

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 30

CA 23/2019

(Appeal from CS 131/2018

Magistrate's Court)

In the matter between:

JOHN MAYENGO

(rep. by Bryan Julie)

Appellant

and

Cash Plus Co Pty Ltd

(rep. by Guy Ferley)

Respondent

Neutral Citation: *Mayengo v Cash Plus Co Pty Ltd* (CA23/2021) [2021] SCSC 30 (26 February 2021).

Before: Carolus J

Summary: Civil Procedure - Pleadings

Delivered: 26 February 2021

ORDER

On appeal from the Magistrates' Court, Seychelles. The appeal is dismissed. I make no order as to costs

JUDGMENT

CAROLUS J

Background

[1] The appellant being aggrieved by the decision of the Learned trial Magistrate in CS131 of 2018 delivered on 12th September 2019, dismissing the case against the respondent (then defendant) has appealed to this Court against the decision.

- [2] The appellant's case before the Magistrates Court is that being a Ugandan national and working as a teacher in Seychelles, he frequently transferred money abroad using respondent's facilities. The respondent's business involves foreign exchange transactions including transferring money to and from Seychelles. It was averred in the plaint that the defendant (now respondent) used the plaintiff's (now appellant) personal details to transfer huge sums of money on several occasions without his knowledge or consent. As a result he was suspected of money laundering and associating with suspected drug traffickers and treated as such by the National Drugs Enforcement Agency and the Financial Investigative Unit. He was also forced to give evidence against what he terms "criminals" to the police in consequence of which his freedom has been curtailed and he fears for his life. In addition he was interrogated at his place of work which caused him embarrassment and shame and fear of losing his job. He claimed that his character was injured and his reputation brought to ridicule. He claimed moral damages from the defendant in the sum of SCR200,000.00.
- [3] The respondent (then defendant) denied any liability to the plaintiff. It averred in its statement of defence that it is compliant with anti-money laundering laws and regulations and has procedures in place to detect money laundering activities as required by the relevant authorities. It averred that it was one of its employees who, on a frolic of her own, used the plaintiff's details to make the transfers complained of; that it never authorised her to make any fraudulent or unlawful transfers; and that it terminated her employment as soon as it became aware of the transaction. The respondent (then defendant) expressed the belief that the appellant (then plaintiff) was in collusion with the employee with regards to the transactions. It further averred that it could only be vicariously liable.
- [4] The trial Magistrate, after having heard the matter, dismissed the plaint on the ground that the case as pleaded against the defendant had not been made out.
- [5] The grounds of appeal as stated in the Memorandum of Appeal are as follows:
1. *The Honourable Magistrate erred when she states in paragraph 34 of the judgment that "no further particulars are pleaded in respect of any*

failures on the part of the defendant specifically that the defendant failed to adhere to its compliance and reporting obligations”.

Evidence was adduced by the FIU in respect of the Respondent’s failure to abide by the established procedures.

2. *The Honourable Magistrate should have ruled in favour of the Appellant when she concluded that the operations of the compliance and reporting officer left much to be desired.*
3. *The Honourable Magistrate was wrong not to rule in the Appellant’s favour when she admitted that “the Plaintiff may have had chances of success if he had brought a case against Mr. Francois Rose”. Mr. Rose was acting under the instructions of the Respondent and he was vicariously liable for the actions of all the employees when acting under his supervision.*

[6] Counsel for the appellant filed written submissions while respondent’s counsel chose to rely on his submissions filed in the case before the trial court. Both submissions were carefully considered and will be referred to as relevant.

Analysis

[7] 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*”. A plaint, properly drafted in accordance with this provision will reveal the legal basis of the plaintiff’s claim, for instance whether it is a contractual or delictual claim, and consequently the applicable law, although this must not be taken to mean that the applicable legal provision should be pleaded.

[8] What is reproached of the defendant (now respondent) in the plaint is that “*the Defendant used the Plaintiff’s personal details to transfer huge sums of money on several occasions without his knowledge or consent*” (Paragraph 4 of the plaint).

