

SUPREME COURT OF SEYCHELLES

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Reportable/Not Reportable/Redact  
[2022] SCSC 922  
CS 01/2015

In the matter between:

**HEADY SINON**  
(*rep. by Alexia Amesbury*)

**Plaintiff**

and

**PUBLIC UTILITIES CORPORATION**  
Represented by its C.E.O. Mr. Morin  
(*rep. by S. Rajasundaram & M. Marguerite*)

**1<sup>st</sup> Defendant**

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**Neutral Citation:** *Sinon v PUC & Anor* (CS01/2015 [2020] SCSC 922 (21 October 2022)).  
**Before:** Carolus J  
**Summary:** Faute – liability under Article 1382 distinguished from Article 1384 - failure of pleadings to allege specific liability.  
**Heard:** 13 & 16 July 2021 and 8 November 2021  
**Delivered:** 21 October 2022

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**ORDER**

The plaint is dismissed as defective as there is no averment of vicarious liability in the plaint, whereas the evidence of the plaintiff is that he sustained damages because of the act of defendant's workers.

I make no order as to costs.

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**JUDGMENT**

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**Carolus J**

## BACKGROUND & PLEADINGS

- [1] The plaintiff has sued the defendant for loss and damages arising from injuries he sustained when in April 2014, the pavement on which he was standing gave way causing him to fall into the river below.
- [2] The defendant the Public Utilities Corporation (“PUC”) is a body corporate established under section 3 of the Public Utilities Act. It is to be noted that the Seychelles Land Transport Agency (“SLTA”) was cited as the 2<sup>nd</sup> defendant in the amended plaint dated 31<sup>st</sup> July 2019. However in its ruling dated 10 November 2020, the Court found that the action against the SLTA was prescribed in terms of section 3 of the Public Officers Protection Act prior to its amendment on 3<sup>rd</sup> April 2017. The amended plaint was therefore dismissed against the SLTA but maintained against PUC. The amended plaint was not amended after the Court’s ruling, therefore where reference is made to the defendants in this ruling when referring to the plaint, this includes SLTA.
- [3] The plaintiff avers that the road in the vicinity of the LWMA offices at English River was in a weakened state as a direct result of the defendants’ negligence to promote and provide an efficient and adequate land transport system which includes land transport services and infrastructure. He also avers that the weakened state of the road was as a direct result of PUC tunnelling under the road to carry out repair works on a water pipe. The plaintiff avers that the defendants failed to erect any notification indicating the weakened state of the road or the fact that building works were under way giving notice to the public that additional caution and attention was necessary in the vicinity, and further that PUC failed to put in place safety demarcations or warnings to passers-by that would indicate that that there was work in progress requiring extra precautions. He avers that as a result the road gave way under the plaintiff who fell in the river injuring his thoracic spine T12 which sustained a compression fracture which is a potentially life-changing injury which could lead to paralysis. In addition he sustained the following injuries facial and knee injuries:

[...]

b) *Midline lower lip laceration, full thickness, 5cm ...*

- c) *Dentoalveolar fracture with the fragment completely discharged from the bone and gum, including lower central incisors and lower left canine, abundant intraoral bleeding ...*
- d) *Intense lower lip edema*
- e) *Bony prominence detected in the dentoalveolar fracture*
- [...]
- g) *Laceration to right knee*

[4] As a result of his injuries the plaintiff was admitted to Victoria Hospital for 11 days from 17<sup>th</sup> March 2014 to 28<sup>th</sup> March 2014. He further underwent an alveoloplasty for his facial injuries.

[5] The plaintiff prays for judgment in his favour in the total sum of SCR1,461,100 representing his loss and damages, from the date of the injury and continuing. He particularised the loss and damages as follows:

i.	<i>Loss of earnings from 17 March 2014 and continuing at the rate of SCR350/day</i>	<i>SCR50,400</i>
ii.	<i>Continuing pain and suffering from injuries</i>	<i>SCR450,000</i>
iii.	<i>Hospitalisation</i>	<i>SCR50,000</i>
iv.	<i>Cost of dental implants</i>	<i>SCR360,000</i>
v.	<i>Trauma from ferocity of assault</i>	<i>SCR150,000</i>
vi.	<i>Moral damage</i>	<i>SCR200,000</i>
vii.	<i>Distress and inconvenience</i>	<i>SCR200,000</i>
viii.	<i>Medical Report x 2</i>	<i>SCR700</i>

