

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC ...
CS35/2020

In the matter between

JENVILLE MOUSMIE
(rep. by Mr. Bryan Julie)

PLAINTIFF

and

PATRICK BONNE
(Ms. Alexandra Madeleine)

1ST DEFENDANT

SYLVIA BUSOGNI
(Ms. Alexandra Madeleine)

2ND DEFENDANT

Neutral Citation: *Jenville Mousmie vs Patrick Bonne & Anor (CS35/2020 [2022] SCSC*

Before: G Dodin

Heard: Written Submissions

Delivered: 23 February 2022

RULING

Dodin J

- [1] On the 12th September, 2014 at around 5am, Plaintiff was bitten by dogs whilst walking home from work. He suffered multiple injuries to his face, neck, lower and upper lips, left cheek, left eyebrow, above right ear, left ear torn off, undisplaced fracture of the right zygomatic arch, left upper limb, right upper and lower leg and Achilles tendon. The Plaintiff was admitted to the Seychelles Hospital where he received treatment for the injuries which included maxillofacial procedures but some of the scars and disfigurement are permanent.
- [2] The Plaintiff filed a complaint against the Defendants on 16th June, 2016 CS57/2017. On the 25th October, 2018, the Plaintiff's counsel moved the Court to withdraw the case which

was granted. Attempts were made to have the case restored to the cause list between April and June 2019 but were unsuccessful. The Plaintiff subsequently applied for legal aid which after initial refusal, was granted on the 11th October, 2019. On 7th February, 2020, the Plaintiff applied for leave to file his Complaint out of time. The Application for leave which was made *ex parte* and heard on 26th February 2020 was granted. The Plaintiff filed the current Complaint on the 7th February, 2020 together with the application for leave.

[3] The Defendants having been served the Complaint raised the following plea in *limine litis* as part of their defence:

- 1) *The cause of action giving rise to the complaint, having taken place on 12 September 2014, is prescribed in terms of Article 2271 the Civil Code of Seychelles Act and the prescription has not been interrupted in terms of article 2247 of the said Civil Code of Seychelles Act.*
- 2) *The Complaint does not disclose any reasonable cause of action against the Defendants for fault based on negligence and imprudence under the Civil Code of Seychelles Act and should be struck off.*
- 3) *The Complaint constitutes an abuse of process of the Court in that the same facts and matters giving rise to this complaint formed the basis of Supreme Court case CS57/2017 Jenville Mousmie v Patrick Bonne & Silvana Bisogni which was withdrawn by the Plaintiff.*

[4] Learned counsel for the Defendants submitted that in terms of Art.2271 a1.1, all rights of action shall be prescribed after 5 years except for real actions in respect of rights of ownership of land or other interest therein (art.2262- prescription of twenty years) and in respect of actions for bona fides purchaser for value (art.2265 – prescription of 10 years). In terms of Art. 2274 of the Civil Code, prescription shall only continue to run if there are legal proceedings pending. Where the plaintiff withdraws his claim, the proceedings shall not interrupt the prescription.

[5] Learned counsel submitted that *ex facie* the complaint filed by the Plaintiff, it is clear that the cause of action arose on the 12th September 2014. The complaint is dated 13th November 2019

and was filed on the 7th February 2020. Ex facie the Defence of the Defendants, at paragraph 7, it is averred that Plaintiff had brought case CS57/2017 Jenville Mousmie v Patrick Bonne and Silvana Bisogni in respect of the same incident of 12th September 2014, and Plaintiff withdrew the plaint from the Court on 25th October 2018. Copies of the plaint file in cs57/2017 in respect of the incident of 12th September 2014 is disclosed in the List of Documents for the 1st and 2nd Defendants. The transcript of Supreme Court proceedings dated 25th October 2018 at 0930 am at the bottom of page 3 shows as follows:

“Mr. Renaud: My Lady, I have discussed the situation with my client, in fact I had started talking to him about it before and our position now is my client has instructed me to withdraw the action.

Court: With the case?

Mr. Renaud: Yes.

Court: Alright.

.....

Court: okay so the motion is granted and the matter stands withdrawn accordingly.”

