

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ...
CS67/2021

In the matter between:

DOROTHY MELISSA LAINE
(rep. by Mr. Daniel Cesar)

Plaintiff

and

1. Air Seychelles Ltd
(rep. by Ms. Shantana Barbe)

1st Defendant

2. SACOS
(rep. by Mr. Kieran Shah)

2nd Defendant

Neutral Citation: *Laine v Air Seychelles Limited & anor* (CS67/21) [2023] SCSC (6th October 2023).

Before: E. Carolus, J

Summary: *Plea in Limine – No vicarious liability for insurers for tort – Liability to indemnify insured wrongdoer arise when injured party has obtained judgment against insured wrongdoer*

Heard: Written Submissions

Delivered: 6th October 2023

ORDER

Plea in Limine is upheld. Plaint is dismissed against the 2nd Defendant (SACOS).

RULING

CAROLUS J

Introduction

- [1] This Ruling arises from points of law raised by the Defendants in their respective statements of defence filed in this suit.
- [2] The amended plaint alleges that on 4th February 2021 the Plaintiff suffered serious injuries when she slipped on glazed tiles in the head office of the 1st Defendant, and that her injuries were due to the *faute* and negligence of the 1st Defendant. The plaint also alleges that the 2nd Defendant is vicariously liable for the actions of the 1st Defendant and prayed for an order from this court that the Defendants are jointly and severally liable to the Plaintiff for loss and damages incurred as a result of the injuries in the claimed sum of SCR2,450,000.00/-.
- [3] In its amended statement of defence, the 1st Defendant pleaded in *limine* that “*This suit is bad in law as it alleges a vicarious relationship between the 1st and 2nd Defendant when there is no such relationship between them*”.
- [4] The 2nd Defendant raised the following points of law in their defence –
- “1. *The plaint discloses no cause of action against the 2nd Defendant [against the 2nd Defendant] in that there is no lien de subordination between the 1st and 2nd Defendants, nor is any fault alleged against it.*
2. *The 2nd Defendant as an insurer of the 1st Defendant, is not liable to the Plaintiff as alleged or at all.*”
- [5] By consent of the parties and in terms of section 90 of the Seychelles Code of Civil Procedure, the points of law raised by the Defendants in their pleadings were set for hearing and disposal before the hearing of the plaint on the merits. The parties also agreed to proceed with the hearing of the plea in *limine* by way of written submissions, and these were duly filed.

1st Defendant's submissions

- [6] The 1st Defendant submitted that the suit is bad in law as there is no vicarious relationship between the Defendants and should therefore be dismissed. Relying on Article 1384(1) of the Civil Code of Seychelles Act, 2020 and the case of *Attorney General & Ors v Alain St. Ange* [2021] SCCA 44 (13 August 2021), the 2nd Defendant submitted that a vicarious relationship and liability under the law of delict arise where damage is caused by (i) the act of persons for whom one is responsible or (ii) things in one's custody which of course assumes a certain level of control on the one having the custody of the thing. Vicarious liability presupposes the existence of a principal and agent relationship and "*link of subordination (lien the preposition) between the principal and agent*".
- [7] The 1st Defendant further submitted that there is no relationship of principal and agent between the Defendants as should exist in order to trigger liability under Article 1384 (1) and others. As the insurer, the 2nd Defendant does not exercise any control over the 1st Defendant, and at the time of the alleged acts and omissions that caused injuries to the Plaintiffs, the 1st Defendant was not in any way in the custody, care or responsibility of the 2nd Defendant.

2nd Defendant's submissions

- [8] The 2nd Defendant submitted as follows. "*The law pertaining to delicts and quasi-delicts is clearly set out in Articles 1382 to 1389 of the Civil Code of Seychelles Act, 2020 and stipulates the circumstances in which fault of another is required to be remedied by those who caused such harms. All relationships and lien de subordination are clearly set out for which a cause of action would exist which does not include insurers.*" The Plaintiff has no relationship with the 2nd Defendant. Her claim is based on the 2nd Defendant being vicariously liable for the actions of the 1st Defendant. The claim does not state in what

capacity such vicarious relationship arises. The Plaintiff has therefore no cause of action against the 2nd Defendant insofar or at all.