[6] PUC in its statement of defence denied any knowledge of the incident giving rise to the loss and damages allegedly suffered by the plaintiff and puts it to strict proof of the same. It also denies any negligence on its part in the promotion and provision of an efficient and adequate land transport system including land transport services and infrastructure and

claims that this falls within the domain of the SLTA. PUC also denies that it undertook any roadworks or repair-works on water pipes at English River and claims that it was the SLTA which carried out such works. As for erecting warning signs and/or safety demarcations PUC avers that it has no knowledge whether this was done or not, and that in any event this falls under SLTA's responsibility and not PUC's, in particular as PUC did not carry out any works as claimed.

[7] As for the injuries that the plaintiff claims to have sustained as a result of the aforementioned acts of PUC and as particularised in the plaint, the latter claims that this is not within its knowledge and puts the plaintiff to the strict proof thereof. As for the alleged compression fracture to T12, PUC claims that the plaintiff could have contributed thereto by his own negligence, and that if at all he sustained a fall the resulting fracture would have been a fracture other than a compression fracture. Further, the plaintiff is put to strict proof that he sustained compression fracture of the T12 vertebrae of the thoracic spine, as this not disclosed in the medical report of the Ministry of Health dated 12<sup>th</sup> May 2014, which only reports tenderness and compression of the thoracic spine. PUC claims that the plaintiff is exaggerating this condition.

[8] PUC puts the plaintiff to strict proof of the loss and damages as particularised in the plaint as well as the sums claimed under each head, which it claims are manifestly excessive and blown out of proportion. PUC further claims that it is not liable either to pay any such sums or at all, to the plaintiff.

## **EVIDENCE**

### **For the Plaintiff**

#### *Testimony of Mr. Heady Sinon*

[9] The plaintiff Mr. Heady Sinon testified that on 26<sup>th</sup> April 2014 at around 8 p.m. while he was waiting for a lift to go home after work, the concrete slab of the pavement on which he was standing broke and he fell below into the gutter. His colleagues including Bernard Rioux helped pull him out and Bernard carried him to the English River Health Centre as he was in pain and unable to walk. After he was examined he was referred to the Seychelles

Hospital where he underwent an x-ray after which he was admitted for 3 days during which he could not move. There had been no signs, warnings or demarcations at the site of the accident either before or at the time of the incident.

- [10] The plaintiff holds PUC responsible for what happened to him because after he went to the SLTA, they informed him in August 2014 that PUC was responsible because it carried out the works in that area. Thereafter he contacted PUC several times regarding the matter but nothing was done. Exhibit P1 is the letter dated 23<sup>rd</sup> December 2014 from plaintiff to PUC. Consequently he had his lawyer write a letter to PUC – admitted as exhibit P2 to which there was no response. He also stated that if the area had been properly demarcated he would not have been standing there, and PUC's failure to demarcate the area caused his injuries.
- [11] The plaintiff testified that earlier on the day of the incident he had seen several PUC workers carrying out works in the area to repair a broken pipe, but that after they had completed the work they had placed no demarcations around that area, as they usually do.
- [12] In cross-examination the plaintiff said that he had crossed the bridge where the incident happened two or three times that day and seen several PUC workers carrying out works there. He knew that they were PUC workers because they were fixing a broken pipe.
- [13] He stated that he did not contact PUC regarding the incident at first but got in touch with SLTA because he was under the impression that they were responsible for anything to do with roads. When he accompanied SLTA representatives to the site of the incident he observed that the concrete had been recently laid and that there were holes that had not been properly filled rendering the slab very weak. He also noticed cracks on the surface of the slab which in addition did not have proper supports hence the reason why it collapsed with his full weight bearing on it.
- [14] He confirmed that because of the compression fracture he had to wear a corset for about three months but now wears a belt when he is driving because the corset is uncomfortable. He stayed at the hospital for only three days. After that he did physiotherapy for about two months but it was not effective and he stopped. There is no longer any follow-up with the

hospital: he was only advised not to do any heavy lifting and carry on as usual. However he claims that his injury is a serious one and that he is not exaggerating his condition. He can no longer lift heavy things and has to get other people to do that when installing air-conditioning units. He also used to do gardening but cannot dig holes anymore. When he attends his 6 monthly medical test to ascertain his fitness as a bus driver, he is advised that driving a bus is not good because of his condition but he cannot stop as needs the job. He also cannot request a medical certificate to that effect as it would result in his employment being terminated. The doctors also cannot recommend that he be given other lighter duties because this is not possible given the nature of his work as a driver.

