

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 84
CS28/2016

KANKAN LIMITED
(rep by Basil Hoareau)

Plaintiff

and

SMALL ENTERPRISE PROMOTION AGENCY
(rep. by George Thatchett)

1st Defendant

and

SEYCHELLES CIVIL AVIATION AUTHORITY
(rep by Samantha Aglae)

2nd Defendant

And

HERITAGE (PTY) LIMITED
(rep by France Bonte)

3rd Defendant

Neutral Citation: *Kankan Limited v Small Enterprise Agency & Ors* (CS 28/2016) [2020] SCSC 84 (30 January 2020)

Before: **Vidot J**

Summary: Causes of action; statutory exemption clauses against liability, inadequate pleadings, faute, vicarious liability

Heard: 12-03-18, 15-03-18, 12-07-18, 08-10-18, 15-18, 25-10-18, 11-02-19, 21-02-19, 09-03-19, 30-03-19, 27-04-19 and 14-06-19

Delivered: 30 January 2020

JUDGMENT

VIDOT J

Background

- [1] The Plaintiff, a body corporate is involved inter alia in the retailing business. They are leasing from the 2nd Defendant, the Seychelles Civil Aviation Authority (“the SCAA”), also a body corporate established pursuant to section 3 of the Seychelles Civil Aviation Authority Act of 2005, a retail shop premises at the international airport. The lease is by virtue of a written contract (“the Lease Agreement”). The 1st Defendant, the Small Enterprise Seychelles Agency (“ESA”) (formerly known as the Small Enterprise Promotion Agency (“SENPA”)) is also a body corporate established under section 3 of the Small Enterprise Promotion Agency Act of 2004. They too are leasing a retail shop at the international airport from the 2nd Defendant. The two shops are adjacent to one another.
- [2] It is alleged that on or about the 4th June 2016, the 1st Defendant carried out construction works (“the works”) on its premises and as a result of which caused dust particles emanating from its premises to damage the Plaintiff’s merchandise that were on sale at the Plaintiff’s premises. It is averred that such damage was caused by the negligence and faute of the 3rd Defendant and / or its workers or agents. The works was being carried out by the 3rd Defendant, a company carrying out construction business. Damages are being claimed against the 1st and 2nd Defendants on averments of vicarious liability.
- [3] The Plaintiff avers further or in the alternative that the Plaintiff’s merchandise was damaged by a breach of contract by the 2nd Defendant or the Lease Agreement. The Plaintiff further claims that in the alternative that the damage of the merchandise was caused by the negligence and faute of the 3rd Defendant and / or its workers or agents. Therefore, the Plaintiff claims that as a result of the negligence of the 1st and 3rd Defendants and / or their agents or workers and / or breach of contract of the 2nd Defendant, the Plaintiff suffered loss and damage. The Plaintiff evaluates the alleged loss and damage to merchandise at SR 968,490.00 and 10 days loss of business at the rate of SR93,142.00. The Plaintiff claims that 1st Defendant and 3rd Defendant are liable to pay damages to the Plaintiff. Further and in the alternative the Plaintiff avers that the 2nd

Defendant is liable to pay damages to the Plaintiff. Yet further still and in the alternative that the Defendants are jointly and severally liable to pay damages to the Plaintiff.

[4] The 1st Defendant denies the Plaintiff and like the 2nd and 3rd Defendants prayed that the Plaintiff be dismissed. The 1st Defendant alleges that their premises were entrusted to the 3rd Defendant, an independent contractor, by way of an agreement dated 24th May 2015. It is averred that on the 04th June 2016 the entire premises of the 1st Defendant was under the absolute control of the 3rd Defendant and its workers who were performing the works as per schedule agreed between the 1st Defendant and 3rd Defendant. Further the 1st Defendant disputes that any of the Plaintiff's merchandise was affected by dust and that the 1st Defendant nor its workers or agents caused any damages to the Plaintiff's merchandise through their fault and that they acted in good faith in the discharge of their duties towards the Plaintiff. She further claims that the 1st Defendant transferred all duty and responsibility to the 3rd Defendant to ensure that the Plaintiff's enterprise was not affected by the works to the 3rd Defendant.

[5] Natasha Riazee who on the 04th June 2016 was Terminal Operations Officer with the SCAA acknowledged to having seen some dust on the computer and some jewellery. However, when Mrs. Savy came she was tapping the clothes to state that there was dust on the clothes. She observed that there was a hole between the 2 shops from where the dust was coming from. She submitted a report of the incident. Lauraine Fred the Business Officer for SCAA also filed a report, about a week after the incident. She was called to the scene and observed dust on shelves, display cabinets, the changing room and on the merchandise in the shop. She concluded that the dust in the changing room area was due to inadequate cleaning. She observed only a small hole from where the electrical cables run down. However, thereafter upon being shown the exhibited photos she agreed that there was a bigger hole. She also observed dust on the exterior of the shutters of Kankan's shop. However, she did not observe total damage of merchandise in the Plaintiff's shop.

