

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 620

CA 04/2019

(Appeal from CS 28/2017)

In the matter between:

B [REDACTED] S [REDACTED]

1st Plaintiff

(rep. by Lucy Pool)

R [REDACTED] S [REDACTED]

2nd Plaintiff

(rep. by Lucy Pool)

and

Z [REDACTED] B [REDACTED]

1st Respondent

A minor represented by his mother and next of kin

D [REDACTED] C [REDACTED] of [REDACTED] Mahe Seychelles

(Rep by Nichol Gabriel)

V [REDACTED] C [REDACTED] L [REDACTED]

2nd Respondent

Neutral Citation: *S [REDACTED] & Or v B [REDACTED] & Or CA04/2019 SCSC 3 September 2020*

Before: Burhan J

Summary: liability of minor – representation of minor in suits – parental liability –
articles 1382 and 1384, Civil Code

Heard: 25th February 2020 and 2nd June 2020

Delivered: 3 September 2020

ORDER

Appeal Dismissed. No costs.

JUDGMENT

BURHAN J

- [1] This is an appeal from a judgment of the Magistrates' Court, dismissing the plaint filed by the appellants (plaintiffs) against the aforementioned respondents (defendants). The background facts of the case are that the first respondent a minor stole the second respondent's car bearing registration number S11863 and while driving away collided with the motor vehicle of the appellants bearing registration number S15246 causing extensive damage to the said vehicle, in a sum estimated at SCR 250,000 (two hundred and fifty thousand).
- [2] The learned Magistrate found that on the basis of the evidence led that there was damage caused to the vehicle of the appellants due to the fault of the first respondent but that the plaintiffs (herein appellants) failed to prove that the minor was capable of discernment. The learned Magistrate further held that the second respondent as owner of the vehicle was not liable as the collision had occurred after the first respondent had stolen the vehicle from the second respondent.
- [3] Being aggrieved by the said decision the appellants have filed this appeal based on the following grounds:
- Ground 1: The learned Magistrate was wrong to dismiss the case against the first defendant having found on page 9 of his judgment that the damage to the appellant's motor vehicle was caused by the first defendant.

Ground 2: The learned Magistrate failed to take into consideration that the case was heard ex parte against the first defendant, a minor, who was represented by his mother.

Ground 3: The learned Magistrate failed to apply the law to the facts of the case with regard to the first defendant. The first defendant was served with summons but failed to appear. Judgment should have been entered against him and his mother.

- [4] The Seychelles Code of Civil Procedure (SCCP) provides that the capacity of the plaintiff and defendant are to be stated in the plaint -

Section 73.

If the plaintiff sues, or the defendant or any of the defendants is sued in a representative character, the plaint must state in what capacity the plaintiff or defendant sues or is sued.

- [5] The Civil Code of Seychelles provides in Article 450.1 that the guardian shall have the care of the person of the minor and shall represent him in all legal acts. The following provisions of the Civil Code are also relevant –

Article 1382.4

A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

Article 1384

(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.

(2) The father and mother, in so far as they have custody, shall be jointly and severally liable for the damage caused by their children residing with them, to the extent that is

deemed reasonable having regard to the age and maturity of the child, the nature of the act or omission by which the damage was caused and other relevant circumstances.

- [6] The appellants averred in their plaint that the accident was caused by the fault and negligence of the first defendant (first respondent), who is a minor. The fact remains that a harm has been caused. There is on the one hand civil liability (resulting in a cause of action for delictual liability) and on the other hand criminal liability (commission of an offence). In this matter, it is not disputed that the appellants' vehicle was damaged as a result of a collision with a vehicle owned by the second defendant and being 'driven' by the first defendant. This issue was never contested as the case proceeded ex-parte against the first respondent.
- [7] It is to be observed that the action was brought in the name of the minor represented by his mother and next of kin Debra Cedras. The first defendant is a minor and does not have legal capacity to appear as a party in court. He therefore needed to be represented by his legal guardian in the proceedings.
- [8] In *Civil Construction Company Limited v Leon & Ors* (SCA 36/2016) [2018] SCCA 33, the court found that the parents of the minor children would be entitled to sue in a representative capacity as the guardians of the children under section 73 of the Seychelles Civil Procedure Code. However, the plaint should have stated that representative status and it did not. With regard to the standing of minors, the Court of Appeal held in paragraphs 48 to 52 as follows:

*[48] Respondents 3 to 6 were minors at the time the suit was filed. They had no capacity to sue in their own right given the provisions of Article 450 (1) of the Civil Code. As in the case of **Rose and others vs Civil Construction Company Limited** [2014] SCCA 2 (11 April 2014), there was no representative action taken on their behalf. Either of the parents of the minor children would be entitled to sue in a representative capacity as the guardians of the children*

under section 73 of the Seychelles Civil Procedure Code. However, the plaintiff should have stated that representative status, and it did not.

*[49] In **In Re Tottenham v. Tottenham**. [1896] 1 Ch. 628A, in a case where a creditor sued a testatrix stating in the last paragraph of his pleadings that he was suing on behalf of all the other creditors of the deceased, the court found that this fact ought to appear in the title of the statement of claim, and not merely in the body thereof, otherwise it would be of no use to show the representative capacity in which he sued. The rule followed by the court in that case (Order 6 and rule 3 of the UK Supreme Court Rules) is akin to section 73 of the Seychelles Code of Civil Procedure.*

[50] In the present case, the plaintiff was therefore wrongly brought on behalf of the minor children, the Third to Sixth Respondents. We therefore uphold this ground of appeal

[51] (...)

[52] There must be a limit as to how far the court in the name of justice should make a case for the plaintiff. Ours is an adversarial legal system and judges are not advocates for the parties. We cannot engage in this exercise.

[9] In this instant appeal too, the plaintiff was brought against the minor in the minor's name, as represented by his mother. The first defendant being a minor, did not have the capacity to sue or be sued in his own name and parental responsibility should have been engaged by making the parent/ parents defendants thereby ensuring their joint and several liability.

[10] In principle, in matters of criminal liability, each person is only responsible for his own acts, which means that parents cannot be sentenced to imprisonment or a fine for the damage caused by the child. It is only the latter who will be able to answer in court for acts done by him that are prohibited by law, as long as he is capable of discernment and

able to understand his acts, regardless of his age. On the other hand, when it comes to civil liability, article 1384 of the Civil Code is clear: when a child (minor) causes the damage, the parents are responsible for his actions. The parents are thus vicariously liable. Therefore, the parents will have the obligation to provide compensation to the victim for the harm or loss and are liable to pay the damages. Therefore the necessity to make the parents defendants in the suit and not the minor. Further, to engage parental liability under article 1384, the appellants would have had to specify such liability in their pleadings, in accordance with section 73 of the SCCP. It appears on consideration of the pleadings it lacks such details of liability as the parents have not been made defendants.

- [11] Further in this instant case the vicarious liability of the first respondent's mother could not be implied and should be specifically pleaded. It was held in the case of *Confait v Mathurin (1995) SCAR 203, LSC 14* that vicarious liability must be pleaded. The Court held that a person who claims damage for an act must state in the pleadings whether the damage is caused by the defendant personally or whether it was caused by a person for whom the defendant is responsible.
- [12] The Courts in Seychelles considered the issue of vicarious liability for minor children in the case of *Barbe v Lefèvre (1964) SLR 110* Souyave J citing paragraphs from **Dalloz Codes Annotés (1874) Art 1384** as set out in the judgment, held that a plaintiff who sues a parent in respect of their minor child must prove that at the time of the act, the defendant's child was a minor and living with the defendant. The Court further held that the onus was on the defendant (parent) in order to escape liability, to show that he could not prevent the act.
- [13] As per article 1382 of the Civil Code, a person shall only be responsible for fault to the extent that he is capable of discernment; and children are not generally considered capable of discernment. In the case of *Gobin v Desaubin (1996) SLR 119*, the Court considered the capacity of minors and held that Article 1382 of the Civil Code and the Children Act

are consistent with the view that children are not capable of negligent acts unless it is proved that they are capable of discernment.