[15] As for future prognosis for his injuries, the plaintiff stated that when he went for his medical tests he was told that even if he does not experience constant pain and the fracture repairs itself, as he ages he will feel pain and have difficulty moving.

[16] In re-examination the plaintiff stated that the PUC workers he saw were wearing PUC uniforms. Further he obtained three months sick leave, for part of which he obtained social security instead of full pay. The money he is seeking for loss and damages is for future medical treatment.

*Testimony of Mr. Bernard Rioux*

[17] Mr. Bernard Rioux has been employed as a bus driver with the SPTC for the past 18 years. On 26<sup>th</sup> April 2014, after coming off duty, he met the plaintiff who is his co-worker just opposite the English River clinic. They greeted each other and briefly exchanged pleasantries and just as he was leaving he heard a noise like something cracking and saw the plaintiff fall through the floor. He immediately came back and observed that a piece of concrete appeared to have collapsed resulting in the plaintiff falling in the river underneath. The plaintiff was covered in mud and gravel and struggling to stay upright so he jumped in to prevent him from swallowing water. With the help of other drivers he removed the plaintiff from the hole, accompanied him to the clinic and assisted him in contacting his family.

- [18] Upon request by the Court he clarified that the incident happened on the bridge between the SPTC terminal and Krishnamart shop, opposite the old English River Clinic where there used to be a phone booth.
- [19] Under cross-examination he stated that he is not especially close to the plaintiff but has known him since they attended the Seychelles Polytechnic at the same period but in different classes. The plaintiff started working for SPTC a few years after he did and they worked in different areas – he in the town area and the plaintiff in the Port-Launay area.
- [20] They do not usually meet where they did on the day of the incident because the plaintiff does not usually wait there for transport. That day they bumped into each other and exchanged a few words and as he was leaving heard a noise behind him and turned and saw the ground collapsing and the plaintiff falling.
- [21] He did not know that the plaintiff was bringing a court case to claim money for the incident as he did not see him for a while afterwards and did not enquire about him until later when chatting with their colleagues. He came to court to help the plaintiff and to tell the truth about what happened that day.

*Testimony of Doctor Telemaque*

- [22] Doctor Telemaque is a Senior Consultant at the Victoria Hospital and has worked there for the past thirty years. He produced a medical report (Exhibit P3) in respect of the plaintiff, which was prepared and signed by Doctor Ben Wamamili, whom he knew first as a student then as a doctor, and whose signature he is familiar with. According to the report the plaintiff was seen at Seychelles Hospital on 26<sup>th</sup> April 2014 complaining of back pain and difficulty walking following an alleged fall. He had tenderness to palpation of the thoracic spine and x-ray revealed a compression fracture of the T12 vertebra which was stable. He was admitted to the male surgical ward for pain control and observation. Strict bed rest was advised and a corset provided. He was discharged on 28<sup>th</sup> April 2014, and advised to keep the corset in place with a review scheduled in four weeks.

- [23] Doctor Telemaque explained that the T12 vertebra is right in the middle of the back. The plaintiff had a stable fracture which heals by itself with time and hence did not need surgery. The average time for healing is six to twelve weeks and the patient has to wear a corset until the fracture is healed and the pain relieved. Regarding the plaintiff still complaining of back pain four years after the injury, he explained that people do get back pain with or without a fracture but that a person who has sustained a fracture may have chronic back pain.
- [24] In cross-examination Doctor Telemaque explained that tenderness to palpation of the thoracic spine means that it is painful when that point in the spine is touched but there is no pain elsewhere.
- [25] He explained the difference between a compression fracture and what he called an angulated fracture. Whereas in the latter case a straight bone is bent, in the latter case the fracture is not displaced but the top bone squeezes the one below it. According to him a common cause of compression fracture is trauma resulting from a fall or a blow to the back but he explained that significant trauma is required to fracture a normal spine. However it is possible to fracture the spine without or with minimal trauma if a person's back is weak or if the person is suffering from a disease in the spine such as cancer. Degeneration is unlikely to cause fracture.
- [26] A compression fracture usually occurs when a person falls on their feet or in a sitting position. In the case of a compression fracture it takes six to twelve weeks for the pain to go and the fracture to fix itself but not to heal completely.
- [27] The usual treatment for a stable compression fracture is to rest the spine which is done by wearing a corset which keeps the spine straight. Once the corset is taken off physiotherapy is required to strengthen the muscle.
- [28] The majority of people who have sustained a compression fracture are able to resume work and a normal life after some time, but a few of them will suffer from chronic back pain.