[6] The 2nd Defendant however, whilst admitting that she was made aware that there were damages to the Plaintiff's merchandise but stated that they cannot ascertain who caused

the damage and what merchandise were on sale. Furthermore, they allege that they are not responsible for control and supervision of work conducted by its tenants within their rented premises but only to be made aware of any work to be done as ensure that work is according to plan which is submitted to them. They allege that nonetheless ensured that the proper procedure was followed.

[7] Mr. Joshua Margueritte, the Business Development Manager of SCAA was called to give evidence. He was made aware of the incident on the Saturday.

[8] The 3rd Defendant denies the averments made in the Plaint and aver that when the works were being carried out, the premises was properly secured and sealed off and that every precaution was taken to prevent any disturbance to the Plaintiff's premises. They also stated that during that period the only work conducted was installation of shelves and the like and that such work was not dust producing work and in particular this is due to the fact that the shelves were built off site.

Pleas In Limine

[9] The 1st and 2nd Defendants apart from filing a defence on the merits, also raised pleas in limine litis. The 1st Defendant pleas in limine are as follows;

(1) The Plaint is statutorily barred against the 1st Defendant under section 12 of the Small Enterprise Promotion Agency Act (Act 15 of 2014) which reads thus;

'No liability civil or criminal shall attach to the Agency, a member of the Board or the staff of the Agency in respect of an act done or omission made in good faith in the performance or purported performance of the functions of the Agency or such member as the case may be.'

(2) The 3rd Defendant is an independent contractor, was in absolute occupation of the 1st Defendant premises when the alleged mishap occurred to the Plaintiff. Accordingly it is respectfully averred that there is no cause of action for the Plaintiff against the 1st Defendant.

Hence it is averred that the plaint does not disclose a reasonable cause of action or answer against the 1st Defendant and that the pleadings be struck out under section 92 of the Civil Procedure Code as against the 1st Defendant upholding the points of law.

- [10] The 2nd Defendant plea in limine reads that the Plaintiff is barred from taking action against the 2nd Defendant as per section 19 of the Seychelles Civil Aviation Act which provides that *“No liability civil or criminal, shall attach to the Authority or a member, officer or employee of the Authority in respect of an act done or omission made in good faith in the performance of the functions of the Authority or such member, officer or employee as the case may be.”*
- [11] The 1st and 2nd Defendants have raised one plea in limine which is similar though it arises under different Acts. It is that each of the Defendants is excluded from liability due to certain provisions of the Acts which regulate them. These are in fact section 12 of the Small Enterprise Promotion Agency Act and section 19 of the Seychelles Civil Aviation Act. In fact these provisions provide that no criminal or civil liability shall be attached to SENPA or the SCAA in respect of acts done or omission made in good faith in the purported performance of their functions. Whilst Counsel for the 2nd Defendant did not expand on the further submission on that issue save to quote the statutory provisions, Counsel for the 1st Defendant addressed that issue at quite great length in his submission.
- [12] First Counsel referred to the case of **Elizabeth v President of the Court of Appeal [2010] SLR 382**. That case deals particularly with whether or not a cause of action has been disclosed. That case cited **Auto Garage v Motokov (No.3) [1971] J EA 514** which states that *“the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable..... the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable”*. Therefore, in order for the Kankanto succeed in this case, they must establish a cause of action against the 1st Defendant. Furthermore, he argues that the 1st Defendant acted in good faith and referred to Article 2268 of the Civil Code that provides that good faith shall always be presumed. The position therefore is that the person who makes an allegation of bad faith shall be

required to prove it. This essentially seems to imply that SENPA did everything it could and did not act in bad faith.

[13] Counsel for the 2nd Defendant drew analogy to section 78(7) (a) of the Children Act. That provision provides that members of the Tribunal in the exercise of its function are immune from liability for anything done in good faith in the exercise of their judicial function under that Act. Counsel relied on **Bernard Fanchette v AG [2014] SCSC 63, CS 155/2012**. It is stated in that case that where there is a statutory immunity “*in the absence of bad faith being pleaded in the Complaint, no fault can be assumed or ascribed to any judicial act*” of the authority which enjoys that statutory immunity. The principle however is such that the said statutory immunity is a qualified immunity and as such that immunity operates only when the claimant of that immunity acts in good faith in the performance of their judicial functions. Another case espousing the same principle of immunity and the requirement to plead bad faith is **Antoine Emmanuel Madeleine v The National Drug Enforcement Agency [2017] SCSC, CS 25 of 2016**. So the position of the 1st Defendant is that plaintiff does not disclose circumstances that could be confirmed as a *faute* and an act of illegality. That case further adds that bad faith has to be pleaded. The plaintiff in that case was struck out and the case dismissed for not disclosing a reasonable cause of action.

