IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 1001
(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 1001 ( )
Before: Govinden CJ
Summary: Plaint; delictual responsibility;
Heard: 17 June 2020
Delivered: 18 November 2022

ORDER

RULING

GOVINDEN J

[1] The Plaintiff avers that 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 by 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 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.

[2] The Plaintiff avers further that 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.

[3] The 3rd Defendant thereafter again 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 held that the 3rd defendant had abused the process of the court. However, the Court of Appeal decision came after the said election. No specific material averments are made against the Registrar of the Supreme Court (the 4th Defendant). As a result, the Plaintiff avers that it could not participate in the said elections and suffered enormous financial losses as well as anxiety, humiliation and stress. Consequently, the Plaintiff 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's actions constitute a faute in law for which they are liable.

[4] In a Ruling dated the 27th of July 2020 this Court upheld several pleas in limine litis and dismissed the cases against the second, third and fourth Defendants; and ordered that the case proceeds on the merits against the first defendant only.

[5] In its defence, the 1st Defendant avers that the Plaintiff has no locus standi to bring the case as it has not functioned as a political party. Though the Plaintiff is put to proof of it being registered as a political party with the name *Linyon Sanzman*, the 1st Defendant avers that this name had been extensively used by it during the 2015 Presidential election campaign.

[6] With regards to the various judicial decisions of the 3rd Defendant, the 1st Defendant avers the court made bona fide judicial pronouncements based on the law and also made bona fide application of the law. Moreover, the 1st Defendant avers that it was the Plaintiff who

maliciously, out of spite and with intent to defraud the electorate, registered the name as its own. Accordingly it is averred that the court orders were just and reasonable as they were made reasonably with the intention of preventing the Plaintiff from defrauding and confusing the electorate. The Defendant goes on to deny the damages claimed by the 1st Defendant and avers that at any rate, they are exaggerated.

[7] On the date fixed for hearing, the counsel for the 1st Defendant was absent without proper justification and the court proceeded to hear the case ex-parte.

[8] The Plaintiff called a representative of the Registrar of the Supreme Court who produced a number of case files relating to Supreme Court proceedings between the Plaintiff and the 1st Defendant as referred to in the Plaint. These are MA 266 and MA 264 of 2016 arising in MC 86 of 2016; MC 87/2016 containing MA 258/2016, MA 262 l2016, MA 263/2016, Ma 262/2016,MA261/2026 and MA 267/2026. He also called the Assistant Registrar of the Seychelles Court of Appeal, who produced the files and proceedings of two appeal cases namely that of SCA 23/2016 and SCA 24/2016.

[9] Mr Martin Aglae testified for the Plaintiff. He is the leader of the political party, Linyon Sanzman. His party's main objective was to participate in the 2016 National Assembly elections. The party was registered in April 2016 and after registration the party started to get ready for the election which was in September of the same year. The party was going to field candidates so as to contest all electoral areas except two. They made billboards, banners and printed umbrellas, caps and t-shirts and held meetings. The printings were done by a business called PRINT-IT Seychelles. The total for the works done by the latter amounted to SCR 1.8 million.

[10] However, Mr Aglae testified further that they could not participate in the election because the 1st Defendant brought several cases before the court. This includes one where the 3rd Defendant ordered the 2nd Defendant not to allow the use of its name in the election. As a consequence, this would have denied the Plaintiff the opportunity to nominate their candidates and fully participate in the election. However, after meeting the leaders of the Plaintiff and the 1st Defendant, the Electoral Commission decided to allow the Plaintiff to use its name in the upcoming election.

[11] Notwithstanding the above, the 1st Defendant brought a court case wherein the same Judge (the 3rd Respondent), ordered the Electoral Commission to struck the Plaintiff off the register of political parties on the eve of the nomination day. Though the Plaintiff successfully appealed to the Seychelles Court of Appeal, this was only of academic significance as the appeal was heard after the election. The 1st Defendant denies the damages allegedly suffered by the Plaintiff and avers that they are exaggerated at any rate.

