SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 217

CA31/2021

In the matter between:

PUBLIC UTILITIES CORPORATION **Appellant**

(rep. by Ms Michelle Marguerite)

and

DAVID DUBIGNON **Respondent**

(Mr Conrad Lablache)

Neutral Citation: *Public Utilities Corporation v David Dubignon* (CA31/2021) [2023] SCSC217 (24 March 2023).

Before: Esparon J

Summary: Appeal from decision of Magistrate Court

Heard: 18th November 2022

Delivered: 24 March 2023

ORDER

Appeal against the decision of the learned Magistrate awarding Rs20,000 in damages in favour of the Plaintiff-Appeal dismissed with cost.

JUDGMENT

ESPARON J

Introduction

1. This is an Appeal against the judgment of the learned Magistrate delivered on the 29th November 2021 awarding the sum of SR 20,000 to the Respondent

2. The grounds of Appeal are as follows;

   1) That the learned Magistrate erred in her assessment of the evidence of Mr Payet.

   2) That the learned Magistrate erred in her findings that the causal link between the act and omissions of PUC and the damage was established in that the elements of *faute* necessary in law and the established procedure in terms of case laws of our jurisdiction are ignored by the learned Magistrate.

   3) That the learned Magistrate erred in failing to allow the Appellant (Defendant) the opportunity to cross-examine the doctor on the evidence of damage, thus denying the opportunity of being heard to the Appellant.

   4) The learned Magistrate failed to adequately consider the third party's involvement in the alleged accident to the Respondent.

   5) The learned Magistrate erred in ruling that the Appellant committed a faute in law and therefore the award of SCR 20,000 is also unjustified wherein the quantum of award is not justified.

Submissions of counsels

3. Counsel for Appellant submitted to the Court as to ground 1 of Appeal that since the evidence of Mr. Payet was that the Land Transport Agency made certain offers to the

Respondent and the Respondent refused which amounted to an admission on the part of the Land Transport Agency and this is tantamount to an acceptance of liability by the said Agency.

4. Counsel for the Appellant submitted as to ground 2 that such a claim cannot be based on Article 1382(1) of the civil code, unless the act and the injury or damage co-existed and there is a causal link between the act and the injury or damage and hence counsel submitted that this link was not proven.

5. Counsel for the Appellant submitted to the Court as to ground 3 of Appeal that although the Respondent gave evidence, the Appellant was denied the possibility to cross- examine the doctor on his injuries and instead the leaned Magistrate admitted the doctor's report despite the objections of the Appellant of which the Appellant feels that this could have contributed to the assessment of quantum in favour of the Appellant.

6. Counsel for the Appellant submitted as to ground 4 that the learned Magistrate failed to take into account the fact that the evidence shows that the damage to the pavement was caused by a third party (namely a Seypec truck) and furthermore that the Appellant never carried out any work on that side of the road of which it was the Land Transport Agency which is the custodian of pavements and roads.

7. As to ground 5, learned counsel for the Appellant relied on Article 1382(2) which defines *faute* and submitted to the Court that the learned Magistrate when assessing the liability of the defendant failed to have recourse to the accepted established test as regards to the standard of care of a skilled professional, commonly referred to as the 'Bolam test', which concerns itself with what ought to have been done in the circumstances.

8. Counsel for the Appellant relied on the case of Emanuel v Joubert 1996 and AG v Labonte 2007 which held that fault under Article 1382 to 1384 of the Civil Code depends on what precautions were taken to foresee the occurrence of an event and measures to prevent the consequences . There can be no fault where there is diligence in

dealing with predictable or unpredictable event and hence Counsel further submitted that the Appellant did not commit any fault since it is proven that precautions had been in accordance with the industry requirements of which the defendant had no dealings with the pavement.

9. Counsel for the Appellant relied on the cases of **Jumeau v Savy** which was applied in **Houareau V/S united Concrete Products (1979)** where it was established that the prejudice or injury suffered must be the direct result of the defendant's fault and submitted to the Court that in the present case that such a cause was remote in nature and points to the negligence of other third parties.

