

SUPREME COURT OF SEYCHELLES

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**Reportable**  
[2021] SCSC 112  
CS 97/2019

In the matter between:

**JOSEPH MARIA**  
(rep. by Anthony Derjacques)

**Plaintiff**

and

**EMMA LEONNIE FANCHETTE**  
(rep. by Joel Camille)

**Defendant**

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**Neutral Citation:** *Maria v Fanchette* (CS 97/2019) [2021] SCSC 112 (31<sup>st</sup> March 2021).

**Before:** Pillay J  
**Summary:** Faute  
**Heard:** 17<sup>th</sup> July 2020 and 21<sup>st</sup> October 2020  
**Delivered:** 31<sup>st</sup> March 2021

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**ORDER**

- [1] Judgment is entered in favour of the Plaintiff in the sum of SCR 165, 000.00.
  - [2] Each side shall bear their own costs.
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**JUDGMENT**

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**PILLAY J**

- [3] The Plaintiff sues the Defendant for the recovery of the sum of SCR 330, 000.00 with interests and costs.

- [4] The Plaintiff claims that he and the Defendant met and became friends in December 2017. They developed an intimate and loving relationship and travelled overseas together. The Plaintiff claims that on numerous occasions and without authorisation, the Defendant has unlawfully and illegally withdrawn money from his bank account, amounting to SCR 330, 000.00, between 27<sup>th</sup> February 2018 to 26<sup>th</sup> September 2018.
- [5] The Defendant admitted that she and the Plaintiff had an intimate and loving relationship. However she denied withdrawing the money illegally and without the Plaintiff's authorisation instead claiming that the withdrawals were done with the Plaintiff's express authority, consent and knowledge.
- [6] She denied withdrawing the money by way of fraud, theft or faute. She claimed that at all times the Plaintiff was aware of the transactions and the said transactions were effected during the time that the parties were in an intimate relationship and in pursuance of that relationship.
- [7] In summary the evidence of the Plaintiff is to the effect that the Defendant stole from him. Following a trip they took to Thailand together, the Defendant learnt his pin code and three days after their return the Defendant started withdrawing money from his account, each time an amount of SCR 15, 000.00, for a period of 8 months totalling SCR 330, 000.00
- [8] The Defendant on oath testified to knowing the Plaintiff and having a relationship with the Plaintiff. Sometimes she went to his place and sometimes he came to her place. They travelled together to Thailand. She testified that she did not steal his ATM card. They were in a relationship and she had access to the card. Sometimes she withdrew money for both of them. It was her testimony that she had his permission to withdraw the money.
- [9] In cross examination she stated that he told her to remove some money but not too much. It was her testimony that the Plaintiff knew when she was withdrawing money but not the exact amount. She testified that she would tell him she is going to withdraw money but did not tell him the exact amount because he could tell her it is a little too much. She accepted that she withdrew more money than he wanted her to.

[10] It was counsel for the Plaintiff's submission that the Court should find as proven the following:

- (1) *That the Plaintiff is an elderly pensioner and appears to be of frail mental acuity;*
- (2) *That the Plaintiff was overly dependent on the Defendant;*
- (3) *That the Defendant had personal knowledge of the Plaintiff's aforesaid condition;*
- (4) *That the Defendant knew where the Plaintiff had kept his ATM card in the house;*
- (5) *That the Defendant knew the pin code of the Plaintiff's ATM card and had withdrawn money from the Plaintiff's Bank Account, on several occasions;*
- (6) *The Defendant under oath, in open court, admitted that she took the money for her personal use, over and above any amount that was used for the Plaintiff's sustenance;*
- (7) *The Defendant, in open court, admitted that the said amounts withdrawn were large, repeated and extracted from the Plaintiff's Bank Account, for her personal use. When questioned by the Court, the Defendant repeatedly implied that a refund could be made and that a percentage of the said amount should be returned to the Plaintiff;*
- (8) *The Defendant, in open court, admitted that the Plaintiff was not aware of the exact amount withdrawn by her from his Bank Account and further was not aware of what was purchased by her for her personal use; and*
- (9) *The Defendant's defence dated the 23<sup>rd</sup> September 2019, and as repeated above, admits that the Defendant "withdrew the money from the Plaintiff's account". Further, her allegations, with respect to the Plaintiff's consent, knowledge, and awareness, is not supported by her oral submission in court under oath. In fact, she contradicts her said defence.*