[14] The Plaintiff indeed did not plead bad faith on behalf of the 1st and 2nd Defendants. Should the Plaintiff be struck out against these Defendants occasioned by the non pleading of bad faith? However, as was submitted by the Counsel for the Plaintiff the operative phrase here is that such immunity has application where the party claiming immunity was acting in the function of his office.

[15] In response Counsel for the Plaintiff stated that the immunity given under the provisions of the respective pieces of legislation regulating the 1st and 2nd Defendants is qualified. It is not absolute. Referring to section 12 of Small Enterprise promotion Agency Act, he submitted that the immunity is not dependent on good faith. He claims that in order for the exemption to kick in 2 conditions must be satisfied. These include good faith but the act or omission must be in the performance or purported performance of the function of

the agency. These functions are set out in the Act. It does not have a specific section dealing with that but the Act has to be considered in its entirety. The role of SENPA is to promote small enterprises and cottage industries in Seychelles. It implements policies and strategies of the Government towards those goals, to administer ateliers and identify obstacles to the sustainable development of small enterprises and cottage industries. Therefore, under section 12 of the Act, the functions are to realise the objects of the Act. One needs therefore consider section 4 of the Act. He argued that the cases of **Bernard Fanchette v AG** (supra) **Antoine Emmanuel Madeleine v The National Drug Enforcement Agency** (supra) can be distinguished as they were cases where the Defendants were exercising the functions of their office as provided under the respective Acts.

[16] Counsel for the Plaintiff maintained that the 1st Defendant is not being sued for breach of its duties under the Act in which case mala fide would have to be pleaded. It is not the function of SENPA to operate a shop. This, Counsel argued is beyond the function of the 1st Defendant, which if it is the case that the latter's Defence should have included pleadings that the 1st Defendant was administering the shop as part of its function or purported function. He referred to proceedings of the 25th October 2018 (P2 of 77) whereby the then CEO of the 1st Defendant, Penny Belmont said as follows;

“We have two shops, one at the airport and one at Camion Hall. The one at the airport is for SCAA and when we rest the shop from them, but we don't pay rental we pay per percentage on the goods we sell. You have to note that the goods that we sell in the shop is not for the agency, it's for the artisans. We have about 40 artisans that bring their goods every month and we pay them back exactly how much we sell, if a good is SR100, we pay back SR100. We do not take any interest on it. The only thing we do is to pay the overheads which are the electricity and the rental to SCAA but we just take care of it because we are the one who sell the products.”

This according to Counsel for the Plaintiff shows that the 1st Defendant went beyond the ambit of their functions or purported functions and they cannot be accommodated by section 12 of the Small Enterprise Promotion Agency Act.

- [17] Counsel for the Plaintiff implored Court to accord a very restrictive interpretation to the Act as to what would be considered the functions or purported functions of the 1st Defendant. He gave examples whereby such interpretation was accorded. He referred to Maxwell On Interpretation of Statutes (Eleventh Edition) at P277 which states; *“The Partnership Act 1865 that when a loan to a trader bore interest varying with the profits of the trade, the lender should not, if the trader became bankrupt, “recover” until the claims of the other creditors were satisfied, did not deprive the creditor of any rights acquired by mortgage. Though he could not recover, he was entitled to retain. On this ground it would seem Statutes of Limitations are to be construed strictly. The defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment, while provisions which give exceptions to the operation of such enactments are to be construed liberally.*
- [18] Counsel submitted that if SENPA wanted to take advantage of the statutory provisions that provide for the exemption they needed to plead that undertaking renovation works in its shop as part of its function. In fact this would have been material facts that needed to be pleaded. In **Marie-Claire Lesperance v Jeffrey Larue SCA 15/2015, CS 211/2011**, cited Section 75 of the Civil Procedure Code provides that *“the statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim”* In **Tirant v Banane [1977] SLR 219**, it was held that *‘in civil litigation each party must state his whole case and plead all facts he intends to rely on, otherwise he cannot at the trial give evidence of facts not pleaded and the defence of an act by a third party in a motor vehicle collision case, not having been pleaded, could not be considered. The whole purpose of pleadings is that both parties are made fully aware of all issues between them.’*
- [19] I agree with submissions made by Counsel for the Plaintiff on this matter. It is necessary that in terms with section 75 requires that parties disclose material facts on which their case is based. There has been a no pleading from the 1st and 2nd Defendants that they were acting in the course of their functions and that as per section 19 of the Seychelles Civil Aviation Act and section 12 of the Small Enterprise Promotion Agency Act they acted in good faith. Neither did the Plaintiff allege that the 1st and 2nd Defendants were acting in