[9] The trial Magistrate, correctly in my view, understood, such averment to be one of fault committed by the defendant giving rise to the latter’s delictual liability. Our law of delict

is provided for in Articles 1382, 1383, 1384, 1385 and 1386 of the Civil Code of Seychelles Act. However at paragraph 34 of her judgment the trial Magistrate expresses her confusion as to whether the action was brought under Article 1382 or Article 1384(c) of the Civil Code, in light of the pleadings. She states:

34. ... it is not entirely clear ... whether the action was brought under Article 1382 or 1384(c). The plaintiff's pleadings appear to be brought under Article 1382 and it is stated in paragraph 4 of the *Plaint* in that 'the Defendant used the Plaintiff's personal details to transfer huge sums of money on several occasions without his knowledge or consent'. No further particulars are pleaded in respect of any failures of the Defendant, specifically that the Defendant failed to adhere to its compliance and reporting obligations despite the evidence being centred on the Defendant's failure to detect the suspicious transactions.

[10] Article 1382 which deals with *responsabilité délictuelle du fait personnel*, provides for liability of a person for damage caused to another by that person's own act i.e. fault. Delictual liability is established by proving the *dommage*, the *faute* of the person causing the *dommage* and a *lien de causalité* between the two.

[11] On the other hand Article 1384 provides for *responsabilité delictuelle du fait d'autrui*: the delictual liability of a person for damage caused by the act of persons for whom the first person is responsible, and for *responsabilité delictuelle du fait des choses*: the delictual liability of a person for damage caused by things in that person's custody. In regards to *responsabilité delictuelle du fait d'autrui*, as concerns liability of masters and employers for acts of their servants and employees, alinéa 3 of Article 1384 provides that:

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.*

[12] This is the vicarious liability that the trial Magistrate mentions in her observation at paragraph 35 where she states:

35. *I further observe that vicarious liability has not been specifically pleaded. Despite this omission to plead vicarious liability, the Plaintiff has made reference to article 1384(c) in his closing submissions and the evidence as led by counsel was that the defendant was vicariously liable for the actions of its employee Wendy Esparon.*

[13] As she rightly observes out at paragraph 48, alinéa 3 of Article 1384 establishes a presumption of fault on employers on the acts of their employees. There is the operation of a *présomption de responsabilité* against the employer once it has been proven that a damage has been caused by the act or fault of a person in the employment of that employer acting within the scope of that person's employment. The trial Magistrate further points out that the plaintiff has failed to plead that any acts were committed by the defendant's employees, servants and agents which would attract the strict liability of the defendant and concludes that she could therefore not see how the case as pleaded could be brought under the aforementioned provision.

[14] In his written submissions, counsel for the appellant states that:

1. *The Appellant has petitioned the lower court for an order declaring the Respondent liable for moral damage, anguish, trauma and embarrassment carried (sic) by the Respondent's employee to the Appellant as a result of the Respondent's negligent behaviour.*

Emphasis added.

[15] A good part of the submissions also focuses on the vicarious liability of the respondent for the acts of its employee Wendy Esparon which the evidence shows carried out the transfers without appellant's consent.

[16] With respect to learned Counsel, not only was any act of the respondent's employee causing the aforementioned damages to the appellant not alleged in the plaint, but no negligent behaviour leading to such acts by the employee was attributed to the respondent in the plaint either. The only act that was alleged in the plaint against the defendant is that it "*used the Plaintiff's personal details to transfer huge sums of money on several occasions without his knowledge or consent*".