[12] According to the Mr. Aglae, the process used by the 1st Defendant was wrong, malicious and was effected with the connivance of the court solely with the intention to deny the Plaintiff a fair chance to participate in the election. He goes on to state that the judge hearing the case, who was then the Acting Chief Justice, heard the case when it should have been placed before the duty Judge.

[13] As a result of this, the Plaintiff lost its sponsors and that loss left it indebted such as the SCR 167,079 being office rent not paid to its Landlord. The party was denied its right to participate in the election, for which he is asking for SCR 1 million professional costs; preparation of the party paraphernalia such as t-shirts, caps etc.; he claims SCR 1.8 million; office rental of SCR 167,079; payment to the Campaign Manager SCR 32,000; legal costs SCR 100,000 and moral damages for pain, humiliation and anxiety SCR 100,000.

[14] The representative of the printing company of the Plaintiff gave evidence that it placed orders for r-shirts, caps stickers and posters. The total sum came up to SCR 1.8 million out of which a sum of SCR 1,287,350 is outstanding.

[15] The representative of the landlord of the headquarters of the Plaintiff at the material time gave evidence that a sum of SCR 151,000 has been left unpaid by the Plaintiff.

[16] I have thoroughly read the Plaint and the Statement of Defence in this case and I have read the submissions of the Plaintiff. I have also very closely read the previous decisions of this court and that of the Seychelles Court of Appeal referred to in the Plaint and the Defence and have given the same attention to the evidence led before me. Having done so I find that there is only a very narrow issue left for my determination. Namely whether the 1st

Defendant brought the suits against the Plaintiff out of malice and without reasonable and probable cause and this fits within the acceptable remit of our law.

[17] The cases of malicious civil prosecution is quite new in the English law. It all started with the case of *Willers v Joyce* [2016] UKSC 43, which involved a dispute between the directors of a private company. The company brought a claim against one of the directors, Mr Willers, for breach of his director's duties. Mr Willers defended the action on the basis that he had been acting under the direction of another director, Mr Gubay. The company discontinued the action shortly before trial. Mr Willers then brought his own action for malicious prosecution, alleging that Mr Gubay was out to do him harm. When the action came before the Court, the question was whether a tort (or civil wrong) of malicious prosecution existed, and if so whether there were public policy reasons against allowing claims of this type. The Court reviewed case law going back to the 1600s, and concluded that the authorities were in conflict. As regards the policy ground, it was argued that there is an existing sanction against someone who brings an improper claim, namely indemnity costs. However, the court found (by a 5:4 majority) that it would be unjust for there to be no remedy for a person who suffers injury as a result of malicious prosecution of civil proceedings. Accordingly, the tort of malicious prosecution of civil proceedings does exist.

[18] In such a case a claimant will have to establish that the proceedings were brought without reasonable and probable cause, and that the party who brought them did so maliciously, i.e. by deliberately misusing the process of the court. The proceedings must not be a bona fide use of the court's process.

[19] The Court in *Willers v Joyce* stressed that it would not be easy to prove that a case was brought maliciously, and the number of successful claims will be small. The likely effect, flowing from the Court's decision, could be a deterrent to potential Claimants whose claims are uncertain, or where the facts are not entirely clear.

[20] In the French law from which we should draw our inspiration, the counterpart is the *faute* of *abus des droit.* The Codes Dalloz, Code Civil, 8th edition, p 895, abus de droit, note 12, is to the following effect:

> *"L'excercice d'une action en justice, de meme que la defense a une telle action, constitue, en principe, un droit et ne degenere en abus pouvant donner naissance a une dette de dommgae-interets que dans le cas de malice, de mauvaise foi ou detteur grossierre equilpollente au dol."*

[21] Hence, irrespective of the English common law or the French law, the principle remains the same. The party bringing such a claim must establish malice and bad faith on the part of the other. He who assert must prove. It is up to the Plaintiff to prove on a balance of probabilities that the 1st Defendant brought the Judicial Review action and seek the orders from the Supreme Court not with the intention of ensuring that the Plaintiff is prohibited from passing itself off as being the 1st Defendant, or at least to be closely associated to the 1st Defendant in the mind of a fair minded average Seychellois voter, but out of malice and bad faith to deny it a fair chance in the 2016 National Assembly election.