the course of their functions and in bad faith. That could be that the Plaintiff did not consider that these Defendants were acting in the functions and that they did so in bad faith. Counsel for the 1st Defendant furthermore did not question the CEO of SENPA whether what was being done at the premises was within the scope of their function. In order for these Defendants to take advantage of sections 19 and 12 of the above mentioned Acts, these matters needed to be pleaded and appropriate questions asked during examination in chief and cross examination. Further I do not believe that it is in every circumstance that good faith has to be presumed as provided in the case **Antoine Emmanuel Madeleine v The National Drug Enforcement Agency** (supra). Article 2268 of the Civil Code which provides that “*Good faith shall always be presumed. The person who makes allegations of bad faith shall be required to prove it*” has no applicability in this present case. This article is being dealt with under the Code under the Title of ‘Prescription of Ten Years’. The provisions of this article therefore have application to acquisitive prescription.

[20] The 1st and 2nd Defendants have not demonstrated to Court that what was being done was part of their functions or purported function I do believe that a strict interpretation of the above referred statutory provisions is necessary. Based on the above, that plea in limine fails.

[21] The second plea in limine litis of the 1st Defendant pertains to the fact that 3rd Defendant was an independent contractor, was absolute occupation of the 1st Defendant’s premises and therefore there exist no cause of action for the Plaintiff against the 1st Defendant. What was being argued was that the occupier of the premises is liable and not the owner. Counsel relied on Article 1797 of the Civil Code which provides that a contractor shall be liable for the acts of the person he employs. The work contract was produced, (exhibit D3) and that contract according to Counsel was accepted without any challenge from the Plaintiff. The 1st Defendant provided a work schedule which the 1st Defendant had to be adhered to. Counsel for the 1st Defendant then referred to the case of **Ekaterina Khvedelidze v Cecile Dell’Olivo SCA 18 of 2018**, which makes reference necessity of existence of a “lien de subordination” between the person undertaking works and the party whose work was being undertaken. It also considers the relationship ‘commettant’

and “prespose” under the Civil Code, which applies to the relationship of employer and employee under paragraph 1 of the Civil Code; see **Lucas v Government of Seychelles [1977] SLR 99**.

[22] Article 1384(1) of the Civil Code provides;

“A person is liable not only for the damage that he has caused by his own act but also the damage caused by the act of persons for whom he is responsible”

Article 1384(3) provides;

“Masters and employers shall be liable on their part for damage caused by their servants for damage caused by their servants and employees acting within the scope of the employment”

What the 1st Defendant was essentially arguing was that there was no ‘lien de subordination’ between them and the 3rd Defendant as they had no authority over the 3rd Defendant’s employees. They state that the works was assigned to the 3rd Defendant and that they had no control over such works. So therefore they could not be made vicariously liable for the latter’s alleged negligence, see **Paton v Uzice [1967] SLR 8**. The 3rd Defendant ought to have been under the supervision and control of the 1st Defendant. Therefore, in terms with Article 1384, the Plaintiff failed to disclose a cause of action against the 1st Defendant. It is necessary that a Plaintiff discloses a cause of action establishing either direct or vicarious responsibility of the Defendant; see **Sylvette Monthy v SLA and Elvis Chetty SCA 37/2016**. In law the contractor is liable for the acts of persons he employs; see Article 1719 of the Civil Code.

[23] The 1st Defendant interpretation of the law is actually correct. Relying on the last mentioned case, Counsel for the 1st Defendant attacks the Plaintiff and submitted that the Plaintiff does not disclose a cause of action against his client. Citing that case which referred to **Marie Ange Pirame v Armano Peri SCA 16 of 2016** submitted as held in that case *“that evidence outside the pleadings although not objected to and the relief not pleaded for cannot and does not have the effect of translating the said issues into pleadings or evidence”* and in **Tex Charlie v Margueritte Francoise CA 12 of 1994**,

the Court of Appeal stated that *“the system of Civil justice in this country does not permit the court to formulate a case for the parties after listening to the evidence and grant a relief not sought by either parties that such evidence may sustain without amending the plaint. In this adversarial procedure the parties must state their respective cases on their pleadings.”* See also **Marie Rosine Georges v Clifford Benoit & Others [2018] SCSC 158, CS 95/2016.**