[11] The issues as identified by Plaintiff's counsel are as follows:

- (1) *Whether the Defendant has, on numerous occasions and without authorisation, unlawfully and illegally withdrew money from the Plaintiff's Bank Account by means of his ATM bank card;*

- (2) Whether the sum of money withdrawn amounts to a total sum of SR330,000.00cts and whether the said money was withdrawn from the Plaintiff's Bank Account between the 27<sup>th</sup> February 2018 and the 26<sup>th</sup> day of September 2018;
- (3) Whether the Bank has in its possession, records and videos showing the Defendant withdrawing the said sum by twenty-two instalments, at its ATM machines;
- (4) Whether upon notification, the said ATM card was seized by the Bank;
- (5) Whether the Defendant was arrested and interviewed by two CIS officers on the 15<sup>th</sup> day of September 2018;
- (6) Whether the Defendant's aforementioned acts amount to a fault in law and is thereby liable in law to the Plaintiff; and
- (7) Whether the Defendant is liable in law to pay the afore-said sum to the Plaintiff and whether the Plaintiff is entitled to moral damage.

[12] Those issues can be narrowed to the following:

- (1) Whether the Defendant has withdrawn SCR 330, 000 from the Plaintiff's account?
- (2) Did she do so without the Plaintiff's permission, unlawfully and illegally?
- (3) If she did so, does it amount to a faute in law for which she is liable?
- (4) What damages is the Plaintiff entitled to if any?

[13] The plaintiff's action being based on fault, the principles of law applicable to this case are that which is found under Article 1382(2) & (3) of the Civil Code of Seychelles which reads thus:

*"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 a positive act or omission"

*“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”*

- [14] Article 1383 (1) in part provides that:

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

- [15] In terms of Article 1382 the Plaintiff needs to show on a balance of probabilities that there was fault on the part of the Defendant that resulted in damage being caused to the Plaintiff.
- [16] In **Simon Emmanuel & Attorney General v Edison Joubert SCA 49/1996**, it was held that a claim arises under Article 1382 of the Civil Code when the act and the injury co-exist and there is a causal link between the act and the injury.
- [17] In the case of **Verlaque v Government of Seychelles SCA 8/2000, 12 April 2001** the Court held that the parties are bound by their pleadings, they are not permitted to set up a case differently from what they have pleaded.
- [18] In the case of **Morel v Antat (1979) SCAR 253** the Court held that a judge is bound by an admission of liability. Counsel should apply for an amendment of the defence to revoke the unreserved admission of liability.
- [19] Is there an admission by the Defendant amounting to an admission of liability?
- [20] In her Defence the Defendant denied paragraph 4 of the Plaintiff in the following terms:

*Paragraph 4 of the Plaintiff is denied and the Plaintiff is put to strict proof thereof.  
In further answer the Defendant avers as follows:*

- (i) *That at all times Defendant withdrew the money from the Plaintiff’s ATM account, same withdrawals has been with the express authority consent and knowledge of the Plaintiff.*

- (ii) *At no time had the Defendant withdraw the money by way of fraud, theft or a faute to the Plaintiff.*
- (iii) *That at all material times, Plaintiff and Defendant had been aware of the transactions and same transaction has been effected during the time that the parties were in the intimate relationship and in support or in pursuance of the same relationship.*

[21] Paragraph 4 of the Plaintiff reads as follows;