- [9] The 2nd Defendant relied on the cases of *Bertha Moustache v Guardian Royal Exchange (1980) SLR 87*, *Milena Nourrice v Michel Florentine & Ors (CS68/2016) [2019] SCSC 919* and *Esparon & Ors v H Savy Insurance Company and Anor (CS92/2018) [2022] scssc 397* to submit that it should not have been made a party to this suit as there is no cause of action against it since no award of damages has been made against the insured party - 1st Defendant.

Plaintiff's submissions

- [10] The Plaintiff submitted that the plaint is well suited against both Defendants and that the pleas in limine ought to be dismissed with costs. Firstly, that the plaint is grounded in delict under article 1384(2), (3) and (4), and that the 2nd Defendant has been joined to the plaint in the capacity as insurer of the 1st Defendant. Secondly, that article 1384(1) is fundamental in that a person is also liable for the harm caused by the act of persons for whom he or she is responsible or by things in his or her care.
- [11] Plaintiff further submitted the following factual matters that are subject to proof and that also do not form part of her pleading: *“The first Defendant did instruct the second defendant to entertain the claims lodged by the plaintiff. This is evident in the content of the email communications between the Plaintiff and the two defendants.”*
- [12] According to Plaintiff’s submission, it is trite law that insurance companies, once instructed by clients, are subrogated in any claims that arise as a result of damages caused to litigant and for which the insured party had been cited as the tortfeasor. Plaintiff relied on the case of *H Savy Insurance Company Limited v Ricchi Savy, Allied Agencies Limited and SACOS CS 05 of 2014 (MA08 of 2014)* to submit that the court should subrogate the 2nd Defendant in the claim of the Plaintiff against the 1st Defendant.

Law and Analysis

- [13] Article 1384 of the Civil Code of Seychelles Act, 2020 (hereinafter referred to as the “Civil Code”) stipulates that –

“1384. (1) A person is liable for harm caused not only by his or her own act but also for the harm caused by the act of persons for whom he or she is responsible or by things in his or her care.

(2) Parents of a child, in so far as they have custody, are jointly and severally liable for the harm caused by their children residing with them, to the extent that is deemed

reasonable having regard to the age and maturity of the child, the nature of the act or omission by which the harm was caused, and other relevant circumstances.

(3) (a) Employers are liable for harm caused by their employees acting within the scope of their employment.

(b) A deliberate act of an employee contrary to the express instructions of the employer and which is not incidental to the service or employment of the employee does not render the employer liable.

(4) Teachers and craftspeople are liable for the harm caused by their pupils and apprentices while under their supervision, only to the extent applicable to parents under paragraph (2).

(5) The liability in the above cases shall exist unless the father and mother and the teachers and craftsmen prove that they were unable to prevent the act that has given rise to the liability. "

(emphasis added)

[14] Ex facie the amended plaint, the following are averred against the 2nd Defendant –

"1. At all material times the Plaintiff was a therapist and the First Defendant is the provider/operator of both international/domestic flights with **the second Defendant being the Insurance Provider to the First Defendant.**

.....

6. **The Second Defendant is vicariously liable to the Plaintiff for the actions of the First Defendant.**

7. That as a result of the accident, the Plaintiff has suffered loss and damage which **both Defendants are bound in law to make good.....**

WHEREFORE the Plaintiff prays this Honourable Court to be pleased **to order the Defendants jointly and severally to pay the Plaintiff the said amount of Scr2,450,000.00**

with interests at the current bank rate and with costs plus any additional relief for the Plaintiff against the Defendants as the Honourable Court deems fit.”

- [15] It is clear from the cited provisions of article 1384 (1) – (4) of the Civil Code that the liability for *faute and negligence* thereby engaged does not encompass that of insurers whose liability is otherwise engaged under an insurance contract. The insurer’s liability for *faute* of an insured wrongdoer has been considered by the Supreme Court in previous decisions. The insurer is only liable to indemnify the insured wrongdoer once the injured party has obtained judgment against the said wrongdoer.