- [24] Counsel for the Plaintiff submitted that the Plaintiff did not bring a case against the 1st Defendant on the premise that the 1st Defendant is liable for the acts done by the 3rd Defendant. However, he agreed that a “lien de subordination” has to exist between these litigants.
- [25] The 1st Defendant relies on the pleadings in the Plaint and the agreement signed between the 1st Defendant and 2nd Defendant dated 25th May 2016 (Exhibit D1 (3)) as being proof that the Plaintiff did not establish any cause of action against the 1st Defendant. The agreement is the agreement for works to be undertaken by the 3rd Defendant on the shop of the 1st Defendant. Taking a close look at the Plaint, paragraphs 7, 8, and 9 suggest that the Plaintiff was alluding to the fact that there was renovations works being carried out on the 1st Defendant premises for which the 1st Defendant is considered liable. Paragraph 9 of the Plaint its particulars of negligence, enumerates in which way the “faute” was committed and the responsibility of the 3rd Defendant. That is perhaps the reason why in the 1st Defendant’s Defence in answer to paragraph 7 of the Plaint makes averments that the work was entrusted to the 3rd Defendant.
- [26] Furthermore, I also note when asked as to why SENPA did not supervise the works to ensure that there was no possibility of disturbance to the neighbours, Penny Belmont, then CEO of SENPA answered *“when somebody is given a responsibility, yes it is a shop of SENPA, at the same time it is the shop of the SCAA and SENPA, yes, we were supposed to maybe have somebody there to check all, but we don’t and we can’t.* This answer does not suggest that all responsibilities regarding the works were assigned to the 3rd Defendant, which would have made the latter solely responsible. It suggests that the 1st

Defendant was responsible to have some oversight over the works. In that case it could be argued that a lien de subordination did not exist.

[27] I am of the opinion that the agreement (Exhibit D1 (3)) does not go far enough to provide an exclusion clause that all damages or nuisance caused by the works will make 3rd Defendant exclusively liable and that it will hold the 1st Defendant harmless against any suit or demand alleging damages caused by such works. Therefore, based on this, the Court cannot hold that no cause of action exists against the 1st Defendant and therefore that plea in limine fails

The Plaintiff's Evidence

[28] Claudine Savy is the Managing Director of Kankan Limited. Together with her daughter Karine Dupouy they are the Directors of the company. The company is involved in the retail business with several shops in Seychelles whereby they sell mainly "exclusive luxury" brand of clothing, jewellery, shoes and accessories. These are mainly designed by Karine Dupouy and manufactured in many countries namely Mauritius and Italy. Their products are marketed under the brand "Kankan". The items are exclusive in the sense that they are not mass produced. There is only limited edition of any item. So there are few of the same items that are manufactured at any one time.

[29] On the 4th June 2016 she was informed of the incident of dust particles having settled in the shop at the airport by an employee around 6.30 am. He was instructed not to touch anything. Mrs. Savy went to the shop and found '*an amount of dust*' everywhere. The dust had settled on the merchandise. She assessed that the only place that dust could have come from was the shop of the 1st Defendant as there was ongoing works being carried out. She called the representative of the SCAA, Natasha Riase and Lauraine Fred came and acknowledged that there was dust. Ms. Cecile Hoareau from SENPA was called as well. They decided to close shop in order to remove all items they felt were damaged and photos were taken. She decided to speak to the Plaintiff's lawyer, Ms. Priscille Chetty who subsequently came on scene. The 2nd Defendant's lawyer, Mrs. Samantha Aglae

came to see the damage caused. That was on the 08th June 2016 as the Plaintiff had wanted to verify the damage. However, Mrs. Aglae and Cecile Hoareau did not stay throughout to see the items that were damaged. Ms. Lauraine Fred from SCAA remained throughout. Ms. Frida Jupiter and Mr. Sumit who were employed by the Plaintiff counted the items. They were placed in boxes sealed and Mrs. Savy and Ms. Jupiter signed on the box. As a result of the dust that had settled in the shop it remained closed for 10 days.

[30] The Plaintiff listed particulars of negligence amounting to a faute of the 1st Defendant and 3rd Defendant. They include the failure to properly supervise works, ensure that the works did not cause nuisance to others and failure to take preventive measures

Evidence of the 1st Defendant

[31] Ms. Penny Belmont, the CEO of the 1st Defendant was the only person to give evidence on behalf of the 1st Defendant. ESA (SENPA) “leases” a shop at the international airport from the 2nd Defendant. The shop is adjacent to that of the Plaintiff. She stated that after getting permission from SCAA to do the work, they passed on the responsibility to the 3rd Defendant and that it was the latter who were entrusted with blocking and securing the area where the works was to be undertaken. However during the course of the works they were made aware of complaints made by the Plaintiff. She maintains that the 1st Defendant did not do anything and had no intention of doing anything that would cause harm to the Plaintiff’s shop.

The 2nd Defendant’s Evidence

[32] The 2nd Defendant first called Natasha Riaze to testify. On the 04th June 2016 she was Terminal Operations Officer with the SCAA and acknowledged to having seen some dust on the computer and some jewellery. However, when Mrs. Savy came she was tapping the clothes to state that there was dust on the clothes. She observed the hole between the 2 shops from where the dust was coming from. She submitted a report of the incident. Lauraine Fred the Business Officer for SCAA also filed a report, about a week after the incident. She was called to the scene and observed dust on shelves, display cabinet and

the changing room. She concluded that the dust in the changing room area was due to inadequate cleaning. She observed only a small hole from where the electrical cables run down. She also observed dust on the exterior of the shutters of Kankan's shop. However, they did not observe total damage of merchandise in the Plaintiff's shop.

