

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 480

(CS 150/2018)

In the matter between

LINYON SANZMAN

(rep by A Madeleine)

Plaintiff

and

LINYON DEMOKRATIK SESELWA

(rep by A Derjacques)

First Defendant

ELECTORAL COMMISSION

(rep by B Confait)

Second Defendant

DURAI KARUNAKARAN

(rep by Mr G Thachett)

Third Defendant

REGISTRAR OF THE SUPREME COURT

(rep by Mr G Thachett)

Fourth Defendant

Neutral Citation: *Sanzman v Linyon Deomokratik Seselwa & Ors* (CS 150/2018) [2020] SCSC 480 (27 July 2020)

Before: Govinden J

Summary: Plaintiff; delictual responsibility; preliminary objections; judicial immunity; a judicial officer cannot commit a faute during the course of his or her judicial functions, the act constitutive of what could have been a faute under article 1382 may, however, amount to a misbehaviour under article 134(1)(a) of the Constitution; claim in delict based in alleged malicious prosecution of a civil claim can sustain an action in delict.

Heard: 17 June 2020

Delivered: 27 July 2020

ORDER

The plaintiff is not maintainable against the 2nd; 3rd and 4th defendant and is struck out. The pleas *in limine litis* of the 1st defendant dismissed and the plaintiff shall proceed on the merits against the 1st Defendant.

RULING

GOVINDEN J

- [1] This is an action in delict, in which *Linyon Sanzman* (the plaintiff) avers that certain events and conduct of the defendants (collectively and individually) resulted in the inability of the plaintiff to use the name *Linyon Sanzman* in the 2016 National Assembly elections. As a result the plaintiff submits that it could not participate in the said election and suffered enormous financial losses as well as anxiety, humiliation and stress. Consequently, the plaintiff in this action claims the sum of SR 3,429,097 million from the defendants jointly and/or severally. It is the plaintiff's case that the defendant actions constitute a *faute in law* for which they are liable.
- [2] The conducts complained of is outlined in the plaint. The plaintiff submits that *Linyon Demokratik Seselwa* (the 1st defendant), out of malice and spite for the plaintiff and its leader, prevented it from using the name *Linyon Sanzman* in the 2016 election. It did so but maliciously bringing a judicial review suit before the Supreme Court, under case number MC 86/2016, challenging the allocation of this name to the plaintiff by the Electoral Commission (the 2nd defendant) and filed an application for a provisional injunction, under case MA 257/16, preventing the name *Linyon Sanzman* from being allocated to the plaintiff. The plaintiff avers further that Durai Karunakaran (the 3rd defendant), being a judge of the Supreme Court at the time these matters were filed, self-allocated the two cases to himself and granted an interim injunction prohibiting the 2nd defendant from accepting, applying or registering any candidates nominated by the plaintiff in the National Assembly election and quashed the decision of the 2nd defendant to allocate the name *Linyon Sanzman* to the plaintiff. The 3rd defendant thereafter self-allocated, determined and refused two ancillary applications connected to these suits. According to the plaintiff the Court of Appeal subsequently reversed and quashed the decision of the 3rd defendant and in so doing had held that the 3rd defendant had abused the process of the court. No specific material averments are made against the Registrar of the Supreme Court (the 4th Defendant).
- [3] All the defendants have raised pleas *in limine litis* pursuant to section 90 and 92 of the Civil Procedure Code based on points of law.

[4] Learned Counsel for the 1st defendant legal objections are as follows;

- (1) *The 1st Defendant, as a legal person and registered as a political party as per the Political Parties and Registration Act has a constitutional right of access to the court, including the Supreme Court of Seychelles in order to petition the court on any legal grievance,*
- (2) *It is a constitutional and legal obligation of any person, within the jurisdiction of Seychelles, to utilise the court systems, as lawfully established, to solve any intractable problem and not to have recourse to any other acts which may be unlawful.*
- (3) *The Republic of Seychelles is a constitutional and Rule of law State, the citizen must always have recourse to legal remedies.*

[5] The 2nd defendant's objection *in limine litis* is that the plaint does not disclose any cause of action against or any act done by the 2nd defendant which constitutes a *faute in law*, and therefore should be struck off the plaint.

