

# FROM THE CODE NOIR TO ENTRENCHED RIGHTS

*Tony Angelo\**

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*The celebration of the service of a longstanding and much valued colleague is here taken as the opportunity to comment briefly on the employment law of Seychelles and to indicate, by reference to a few key cases, that the employment decisions reflect, perhaps unsurprisingly, significant features of contemporary Seychelles society. This article presents an historical overview of the labour law of Seychelles,<sup>1</sup> followed by some case studies and a brief conclusion.*

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## **I SEYCHELLES – BACKGROUND TO THE LABOUR LAW**

"My grandfather was a slave and I am proud of it".

When a friend tells you that it provides a timely reality check for most people in the 21st century.

During the 18th century there was regular skirmishing between the French and British over use of the islands that are now within the state of Seychelles. Particularly the island of Mahé was a point of rivalry.<sup>2</sup>

It appears that the first civilian settlement in Seychelles was in the 1870s and was from Mauritius, which was then a French colony. It consisted of about 28 people – white settlers and their slaves. The colony of Mauritius was ceded to the British by the French by the Act of Capitulation of 1810. That Capitulation provided that Mauritius would be able to keep its laws, religions and customs. At that time the population in Seychelles was approximately 200 whites and 2,000 blacks i.e. essentially white owners and their slaves.<sup>3</sup>

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1 For general background to the Seychelles legal system and comment on several areas of substantive law the current text is Mathilda Twomey *Legal Metissage in a Micro-Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles* (2017) 6 *Comparative Law Journal of the Pacific*: Collection 'Ex Professo'. Historical information from the British colonial viewpoint can be found in Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens and Sons, London, 1966) at 731–733.

2 See generally Twomey, above n 1, at 6–7, nn 24 and 27.

3 See Twomey, above n 1, at 12.

At 1810, Mauritius had two significant bodies of law relating to labour matters. The first was the Code Noir<sup>4</sup> which governed the conditions under which members of the slave community lived. The other, for non-slaves, was the Code Napoleon which had been extended to Mauritius by France in 1808.

The employment provisions in the Code Napoleon were essentially arts 1779 and 1780. These provisions appear in Book III of the Code Napoleon and deal with the contract of hire. Article 1708 says there are two types of hiring:<sup>5</sup> that of things and that of work. Of the 92 articles on hire only three related directly to labour contracts; there are a few which deal with entrepreneurs. Most of the 92 articles relate to the hire of things.

Article 1779 provided that there are three main types of hire of works and services. The important type for the purpose of this article is: the hire of workers who enter the service of another person.<sup>6</sup> Article 1780 provided that a person might only undertake to render services for a certain time or for a specific enterprise.

During the course of the 19th century the slaves in Mauritius were freed and that change applied equally to slaves in Seychelles. This effect was officially achieved by 1838. The labour needs of Mauritius were by then beginning to be filled by the bringing of indentured labourers from India. That system involved thousands of people and had a significant immigration aspect to it. The labour laws of Mauritius as they developed reflected that immigration aspect. The Labour Ordinance of 1878 consolidated and amended the existing law and the 287 sections (covering approximately 120 pages of legislation) of the Ordinance provided the labour law for Mauritius. This statute was still in force in 1903 when Seychelles became a separate British colony. Seychelles inherited the Mauritius Labour Ordinance<sup>7</sup> and also the Code Napoleon. The Code Napoleon provisions remain in Seychelles as enacted in France in 1804 and are found in the English language Civil Code of Seychelles Ordinance of 1975.

After 1903 the labour law of Seychelles developed separately from that of Mauritius. The Mauritius phenomenon of Indian indentured labour was not a feature of the Seychelles colony. The labour law of Seychelles therefore developed to reflect an environment where the workers in the community were all local. The principal Seychelles legislation was the Employment of Servants

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4 The Code Noir had its origins in France in 1685 and ceased to be effective in France in 1848 with the abolition of slavery. The Code Noir was brief, and dealt in 60 clauses with the life and death of slaves. A useful commentary is Louis Sala-Molins *Le Code Noir* (University Press of France, Paris, 1987).

5 "Il y a deux sortes de contrats de louage: celui des choses, et celui d'ouvrage."

6 "Le louage des gens de travail qui s'engagent au service de quelqu'un."