[29] In re-examination Doctor Thelemaque clarified that when someone has sustained a compression fracture, in the beginning it is not advisable for them to lift heavy things but after the injury has healed the person should be able to resume normal activities.

*Testimony of Doctor Felix*

[30] Doctor Felix is a private medical practitioner with twenty-two years' experience. In August 2014, he saw the plaintiff who complained of pain of his spine as a result of a fracture of his 12<sup>th</sup> thoracic vertebra sustained in April 2014. The plaintiff requested and was provided with a medical report dated 18<sup>th</sup> November 2014 (Exhibit P4) according to which examination had revealed tenderness of the 12<sup>th</sup> thoracic vertebra and he was prescribed diclofenac - an anti-inflammatory drug. His condition improved after one week but he had to be treated three times for the same problem which had not been completely resolved, since he works as a bus driver and has to remain seated for long periods of time.

[31] Doctor Felix produced a second medical report dated 12<sup>th</sup> January 2019 (Exhibit P5) in which he stated that the plaintiff presents frequently with intermittent backache and has to wear a vest permanently for his type of work. Further that he is currently treated with non-steroid anti-inflammatory drugs. He stated that the last time he saw the patient was in 2021 regarding the same matter. He stated that the fracture itself is resolved and the spine has healed but that there could be for example, compression of a nerve. Although the plaintiff was not in the same condition as at the time of the injury, he concluded that the problem was ongoing. He stated that for some people the problem is never resolved and they have to live with the pain for their lifetime.

[32] In cross examination Doctor Felix stated that in 2014, the plaintiff presented with symptoms of back pain and when he touched the affected area this elicited a reaction which is termed tenderness in medical terminology. In 2019 when he saw the plaintiff he did not have to carry out the same exercise to ascertain if there was still tenderness, but proceeded to treat him because by then he had concluded that he had a chronic condition, which does not cause him pain all the time but requires treatment when it flares up. His conclusion that the plaintiff had a chronic condition was based on the fact that he had presented three times with the same problem from his first visit in August 2014 to November 2014 when Exhibit

P4 was drawn up, and each time the examination revealed the same thing i.e. tenderness, which had to be treated. Therefore on subsequent visits there was no need to carry out any examination but simply to treat him as a patient with a chronic condition. With a chronic condition treatment is continued without carrying out further tests. Doctor Felix stated that although it is not stated in his reports he saw the plaintiff maybe two or three times a year after the first medical report Exhibit P4 but could not confirm the same.

[33] Doctor Felix clarified that he was a general practitioner and although he does not specialise in orthopaedics he has twenty years of experience. The plaintiff was initially treated with diclofenac but by his last visit in 2019 the doctor was no longer prescribing these drugs and was only treating his patients with natural herbal medicines. He stated that in his experience physiotherapy does not work – the pain simply stops for a while then comes back.

[34] In reply to clarification sought by the Court Doctor Felix explained that a patient with a chronic condition can at times be well with no pain and walk and work normally but that the symptoms may flare up depending for example on whether they are stressed or if they bend down or lift heavy objects. He also expressed the view that the plaintiff's work as a bus driver could aggravate his condition because he would be sitting for long periods with his back upright or bending.

*Testimony of Joseph Desire Payet*

[35] Joseph Desire Payet, now retired, worked at as traffic manager at the SLTA in 2014. In that capacity he received a complaint from the plaintiff that he fell into a hole at English River pursuant to which they visited the scene of the incident together. He saw a hole in the pavement just above the bridge near the former English River clinic. Upon investigation he found that there was a burst pipe in that hole which the PUC workers had worked on but which they had subsequently left uncovered. He reported the matter to the CEO of SLTA and some workmen were dispatched to fill up the hole.