[6] Learned Counsel for the 3rd and 4th defendant on the other hand raised the following objections;

- (1) *It is respectfully averred that the summons issued against the 3rd and 4th defendants are to be struck out in view of Constitutional Immunity under Article 119(3) of the Constitution.*
- (2) *It is respectfully averred that the plaint does not disclose any reasonable cause of action against the 3rd defendant and hence it is prayed that the pleadings be struck out as against the 3rd defendant.*
- (3) *It is respectfully averred that the 3rd defendant was acting in his judicial capacity and that the passing observation in the judgment of the Appellate Court, cannot give rise to an action for damages against the judge and/or Registrar of the Supreme Court.*
- (4) *It is respectfully averred that causing a plaint to be filed in the name of a judge and causing summons to be issued against the judge, is untenable, improper and an abuse of process of law amounting to contempt of court and hence falls to be dismissed.*
- (5) *It is respectfully averred that the 4th defendant is neither representing the judiciary nor vicariously liable for the judiciary and that there are no pleadings against the 4th defendant giving rise to a reasonable cause of action. Hence it is prayed that the pleadings be struck out against the 4th defendant.*
- (6) *It is respectfully averred that the plaint which does not disclose a reasonable cause of action is a nullity and not plaint at all, as against the 3rd and 4th defendant*

[7] The Court heard submissions from the defendants' Counsel on their pleas *in limine* ex parte as a result of the non-appearance of Counsel for the plaintiff and Ruling was reserved. However, in the meantime, Learned Counsel for the plaintiff showed good cause for her absence, and the Ruling was therefore rendered otiose and the motion was thereafter heard anew, this time inter partes, inter partes. Following the agreement of parties, the court agreed to make its determination based on the pleadings; objections and submissions filed.

2nd Defendant

[8] The 2nd defendant in this case is a creature of the Constitution as established under Article 115 of the constitution. Its mandate is set out in Article 116. The facts of the case show that at the time that it acted there was purportedly a valid order of the Supreme Court given pursuant to Article 125(1) of the Constitution. It was therefore bound to act upon the judgment. Failure to do so would have amounted to contempt of court. Though the orders were reversed by the Court of Appeal, under case number SCA 23/24 of 2016, they carried the authority of the law and had to be complied with by the Electoral Commission. Accordingly, no fault was committed by the 2nd respondent when it acted in compliance with the impugned decisions of the 3rd respondent. The 2nd defendant is accordingly struck out of the plaint and the plea *in limine* of Counsel for the 2nd defendant is maintained.

3rd and 4th Defendants

[9] I have scrutinised the different objections, having done so, I find that the pleas raised and canvassed by Counsel for the 3rd and 4th defendants speak to a common thread, namely the issue of judicial immunity. This is a fundamental issue that goes to the core of these proceedings. Judicial immunity is a shield and not a sword, whenever raised it needs to be given the priority that it deserves. A plea of judicial immunity has to be treated as such because the facts and circumstances surrounding it affect the integrity and credibility of not only the judge but the Judiciary as a whole and it goes to the root of institutional and individual legitimacy. Therefore, the Court will address this issue first. If it rules in favour of the 3rd defendant, the case will have to be dismissed against him given the absolutist nature of this plea as established by case law.

- [10] There exists an array of case law in this jurisdiction on the issue of judicial immunity. This includes *Edmond v Chairman of the Family Tribunal* (Cons No 3 of 2000); *Elizabeth v President of the Court of Appeal* 2010 SLR 382; *Berard Fanchette v Attorney General* SCA12/14; *Subaris Co (Ltd) and Ors v Perara and Ors* 2011 SLR; *Charles Lucas v F Macgregor and Ors* (Cons 2 of 2018).
- [11] The constant principle that runs across these cases are that Justices of Appeal, Judges and Masters of the Supreme Court are, as per Article 119(3) of the Constitution, immune from all suits and liabilities for anything done or said during the course of their judicial performance. These cases emphasise that judicial immunity is “subject to the Constitution” and that therefore though they cannot be sued before a civil court where the Constitution provides for a specific procedure making them liable to proceedings, those constitutional proceedings shall stand in good. The proceedings that the Constitution has prescribed is found in Article 134(1) of the Constitution which makes judicial tenure subject to good judicial conduct. The ultimate sanction being the removal of the judge from office.
- [12] This is established case law and this Court sees no reason to depart from the principle that the jurisprudence has firmly established.
- [13] The former Judge in this case being the 3rd defendant was the subject matter of removal procedures under Article 134(1)(a) of the Constitution. These proceedings focussed partly on his actions in the two cases as raised in this plaint. As per the Constitutional procedure a Tribunal was appointed under article 134(2)(a). The Tribunal after inquiring into the matter recommended to President to remove the 3rd defendant from the office of a judge of the Supreme Court as per the provision of Article 134(3) of the Constitution. The President acting on the recommendation, removed him from Office. In its recommendation the Tribunal made the following finding and determination against him:
- “Mr. Rajasundaram also referred to the humiliating treatment he had received in the LDS case (supra), when they sought to intervene in the case. The Judge had made a statement “LSD... LDS so confusing it is confusing me”. This according to Mr. Rajasundaram was unprofessional as it amounted to a prejudgment of the subject matter*

