meant to compensate for the diminution in the enjoyment of life of the victim and includes the physical pain and suffering of the victim. The material damage can be the destruction of things caused by the delict but also economic damage brought about by the inability of the victim to work or make a living. The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the victim as a result of the delict.

- [33] In the present case, the Plaintiff has claimed SR 750,000 for loss of amenities and SR900, 000 for permanent disability. These are corporal damages and in total amount to SR1, 650,000. She has also claimed another SR 75000 in moral damages. Without any doubt, these claims are exaggerated.
- [34] Although there is evidence that there is a mild deformity in the Plaintiffs right foot probably caused by synovitis occurring as a result of the traumatic injury to her ankle and that she suffered considerable pain I cannot see how such a monetary claim was arrived at nor did Counsel submit any comparative awards. There are also some discrepancies between the Plaintiff's account of her injury and treatment and that contained in the medical reports.
- [35] In *Barbe* (supra) the Plaintiff as a result of an accident had a swollen face, bruises on his head and hand, had lost a tooth and broken his left leg. He could not recall how long he spent in hospital but stated that he had to undergo physiotherapy for another seven months after being discharged. He had to stop working. He could not reach the house he had been renting with this girlfriend who was expecting his baby because of his leg injury and had to move into his mother's house. He could not meet his daily expenses. He continues to suffer from discomfort in his leg. He was awarded SR 200,000 for corporal damage. In *Tucker v La Digue Lodge* (unreported) C.S 343/ 2009, the Court awarded the sum of SR190, 000 for the fracture of a femur. In *Vital v Attorney General* CS 348 of 2005 in a similar injury, Renaud J awarded SR 200,000 but in that case the claimant had a residual limp. In *Farabeau v Casamar Seychelles Ltd* (2012) SLR 170, a sum of SR350, 000 was awarded also for a broken leg but this included permanent disability and atrophy of the limb.
- [36] I take into account the deformity to the Plaintiff's ankle and therefore grant her SR250, 000 in respect of corporal damages to include her claim for loss of amenities and permanent disability. I grant her a further sum of SR100, 000 for moral damages in terms of her pain and suffering.
- [37] In respect of her claim for material damages that is economic loss and future economic loss amounting to SR1, 089.312 in total, there is an insufficiency of evidence to support

her claim. Her Employer paid her wages for four months while she was off work. She claimed that after that period she received disability benefit amounting to SR2, 500 monthly whilst she had enjoyed an average salary of SR 8000 monthly previously.

[38] Since her Employer paid her salary until December 2013, I am prepared to compensate the Plaintiff in the difference in her wages after that period. However, I have a difficulty in ascertaining the end date for such a computation as the medical evidence is equivocal as to when she was able to return to work. She has claimed for economic loss for five years. She was clearly walking in 2014 although with pain and discomfort. She has also not brought evidence to support her claim that she cannot seek alternative employment. In the spirit of fairness since she was earning SR8, 000 monthly and was unable to walk properly for at least two years and received SR 2,500 from the Social Security Department monthly. I am willing to grant her the difference in earnings. Had she worked for the twenty-four months she would have received SR192, 000. Instead, she received SR60, 000 from Social Security. She is entitled to the difference in earnings that is, SR 132,000.

[39] I cannot entertain the Plaintiff's claim for future economic loss as there is insufficient evidence to support such a claim.

My Orders

[40] In the circumstances I order the Defendant to pay the Plaintiff the sum of SR250,000 for corporal damage, SR 100,000 for moral damage and SR132, 000 for material damage – a total of SR 482,000.

[41] The whole with costs.

Signed, dated and delivered at Ile du Port on 24 June 2019.

M. Twomey
Chief Justice