

## **BANANE v GOVERNMENT OF SEYCHELLES**

**(2011) SLR 271**

A Derjacques for the plaintiff

D Esparon for the defendants

**Judgment delivered on 1 August 2011 by**

**GASWAGA J:**

This is a plaint for damages against the Government of Seychelles (defendant) in the sum of R302,000 together with interest and costs. It has been averred that the defendant is being sued for having established and also organized a National Guard service, which organisation's activities it regulates and administers. It should be noted from the outset that whereas the plaintiffs filed their submissions as ordered by the court the defendant failed or ignored to do so despite several reminders and the case proceeded to judgment in that state.

Evidence has been led to the effect that on the 19 May 2006, a few minutes after 1100 hours, at Sans Soucis, Mahe, Samuel Banane, now deceased, was shot and killed by a member of the National Guard namely Antoine Benoit of Quincy Village, acting during the course of his duties and employment with the defendant. The plaintiffs further aver that it was as a result of the fault of the defendant that the said shooting and killing occurred. The plaintiffs have particularized the elements of fault in the following terms -

### PARTICULARS OF FAULT

- a) Failing to properly supervise and monitor the actions of the said National Guard.
- b) Failing to ensure a proper system for safety for the public.
- c) Failing to secure the National Guard fire arms.
- d) The said Antoine Benoit in negligently discharging his weapons.
- e) The said Antoine Benoit in consuming alcohol whilst at work and or reporting for work.
- f) The said Antoine Benoit in reporting for duty whilst angry and emotional concerning a second National Guard.
- g) Failing to act in a responsible manner towards the said deceased.

Articles 1382(1) and (2) of the civil code of Seychelles provides -

- (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.

The defendant denies liability and states that Antoine Benoit, though a member of the National Guard, was not acting within the scope of his employment whilst doing

the said act which was deliberate and contrary to the express instructions of the defendant. That the said act was not incidental to the service or employment of Antoine Benoit.

Jude Bibi, a friend of Samuel Banane testified that on the evening of 19 May 2006 he had met up with the deceased at a shop from where they each had a beer before deciding to go to Victoria. Antoine Benoit, who also lives at Quincy Village, asked for a lift in Bibi's vehicle bearing registration number S5631 to be taken to Sans Souci to get money at the residence of one Mrs Michel where he was deployed to guard. At Sans Souci, Benoit went into the guardroom and returned with a AK 47 rifle and threatened to shoot Bibi who jumped out of the car and took cover in a ditch. He then heard the sound of a gun three or four times and ran away into the forest. Bibi returned 30 minutes later and went into the house of Mrs Michel who telephoned the police.

Lance Corporal Tony Amesbury had arrived at the scene after the shooting and saw the deceased's motionless body lying on the ground in a pool of blood next to the rear left door of the car. According to him, Samuel Banane had already died. The hospital staff that came in the ambulance shortly thereafter also stated so. There were twelve bullet holes in the car. Paul Banane's death was later confirmed by Dr Xiao Pengo (see medical report (P2) and death certificate (P3)).

From the evidence adduced, it became clear that Paul Banane was a mere passenger in the car which was being driven by Jude Bibi who had ceased being an employee of the National Guard in 2002. The other National Guard officers on duty, namely Sophola and Quatre, had opened the gate and allowed the car in together with these two civilians who were not part of their force. It also came to light that there was no armoury at the residence and the two rifles were left in a wooden cabinet made of plywood while its keys were kept in the guardroom in a place known to Antoine Benoit. No logbook was maintained at the said residence and the system of keeping weapons was not orderly.

In these circumstances, I am in agreement with the plaintiff's submission that the National Guard officers acted negligently in so far as they failed and or ignored to safely secure the weapons in their custody and prevent their colleague, whether he was on duty or not at the material time, from accessing the rifle and firing a minimum of twelve shots which killed Samuel Banane. Had the officers, also employees of the defendant, exercised diligence and due care and stopped the car and its occupants from entering the gate, as well as Antoine Benoit from accessing the weapons which were under their control, it is most likely that the said killing would not have happened. The officers did not act as prudent persons. Pursuant to article 1382(2), this was an error of conduct or omission which would not have been committed by a prudent person in the special circumstances in which the damage was caused.