in issue and in his view, the comment was made to play to the large crowd present who burst into laughter.

He stated when he got up to address, he was told to sit down his turn will come. Without even giving him a chance to properly address the Judge on the content of his application to intervene, his application was denied by Judge Karunakaran. The Judge had ridiculed him in Open Court by mentioning in his Order that even a first year law student would know the legal procedure for intervention. He stated however when he took the matter in appeal to the Seychelles Court of Appeal he was successful. (Refer Annexure 16). He felt that Judge Karunakaran was acting in a prejudicial manner against him by finding any way to dismiss his application. He further stated that Ms Aglae who appeared for the Elections Commissioner was treated in a similar manner.

Ms Aglae gave evidence that after the dates of the nomination had been received they received an Order from Court in the LDS case that a political party should be struck out and the Electoral Commission could not proceed to accept their nomination. She stated it was unfair by her clients as the case had been filed and the Order granted on the same day without any notice to her client and on no legal basis as later on decided by the Court of Appeal. (Refer Annexure 16. She appeared the next day in Court for the Electoral Commission and described that Judge Karunakaran's conduct was embarrassing and he subjected her to ridicule. The people present in Court shouted whatever they wanted, the Judge did not attempt to control them. They were shouting and cheering. On the said day his remarks were full of sarcasm toward her personally and she felt belittled and humiliated in the case. She testified that the procedure of hearing was irregular and was sarcastic by setting a hearing date for their application after the election day though this was a matter of extreme urgency and had to be heard prior to the election. She too corroborated the fact that Mr. Rajasundaram was not given an opportunity to plead his case and Judge Karunakaran denied his right of audience.

The evidence of these witnesses are corroborated and supported by the relevant proceedings in the file and the recordings of Open Court proceedings in the said case. We see no reason why we should disbelieve these witnesses who are respected members of the Bar. It is our view that every litigant has a right to complain to the Chief Justice regarding his case and it is the duty of the Chief Justice to bring to the notice of the Judge the complaints made. A Judge should not thereafter badger or intimidate the litigant or his Counsel to withdraw his complaint. The litigant is thereafter placed in a desperate situation with no respite from the ongoing unfairness or delay he experiences in Open Court on one hand and the danger of retribution, if he complains to the Chief Justice on the other. Judge Karunakaran's conduct in telling litigants to go and withdraw the complaints they have made against him, amounts to intimidation as he is in control of their case and it clearly implies if they do not, they will have to face the

consequences. This in our view is improper judicial conduct. The Judge in effect abused the authority of his office to cover up aspects of misconduct being brought to the attention of judicial authorities.”

[14] Partly based on this decision, the Tribunal concluded that it was satisfied that the conduct of Judge Karunakaran had breached the provisions of Article 134 (1) (a) of the Constitution and was of such a serious nature and magnitude to amount to gross misbehaviour. All attempts on the part of the 3rd defendant to reverse the decision of the Tribunal have proven to be unsuccessful.