7 Repealed in Seychelles by the Employment of Servants Ordinance (25 of 1945).

Ordinance (25 of 1945). That statute was supported by the Employment of Women (Restriction) Ordinance (18 of 1936) and the Employment of Young Persons and Children Ordinance (12 of 1932).

Seychelles became an independent state in 1976. The then existing labour law continued and has been subject to substantial amendment in many respects since 1976. First of all there is the Constitution<sup>8</sup> with entrenched rights, including the right to work in art 35. There is also specific provision in art 30 for the rights of working mothers to special protections, paid leave and special working conditions. The Constitution is also of interest for its inclusion in art 40 of, among other things, a duty to work:

40. It shall be the duty of every citizen of Seychelles –

...

(c) to work conscientiously in a chosen profession, occupation or trade ...

The current basic employment law is found in the Employment Act 1995. It is very much a compendium of employment law and establishes an Employment Tribunal and an exclusive set of remedies in the employment arena. The Civil Code provisions continue but the Supreme Court has held that the Employment Act supersedes the provisions in all other legislation. This position is reflected in a proposed amendment to art 1780 of the Civil Code which reads "[t]he hire of workers is governed by the Employment Act".<sup>9</sup> The work conditions for persons employed in the public service and grievances in relation to those conditions are heard by a Public Service Appeal Board which is a constitutional body set up in arts 145–150 of the Constitution.

## II CASES

### A R v Ah-Lime

In this Part some key labour cases are presented to provide insights into the operation of the legal system of Seychelles and to indicate trends that are not restricted to labour law.

*R v Ah-Lime* appears to be the first reported Seychelles labour law case.<sup>10</sup> It is reported in the *Digest of Ruling Decisions by the Courts of Seychelles from 1903 to 1933*<sup>11</sup> and is digested under the heading "Master and Servant".

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8 The first Constitution of the Independent Seychelles was of 1976. The current Constitution of the Republic of Seychelles is of 1993.

9 Civil Code of Seychelles Bill 2018 (Bill 13 of 2018).

10 *R v Ah-Lime* Cr S 116/1915.

11 Paget J Bourke *A Digest of the Ruling Decisions of the Supreme Court of Seychelles from 1903 to 1993 and the Reported Cases on appeal therefrom to His Majesty's Privy Council from 1870 to 1902* (Government

The *Digest* note for the case indicates that the Chief Justice held:<sup>12</sup>

When the doing of an act is absolutely forbidden by Statute, under a penalty, apart from any question of *mens rea*, the master is criminally liable for the act of his servant acting within the scope of his employment. There is an exception when the master has expressly forbidden the servant to do the act.

The prosecution of the employer for the act of the employee was under s 3 of the Sale of Foodstuffs Ordinance 15 of 1914. Relevant precedents cited in the judgment were *Hennen v Southern Countries Dairies Co Ltd*,<sup>13</sup> *Brown v Foot*,<sup>14</sup> and *Kearley v Tonge*.<sup>15</sup> *R v Ah-Lime*, *Hennen v Southern Countries Dairies Co Ltd*, *Brown v Foot* and *Kearley v Tonge* all related to the adulteration of food (milk or butter) by an employee.

Further cases in the field of vicarious liability of an employer for the acts of an employee include a case of assault by police officers.<sup>16</sup> In that case, police officers seriously injured the plaintiff. The plaintiff sued not only the policemen concerned but also their employer. It was held "[t]he actions of employees, such as police officers, if done contrary to express instructions of their employer, do not render the employer liable."<sup>17</sup>

More specifically, it was stated that:<sup>18</sup>

Although the first three Defendants were in service or employment as police officers during the relevant period, the act of "causing grievous bodily harm" to the Plaintiff or to anyone for that matter, can no way be said to form part of their duty nor was that act incidental to the service or employment or performance of their duties as police officers in maintenance of law and order in the country.

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Press, Seychelles, 1934). It was compiled by Paget J Bourke who was at one time legal advisor and Crown Prosecutor in Seychelles.

12 At 5, entry 10.

13 *Hennen v Southern Countries Dairies Co Ltd* [1902] 2 KB 1.

14 *Brown v Foot* (1892) 61 LJMC 110.

15 *Kearley v Tonge* (1891) 60 LJMC 159. A judgment that was later discredited: see *Halsbury's Laws of England* (3rd ed, Butterworths, London, 1956) vol 17 Food at 485(f).