[22] The only evidence tendered to prove bad faith and malice on the part of the 1st Defendant in this case comes from two sources. The first is the testimony of Mr Aglae and the second are certain pronouncements by the Seychelles Court of Appeal. The Printer and the Land Lord being called only to prove losses following the impugned acts of the 1st Defendant.

[23] I have scrutinised the testimony of Mr Aglae, I have not found anywhere in the proceedings where he blamed the 1st Defendant for his party's unfortunate loss. Rather, he seemed to put the fault entirely on the judge who he says did not follow the procedure and instead heard the case in bad faith. In respect of the 1st Defendant, he only appears to take it to task with respect of how it drafted its counterclaim in its Statement of Defence, which he terms amount to an abuse of process. Though admittedly he was quick to point out in the same breath that given that he was not a legal expert, he would not know whether that he was correct in his assertion.

[24] This leaves this court only with the decision of the apex court in the case SCA 23 and 24 of 2016. The relevant parts of this judgment are submitted upon in the written submissions of counsel for the Plaintiff. The first one is found at page 12 para 32, where that court held:

> *"In the whole process a litigation minded court user was able to use the court system to prevent two parties from exercising their democratic rights under the Constitution. Those denied that democratic right is the Appellant in SCA Appeal SCA 23 of 2016 arising out of MC 86 of 2016 and Appellant in the Appeal in SCA 24 of 2016 arising out of MC87 of 2016.".*

[25] From the assertion is quite apparent that the "litigation minded court user" was none other than the 1st Defendant. However, this court is not convinced after reading the totality of this judgment that the rest of this finding relates to the same Defendant. Reading the decision as a whole it is clear that the Court of Appeal admonished the Learned Judge who effectively prevented the Plaintiff from exercising its democratic rights after the 1st Defendant as *"a litigation minded court user"* had moved the court.

[26] With reference to the motivations of both the Plaintiff and the 1st Defendant, the Court of Appeal had this to say at para 74:

> *"In this case, parties have used the process to score political points. This we cannot allow. If we allow that we shall be introducing in our judicial system a virus".*

[27] Hence the concern of that court was that the Judge had allowed the court process to be abused for political gains and not that the parties, including the 1st Defendant, acted maliciously and in bad faith with regards to the process and substance of their cases. Each of the parties were pursuing their cases on what they thought to be on reasonable and probable causes and so I find. Hence, contrary to the written submissions of the Plaintiff to this court, this finding cannot amount to one in which that court found bad faith or malice on the part of the 1st Defendant.

[28] To my mind, the liability of the Judicial Officer as compared to the litigant is succinctly captured by that court at para 32, in what this court considers to be the *ratio decidendi* of that case, where it held:

"The Learned Judge should have exercised a degree of professional scepticism to check on the good faith of the application. Had he done so, the latent flaws in the application would have been more evident. Instead, he readily granted the application ex-parte. What is more, he issued a number of wide ranging orders, in themselves not asked for in the prayers of the application. As may be seen, the challenge was not of the decision making process but of the decision itself."

[29] Therefore, I find that the 1st Defendant did not commit a faute and is not liable in law as it was acting on reasonable and probable cause, and not acting maliciously or in bad faith when it petitioned the Supreme Court in MC 86/2016 and filed an application for a provisional injunction, under case MA 257/16.

[30] The Plaint is accordingly dismissed.

Signed, dated and delivered on the 17th November 2022 at Supreme Court, Ile du Port, Mahe, Seychelles

Govinden C J