

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 55
(CS No. 75 of 2020)

In the matter of:

Gabriel Peter Pillay
(rep by Mr. F. Elizabeth)

Plaintiff

Versus

Indian Ocean Tuna Ltd
(rep by Mr. Divino Sabino)

Defendant

Neutral Citation: *Gabriel Pillay v Indian Ocean Tuna Ltd* (CS No. 75 of 2020) [2023] SCSC 55 (30 January (2023))

Before: Andre JA (sitting as a Judge of the Supreme Court)

Summary: Delictual liability - Article 1382 (1) and 1384 (1) of the Civil Code of Seychelles Act (prior to Amendment)- Claim of damages arising out of injuries sustained in the course of employment.

Heard: 28 November 2022 (last sitting to fix Judgment date)

Delivered: 30 January 2023

ORDER

The Court makes the following orders:

- (i) The plaint is dismissed.
- (ii) No order of costs is made in favour of any party.

JUDGMENT

ANDRE JA

Introduction

- [1] This judgment arises out of a plaint filed by Gabriel Peter Pillay (hereinafter referred to as the plaintiff) on 16 June 2020 against Indian Ocean Tuna Ltd (hereinafter referred to as the defendant).
- [2] The plaintiff alleges fault of the defendant and claims damages arising out of injuries allegedly sustained in the course of his employment with the defendant in the sum of Seychelles Rupees Five Hundred and Eighty-Five Three Hundred and Fifty (*SCR* 585,350.00/-) together with interests and costs.
- [3] The defendant by way of a statement of defence filed on 22 September 2020, denies the claim and liability and prayed for dismissal of the plaint with costs.

Background (as per pleadings)

Plaintiff's case

- [4] Plaintiff avers that he was at all material times employed as a driver by the defendant, the latter being a private company in the business of caning tuna fish.
- [5] That on or around 19 May 2018, whilst picking up a container for the defendant at the defendant's premises, the Plaintiff suffered an injury to his right arm and that at the time of the accident, there was no one on-site to provide medical assistance to him. He further averred that this injury was the fault of the defendant.
- [6] The plaintiff further avers that at Anse Royale, he informed one Mr. Maxime Agricole and Mr. Hughe Pierre, who are employed as managers by the defendant, of the accident. And that Mr. Maxime Agricole and Mr. Hughe Pierre ignored him.
- [7] It is further averred that on or around 21 May 2018, he visited Doctor (Dr) Veshna Pillay, an employee of the defendant, at the defendant's medical clinic and was provided a medical certificate. Further, in a conversation between Dr Veshna Pillay and himself, Dr Veshna Pillay reassured him that his arm 'was ok'.

- [8] On or about 4 February 2019, the plaintiff visited Dr Veshna Pillay with complaints of persistent pain in his right arm and he was referred to the Seychelles hospital following gross swelling and deformity of the bicep area of his right arm.
- [9] On 25 March 2019, Dr Veshna Pillay referred him to the Euro-medical family clinic, in Providence, Mahe, Seychelles to investigate whether the muscle in the plaintiff's right arm was torn from the bone.
- [10] In the medical report dated 25 July 2019, it is stated that he was consulted by an orthopaedic surgeon on 20 May 2019, who advised that the right bicep tear was over a year ago and that surgical intervention would not be possible. That he was 47 years of age at the time of the alleged accident and attended physiotherapy for the injury to his right arm.
- [11] The plaintiff avers that the said injury he suffered to his right arm was caused by the fault of the defendant and claims a total of Five Hundred and Eighty-Five Thousand Three Hundred and Fifty (SCR 585,350.00/-) for moral damages for pain and suffering, mental anguish, and inconvenience; disfigurement; permanent disability; loss of chance of corrective surgery; and cost of a medical report.
- [12] Therefore, the plaintiff prays the Court to enter judgment against the defendant, in the above-mentioned total sum with interests and costs.

Defendant's case

- [13] Defendant denies the allegations of the plaintiff. Defendant further avers that according to the plaintiff's account given to Dr Veshna Pillay, the accident allegedly occurred on 15 May 2018. However, in the consent for a medical report signed by the plaintiff, the accident allegedly occurred on 1 May 2018.
- [14] It is averred that the defendant's clinic is opened 24 hours a day and there are clinics and a hospital in a short distance away from the defendant's premises, which the plaintiff

may have reported to. Furthermore, the plaintiff failed to report the alleged work incident as per established work procedures.