10. On the other hand, counsel for the Respondent submitted to the Court as to ground 1 of Appeal in relation to the evidence of Mr Payet that it is trite law that when it comes to matters of facts, this should be properly assessed by the Judge at first instance who had the opportunity to observe the witnesses as they deponed.

11. Counsel for the Respondent submitted to the Court as to ground 2 that the causal link itself had been established by the evidence of the Appellant's representative which testified that there was an accident on the other side of the road and hence clearly this establishes that the vehicles were using this part of the road which was the cause of the damage to the pavement of which there was use of the pavement by the vehicles when the pavement was not properly supported for this type of use. Hence counsel for the Respondent submitted to the Court that the Appellant should have taken the appropriate measures to reduce the risk of pedestrian being injured because of the damage sustained to this part of the road.

12. As regards to ground 3, counsel for the Respondent submitted to the Court that as a result of quantum of damages, that the learned trial judge took into account all the factors that he had considered in awarding 20,000 to the Plaintiff as stated paragraph 23 of the judgment and according to counsel such a quantum of damages should not be interfered with by the Court on Appeal unless it is manifestly excessive.

13. As regards to the Appellant not having the opportunity to cross-examine the doctor, counsel submitted that the learned Magistrate did not erred in relying on section 14 of the evidence Act in allowing the admission of an official document and furthermore that there were other evidence on record which showed that the Plaintiff had suffered injuries such as the evidence of the Plaintiff and the evidence of the son who produced photographs of the injuries. Counsel also submitted that the defendant did not deny that the plaintiff suffered injuries of which a fact not specifically denied is deemed to have been admitted. It is also submitted that the court did not give much weight to the said medical report but relied on other evidence.

14. As regards to the 4th ground of Appeal relating to third party involvement, counsel submitted that counsel for the Appellant cannot rely on this in his submission as it had not been pleaded in his defence. Counsel for the Respondent further submitted that the learned Magistrate did address this issue in her judgment where the Magistrate held that there was no evidence produced to support this allegation.

15. As to the 5th ground of Appeal, counsel for the Respondent submitted to the Court that the Appellant in failing to take precautionary measures of which part of the concrete slab on the other side of the road was damaged leading to the injuries sustained by the Respondent.

Determination

16. As regards to the 1st grounds of Appeal that the Leaned Magistrate erred in the assessment of Mr. Payet's evidence, the learned trial Judge dealt with the evidence of Mr. Payet at Paragraphs 8 to 10 of her judgment. In the case of **Mon Tresor and Mont Desert Ltd V/s Ministry of housing and Lands and Board of Assessment, 2008**

UKPC (31) which relied on the case of **Benmax V/S Austin Motors 1955, AC 370** where it was held that ;

'An Appellate Tribunal ought to be slow to reject a finding of a specific fact by a lower Court or Tribunal, especially one founded on credibility or bearing of witnesses. It can however form an independent opinion on inferences to be drawn or evaluation to be made of specific or primary facts so found though it will naturally attach importance of the trial Judge or Tribunal.'

17. In respect to the issue of the Learned Magistrate assessment of Mr. Payet' s evidence, this Court shall follow the authorities cited above especially the case **Benmax V/S Austin Motors 1955, AC 370** since it is the learned Magistrate who has seen and heard the evidence of the said witness in the trial Court below. Hence this Court shall not interfere with the learned Magistrate's finding on the assessment of evidence of the witness for the Plaintiff, Mr. Payet. I therefore dismiss ground 1 of Appeal.

18. As to the 2nd ground of Appeal, the main issue to be decided by this Court is as to whether the learned Magistrate erred in her findings that the causal link between the act and omissions of PUC and the damage was established.

19. In the case of **Emanuel V/S Joubert Civ Appeal 49/96**, Seychelles Court of Appeal Ayoola JA stated;

'It is clear that a claim cannot be based on article 1382(1) of the Civil Code, unless the act and injury or damage co- existed and there is a causal link between the act and the injury or damage'.

20. In the case of **Shani properties (Pty) Ltd V/S Oliaji Trading Company Ltd, 2008 SLR 176,** Karunakaran J stated;

'The alleged acts of the defendants must be the sole and immediate cause for the Plaintiff's damage. The alleged acts must be the 'primary cause' and not simply a cause amongst other possibilities'.