- [14] The parents are therefore vicariously liable and, given the incapacity of the minor, it is the parents' liability that should have been set out in the suit. In our Civil Code based on French law, it has been established that certain conditions must be met in order to engage the parents' liability. Articles 1384 (1) and 1384(2) set out below, contains the conditions that must be met for a parent to be held liable for the acts of a minor

Article 1384

(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.

(2) The father and mother, in so far as they have custody, shall be jointly and severally liable for the damage caused by their children residing with them, to the extent that is deemed reasonable having regard to the age and maturity of the child, the nature of the act or omission by which the damage was caused and other relevant circumstances.(emphasis added)

- [15] The parent responsibility therefore only occurs if the child is a minor *whom he is responsible for* at the material time the minor does the act and *damage is caused*. Further parents' responsibility exists, only if the minor child is subject to the exercise of parental authority, whether exercised jointly or unilaterally. Article 1384 (2) of the Civil Code specifies that the liability of the parents exist "*insofar as they have custody*" of the minor child. Further for parental authority to exist, the parent should have *custody* and the minor should be *residing* with the parent exercising parental authority refer Article 1384.2 of the Seychelles Civil Code.

- [16] Once the aforementioned conditions are met, the parents are automatically liable: this means that the parents are presumed responsible for the damage caused by their minor child and may therefore be sued for the purpose of compensating the victim. This is the reason why the appellant had a cause of action against the parents for damages but failing to make the parent a defendant party to the action, the court cannot enter judgement against the parent in this instant case. For the aforementioned reasons grounds 1 and 2 of the appeal are dismissed.
- [17] The appellants also contend that the learned Magistrate should have entered judgment against the first respondent and his mother as a consequence of their failure to appear. This is cited in the third ground of appeal and also referred to in the second ground of appeal.
- [18] In the record of proceedings for 19th October 2017 (at page 3), counsel for the plaintiffs (appellants) enquires whether the first defendant had been served, since fresh summons had been ordered on 22nd September 2019. There is no reply recorded from the Court in the transcript before counsel moved for an ex parte hearing against the first defendant. However, it does appear from the file that the first defendant's mother was served on 4th October 2017, so she must have been aware of the suit. It appears that the first defendant remained absent and unrepresented for the entirety of the proceedings. At that point, the appellants could have moved the Court to enter judgement against the first respondent for failing to appear despite being served, but did not. They cannot claim on appeal now that the Court should have done so, when the Court was not so moved.
- [19] It would be pertinent to set out the Rules and law in respect of this issue, In the Magistrates Court (Civil Procedure) Rules, rule 18 contained in the Courts Act CAP 52 reads as follows:

“if on the day so fixed in the summons when the case is called on the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court after due proof

of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant, or may adjourn hearing of the suit ex-parte."

- [20] Further section 65 of the Seychelles Code of Civil Procedure (SCCP) also provides for the procedure to be followed if defendant served with summons does not appear on the date fixed in the summons:

"If on the day so fixed in the summons when the case is called on the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant, or may adjourn the hearing of the suit ex parte."

- [21] Therefore the discretion is made available for court to either proceed to hear the suit and give judgment or to adjourn the case for an ex-parte hearing in both instances. Further the second defendant was present at the hearing and proceeding to defend the matter, so a hearing was in any event, inevitable. Therefore it is the view of this court that the learned Magistrate exercised his discretion judiciously and correctly in fixing the matter for hearing ex-parte against the first respondent and inter-partes against the second respondent. The above provisions of the SCCP make it clear that the failure of the defendant to appear does not automatically mean that the court will give judgment in favour of the plaintiff. The plaintiffs would still need to prove their case in an ex-parte hearing. The learned Magistrate in this instant case could not have entered judgment against a defendant who had no legal capacity and whose personal liability could not be invoked. I therefore proceed to dismiss the 3rd ground of appeal as well.

- [22] Accordingly, the appeal is dismissed. Considering the facts peculiar to this case no order is made in respect of costs.

Signed, dated and delivered at Ile du Port on this day 3 August 2020.



M..Burhan J