[33] The 2nd Defendant however, whilst admitting that she was made aware that there were damages to the Plaintiff's merchandise stated that they cannot ascertain who caused the damage and what merchandise were on sale. Furthermore, they allege that they are not responsible for control and supervision of work conducted by its tenants within their rented premises but only to be made aware of any work to be done so as ensure that work is according to plan which is submitted to them. They nonetheless assured Court that the proper procedure was followed.

[34] Mr. Joshua Margueritte, the Business Development Manager of SCAA was called to give . He was made aware of the incident on the Saturday. Apart from that he could give little pertinent evidence relating to the incident itself.

The 3rd Defendant's Evidence

[35] Mr. Bernard Port-Louis was the person to testify for the 3rd Defendant. He is a director of the 3rd Defendant. He admits to have been hired by SENPA to renovate their shop at the international airport which work started around the 25th May 2015. An agreement was signed between them on 24th May 2015 (exhibit D1(3)). One of the first requirements of the scope of work was to barricade and secure the area, an obligation they complied with. That blockade was all the way from the floor to the ceiling, save for a little hole between the 2 retail shops (exhibit P3 (120) where some cables would run through. Everything was sealed off between the two outlets. However, he claims there was a little corridor between the 2 shops. Around the 2nd to 04th June 2016 they completed works that would essentially produce dust but around that time they putting up shelves. These had been manufactured off site. Such activity did not generate dust.

Faute

- [36] Article 1382 obliges a person who causes damage to another to repair such damage. The Plaintiff avers that merchandise found in the Kankan's shop at the airport suffered damage as a result of works being carried out by the 3rd Defendant. In fact, a locus in quo effected at the place of business of the parties allowed the Court to better appreciate and situate the case.
- [37] After the Court conducted a locus at the business premises of the Plaintiff and the 1st Defendant, I am absolutely certain that due to the fact that a hole was left in the hoarding as shown in exhibit P3 (12) that dust from the latter's premises entered into the premises of the former. Mrs. Savy testified that upon noticing an accumulation of dust in Kankan's shop, she had requested that representative of SENPA comes on site; see also P9B. Lauraine Fred and Natasha Riase of the SCAA were called and they both confirmed presence of dust in the shop, thereby corroborating evidence of Mrs. Savy. In fact in exhibit P9 C, a report from Natasha noted that dust came from a small opening in the hoarding and that the dust was due to renovations work going on in the 1st Defendant's shop. This is also confirmed by Lauraine Fred. She also produced photographs which she took and produced a report that shows that on the 04th June there was a hole in the hoarding. After the incident, we noticed through exhibit P4(1) that the hole in the hoarding was after the incident hoarded off.
- [38] I noted that there were arguments emanating from Counsels for the Defendants that no direct evidence of anyone seeing dust coming from SENPA's shop and landing in Kankan's shop. That is true. They also emphasized that it is a legal rule that requires a fact be proved and as held in **Barry Souffe v Cote D'Or Lodge [2013] SCSC (CC 24 Of 2012)**. That case noted that “ *if a legal rule requires a fact to be proved, a judge and jury must decide whether or not it happened. There is no room for finding that it might have happened.*” However, I find that there is overwhelming circumstantial evidence that suggests without doubt that the source of dust was from the 1st Defendant's shop. Counsels for the Defendants did not plead in their defences that there was dust coming from areas or sources other than from the 1st Defendant's shop and that landed in the Plaintiff shop. I know that there were attempts to suggest that there were other shops having tiles placed and that that could have been the source of such dust. Questions to

suggest such were not allowed as the same was not pleaded and in any case, no concrete evidence was advanced to support such allegations. I find that the Plaintiff have discharged such burden of proof even to a higher standard required, which is the balance of probabilities.

Vicarious Liability

[39] The Plaintiff holds the 2nd Defendant to be vicariously for the acts what he alleges are the negligent acts of the 3rd Defendant. Counsel for the 2nd Defendant referred to Article 1384 of the Civil Code which states “ *A person is liable not only for the damage he has caused by his act but also for the damage caused by the act of persons for whom he is responsible or the things in his custody.*” Citing **Attorney General v Jumaye [1978-1982] SCAR 348**, Counsel noted Lalouette JA stated that in France liability under Article 1384 is not based on faute but an objective liability independent of faute.