Merely stating that the Antoine Benoit was off duty that evening and therefore whatever he did was outside his scope of employment, to me, is not convincing enough to exonerate the defendant of liability when actually he used his 'tools of work trade' (loaded rifle) allocated to him by his employer (government) for his daily duties to shoot and kill apparently an innocent citizen at the place where he had always been assigned to work. If that is the basis of the defendant's case (denial)

then one would ask why and how Benoit gained entry to his place of work yet he was off duty and took possession of the rifle which should by this time have been under the custody of another officer on night duty. It defeats my understanding for one to claim that an officer was off duty when he is actually handling and operating a rifle, his main tool of work, especially one provided by his employer. It would be a different matter if he had stolen it. There is no evidence on record suggesting any report of loss or forceful snatching of a rifle from that residence.

But that is not all. Further negligence is exhibited when the same Antoine Benoit, after this shooting, was not prevented by the guards from walking away with the rifle all the way to Quincy Village via Victoria, a distance of about ten kilometres where, according to witness Philip Joubert, he had earlier threatened to kill him using a gun. Philip Joubert had unsuccessfully called the National Guard headquarters and the Central Police Station several hours before the killing of Samuel Banane and reported the awkward behaviour and threats of death by Benoit that evening. Witness Tony Amesbury who was on duty that evening confirmed this and further stated that the report was about Benoit going to get his gun to kill Philip Joubert. Philip Joubert also testified that Benoit executed his threats when he returned with a gun, entered his house and started shooting in the kitchen and all the three bedrooms upstairs. Philip Joubert and his wife were at the time hiding in the toilet and survived the shooting. Benoit came back into Philip Joubert's house three times and fired bullets on each occasion.

On this matter, the plaintiffs had submitted thus -

the defendant failed to detect the makings of this tragedy, help and counsel Benoit, secure all weapons, deprive Benoit of his weapons, disarm Benoit, and prevent the killings .... many people's lives were endangered.

From the foregoing, it cannot be argued strongly that Antoine Benoit acted outside the scope of his employment and contrary to the express instructions of the defendant otherwise one would wonder why and how he got into the residence and, without any difficulty or resistance, accessed the rifle and used it. If such argument is left to stand, could it be logical to say that the two officers were under express instructions to allow Antoine Benoit to access the premises and use the gun? Put differently, if he was not on duty how could he be allowed in to use the rifle? Could he have been on a frolic of his own in a well-guarded residence with restricted entry like the one herein? It must be stressed that whoever owns or is in charge of weapons, such as the defendant herein, must take extra care to ensure at all times that such dangerous weapons are not only in the hands of people that they trust to safely hold them on their behalf but also will put them to their proper and intended use. This, the defendant failed to do. Yet, in my view, its responsibility to constantly manage and monitor the possession and use of firearms by its employees never ceases. The defendant cannot now divorce itself from the consequences of the acts and or omissions of its officers with whom it had entrusted the weapons. For these reasons and the uncontroverted evidence on record the defendant is found to have been negligent and at fault, and has to be held vicariously liable.

## **Damages**

The plaintiffs have prayed for damages in paragraph 5 of the plaint which, in matters of this nature, are assessed on a consideration whether the *de cujus* died instantly or sometime after the fatal injury. The particulars of loss and damage read thus:

<u>PARTICULARS OF LOSS AND DAMAGE</u>	
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a) 1 <sup>st</sup> plaintiff, the estate, pain and suffering and knowledge of impending death.	50,000
b) 2 <sup>nd</sup> plaintiff, moral damages, distress, anguish, sorrow and depression	60,000
c) 3 <sup>rd</sup> plaintiff, moral damages, distress, anguish, sorrow and depression	30,000
d) 4 <sup>th</sup> plaintiff, moral damages, distress, anguish, sorrow and depression	30,000
e) 5th plaintiff, moral damages, distress, anguish, sorrow and depression	30,000
f) 6th plaintiff, moral damages, distress, anguish, sorrow and depression	30,000
g) 2 <sup>nd</sup> plaintiff, economic loss. Loss of maintenance contributions at R1,00 monthly for 5 years	60,000
h) Special damages, coffin, flowers, church service, clothing, the wake, transportation	12,000
	<u>302,000</u>

Relying on *Le Tourneau, Le Responsabilite Civil* 2nd Edition paragraphs 171, 172, 173 and 174, the court in *Elizabeth v Morel & others* (1979) SLR 25 held inter alia:

In law, the heirs of a deceased are entitled to claim in that capacity, damages for prejudice, material and moral, suffered by the deceased before and until his death and resulting from a tortious act whether he had, or had not commenced an action for damages in respect of the tortious act before his death, provided he had not renounced it. When death is concomitant with the injuries resulting from the tortious act, the heirs cannot claim in that capacity and may only claim in their own capacity as in such a case, the cause of action of the deceased would not have arisen before he died.