- [15] The defendant further avers that the allegations against its staff Agricole and Pierre are denied so far that it suggests that the said staff did not follow work protocols. That it was the plaintiff who did not follow established work processes by not reporting the alleged incident and not seeking medical attention as soon as possible.
- [16] The defendant further denies the allegations in paragraph 4 of the plaint in so far as the plaintiff came to see Dr Veshna Pillay on 22 May 2018 and not 21 May 2018. That he was given 3 days of sick leave, and painkillers and was instructed to apply ice to the affected area. It appears that the plaintiff continued to come to work despite being given three days of sick leave and he continued to complain of pain. Thereafter, Dr Veshna Pilay referred him to take an MRI scan at the Seychelles hospital, which was originally booked for 5 December 2018 but after rescheduled to 4 February 2019.
- [17] The defendant denies that the alleged injury sustained by the plaintiff was due to the fault of the defendant and further avers that any injury allegedly sustained by the plaintiff at work was not the fault of the defendant. It is averred that work safety processes and procedures are in place and known to the defendant's employees. That any injury the plaintiff may have sustained may have been incurred by not following work safety procedures. That the plaintiff further failed to report the alleged work accident and thereafter failed to seek medical attention as soon as possible.
- [18] The defendant further denies particulars of fault and injuries as per paragraphs 5 and 6 of the plaint. The defendant further avers that the plaintiff's medical report from the health care agency dated 25 July 2019 states "*biceps brachialitis tear*", "*avulsion to the tip of the olecranon*", "*the tendon and muscular injury was not seen on CT scan*". As such, there is no mention of permanent disability and it was recommended in the said report that the plaintiff continues with physiotherapy.

- [19] The defendant admits that Dr Veshna Pillay on 4 February 2019 referred the plaintiff to the Euromedical clinic for three weeks of treatment and that the plaintiff was then discharged on 4 April 2019 by Dr Manoo.
- [20] The defendant admits the medical report of 25 July 2019 as per paragraph 9 of the plaint. However, the defendant denies the averments of paragraph 10 of the plaint and further avers that any damage the plaintiff may prove he suffered was not caused by the defendant.
- [21] The defendant moves to have the plaint dismissed with cost.

Legal analysis and Discussion of evidence

- [22] The issues to be determined are whether Plaintiff has proved on a balance of probabilities that as the then employee of Defendant, he incurred damages arising out of the alleged injuries sustained in the course of his employment with the defendant and that the said injuries arise out of the sole fault and negligence of the defendant as claimed.
- [23] The Plaintiff has canvassed his case under Article 1382 (1) (2) & (3) of the Civil Code. He has also taken the liberty to rely on Article 1384 (1) of the Civil Code. This has been pronounced in the written submissions dated 21 June 2022. The plaintiff submits that he has discharged the burden of proof on a balance of probabilities and proven the essential elements required of him to establish a case of a fault in law under Article 1382 (1) (2) (3) and Article 1384 (1) of the Civil Code. It is submitted that the defendant as his employer at all material times was not prudent in all the circumstances of the case, by failing to do the following: -
- a) Failed, refused, or neglected to provide a safe place and system of work for the plaintiff;
 - b) Failed, refused, or neglected to provide proper and adequate supervision throughout;

- c) Failed, refuse, or neglected to provide safety equipment, equipment clothing, and footwear;
- d) Failed, refused, or neglected to warn the plaintiff of the dangers posed by lifting heavy containers on the work site;
- e) Failed, refused, or neglected to provide medical assistance on the work site;
- f) Failed, refused, or neglected to relieve the plaintiff from his duty to seek medical attention;
- g) Failed, refused or neglected to properly diagnose the extent of the plaintiff's injury and
- h) Failed, refused, or neglected to provide a correct prognosis of plaintiffs' injury.

[24] Article 1382 (1) (2) (3) and Article 1384 (1) of the Civil Code (prior to amendment) provides as follows;

Article 1382

1. *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 the result of a positive act or an omission.*
3. *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.*

...

Article 1384

A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.

[25] From the onset, I reject the application of Article 1384. This is because Article 1384 (1) is applicable in vicarious liability instances, where a plaintiff claims damages from both the tortfeasor and the employer of the tortfeasor. After all, such damage was caused during the employment of the tortfeasor. It is therefore easy to see why article 1384

finds no relevance to the present matter because Plaintiff was not injured owing to acts of a third party who is an employee of Defendant. Therefore, all analysis to be undertaken below will be in respect of Article 1382 which I find more appropriate in the circumstances.

- [26] It is also important to emphasize that the Plaintiff has canvassed his claim in delict given the wording of the Plaint in paragraph [5] which reads as follows:

“5. The Plaintiff avers that the said injury he suffered to his right arm was caused by the fault of the defendant.”

- [27] In the case of *Joubert v Suleman* [2010] SLR states, fault under Article 1382 requires three elements namely, fault, damage; and a causal link between the fault and damage caused. In *Pierre v Attorney-General* (2008) SLR 251, the Court explained that fault is an error of conduct that results from a breach of a duty of care, which is distinguishable from illegality is an error of law that emanates from a breach of statutory duty.