*The Plaintiff avers that the Defendant has, on numerous occasions and without authorisation, unlawfully and illegally withdrawn money from his bank account, namely account number 0104153283, with his Barclays ATM card, amounting in the total sum of SCR330, 000.00cts. That the aforesaid sums were withdrawn from his account between the 27<sup>th</sup> day of February 2018 and the 26<sup>th</sup> day of September 2018.*

- [22] She first denies withdrawing the sum of SCR 330, 000.00 but then proceeds to aver that at all times she “withdrew the money from the Plaintiff’s ATM account with the express authority consent and knowledge of the Plaintiff”. By reference to withdrawing “the money” and the only sum referred to in paragraph 4 of the Plaintiff is SCR 330, 000 she admits that that is indeed the amount she withdrew. In effect, her denial is only as to whether or not she had permission to effect the said withdrawals.
- [23] In terms of **Morel** above it cannot be said that the Defendant has admitted liability since she does not admit to having withdrawn the money without permission, illegally and unlawfully. However in admitting that she withdrew “the money” then there is no proof required to prove that she did withdraw the sum of money claimed being SCR 330, 000.
- [24] In terms of whether she had the Plaintiff’s permission to withdraw the said sum or whether she did so illegally or unlawfully; in her evidence, though she initially insisted that the Plaintiff knew she was withdrawing the money, she finally accepted that the Plaintiff did not know the exact amount that she was withdrawing. In fact she stated that the Plaintiff told her “konn tire” which she accepted on oath that she understood that to mean be reasonable. This to my mind is indicative of the Plaintiff giving her permission

to withdraw a reasonable sum of money but certainly was no green light for her to withdraw money from the account as she wished.

- [25] In her re-examination she stated that “There are days when I am going to remove I tell him today I need Rs15000/- or today I need Rs10,000/- and sometimes I do not tell him how much I only tell him that I need some money he tells me to know how to remove it.” On being asked by the Court she accepted that she understood that to mean to be reasonable. To my mind this is the key evidence in the matter.
- [26] At this point I have to say that I do not believe the evidence of the Plaintiff with regard to the Defendant stealing his card. He attempted to deny that there was ever any intimate relationship between himself and the Defendant but then went on to state that “I thought she was somebody who wanted to be my lover but she did not want that.” However, though his confusion was evident throughout his testimony, I cannot ignore the evidence of the Defendant as above in addition to the following exchange in cross examination:

*Q: Why don't you tell him that you are going to withdraw SCR15, 000?*

*A: Because maybe he can tell me that this is a little bit too much.*

- [27] In conclusion I find, on her own admission, that the Defendant did withdraw the sum of SCR 330, 000.00 from the account of the Plaintiff. I accept her evidence that she had the permission of the Plaintiff to withdraw money from his account. She however understood that he did not give her carte blanche to withdraw however much she wanted. Though she had permission to withdraw funds from the account she had no permission to withdraw the amounts she did. She had permission to withdraw funds relative to their daily living expenses. Indeed she could not even remember how she spent the sums of SCR 15, 000.00 that she withdrew, on some occasions on 2 or 3 consecutive days. I find that her actions were an error of conduct which would not have been committed by a prudent person in her circumstances, rendering her liable for the money she withdrew in excess.
- [28] In view of the findings above I would assess the reasonable living expenses of the parties to be half-half, in which case I find that the Defendant is liable to refund the Plaintiff the sum of SCR 165, 000.00.

- [29] As for the claim for moral damages I note that from the very beginning of his testimony the Plaintiff expressed his sentiment of rage. He was to use his own words “pissed” that she stole from him. He had thought that “she was somebody who wanted to be [his] lover but she did not want that.” Other than that evidence there was no indication of what moral damage he suffered or the extent to which he should be compensated for any moral damage. In the circumstances I make no award under the head of moral damages.
- [30] Judgment is entered therefore in favour of the Plaintiff as against the Defendant in the sum of SCR 165, 000.00.
- [31] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on .....

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Pillay J