See also *Marie Andre Joanneau & Others v Government of Seychelles and Commissioner of Police* Civil Side No 12 of 2005.

Moral damages are compensatory and not punitive, and should take into account the socio-economic realities of the times, including inflation or devaluation of the currency, and be adjusted to reflect the true standard and cost of living. The award should be viewed as compensation and not reward. See the Court of Appeal judgment in *Marie Andre Joanneau & Others v Government of Seychelles and Commissioner of Police* SCA No 4 of 2007 wherein the police had shot and killed one Robin Jourdan Henriette and Hodoul JA revised the award from R77,000 to R152,500. However, while assessing such awards, the court must ensure that the claims are not made "an occasion of coining profits out of affliction and turning family bereavement into pecuniary advantage". See *Choonia v Pitot* (1914) MR 53.

It has been deponed that the incident happened at about 10.30pm. Lance Corporal Tony Amesbury arrived at the scene in response to a telephone call from the

residence. According to him, Samuel Banane had already died. The witness had seen Samuel Banane's motionless body next to the car. The hospital staff that came in the ambulance shortly thereafter also stated so. Samuel Banane's death was confirmed by Dr Xiao Peng who saw the body at 1:00am at the Victoria hospital and prepared a post mortem report which was presented in court by Dr Brewer. See medical report (P2) and death certificate (P3). In the post-mortem report dated 19 May 2006, it was stated that -

the cause of death was due to external and internal bleeding as a result of multiple gunshot wounds (approximately 12). The wounds were seen on the right shoulder, right hand, right side of the abdomen, the left testis, right part of waist, legs, right side of the back, right side of the neck and buttocks. The approximate time of death was 01:00 am, 19 May 2006.

Given this evidence which does not show exactly at what time Samuel Banane died, and considering the time span between the shooting and the time the witnesses saw the motionless body, the number and nature of fatal wounds as well as areas of the body affected, it appears to this court that Samuel Banane's death was concomitant with the injuries inflicted as a result of the multiple gunshots. The first plaintiff cannot therefore successfully claim under the head.

Evidence has been led to the effect that Paul Banane, a sixty-five year old electrician of Quincy Village and plaintiff No 1 herein was the father and next of kin of late Samuel Banane. He is the administrator of the estate of the deceased and has also sued the defendant in his personal capacity as plaintiff No 2. Mrs Annette Monthy, plaintiff No 3 is the half sister of the deceased while Lisette Banane, plaintiff No 4 and Sheila Banane, plaintiff No. 5, are sisters to the deceased. Plaintiff No 6, Daniel Banane is the brother of the deceased.

The deceased was a plumber whose income could not be readily ascertained since he depended on contracts. He was living with his father at Quincy Village and used to contribute an average of R1,000 to R1,200 every month towards food and lodging. In cross-examination, Paul Banane clarified that the money was not only for the deceased's food but for him as well. The deceased was 26 years old and a bachelor. On seeing the body of his only son in the mortuary, Paul Banane felt so stressed, devastated and desperate and that he cries whenever he thinks of him or goes to his room and finds that he is not there. His health has since steadily deteriorated with no improvement to his condition of diabetes and high blood pressure. That Samuel Banane's death has also affected the whole family, brothers and sisters who miss him especially whenever they have family reunions.

As already indicated, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs are sisters and brothers of the deceased and testified that they suffered distress, anguish, sorrow and depression whereupon they claimed a sum of R30,000 each. They are all adults and live independently and were therefore not dependent on the deceased. Anette Monthy suffered shock and mental pain. The deceased used to help her in a number of ways when she was not working. Lisette Monthy testified that she was terrified with the news of the deceased whom she looked at as the pillar of their father's home and considered him as a close brother. Daniel Banane and Sheila Hoareau stated that they were on very good terms with deceased with whom they had lived for some

time. This court is satisfied that the plaintiffs have demonstrated that the death of Samuel Banane adversely affected them and they suffered grief.

Having once again taken note of the above factors and awards in the cited authorities, in light of the fact that the sums claimed were arrived at in September 2006 when the case was filed, after the incident taking place in May 2006, I hereby make the following awards:

- 2nd plaintiff - R35,000.
- Each one of the brothers and sisters (3rd to 6th plaintiff) – R10,000
- 2<sup>ND</sup> Plaintiff (Economic loss) -R30,000
- Special damages for coffin, flowers, church service, clothing, the wake and transportation -R12, 000.

Accordingly, judgment is entered against the defendant in the sum of R117,000 with interest and costs.