- [28] According to the Plaint under the heading ‘particulars of fault’, the error by Defendant was a failure, refusal, or neglect to provide a safe place and system of work; proper and adequate supervision throughout; safety equipment clothing, and footwear among other things. This is the conduct that forms part of the fault. The next thing to consider therefore has this conduct resulted in damage.

- [29] According to the Plaintiff, the conduct of the plaintiff resulted in damage. To support this, he submitted a medical report entered as *Exhibit P1*. From this report, it can be gathered that Plaintiff has suffered an injury. In cross-examination by counsel of Defendant, Plaintiff was asked about the date and the content of the document. Below is an extract of the proceedings I wish to refer to (*page 52 of the proceedings refers*):

Q: I want you to look at Exhibit P1. Now you see there is the date on the stamp from Dr. Veshna Pillay as 4th of February 2019. So you see that?

A: Yes.

Q: Would you agree with me that that is the date that this document was made?

A: Of course yes.

Q: Now I want you to look at the instructions of the Doctor, that paragraph and the second line. The Doctor says supposedly you have some persistent pain following lifting a heavy weight 10 to 12 weeks ago. Do you see that part?

A: Yes, I remember.

Q: So the Doctor is saying whatever pain you are suffering as regard to this document is as a result of some heavy weight 10 to 12 weeks ago. So would you agree with me therefore that in this document the Doctor is talking about something that must have happened maybe **December 2018?** (emphasis is mine)

A: Sorry. It must be.

[30] Plaintiff admits that *Exhibit P1* dated 4 February 2019 refers to an injury sustained 10 to 12 weeks ago, which puts the injury referred therein around December 2018.

[31] The Plaintiff was later shown *Exhibit D1*, consent for the medical report regarding admission by the plaintiff at the Victoria Hospital, which occurred on the 1st of May 2018 at D'offay Ward. He was questioned specifically on the date of the injury entered in the document. Plaintiff testified that the date on the medical report was incorrect because when he went to Victoria Hospital, the person who attended to him entered it incorrectly. This is because when asked about when the incident occurred, Plaintiff

simply stated ‘Labour Day’ instead of ‘Labour Day Party’ to specify that said ‘labour Day’ was on 19 May 2018 rather than the ordinary 1 May 2018.

[32] It is the submission of Defendant that the evidence given by Plaintiff is insufficient to substantiate and prove his case before this Court. Three reasons are advanced in this respect as submitted in Defendant’s written submissions filed 22 April 2022. First, it is that Exhibit P1, which is the medical referral form dated 4 February 2019, states that the injury suffered occurred 10 to 12 weeks before the same was issued. Accordingly, it means the injury referred therein occurred sometime in November 2018. Secondly, Exhibit D1 which is the medical report consent form, states that the incident occurred on 1st May 2018. Third, Exhibit P3 which is the medical report of Dr Gayon states that the injury occurred whilst doing heavy lifting 10 to 12 weeks before the referral (Exhibit P1). It is submitted in the circumstances, Plaintiff’s evidence is filled with uncertainty.

[33] In contrast, Plaintiff submits that despite the confusion about the exact date that he suffered the injury, in law he is not required to prove his case beyond all reasonable doubt. Rather, the standard of proof is on a balance of probabilities. Plaintiff submits that this Court has to be satisfied that it was more likely than not that Plaintiff suffered an injury whilst in the course of employment and that injury was as a result of the act or omission of Defendant.

[34] I agree with the submissions of the Plaintiff in respect of the standard of proof. In my view, it is plausible that there may have been a mistake or error in the date given on Exhibit D1. However, I find no difficulty in making a finding that Exhibit D1 weakens the case of the Plaintiff. This is because it shows that indeed the Plaintiff was attended to in the Casualty, in D’Offay Ward, and further describes the medical problem as a ‘laceration rt arm’ which means laceration on the right arm. A laceration is a deep cut or tear. I cannot fathom how lifting a container would see a person suffer a deep cut or tear.

[35] Upon examining the contents of the medical reports advanced as evidence by the Plaintiff, namely Exhibit P1 and P3, it is clear to me that the date on which the plaintiff is claiming he sustained the injury is unlikely to be the one referred to as sustained on 18 May 2018. *Exhibit P1* medical referral dated 21st February 2019 puts it at 10-12 weeks

before the report, which places the incident roughly in November or December of 2018 and not in May 2018 as the plaintiff claims. Exhibit P3 refers to the same time frames.

[36] It is more probable to me that the Plaintiff's injury referred to in Exhibit P1 and P3 was not sustained on 18 May 2018 as the Plaintiff seeks to put before this Court. Rather, the injury was sustained 10 to 12 weeks prior, which would be around November of 2018. Therefore, the Plaintiff has failed to prove his case on a balance of probabilities.

Conclusion

[37] The Complaint is dismissed.

[38] I make no order as to costs.

Signed, dated, and delivered at Ile du Port on the **30 day of January 2023.**

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ANDRE AJ

(sitting as Judge of the Supreme Court)