[36] Mr Payet stated that whenever works are to be undertaken by PUC, they should inform the SLTA so that the latter can then carry out any repairs which may be necessary. However

sometimes PUC fails to inform them, as in the instant case. Had the SLTA been informed a contractor would have immediately have been dispatched to effect necessary repairs. He agreed with counsel for the plaintiff that the accident to the plaintiff was entirely caused by PUC's negligence in failing to inform SLTA of the damage to the pavement.

[37] In cross examination, Mr Payet admitted that since the incident occurred seven years ago he did not recall exactly when the plaintiff made his complaint to the SLTA, and whether it was one or three months after his fall. He also does not recall the day or time he went to visit the site of the accident although he states it was a weekday.

[38] Whilst he admitted that the SLTA is responsible for roads, he stated that permission has to be sought from the Road Transport Commissioner for any road works to be undertaken. He explained that the SLTA and the Road Transport Commissioner work jointly, and that while the Road Transport Commissioner has more to do with establishing policies and guidelines, the SLTA implements them. He also explained that while PUC would normally have to request permission from the Road Transport Commissioner to undertake any work that required breaking a pavement, in cases where works are urgently required, PUC does not need to follow that procedure.

[39] Mr Payet stated that his duties at the SLTA consisted of supervision of only some road works. He explained that supervision of civil works was undertaken by another unit comprising of project officers and other technical staff. Any type of work which required breaking the road would be supervised by the civil works unit.

[40] He stated that SLTA normally provides guidelines in regards to road safety to contractors carrying out road works, which is included in their scope of work together with all the contractual obligations of the contractor. In terms of the contractors' scope of work therefore they have to ensure that road safety regulations are abided to. The SLTA plays only a supervisory role in that regard. However Mr Payet went on to say that SLTA would not necessarily be responsible for supervision of works carried out by PUC on the road and ensuring that road safety requirements are met. He agreed with counsel for the plaintiff that after permission is given therefore, SLTA has nothing more to do and just lets the person

authorised to carry out the works do so. He further stated that permission is granted to carry out works on condition that affected roads or pavements are to be restored to its original state. SLTA will only be involved in repairing roads and pavements when they are informed of the same. He explained that in the present case there was a hole in the middle of the pavement which the person carrying out the works should either have backfilled with soil or repaired with concrete. Since this was not done, upon visiting the site and seeing that it posed a danger to pedestrians SLTA stepped in and repaired the hole.

- [41] Mr Payet stated that PUC was responsible for making the hole as it was obvious that they did so to repair a burst water pipe underneath the pavement. Although he admitted that he did not actually see the pipe burst or anyone from PUC repairing it he knows that the water pipe is the property of PUC and managed by them. The hole which was about half a metre wide was of a size which would enable to repair the pipe. He maintained that there could be no reason for the hole in the pavement, other than to repair a burst pipe. It was put to him that if works had indeed been carried out by PUC then it was SLTA's responsibility to repair the pavement. He replied that there was no hole in the pavement previously and that it must have been caused to repair a burst pipe which SLTA repaired when it was brought to their attention.
- [42] He rebutted the suggestion that the hole could have been caused by a vehicle going over the pavement, by stating that this would have damaged the railing in front of the pavement which was intact.
- [43] It was put to Mr. Payet that he was trying to shift the responsibility for not repairing the hole on PUC when it was SLTA which was responsible for doing so. He replied that SLTA normally conducts inspections in various places in Victoria, and if the pavement had been damaged they would have noticed. However making the hole was the only way that PUC could access the water pipes and therefore it was obvious that they had done so to repair the burst pipes.
- [44] In re-examination Mr. Payet confirmed that he wrote a letter (Exhibit P6) in which he stated that in April 2014 SLTA had to repair a damaged section of the footpath in the vicinity of

the LWMA offices at English River due to a broken water pipe underneath caused by PUC. He stated that this letter confirms that he visited the site in April 2014.

- [45] He also stated that had PUC followed the guidelines and informed SLTA of the works it had carried out, SLTA would have done the necessary to make the area secure.
- [46] Upon the Court seeking clarification, in light of Mr. Payet's previous testimony, as to whether in the present case as a condition for carrying out works PUC would have to restore the pavement back to its original condition, Mr Payet stated that PUC could have done so or informed SLTA so that the latter could have done it for them. He did not know whether PUC was specifically told that they had to restore the pavement back to its original condition.

