IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Section 5C of the High Court of the Provisions (Special Provinces) Act No. 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC / APPEAL / 52 / 2017

SC / HCCA / LA / 332 / 2016

WP / HCCA / COL / 84 / 2015 / LA

D.C (Colombo): 01124 / 2013 / DMR

Chandradeepa Shanthapriya Perera Abeysinghe,
No. 1084B, Liyanagoda,
Hokandara Road,
Pannipitiya.

PLAINTIFF

Vs

1. University of Colombo,
P O Box 1490,
Kumaratunga Munidasa Mawatha,
Colombo 07.

2. Prof. Thilak Hettiarachchi
No. 90, Templers Road,
Mount Lavinia.

3. Prof. Thapani Manel Sulochana Atukorale,
No. 110/8, Kotte Road,
Colombo 08.

DEFENDANTS

AND THEN BETWEEN

Prof. Thapani Manel Sulochana Atukorale,
No. 110/8, Kotte Road,
Colombo 08.

3rd DEFENDANT - PETITIONER

Vs

1. Chandradeepa Shanthapriya Perera Abeysinghe,
No. 1084B, Liyanagoda,
Hokandara Road,
Pannipitiya

PLAINTIFF - RESPONDENT

2. **University of Colombo,**
P O Box 1490,
Kumaratunga Munidasa Mawatha,
Colombo 07.

3. **Prof. Thilak Hettiarachchi**
No. 90, Templers Road,
Mount Lavinia.

1st and 2nd DEFENDANT – RESPONDENTS

AND NOW BETWEEN

Prof. Thapani Manel Sulochana Atukorale,
No. 110/8, Kotte Road,
Colombo 08.

3rd DEFENDANT – PETITIONER – APPELLANT

Vs

4. **Chandradeepa Shanthapriya Perera Abeysinghe,**
No. 1084B, Liyanagoda,
Hokandara Road,
Pannipitiya

PALINTIFF – RESPONDENT – RESPONDENT

5. **University of Colombo,**
P O Box 1490,
Kumaratunga Munidasa Mawatha,
Colombo 07.

6. **Prof. Thilak Hettiarachchi**
No. 90, Templers Road,
Mount Lavinia.

1st and 2nd DEFENDANTS – RESPONDENTS – RESPONDENTS

BEFORE	:	Vijith K. Malalgoda, PC. J P. Padman Surasena, J A. H. M. D. Nawaz, J
COUNSEL	:	Dr. Romesh De Silva, PC with Sugath Caldera for the 3rd Defendant – Petitioner – Appellant. Riad Ameen with Zam Zam Ismail for the 1st and 2nd Defendant – Respondent-Respondents. Anura Meddegoda, PC with Asela Muthumudalige, Isuru Deshapriya and Nadeesha Kannangara for the Plaintiff – Respondent – Respondent.
ARGUED ON	:	**28.06.2023**
DECIDED ON	:	**23.08.2024**

A. H. M. D. Nawaz, J.

1. The Plaintiff-Respondent-Respondent (the "Plaintiff") was a laboratory technician at the University of Colombo (the "1st Defendant"), while the 2nd Defendant-Respondent-Respondent (the "2nd Defendant") was the Vice Chancellor of the said university and the 3rd Defendant-Petitioner-Appellant (the '3rd Defendant") was the head of the Department of Biology and Molecular Biology.

2. The Plaintiff instituted this action against the 1st, 2nd and 3rd Defendants on June 21, 2003 in the District Court of Colombo *inter alia* for a sum of Rs. 5 million as damages caused by the 1st, 2nd and 3rd Defendants by conducting a purported disciplinary inquiry against the Plaintiff.

3. The 3rd Defendant-Petitioner-Appellant (the "3rd Defendant") prior to filing her answer, filed a motion dated February 24, 2014 and brought to the notice of court that-

   a) the plaint does not disclose a cause of action against the 3rd Defendant
   b) the plaint does not conform to the mandatory provisions of the Civil Procedure Code
   c) the plaint does not conform to the imperative provisions regarding the pleadings in defamatory action
   d) there is a misjoinder of parties and causes of action
   e) the cause of action is prescribed before law

f) the plaint does not disclose a cause of action against the 3rd Defendant

4. The said motion had been filed in accordance with the propositions decided in cases such as ***Actalina Fonseka v Fonseka*** [1] and ***Fernando v Standard Chartered Bank***.[2]

5. Since these were questions which the parties wanted the court to examine as preliminary matters of law, the court agreed to have these questions disposed of *in limine.*

6. The learned Additional District Judge of Colombo delivered her order dated June 26, 2015 overruling the aforesaid objections raised by the 3rd Defendant and decided to proceed with the trial.

7. The 3rd Defendant preferred an application for leave to appeal to the High Court of Civil Appeal of the Western Province and by order dated June 07, 2016, the learned Judges of the Civil Appellant High Court of the Western Province refused to grant leave to appeal in the said application.