21. As a result of the above authorities, the Plaintiff has to prove that there is a causal link between the act of the defendant and the injury or damage and that the allege act must be the sole and immediate cause of the damage caused to the plaintiff. When one looks at the evidence in the case we have the evidence of Mr. Payet who gave evidence to the fact that in his expert opinion that PUC was responsible for the accident because they had blocked one side of the road which caused vehicles to drive onto the pavement .The road was busy and therefore there was a real risk of vehicles driving onto the pavement to get by. He observed that he could not identify any other cause for the pavement to cave in apart from the work and resulting risk they created. That PUC could have reported the risk and could have additionally placed steel plates on top of the pavement to spread the load to minimize the risk of damage but none of these precautionary measures were taken.

22. In view of the evidence of Mr. Payet, this Court finds that the alleged act of the defendant was the sole and the immediate cause of the damage or injuries caused to the Plaintiff and hence this Court finds that the learned Magistrate did not erred when she concluded at page 9, paragraph 22 of her judgment, when she stated that '' I am Satisfied that the injuries sustained by the Plaintiff were caused as a result of the defendant's sole acts and omission which amount to 'a faute in law'. Hence I dismiss ground 2 of Appeal.

23. As for Ground 3 of Appeal namely that the learned Magistrate erred in failing to allow the Appellant the opportunity to cross-examine the doctor on the evidence of the damage, thus denying the opportunity to be heard of which it is this Court's view that although counsel for the Plaintiff did not lay down the foundation under section 14(1) (b) of the evidence act, of which such a sub-section should be read cumulatively with section 14(1)(a) for the admissibility of such evidence upon its production. Hence this Court is of the view that it should not disturb the findings off the learned Magistrate since I agree

with the submissions of counsel for the Respondent that there were other evidence on record which shows that the Plaintiff had suffered injuries. Such evidence according to Counsel for the Respondent would be evidence of the plaintiff and evidence of his son who produced evidence of such injuries and since the Court considered such evidence and did not attach much weight to the medical report, this Court does not find that the learned Magistrate erred in this respect.

24. In addition this Court is of the view that the defendant in the Court below did not specifically deny in his defence that the Plaintiff had suffered injuries. In the case of **Mullery V/S Stevenson- Delhomme, SLR 1955,** the Court relied on Odger's pleadings and practice (14th edition) at page 122 which states the following;

'It is in the power of the party either to admit or to deny each allegation in his opponents plea, as he thinks fit. If he decides to deny it, he must do so clearly and explicitly. Any equivocal or ambiguous phrase will be construed as an admission of it. There is no third or intermediary stage. If the Judge does not find in the pleading a specific denial or a definite refusal to admit, there is an end of the matter; the fact stands admitted'.

In Mullery (Supra) Osman J and Lavoipierre Ag J stated;

'It is clear therefore that the averments of the Appellant in the 1st paragraph which were not specifically denied should have been taken to be proved.'

25. Section 75 of the Seychelles Code of Civil Procedure states as follows;

'The Statement of defence must contain a clear and distinct statement of material facts on which the defendant relies to meet the claim. A mere general denial of the Plaintiffs claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted'.

26. As a result of the above authority and provision of the law, since in the present case the defendant had not specifically denied in his defence that the Plaintiff had suffered injuries, this Court finds that the Court should in any event should have taken it to have been proved that the Plaintiff had suffered injuries of which the Court should have looked no further in the present case of which as a consequence of this, I find no reason to disturb the findings of the learned magistrate on this issue and I accordingly dismiss ground 3 of Appeal

27. Ground 4 of Appeal is that the learned Magistrate failed to consider the third party involvement in the alleged accident to the Respondent. Learned counsel for the Respondent submitted to the Court that the defence of a third party involvement was never pleaded in the defence of the Appellant (the defendant). Counsel for the Appellant submitted to the Court that such a defence had been pleaded in the amended defence filed in Court by the Appellant (defendant). When perusing the Court's file, the court has come across an amended defence dated the 9th August 2021, where it is pleaded in the alternative that it was through the fault of the third party.