*Testimony of Steve Mussard*

- [47] Steve Mussard works at the Property Management Corporation. In 2014 he was the Managing Director for Water and Sewage at PUC. His work entailed overseeing anything to do with water and sewage.
- [48] He stated that in April 2014, PUC carried out works everywhere but there could probably have been a small incident where a water pipe burst. He confirmed that in such a case it would be PUC which would carry out repairs to the pipe, and that if the pipe was under the pavement it would have to be cut to access the pipes. If the pipe is under a pavement, certain procedures have to be followed: first permission has to be obtained, then the pavement is broken and the pipe is repaired, after that the area is backfilled temporarily. The permanent repairs are done by a contractor hired by PUC or by PUC workers themselves, if it is not a big job.
- [49] In regards to the incident giving rise to the present case, Mr. Mussard expressed surprise that a hole of at least half a meter wide had not been backfilled by the PUC workers. He was also surprised that a hole of that size was made to repair the pipes in that area because they were of the small, black, polythene type which are located more or less near the surface

so that there would have been no need to make a big hole in order to repair them. However he stated that he could not comment on the size of the hole as he had not seen it personally.

[50] He also agreed that PUC was informed of the incident based on plaintiff's letter to the CEO of PUC.

[51] In cross-examination he reiterated that on 26<sup>th</sup> April 2014, PUC probably did some work in the area where the incident allegedly occurred, but he could not confirm it unless he checked the records at the call centre. He stated that there was some work done but he does not recall the exact date and would need to check the register and logbook to ascertain the same.

[52] He explained that in that area they have the main pipes which are installed quite deep and under the road and to which the distribution pipes are connected. Distribution pipes are small polythene pipes used to supply water to customers on the other side. They are installed underneath the pavement and then branch out to the customers. He admitted that he could not confirm how PUC accesses these pipes and whether it is from above through the pavement or from below underneath the bridge.

[53] Mr Mussard vaguely remembers a letter regarding the plaintiff's claim, but could not confirm seeing it or remember when it was received or what instructions he received regarding that letter.

[54] He stated that if PUC was repairing a broken pipe, if it is a deep excavation most of the time they will backfill the hole or exceptionally secure it with a barricade. If it is a small hole they will repair it with concrete and if need be secure the area with safety tape.

[55] In regards to the plaintiff's letter of 24<sup>th</sup> October 2014, which stated that there were no safety demarcations or warnings at the site of the incident, he stated that as it was probably not a deep excavation it just involved digging to get to the pipe, repairing it and backfilling which does not require safety tape or road signs. To him it was just a small repair.

[56] Mr. Mussard did not add much to his evidence in re-examination. He expressed surprise that the plaintiff could have fallen through the hole when to him it would have been a small hole just to reach the small distribution pipes just below the pavement.

[57] Upon clarification sought by the Court, as to whether the works were carried out on the main pipes or the distribution pipes, Mr. Mussard stated that from all he had heard it was evident that it was on the small pipes. Had works been performed on the big pipes, half of the road would have to be closed for that purpose.

### **For the Defendant**

#### *Testimony of Vincent Bacco*

[58] Vincent Bacco of Le Niole has worked at PUC in the water breakdown department for twenty-one years, where he is still working as an assistant engineer. He states that PUC received a complaint from the SLTA informing them that someone had complained that he had sustained injuries from holes in the road, pursuant to which he went to visit the site with Mr. Payet, although he only remembers that it was around 2013 to 2014 but not the month or the date.

[59] He stated that in the area opposite the old clinic at English River, PUC has pipes coming from Hermitage going to the North of the island (big pipe of approx. 250 mm) and other small pipes that distribute water to clients in that vicinity.

[60] At the site he observed a big hole which appeared to have been there a long time as grass had grown in the hole. Although SLTA claimed that was done by PUC, it could be seen that it had been there a long time.

[61] He is not aware of any works being undertaken by PUC on 26<sup>th</sup> April 2014 when the plaintiff allegedly fell, and he did not check whether any calls had been received to report any burst pipes at around that time. As to whether he had tried to ascertain whether any works had been done in that area at the material time, he stated that his involvement in that matter was limited to visiting the site because he was asked to do so. Nobody had contacted him personally to report any repair work to be done in the area at the time.