8. It is from this order dated June 07, 2016 that the 3rd Defendant filed the petition dated July 11, 2016 seeking leave from this court and subsequently this court granted leave to the 3rd Defendant.

[1] (1989) 2 Sri LR 95.

[2] (2011) BLR 242.

9. This court will address the key legal issues, categorized under several headings for clarity, though some of these may overlap. It must be admitted that some of them overlap with each other.

Whether the plaint does not confirm to the imperative provisions regarding the pleading in defamatory actions?

10. The above question proceeds on the basis that the Plaintiff filed this action for defamation. Whilst the 3rd Defendant submitted that the action of the Plaintiff was based on defamation, the Plaintiff asserted that his action was premised on malicious *p*rosecution. The learned High Court Judges who refused leave for the 3rd Defendant also acknowledge that the action is one of defamation. Although the phrase "malicious *p*rosecution" is not used in the plaint, the plaint does speak of "අවමානය, අපහාසය සහ මානසික පීඩාව" (Disgrace, humiliation and mental distress).

11. In the prayer to the plaint damages have been sought for "මානසික, සමාජීය සහ ආර්ථික පාඩුව" (mental, social and economic loss). In the view of the learned High Court Judges, this is an action for malicious *p*rosecution.

12. In my view, the Plaintiff's cause of action cannot be strictly compartmentalized into categories such as malicious prosecution, as

the learned High Court Judges suggested, or defamation, as argued by the 3rd Defendant.

13. If the cause of action as set out in the plaint is for malicious *p*rosecution and nothing else, then the Plaintiff's action must be dismissed if he is unable to prove a prosecution. The following cases establish that the prosecution contemplated in the delict of malicious *p*rosecution must take the form of judicial proceedings. See ***Dissanayake v Gunaratne***[3]***, Donis v Silva***[4]***, Kotelawala v Perera***[5]***, Saravanamuttu v Kanagasabai***[6] ***and Hathurusinghe v Kudaduraya***[7]***.***

14. Moreover, **McKerron** in his **Treatise of Law of Delict**[8] sets out that in order to succeed in an action for malicious prosecution, the Plaintiff must show that,

    a. the defendant instituted or instigated the proceedings;

    b. the defendant acted without reasonable and probable cause

    c. the defendant was actuated by malice; and

    d. the proceedings terminated in his favour.

15. McKerron also states in a footnote to this passage that in principle, the Plaintiff must also show either that the proceedings in question

[3] (1938) 11 CLW 12.

[4] (1913) 16 NLR 154

[5] (1936) 39 NLR 10

[6] (1942) 43 NLR 357

[7] (1954) 56 NLR 60

[8] 7th edition, (1971) *fn* 14 at p. 261.

occasioned him patrimonial loss, or that they were calculated to injure his reputation.

16. Under these circumstances, the inclusion of reputational damage in the plaint does not, by itself, transform the action into a defamation suit.

17. In ***Silva v Silva*** [9] it was laid down that in a case of malicious *p*rosecution the onus of proof is on the Plaintiff. He must prove on a preponderance of evidence or on a balance of probabilities,

    I. there was a prosecution on a charge that was false.

    II. such prosecution was instituted maliciously or with *animus injuriandi* and not with a view to vindicating public justice.

    III. there was want of reasonable or probable cause for such action.

    IV. the prosecution terminated in favour of the Plaintiff as against the complainant.

18. Thus, in our precedents on malicious prosecution, it is well established that the perceived notion of ensuring public justice has been emphasized. All this shows quite unmistakably that the delict of malicious *p*rosecution embodies within it the institution of legal proceedings in court.

19. This has to be contrasted with the disciplinary inquiry that was conducted against the Plaintiff in the case. These were domestic

[9] (2002) 2 Sri LR 29.

inquiry proceedings that were initiated at the instance of the 3rd Defendant and these proceedings cannot attract the classification of malicious prosecution. In my view, this case is entirely different. The plaint does not set out a cause of action based on malicious prosecution; and nowhere does it mention or even imply a prosecution.

20. The Plaintiff's cause of action centers on being subjected to a purported disciplinary inquiry, which allegedly led to mental, social, and economic loss, attributed to the malicious, negligent, and reckless actions of the 1st, 2nd, and 3rd Defendants.

21. In ***Alwis v Ahangama***[10] Mark Fernando., J refers to a passage where one of the categories of wrongs for which *actio injuriarum* provides a remedy is described as 'abuse of legal procedure.

22. Under that category, McKerron first addresses 'malicious prosecution' and then other malicious proceedings. McKerron's inclusion of 'other malicious proceedings' within the scope of *actio injuriarum* as a civil remedy confirms that *injuria* is not limited to court prosecutions but extends to all types of 'proceedings.

23. The head of liability of "Abuse of legal procedure" establishes that an act may amount to "*an injuria*" even though no court "proceedings" have taken place or are in contemplation.

[10] (2000) 3 Sri LR 226 at p. 235.