- [17] In the case of **Confait v Mathurin SCA 39/1994, 9 March 1995, LC 63, LSC 14 [13]**, cited by the trial Magistrate, 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”. It is abundantly clear from the plaint that no averment of vicarious liability was pleaded in that it was not averred that the damage allegedly caused to the plaintiff (now appellant) was caused by a person for whom the defendant is responsible. I therefore agree with the trial Magistrate that the plaint does not support an action for vicarious liability under alinéa 3 of Article 1384.
- [18] The trial Magistrate also found that the plaint did not support an action under Article 1382 for the personal liability of the defendant. She stated at paragraph 34 of her judgment (reproduced at paragraph 10 above) that “*The plaintiff’s pleadings appear to be brought under Article 1382 and it is stated in paragraph 4 of the Plaint in that ‘the Defendant used the Plaintiff’s personal details to transfer huge sums of money on several occasions without his knowledge or consent’*”. She then went on to state that “[N]o further particulars are pleaded in respect of any failures of the Defendant, specifically that the Defendant failed to adhere to its compliance and reporting obligations despite the evidence being centred on the Defendant’s failure to detect the suspicious transactions”. Presumably the absence of any averment of fault committed by the defendant itself which would have engaged its liability, as opposed to fault committed by its employees is what lead the trial Magistrate to make this last statement.
- [19] The first ground of appeal is to the effect that the trial Magistrate erred in stating that “*no further particulars are pleaded in respect of any failures of the Defendant, specifically that the Defendant failed to adhere to its compliance and reporting obligations*” because there was evidence of respondent’s failure to abide by established procedures. It appears that counsel is assimilating pleadings to evidence. It is trite that a court cannot explore outside what is pleaded. The cases of **Nanon v Thyroomooldy (2011) SLR 92** and **Amelie v Mangroo (2012) SLR 48** are authority that a matter which has not been pleaded cannot be held to have been proved and no evidence should be adduced or admitted in respect of it. The first ground of appeal therefore fails.

[20] The trial Magistrate further stated at paragraph 39 of her judgment that the defendant being a company, an action under Article 1382 would not be appropriate. I am also of this view. The proper procedure would have been to file an action against the respondent alleging vicarious liability for the acts of its employee Wendy Esparon. In the case that it could not be proven that she was acting within the scope of her employment as found by the Learned trial Magistrate at paragraph 40 of her judgment, it may have been proper to plead vicarious liability of the respondent for the acts or omissions of Mr. Francois Rose in his capacity as compliance and reporting officer, namely his failure to carry out or properly carry out his duties as compliance and reporting officer, which gave rise to the damages allegedly sustained by appellant. A company may also be held liable for the acts of its Managing Director under certain circumstances. However the trial magistrate was confined to considering the case before it as pleaded.

[21] The second and third grounds of appeal are to the effect that the trial Magistrate should have ruled in favour of the Appellant when she concluded that “*the operations of the compliance and reporting officer left much to be desired*”; and that she was wrong not to rule in the Appellant’s favour when she admitted that “*the Plaintiff may have had chances of success if he had brought a case against Mr. Francois Rose*” as Mr. Rose was acting under the instructions of the Respondent and he was vicariously liable for the actions of all the employees when acting under his supervision. On those points, I find it necessary to reproduce the parts of paragraph 41 of the judgment referred to by the appellant in more detail. It reads:

41. ***It is clear from the evidence that the operations of the compliance and reporting officer of the Defendant left much to be desired and there may be a case that he fell short of his duties as required under Anti-Money Laundering Act, which resulting (sic)in the transactions going undetected for some time. In my view the Plaintiff may have had better chances of success if he had brought a case against Mr. Francois Rose the compliance and reporting officer for his alleged failure to adhere to its compliance, monitoring and reporting obligations specifically to keep the Plaintiffs (sic) personal details safe, his failure to adhere to a standard of reasonable care, failure to conduct effective supervision, his decision to delegate duties, failure to have proper control and supervision over the management of the business all of which could have resulted in the suspicious transactions not being detected, and simultaneously adding the Defendant***

company as party being vicarious (sic) liable for its compliance and reporting officer. This is unfortunately however not the case which has been filed before the court. 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.

Emphasis is mine

[22] It would seem that counsel for the appellant overlooked the concluding part of the said paragraph 41 to the effect that the case filed before the court is not one for failure of Mr Rose to carry out his duties as compliance and reporting officer and as such the Court cannot go outside the pleadings and formulate a case for the plaintiff.

[23] It would also appear that counsel for the appellant is confusing the respondent Cash Plus Co Pty Ltd and Mr. Rose who is cited as representing the respondent presumably in his capacity as its managing director. In the second ground of appeal he states that Mr. Rose was acting under the instructions of the respondent and he was vicariously liable for the actions of all the employees when acting under his supervision. This argument is misconceived. It is the respondent and not Mr. Rose who is vicariously liable for the acts of respondent's employees. Grounds 2 and three therefore also fail.

[24] In the circumstances, I dismiss the appeal.

Signed, dated and delivered at Ile du Port on 26 February 2021.

Carolus J