[15] In the present matter before me the 3rd defendant’s conduct amounted to misbehaviour which was confirmed by the Tribunal, which came to conclusion and recommended to the President that the 3rd defendant be removed from office. Having been sanctioned through the only possible constitutional avenue for his fault, so to speak, this Court is of the view that he cannot be made liable de novo for the same wrong doing, this time as a faute under article 1382 of the Civil Code. This “double jeopardy” is prohibited by the Constitution. Accordingly, this Court will uphold partly the 3rd and 4th defendant’s preliminary objections. The 3rd defendant acting in his judicial capacity was not absolutely immune, he was brought before a disciplinary Tribunal for the alleged acts and or omissions raised in the plaint. Those proceedings being over, he is immune to proceedings based on similar facts and or omissions and he cannot be made liable to civil proceedings based in the same.

[16] Accordingly, I find that the action against the 3rd defendant cannot be maintained. I uphold the 3rd and 4th objections of Learned Counsel, Mr Thachett, to the extent mentioned in this Ruling. I accordingly strike the 3rd defendant from these proceedings

[17] In respect of the 4th defendant, no averments of faute have been made against her. The capacity in which she is cited as a party is also not stated. At any rate she cannot be said to be vicariously responsible for a judicial decision of the 3rd defendant. A judge is sovereign in his or her decision and binds the Registrar in law. She bears the sole responsibility for her official decision or that of the Judiciary to the extent that the law provides. The Registrar who is appointed under the Courts Act, as provided for in this

Act. I would therefore also, on similar basis, strike out the 4th defendant from the plaint and uphold the *plea in limine* of Counsel for the 3rd and 4th defendant in this regard.

1st Defendant

[18] As regards the pleas on behalf of the 1st defendant, they can be summed up as the right to sue and right of access to justice. In furtherance of what it thought to be a statutory breach on the part of the plaintiff the 1st defendant avers that it legitimately and legally brought a judicial review action challenging the name sought to be registered by the plaintiff based on close resemblance it had to its own name. The 1st defendant hence claims that this cannot be a *faute in law*. To the contrary, the plaintiff avers that these actions were motivated out of malice and constitute an abuse of the court process. Essentially the plaintiff is averring a case of malicious prosecution of civil claims. The 1st defendant denies this and avers that its case is good in law as he has a right to sue on a just claim. In the UK Supreme Court case of *Willers (Appellant) v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased)) (Respondent)* (1)[2016] UKSC43, the question before the court was whether there was a tort of malicious prosecution of a civil claim. Lord Clarke holding in favour of the majority decision, held:

“For my part I can see no sensible basis for accepting that the tort of malicious prosecution of a crime exists in English law, whereas the tort of malicious prosecution of a civil action does not. Not only are the ingredients the same, but it seems to me that, if a claimant is entitled to recover damages against a person who Page 31 maliciously prosecutes him for an alleged crime, a claimant should also be entitled to recover damages against a person who maliciously brings civil proceedings against him. The latter class of case can easily cause a claimant very considerable losses. They will often be considerably greater than in a case of malicious prosecution of criminal proceedings.”

[19] Furthermore, the concept of abuse of process or *abus des droits* is also well known to the French law. In Amos and Walton’s *“Introduction to French Law* (Clarendon Press, 3rd edn P. 219-220) the learned authors state:

“...French writers have endeavoured to create an extensive and generalised theory of abuse of right...[L]aw is for the benefit of the community and not for the advantage of the individual and there is an abuse of rights whenever a right is exercised in a manner contrary to the social interest. In contrast with this objective test, other writers favour a subjective one, based on the intention to inflict harm... The courts have declined to consecrate categorically either the one theory or the other. In practice, they do not search for the subjective intention to do harm but infer from that the commission of acts consistent with no other intention.”

[20] Hence, I hold that this is a case worthy of being tried on the merits between the plaintiff and the 1st defendant. The facts of the case will determine whether the acts of the 1st defendant were motivated by malice and abuse or were founded on reasonable and probable cause. The pleas *in limine* of the 1st defendant, to the extent that it seeks to prevent this claim, is dismissed.

[21] In my final determination, therefore, I uphold the pleas *in limine litis* to the extent that the action against the 2nd; 3rd and 4th objections are not maintainable. On the other hand, I dismiss the pleas regarding the dismissal of the case against the 1st defendant, in respect of which I call upon it to file its defence forthwith.

Signed, dated and delivered on the 27 July 2020 at Supreme Court, Ile du Port, Victoria, Mahe, Seychelles

Govinden J