28. As regards to the defence that the damaged caused was as a result of the fault of the 3rd party, I find no evidence on the record of the proceedings brought by the Appellant (defendant) Hence this Court finds that the learned Magistrate did not erred when he held that the alleged fault of a third party was never proven through any evidence adduced by the defence. As a result I therefore dismiss ground 4 of Appeal.

29. Ground 5 of Appeal is that the learned Magistrate erred in ruling that the Appellant committed a faute and therefore the award of 20,000 is also unjustified wherein the quantum of award is not justified.

30. Article 1382(2) of the Civil Code reads as follows;

'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 cause. It may be the result of a positive act or omission.'

31. In the case of **Shani Properties (Pty) Ltd V/S Oliaji Trading Company Ltd (2008) SLR 176** Karunakaran J stated;

'when the defendants carried out 'the alleged acts' including the deep excavation of works for the foundation of OTC building on their site, obviously the defendants did not take necessary or any precaution and reasonable care to arrest the soil movement from adjoining land, where the Plaintiff had already built a three story building consisting of several offices, shops and residential units on three floors.'

32. In the case of **Attorney General V/S Labonte SCA 24/2007** the Court of Appeal held that;

'Fault under Article 1382-1384 of the Civil Code depends on what precautions were taken to foresee the occurrence of an event and adopt measures to prevent the consequences'.

The Court further held that;

'There can be no fault where there is diligence in dealing with predictable or unpredictable events'.

33. The learned trial Judge addressed the issue at paragraph 22 of his judgment by stating the following;

'I am satisfied that it has been established on a balance of probabilities that due to the reduction in the width of the road, the larger trucks and busses were having to traverse onto the pavement and that no measures had been put in place to minimize the pressure that the additional weight was putting on the pavement. It is further evident that Mr Hall was aware that the pavement had sustained damages but that despite PUC obligations to remedy the damage nothing had been done to warn the pedestrians of the danger or to replace the damaged slabs.

The Magistrate further stated that I'm satisfied that the injuries sustained by the plaintiff were caused as a result of the defendant's sole acts and omissions which amount to a 'faute in law'.

34. Counsel for the Appellant submitted to the Court that the standard of care Applicable for the employees of PUC in the instant case is one of a person exercising that trade or profession which is that of a skilled professional. This Court disagrees with the submissions of counsel for the Appellant on this issue and holds that the standard of care applicable to PUC employees whilst conducting such road works such as laying pipes is that of a prudent person since the employees do not belong to a self-regulating organization. The mere fact that someone specialises in a particular area does not make that person a professional (vide: **Attorney General V/S Labonte SCA 24/2007).**

35. This Court has considered the evidence on record of the Plaintiff himself, Mr. Desire Payet and Mr Hall of which it was clear that the Appellant was carrying works on the other side of the road as a result of which there was a reduction in the width of the road causing other vehicles to traverse on the pavement and furthermore no measures were taken to reduce or minimize the weight of the vehicles going over the pavements and as such the pavement was damaged and that nothing was done to warn the pedestrians of the danger nor to replace the damaged slab.

36. As a result of the above paragraph 35 of this judgment, this Court is of the view that the Appellant (defendant) did not take necessary or any precaution and reasonable care to foresee the occurrence of an event and to adopt measures to prevent the consequences namely to prevent any person from sustaining injuries as a result of the damaged pavement. This Court also finds that the Appellant did not exercise due diligence in dealing with the predictable or unpredictable event as in the present case.

37. For the above reasons, this Court finds that the learned Magistrate did not erred in ruling that the Appellant had committed a faute in law. Furthermore this Court shall not interfere with the quantum of damages awarded by the learned Magistrate being Rs 20,000, since this Court finds that such an award is not manifestly excessive in all the circumstances of the case (vide: **Mousbe V/S Elizabeth SCA 14/1993**). Hence I accordingly dismiss ground 5 of Appeal.

38. As a result of the above findings, I accordingly dismiss this Appeal with cost.

39. The Appellant has a right of Appeal within 30 days from the date of this Judgment.

Signed, dated and delivered at Ile Du Port on the 24th March 2023.

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Esparon Judge

DAVID ESPARON SUPREME COURT SEYCHELLES SUPREME COURT JUDGE