- [62] He explained that in case of a breakdown PUC could access pipes which were found under the pavement in two ways: if the pipes are accessible from under the bridge, there is no need to break the pavement and the workers can just go under the bridge and carry out the repairs. If the pipes are not accessible from under the bridge and are not visible from the pavement, then the pavement has to be broken to effect the repairs, after which PUC repairs or reinstates the pavement to its previous state. If they cannot repair the pavement, in order to ensure that no harm is caused to the public, they install barrier tapes or sign boards until this can be done. If they can, they fill any holes with coral fill and the next day cement the hole. He confirmed that this is the normal procedure followed every time PUC carries out works which entail breaking pavements. He stated that in the area in question there is one pipe that goes under the bridge. He also added that for holes in the road as opposed to pavements, SLTA takes care of the same.
- [63] He reiterated that when he went on site there was a hole in which grass had grown. He stated that they only visited the site because SLTA had stated that PUC was responsible for it but could not ascertain whether it was indeed PUC which had made the hole or another entity or person. At the time of the incident he had not been working in that region but was asked to go and make a report of his observations which he did. Following his site visit he compiled a report as he was instructed to do but does not know what happened to it.
- [64] Counsel stated that the incident allegedly happened in April and that Mr. Bacco only visited the site much later during the year when he claimed he saw grass growing in the hole, but pointed out that SLTA stated that they repaired the pavement in April. Mr Bacco maintained that when he went there he saw the hole with the grass growing in it and stated that maybe SLTA put cement on the hole after that but he could not comment on that because he did not see them do it.
- [65] In cross examination Mr. Bacco was asked whether he was trying to say that there was grass in a hole in the middle of a pavement. He explained that the hole was covered with coral fill and the grass had grown on the coral fill. It was put to him Mr Payet had testified



that when they went on site the hole was there and was half a metre wide and he replied that he was only saying what he saw.

[66] He agreed that he would not have known about the incident if he had not been informed about it by SLTA, and stated that when he accompanied Mr. Payet there the hole had been covered by coral fill on which grass had grown. It was put to him that SLTA had already blocked the hole when he went there and that grass would have grown on it by then, but he could not remember the date on which he went there.

[67] In re-examination he confirmed that he was not aware whether any work was carried out by PUC in April 2014 and that upon visiting the site he saw that the hole had been filled with coral fill on which grass had grown.

[68] Upon the court seeking clarification, Mr. Bacco stated that when he visited the site it was clear that the pavement had been broken but it was filled in with coral fill. Further he would only have known if there was a problem with the pipes if he had been told.

#### **Submissions**

[69] Counsel for the plaintiff did not file any written submissions.

[70] Counsels for PUC essentially submitted that the plaintiff had failed to prove that the damage to the pavement which ultimately caused the plaintiff to fall and sustain injuries, loss and damages was caused by PUC. They also submitted that the plaintiff had failed to establish whether his claim was made under Article 1382 or 1384, and expressed the view that Article 1382 could not be the basis of the claim. In that regard they went on to submit that if vicarious liability under Article 1384 is the basis for the claim, the absence of pleadings as to who is primarily responsible and how the principal is vicariously liable must result in dismissal of the claim. It is further submitted that that the damages sought are without basis and excessive as the evidence adduced does not support the extent of damages the plaintiff claimed to have sustained particularly in regards to the injury to his spine.

## Analysis

- [71] It is clear from the pleadings and evidence that the nature of the claim is a delictual one. It is pleaded by the plaintiff that as a result of the acts of PUC (tunnelling under the road to repair a water pipe thereby weakening the road) and its omissions (failing to place warning signs in the affected area) the plaintiff sustained certain injuries, loss and damages including moral damages.
- [72] It is also evident that the averment at paragraph 4 of the plaint that *“the road was in a weakened state as a direct result of the Defendants negligence to promote and provide an efficient and adequate land transport system which includes land transport services and infrastructure”* was aimed at the SLTA which was initially the 2<sup>nd</sup> defendant in this case rather than at PUC. It is noteworthy that the underlined part of the aforementioned paragraph of the plaint replicates the object of the SLTA under section 4 of the SLTA Act.
- [73] The present claim therefore falls under Chapter II of Title IV of Book III of the Seychelles Code of Civil Procedure Cap 33 which deals with delicts and quasi-delicts. The relevant provisions under Chapter II provide as follows:

### *Article 1382*

- 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.*
- 3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest*

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.*
5. *Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.*

*Article 1383*

1. *Every person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence.*

*[...]*

*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.*

*[...]*

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. Emphasis added.*

[74] It appears from the pleadings that the fault causing damage to the plaintiff was committed by PUC personally under Article 1382(1) whereas the testimony of the plaintiff to the effect that the acts and omissions complained of were carried out by the servants and employees of PUC appears to show that the present claim falls under Article 1384 alinea 3.