[40] Article 1384 (3) provides that masters and employers are strictly liable for damage caused by their servants and employees acting in the scope of their employment. That means that the presumption of fault of the employer for the acts of their employees. Counsel for the 2nd Defendant submitted that the Plaintiff does not support an action under Article 1384. They added that the Plaintiff and particulars does not disclose whether direct or vicarious liability is being alleged. Counsel cited **Confait [1995] v Mathurin SCAR 203** wherein the Court of Appeal held;

“Where a party claims damages against another for damage caused to him by an act, he must state in his pleading where the damage is caused by the act of the another person himself or by the act of a person for whom he is responsible. By virtue of Article 1384 of the Civil Code, a person is responsible for the damage which is caused by his own act or by the act of persons for whom he is responsible. The cases in which one person must answer for the acts of another are specified..... where a party avers that liability is based on the act of the other party, he should not set up a case at the trial based on liability of the act of a person for whom he is responsible. Where the case of the plaintiff is that the defendant is sued for the act of a person for whom the defendant is responsible, the

Plaintiff must aver by his pleadings and prove the relationship which gives rise to such liability unless such is admitted.

[41] I have closely studied the pleadings, particularly the Complaint, I find that it adequately avers fault and a breach of contract from the 1st and 3rd Defendants and the 2nd Defendant respectively. I do not find the Complaint to be lacking in averring the very particulars of fault and breach of contract.

[42] The 1st Defendant's liability is expressed to arise from the fact that the 1st Defendant owned a duty of care to ensure that the works carried out did not cause damage to the Plaintiff's merchandise. It has already been stated that Penny Belmont admitted that maybe the 1st Defendant was supposed to have someone out check out the works. She further made a judicial admission that if they had done a supervision of the works she would have noticed the space in the ceiling and requested that the contractor place adequate and proper hoarding and that would prevent adjoining neighbours from experiencing any damage. She further added that had they done so, damages would not have occurred. Such judicial admission satisfies provisions of Article 1356 of the Civil Code.

[43] The liability of the 2nd Defendant as averred in the Complaint is said to come through a breach of contract. That is that under the agreement they are obligated to ensure that the Plaintiff does not experience any nuisance and damage to its undertaking. The 2nd Defendant through its Defence admitted that there was a lessor / lessee relationship between the 2nd Defendant and the Plaintiff. In fact Article 1719 of the Civil Code provides that the tenant shall be allowed peaceful enjoyment of the leased premises during the period of hire. However, Article 1725 provides that *"The owner shall not be bound to warrant the tenant against any disturbance of his enjoyment caused by any acts of trespass of third parties, even if caused without a claim of right upon the thing under hire,; but the tenant may sue such parties in his own name.* Therefore that allows for the 2nd Defendant to be sued in the circumstances of this present case.

[44] What has to be considered is if in the circumstances the 2nd Defendant was a party to the nuisance or damage caused? In answer that the question one has to refer to Dalloz (102

edition) and Counsel for the Plaintiff referred to Article 1775 of the French Civil Code (p1466) where it provides as follows;

“4. Le fait par un locataire d’exéder des droits découlant de son bail ne peut avoir pour effet de le faire considerer comme un tiers au sens de l’art.1772; c’est donc a bon droit que réparer le dommage resultant du trouble de jouissance qui en résulte pour un colocataire “

Basically the above declares that a co-tenant is not a third party which would mean that when a lessee is responsible if a co-tenant does anything that affects another co-tenant. To reinforce the liability of the 2nd Defendant for the acts of the 3rd Defendant Counsel for the Plaintiff further referred to Les Contrats Speciaux (Edition 2014) at page 431 which states;

“Encore faut-il que l’auteur du trouble de fait soit un tiers, c’est-à-dire une personne donc le bailleur ne dois pas répondre, n’est pas tiers le prepose du bailleur. Pas plus le bailleur ne doit-il répondre du fait d’un de ses copropriétaires dans l’immeuble. Etendant les obligations du bailleur, la jurisprudence decide qu’il répond du trouble causé par un colocataire.”

Therefore, for all intents and purposes the 2nd Defendant is vicariously liable for the act of the 3rd Defendant,. The 2nd Defendant is not a third party in terms with Article 1725.

[45] Mr. Joshua Margueritte also admitted that there was an obligation of the 2nd Defendant to ensure that the Plaintiff has peaceful enjoyment of its leased property and the obligation to supervise the works being carried out was under airport management

Quantum

[46] The Defendants submitted that Plaintiff gave only the sale price of the items allegedly damaged by dust. The cost price was not given and furthermore there was not an iota of evidence as regards the latter price. They submitted that therefore, with the absence of such evidence the court cannot give an imaginary price to such items and make a judgement in favour of the Plaintiff. It is indeed necessary that in order to recover from

the Defendants the loss that they have been put to by the Defendants the Plaintiff must establish that through evidence. The Plaintiff has to prove the loss that they have suffered and the quantum thereof. The burden of proof lies on the Plaintiff. In **Ebrahim Suleman and Others v Marie-Therese Joubert and Others SCA No. 27 of 2010**, cited in **Barry Souffe v Cote D’Or Lodge Limited [2013] SCSC CC 24 of 2013**, it was said;

‘in such circumstances applying evidentiary rules we need to find that the Respondent discharged both their evidentiary or burden of proof as required by law. The maxim “he who asserts must prove” obtains and prove he must on the balance of probabilities.