- [6] Learned counsel submitted that in applying the provision of Art.2271 a1.1 of the Civil Code, the Plaintiff’s cause of action in respect of the incident of 12 September 2014 was prescribed on 12 September 2019. As at 12 September 2019, there were no pending proceedings for claim in respect of the said incident. The Plaintiff having withdrawn his plaint filed 2017 in cs57.2017 on 25th October 2018, the 5 year prescription has not been interrupted. Therefore the cause of action giving rise to the plaint is prescribed and should be dismissed.
- [7] Learned counsel submitted on the second ground of the plea in limine that in terms of section 92 of Seychelles Code of Civil Procedure, the Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action, ground or

answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just.

[8] Learned counsel submitted that according to the Plaintiff, the Defendant's liability kicked in when dogs inside the gate on the Defendant's property pushed open the gate and attacked him on the public road. The defence of the Defendants show that the gate in question is locked by latch and padlock and cannot be opened by dogs leaning on the gate. The Defendants took all necessary and reasonable care on their property; gates are closed at all times; they keep their dogs in a secured place at all times since the entire property is completely walled and fenced from the public road. If the Plaintiff was at all attacked by the Defendant's dogs, it was entirely and largely contributed by Plaintiff opening the gates and/ or agitating the dogs.

[9] Learned counsel further submitted that the transcript of the Magistrate's court proceedings and judgment in CR100/15 Republic v Pacquerette Agnelle Jean shows clearly that there was no negligence on the part of the person who was present at the residence of the Defendants on the date and time of the incident in 2014. If the caretaker was acquitted of any liability for negligence it is highly improbable that the owners who were absent on the said date and time could be triggered taken together with the fact that the action is being brought out of time. Hence, ex-facie the plaint and defence, there is no reasonable cause of action against the Defendants and the plaint should be struck out.

[10] On the 3rd ground of the plea in limine litis, learned counsel for the Defendants submitted that this Plaintiff is an abuse of process. Learned counsel submitted that in the case of Gomme v Maurel (2012) SLR 342, the Seychelles Court of Appeal, explained the doctrine of abuse of process in the wider sense as follows:

“The wider scope of abuse of process is put succinctly by Auld LJ in the case referred to: Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/ or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is

such an inconsistency between the two that it would be unjust to permit the later one to continue.”

Based on the case of *Gomme*, even where the plaint was withdrawn as in the present case and refiled after the time limit has expired and in circumstances where the negligence and liability of the person who was present on the date of the incident, [had not been resolved] would constitute an abuse of the Court’s process. Had the Plaintiff refiled within the time limit, the matter could proceed on the determination on the merits.

[11] Learned counsel moved the Court to uphold the plea in limine litis should to dismiss the Plaint against the Defendants.

[12] Learned counsel for the Plaintiff submitted that the grounds raised in the plea in limine litis are the Defendants’ attempt to mislead the Court. Learned counsel submitted that the Defendants did not produce in full the extract of proceedings of the Magistrate’s Court which stated that the Plaint was withdrawn with liberty to restore as a result of which the Plaintiff filed an application to refile the plaint. The 5-year prescription was therefore interrupted.

[13] On the second ground of the plea in limine litis learned counsel submitted that the Plaint discloses a very reasonable cause of action against the Defendants. As the Defendants rightly pointed out in their submission they are under strict obligation to ensure that the gates are kept under lock and key at all times. Through their negligence the dogs were allowed to leave the premises to cause grievous bodily harm to the Plaintiff on the public road. In *Elisha v/s Wheeler (1965) SLR 77*, it was held that “for liability under 1384 of the Civil Code to arise, the damages caused by a thing of which a person has custody must be caused by the thing per se independently of the direct human intervention.

[14] Learned counsel submitted that Article 1385 of the Civil Code stipulates that the owner of an animal, or the person who uses it, while he has the use of it, is liable for the damage that the animal has caused, whether the animal was under his care or lost or escaped. In *Joubert v/s Suleman (2010 SLR248)* it was also held that a person is liable not only for

the damage caused by their act but also the damage by things in their custody. There is a presumption raised against the person who has custody of a thing which causes damage. That presumption can be rebutted only if the custodian can prove that the damage was solely caused by the act of the victim, the act of a third party or an act of God. Although a defendant may have a remedy against a third party who contributed to the damage, this will not exonerate the Defendant from liability towards the Plaintiff. In *Johanson v/s Renaud (SCA 5/1994LC 54*, it was also held that the guardian of a thing is presumed to be liable for damage caused by the thing.