- [75] In the case of *Confait v Mathurin* SCA 39/1994, 9 March 1995, LC 63, LSC 14 [13], the defendant (Confait) and the plaintiff (Mathurin) had entered into an agreement in terms of which the defendant was to cut down five trees on the plaintiff's property. The defendant organised a third party (Uzice) to carry out the work. During the course of the work one rotten tree fell over damaging the plaintiff's house and he sued the defendant. The trial court found the third party negligent and held the defendant vicariously liable for that negligence. On appeal the defendant pointed out that the pleadings did not claim vicarious liability but were against the defendant personally.
- [76] Allowing the appeal the Court of Appeal held that “[A] person who claims damage from 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”.
- [77] The case of *Confait v Mathurin* was also relied on by the Court of Appeal in *Public Utilities Company v Chelle Medical Limited* (SCA 42 of 2019) [2021] SCCA 78 (17 December 2021), an appeal against a Supreme Court decision dismissing a claim on the grounds that on the face of the claim no cause of action against Chelle Medical Ltd (Chelle) (the defendant) had been made out by Public Utilities Company (PUC) (the plaintiff). In dismissing the appeal Twomey JA stated the following:
- [24] *I have scrutinised the pleadings and it is apparent that a scattergun approach for liability was used by the Plaintiff with regard to the liability of Chelle. The relevant pleadings ... demonstrate the obfuscation of whether it is Chelle who is directly sued under Article 1382 or vicariously under Article 1384. This is the point that PUC seems to be missing. It must either state in its pleadings whether Chelle, as an entity is liable for personal actions or vicariously for the actions of others.*
- [25] *This Court is not asking that the dispositions of the law relating to delict be set out in the pleadings but rather that there is clarity in whose acts caused the damage. In other words, the pleadings must make it clear under which provision of the law the case is being brought given the different heads of action available in delict. This is important so as to notify the defendant as to the nature of the suit he is defending. It is also important as Article 1382 dealing with delictual responsibility arising out of one's personal action provides for liability of a person for damage caused to another by that person's own act or omission. Delictual liability, in that case, is*

*established by proving the damage caused, the faute of the person causing the damage and the causality link between the two.*

[26] *On the other hand, Article 1384 provides inter alia for the delictual liability of a person for damage caused by the act of persons for whom the first person is responsible. Article 1384 (3) importantly establishes a presumption of fault on employers/principals for the acts of their employees/agents. Hence once it is proved that damage has been caused by the act or fault of a person in the employment/agency of that employer /principal, acting within the scope of that person's employment/agency, the strict liability of the latter operates. As pointed out by Mr Shah, the only exception in these circumstances would be evidence that the employee/agent was on a frolic of his own.*

[27] *The components for proving each cause of action are sharply contrasted and a choice must be exercised by the plaintiff.*

[28] *Section 71(d)\* of the Seychelles Code of Civil Procedure provides that a plaint must contain: "a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".*

[29] *That is certainly not the case in the pleadings before this Court. In the case of Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA 33 (14 December 2018) a similar issue arose and this Court referred to the case of Confait v Mathurin in it found that parties are bound by their pleadings, the purpose of which is to give notice of its case to the other party. The Court went on to state that:*

*"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 is 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."*

[30] *This court cannot make the point any clearer. In the circumstances, I cannot fault the learned trial judge on this issue. This ground of appeal therefore cannot be sustained.*

[78] In the present case no averment of vicarious liability was pleaded in that it was not averred that the damage allegedly caused to the plaintiff was caused by “*servants and employees*” of PUC. It would seem therefore that PUC was being sued for its personal acts whereas the plaintiff’s testimony was to the effect that he sustained damages because of the act of PUC’s workers. On the strength of the above authorities, I therefore find that the plaint is defective and for that reason stands dismissed. Given the dismissal of the plaint, there is no necessity for this Court to consider this matter on the merits.

[79] I make no order as to costs.

Signed, dated and delivered at Ile du Port on 21<sup>st</sup> October 2022

Carolus.

Carolus J