[47] In considering whether the Plaintiffs have discharge the required burden according to law, I remind myself of the word of Lord Goddard CJ in **Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177** at page 178;

“Plaintiffs must understand that they bring actions of damages it is for them to prove their damage, it is not enough to write down the particulars and so to speak, throw them at the head of the Court, this is what I lost; I ask you to give me these damages. They have to prove it”

I find that in the present circumstance there was no requirement to prove the cost price of such items. These items were in a shop and so the Plaintiff only had to prove what the sale price would have been; that is they claim the cost price as well as the sale price which includes a profit. The Plaintiff produced a list of prices they had prepared (exhibit P6). There was no objection to that list being admitted as an exhibit. At the end of the day what is pertinent is the sale price, not the cost price. Some of the items even had price tags on them.

[48] The Defendant have argued that the Plaintiff did not provide the cost price of the items and that their claims should be restricted to that cost only and not the profits. I disagree with this argument. In fact Article 1145.1 of the Civil Code provides that *“the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter”*. Paragraph of the same article goes on to adds *The damages payable under paragraph 1 and 2 of this*

article, and as provided in the following articles, shall apply as appropriate to a breach of contract and the commission of a delict.” It is therefore clear that the price would in effect be the sale price rather than the cost price.

[49] The Defendants argued that the Plaintiff should have mitigated their loss. In fact Counsel for the Plaintiff acknowledged that a person who suffers damages, be it in tort or contract, has a duty to mitigate his loss. In fact there is an abundance of jurisprudence that establishes that as a rule. However, Counsel for the Plaintiff insisted that the case has to be put into context. He argued that the merchandise being sold by the Plaintiff are exclusive. Kankan is a brand. If they were to clean and sell the clothes, the brand will go down and selling goods which have been damaged will tarnish the brand and the name. I unfortunately do not share this view. Many of the items produced before court had no damage at all, a large proportion had negligible damage and very few had serious damage. I of the view that the Plaintiff could have mitigated its loss and sold the damaged items at a reduced price. I note that generally for the Seychellois market the items sold by the Plaintiff have stiff prices and a local client would have enjoyed having an item at a reduced price and all that would be needed is a bit of cleaning of the item and in most cases the cleaning would have been very insignificant. I am aware that there are some international brands that sell their slightly damaged items at a reduced price. In any case the Plaintiff gave evidence that they normally have to clean the shops 4 to 6 times a day because of dust. That suggests that there is an normally an accumulation of dust and items like jewellery have to be cleaned on a regular basis and I would believe that all that would be necessary is a damp cloth.

[50] I find that the claim for loss of earning for the 10 days that the shop remained closed as not maintainable. This is because the Plaintiff is already claiming for loss on the cost of items which as stated include the actual cost of the items including the loss of profit on these items. To make a claim for closure of business for those 10 days will in effect be

making a second claim on the same items on which damages are being claimed. This is a duplicity of claim. However, the loss was also not proved.

[51] I have serious reservations whether all the items produced in Court were actually displayed in the shop. At the locus I observed at the most 10 display stands for hats. What has been produced in court exceeds what the shop can accommodate. The pieces of garments produced as exhibit exceed the capacity of the railing used for displaying such items. I have noted before that I have looked at and handled some of the items produced and did not find any dust on them. I also find that a large number of bags were produced, yet there wasn't sufficient place to hold such large number of bags in the shop. I also note that despite having had legal advice and having a lawyer to visit the shop, when Mrs. Savy and her staff were placing the alleged damaged items in boxes to keep as exhibits, despite having Lorraine Fred around did not ask her to sign on the seal but only her and another Kankan staff signed. I believe that some of the items could easily be cleaned with just a damp cloth such as the jewellery. Again I have reservations as to whether all the jewellery produced was on display. The boxes in which the merchandise were kept for exhibits showed negligible amount of dust. I shall give serious considerations to the above when making the calculating quantum to be awarded.

- (i) I shall allow a claim of 45% of items that were contained in boxes 1, 2 and 3. That amounts to SR193, 360.00
- (ii) I shall award only 35% of the claim for hats found in bag no 4 amounting to SR35,000.00
- (iii) I shall allow only 35% of the claim for Box 5 that contained the bags which amounts to SR26, 218.
- (iv) I shall allow only S20% of the claim for jewellery amounting to SR27,685.00

[23] Therefore, I enter judgment in favour of the Plaintiff against the Defendant who are jointly and severally liable to pay the Plaintiff the sum of SR282.863.00 with interest and cost. The merchandise exhibited shall be returned to the Plaintiff.

Signed, dated and delivered at Ile du Port 30 January 2020

Vidot J