24. As Mark Fernando J pointed out in ***Alwis v Ahangama***[11],

> "*Attempts to confine the wrong to malicious prosecution as understood in the English Law have been rejected both in South Africa and in Sri Lanka*. Watermeyer, J. said in ***Collins v. Minnaar***[12],
>
> "*Now, whatever the English law may be about malicious prosecution, we must be guided by the principles of the Roman-Dutch law, and in Roman-Dutch law what is complained of is an injury...*"

25. In ***Podi Singho v Appuhamy***[13] de Sampayo AJ said:

> "*Besides, the Roman-Dutch action for injury is quite different from the English action for malicious prosecution, and I think it is sufficient if the defendant set the authorities in motion to the detriment of the plaintiff*".

26. ***Wijegunatilleke v. Joni Appu***[14], was a case in which the trial Judge had called the action one for malicious prosecution, and regarded it as identical with the action of that name as known to the English law.

Schneider, A.J, observed:

> "*The correct view of our law is that expressed by Bonser.CJ, in* ***Haide Hangidia v. Abraham Hamy*** (an unreported 1898 decision] ..."
>
> *He then brought an action against the defendant in the form of an English action for malicious prosecution. I asked what authority there is for such an action, and none was produced. It is clear that an action on this case for injury lies. That is a form of action free from the technicalities of the English form of action*".

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[11] See *fn* 10 at p. 236.
[12] (1931) CPD 12, 14.
[13] (1904) 3 Bal 145.
[14] (1920) 22 NLR 231.

27. Dr.U.L.A. Majeed in his "***A Treatise on the Law of Delict (Tort)***" recognizes a wider category of civil action against public authorities[15]. The learned author observes;

> "*.... But it is not the breach of duty alone which gives rise to the cause of action, but "an injury" is the suffering of pecuniary loss. The current of the decisions is against this view, which finds no support from general principles. On general principles it is to express but a truism to say that the foundation of an action for damage is not that damage has been caused, but that there has been a violation of a private right resulting in pecuniary or moral damage. Injuria sine damno gives a cause of action, while damnum sine injuria does not.....*"

28. Therefore, *the actio injuriarum is* much wider in its scope than the malicious prosecution known to the English law. The action lies whenever a defendant has acted *dolo malo* to the detriment of the defendant. The action stands or falls on proof of malice and the plaint formulated by the Plaintiff fulfills the requirements for an *injuria.*

Time-Bar

29. Related to the issue of law is the question of whether the action is time-barred, as raised by the 3rd Defendant, citing Section 9 of the Prescription Ordinance. The amended charge sheet was served to the Plaintiff on 24.07.2006, and the domestic inquiry concluded on 29.07.2009. However, I do not consider these dates as the starting point for the two-year limitation period. The University Services Appeals Board (USAB) delivered its final decision exonerating the Plaintiff on 29.01.2013. Subsequently, the charges were quashed on that date, and the plaint was filed on June 21, 2013.

[15] See p 14

30. As the learned High Court judges have determined, this is the point from which the two-year time bar for the delict of *injuria* must be calculated. It was on this date that the Plaintiff became aware that the disciplinary proceedings against him were initiated without reasonable and probable cause.

31. I therefore hold that the Plaintiff's action is maintainable, being an action in respect of an *injuria* allegedly committed jointly and severally by the Defendants by (a) maliciously and (b) without reasonable and probable cause, (c) by the initiation of a complaint against the Plaintiff, (d) which resulted in disciplinary proceedings against the Plaintiff and the alleged damage to his reputation and social and economic deprivations.

Misjoinder of Parties and Cause of Action

32. The Plaintiff has pleaded a joint and several cause of action against the three Defendants, stemming from the same disciplinary proceedings that the Plaintiff alleges were maliciously instituted against him. An effective adjudication on the alleged joint and several liability can only occur if the three Defendants are tried together. Allowing a suit to grow out of another suit would be an abuse of process, and the ends of justice are best served by avoiding a multiplicity of suits. As Prasanna Jayawardena, PC. J pertinently observed in ***Seylan Bank PLC v. New Lanka Merchants Marketing (Pvt) Ltd and Others***–

> "*A Court should keep in mind the desirability of reducing the multiplicity of litigation……*"[16]

33. In the circumstances, the preliminary objections raised by the 3rd Defendant on the maintainability of the Plaintiff's action cannot be sustained and we proceed to affirm the orders made by the Civil

[16] SC Appeal 198/2014 at p24.

Appellate Court dated 7th June 2016 and the District Court 26th June 2015. The questions of law raised before this Court are answered in favour of the Plaintiff.

34. Accordingly, the appeal of the 3rd Defendant is dismissed and the learned District Judge of Colombo is directed to hear and conclude the original court action as expeditiously as possible.

Judge of the Supreme Court

V. K. Malalgoda, PC. J

I agree, Judge of the Supreme Court

P. Padman Surasena, J

I agree, Judge of the Supreme Court