[15] On the third ground of appeal, learned counsel submitted that reference to case law in Defendant's Plea in Limine shows no relevance to the matter. In order to prove abuse of process, the following elements must be established:

- 1) A legal procedure set in motion in proper form, even with probable cause and ultimate success;
- 2) The procedure is perverted to accomplish an ulterior purpose for which it was not designed; and
- 3) A wilful act is perpetrated in the use of the process which is not proper in the regular conduct of the proceeding.

Learned counsel submitted that the test of abuse of process is whether judicial process is used to extort or coerce. The key to the tort is to improper use of the process after its issuance in order to accomplish a purpose for which the process was not designed. Thus it is the purpose for which the process is used, once issued, that is important in reaching a conclusion.

[16] Learned counsel submitted that the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

- [17] Learned counsel moved the Court to dismiss the plea in limine litis and to hear the case on the merits.
- [18] Grounds 2 and 3 of the plea in limine litis can be disposed of in short order. In respect of ground 2, that the Plaintiff does not disclose any reasonable cause of action against the Defendants for fault based on negligence and imprudence under the Civil Code of Seychelles Act and should be struck off, learned counsel for the Defendants relies heavily on facts which had not been placed before this Court in support of this ground. The same is evident in respect of ground 3 of the plea.
- [19] It is well established principle that the Court determines plea in limine by virtue of the content of the pleadings. The plea must by necessity be based on the pleadings and the law and not on facts. That is because at this preliminary stage, there is no facts before the Court. On both grounds 2 and 3, the Court has to assess the facts before making an informed decision. The plea in limine as worded in grounds 2 and 3 therefore cannot succeed at this stage of the case.
- [20] I now come to the remaining ground of the plea in limine litis. Ground 1 states that the cause of action giving rise to the plaint, having taken place on 12 September 2014, is prescribed in terms of Article 2271 of the Civil Code of Seychelles Act and the prescription has not been interrupted in terms of article 2247 of the said Civil Code of Seychelles Act. Article 2271 of the Civil Code of Seychelles states:

“All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code”.

Articles 2262 and 2265 are irrelevant to this case as they refer to immovable property rights.

Articles 2247 states:

*“If the proceedings are dismissed owing to a formal defect,
If the plaintiff withdraws his claims,*

If he allows the proceedings to lapse,

Or if his claim is rejected,

The interruption shall be deemed not to have occurred.”

[21] It is not in dispute that the incident in question occurred on the 12th September 2014. The Plaintiff filed the first case CS57/2017 against the Defendants on 16th June, 2017. On the 25th October, 2018, the Plaintiff withdrew the case with liberty to restore. However it appears that case CS57/2017 was never restored. In fact the Plaintiff received a letter dated 3rd June 2019 from the Registrar of the Supreme Court formally informing him that the case has been withdrawn. This was still within the prescribed time and the Plaintiff did not file any proceeding until 7th February 2020 when an application for leave to file plaint out of time was made. This raises two issues not favouring the Plaintiff. If the Plaintiff was still within the prescribed time 1). why was it necessary to seek leave to file plaint out of time?; and 2). why did the Plaintiff not simply apply to have the case restored to the cause list? I appreciate that the Plaintiff being a layman would not have understood the intricacies of such legal processes but this would not have any effect on the prescribed time for initiating legal proceedings.

[22] Learned counsel for the Plaintiff also argued that the fact that there was a previous case before the Court although withdrawn, amounts to interruption of prescription. One must always vector in that prescription is a shield, not a sword. It gives protection to a defendant. In addition, the Plaintiff cannot use his own act of withdrawing the previous case as one that interrupts prescription when in fact Article 2247 states specifically that:

“If the plaintiff withdraws his claims,

If he allows the proceedings to lapse,

The interruption shall be deemed not to have occurred.” [Emphasis mine].

[23] Considering the pleadings before this Court, I find that the incident for which the Plaintiff is claiming damages from the Respondents occurred on the 12th September, 2014. As case

CS57/2017 was withdrawn and never restored to the cause list, it did not interrupt the running of prescription. 5 years was reached on the 11th September, 2019. This plaint filed on the 7th February 2020 is therefore out of time by almost 5 months. This Court has no discretion to allow a claim to proceed outside its prescribed time limit if the Defendant has raised prescription as part of its defence.

[24] This ground raised by the Defendants in their plea in limine litis therefore succeeds. Consequently, the Plaint is dismissed.

[25] I make no order for costs.

Signed, dated and delivered at Ile du Port on 25 February 2022.

G Dodin

Judge