- [16] In ***Bertha Moustache v Guardian Royal Exchange (1980) SLR 87*** (the case referred to by the 2nd Defendant) the Plaintiff’s car had been damaged as a result of a collision with another motor vehicle and both vehicles were insured with the Defendant company for “third party risks” only. In dismissing the Plaintiff’s claim for the value of the car under the insurance contract, the Supreme Court held, inter alia, that –

“The general rule applicable in Seychelles is that a person injured by reason of another’s fault has no right of action against the insurers who have undertaken to indemnify the wrongdoer; his only cause of action is against the one who has committed the fault.”

- [17] In the case of ***De Lazzari v Denousse SSC117/1999, 7 October 2002***, the Plaintiff was injured in a road traffic accident and sued the 3rd Defendant (H. Savy Insurance Co. Ltd) in the capacity of insurer of the vehicle involved in the accident. The 3rd Defendant pleaded that it had no knowledge of the facts of the case, it is not able to plead thereto and has no legal relationship with the Plaintiff that would render it liable to the Plaintiff in absence of a Judgment against the 2nd Defendant (the employer the 1st Defendant). The Supreme Court per Nundoo, J held that –

*“in accordance with the interpretation in the ruling in ***Loze v Francois*** and Judgment delivered in ***D.Rose & Ors v Vidot & Ors CS287/1997*** judgment delivered 8th July 2002, the duty of insurers to satisfy judgments against persons injured only arises once judgment is obtained”.*

(emphasis added)

- [18] In the recent case of *Seyswift Car Hire v Dubignon & Ors (CS 12 of 2020) [2023] SCSC 620 (10 August 2023)* the Supreme Court per Dodin, J also considered similar plea in limine on the liability of insurers to an injured party. It had been pleaded that there was no case against the 3rd Defendant in that “*a contract of insurance is a contract of indemnity whereby its insured is indemnified for payment of damages that the insured would have to pay. It does not give the Plaintiff a cause of action to sue the 3rd Defendant for damages arising from an alleged delict its insured caused.*” The court held as follows

“it is now settled law that an insurance company has a contractual relationship with its insured. Even considering the doctrine of privity of contract, it would be obvious that a person not a party to a contract, may not claim on the basis of a contract entered into exclusively between two parties except in very limited circumstances where the third party has been explicitly given the right to claim by the contracting parties. As rightly pointed out by learned counsel for the 3rd Defendant and with reference to the cases mentioned above, an insurance company is not involved in the act of its insured. It only undertakes to indemnify the insured under the insurance contract between the insured and the insurer. As such, it cannot be sued or made liable for the act of the insured.

(emphasis added)

- [19] The plaint pleads vicarious liability of the 2nd Defendant to the Plaintiff for the acts of the 1st Defendant. Plaintiff’s submission raised the issue of subrogation. It is trite that parties are bound by their pleadings and a court cannot adjudicate on issues which have not been raised in the pleadings: *Vel v Knowles SCA41/1998, 42/1998*. Thus, the facts averred by the Plaintiff in her written submissions beyond her pleading and that are also subject to proof, and the submission on subrogation cannot be considered by this court.
- [20] Having considered the previous decisions of the Supreme Court relevant to the plea in limine as cited above, it is clear that there is no vicarious liability for the 2nd Defendant in the circumstances pleaded. I agree with the 1st and 2nd Defendants that there is no *lien de subordination* between the Defendants but merely a contractual relationship for the insurer to indemnify the insured party. The 2nd Defendant’s obligation to indemnify under

the insurance contract is only engaged once the Plaintiff has obtained a judgment against the 1st Defendant. There being no judgment entered against the 1st Defendant, there is also no cause of action against the 2nd Defendant.

Order

[21] Therefore, I uphold the plea in limine litis raised by the Defendants and dismiss the plaint against the 2nd Defendant.

Signed, dated and delivered at Ile du Port on 6th October, 2023.



Carolus J