16 *Francourt v Didon* (2006) SLR 186 (SC).

17 At 195.

18 At 194.

A somewhat similar situation arose in the case of *Banane v Government of Seychelles*.<sup>19</sup> In that case, an off-duty National Guard killed a former National Guard with an AK-47 rifle which he had acquired from the National Guard Guardroom minutes before the killing. The Court held that:<sup>20</sup>

... 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 [the deceased].

...

Merely stating that the [defendant] 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 ...

A case of non-liability of an employer for loss to an employee which occurred in the work premises is the case of *Constance v Leguire*.<sup>21</sup> The plaintiff was a cleaner at a hotel and claimed she was sexually harassed by a hotel guest. The plaintiff reported the matter to the hotel management. The Court held that:<sup>22</sup>

In the normal circumstances an employer has a duty of care to provide its employee with a working environment which is free from sexual harassment. This duty must be viewed in relation to the type of work in the prevailing physical environment.

...

[The guest] was not an employee, agent or prepose of the employer ... and the latter cannot be held vicariously liable for the action of [the guest].

The case against the employer was therefore dismissed; judgment was given against the hotel guest.

## **B Dora v The Curator of Vacant Estates**

In *Dora v Curator of Vacant Estates*,<sup>23</sup> the plaintiff was the *concubine*<sup>24</sup> of the deceased (represented in the case by the Curator of Vacant Estates) and also worked for him for three years as a maid in his house and as an assistant in his shop. The deceased had not paid her for her work and

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19 *Banane v Government of Seychelles* (2011) SLR 271 (SC).

20 At 273.

21 *Constance v Leguire* (2012) SLR 129 (SC).

22 At 133–134.

23 *Dora v Curator of Vacant Estates* (1963) SLR 66 (SC).

24 The translation of this French term is "de facto partner".

had died intestate. On application for payment of remuneration out of the estate, the Court applied principles relating to unjust enrichment. The Court followed Mauritius precedent and awarded Ms Dora the equivalent of 12 months salary as a domestic servant.

A similar situation arose in the case of *Dingwall v Weldsmith*.<sup>25</sup> The parties were each married to other persons at the time they entered into their de facto relationship. When the breakdown of the de facto relationship occurred after six years, the plaintiff (the woman in this instance) claimed remuneration for the domestic services she had rendered to the defendant partner during the course of their relationship. The Court held that there was the possibility in such a case of a claim for unjust enrichment but that on the facts the plaintiff had been advantaged rather than disadvantaged by her participation in the relationship; the plaintiff's claim was dismissed.

Another case to mention in this context is *Esparon v Monthy*, in which the Court stated that:<sup>26</sup>

This is the case of an unmarried couple who separated after fifteen years of cohabitation and the female cohabitee is claiming to be entitled to a share in the properties purchased during the cohabitation. I am fully satisfied that both of them pooled their resources, their savings, their efforts and their labours together in order (1) to erect and to run a shop, and (2) to build and equip a home...

...

It is crystal clear that without the substantial contribution of plaintiff in the running of the shop, defendant would not have been able to see better days again, after the collapse of his commerce and his marriage. It is equally clear that the powers conferred upon the Court in relation to the division of properties of married couples on divorce cannot apply here and accordingly the court seems to have no means to make an order on the basis of a fair and reasonable division of the property.

In the result, the Court awarded a sum which was assessed as being the woman's share towards the construction and running of the shop and house. This is not to indicate that there is perfect equality in respect of married parties. In the case of *Etienne v Constance*,<sup>27</sup> the Court made it clear that "the fact that a married woman devotes herself to the household work and thus helps her husband to save money with which he acquires property does not make that married woman any share in the property thus acquired".<sup>28</sup>

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<sup>25</sup> *Dingwall v Weldsmith* (1967) SLR 47 (SC).

<sup>26</sup> *Esparon v Monthy* (1986) SLR 124 (SC) at 126–127.

<sup>27</sup> *Etienne v Constance* (1977) SLR 233 (SC).

<sup>28</sup> At 240.

### **C Rosette v Union Lighteridge Company Ltd**

*Rosette v Union Lighteridge Company Ltd* is the leading case<sup>29</sup> on the role of the Employment Act 1990 relative to other legislation. It is a decision of the Court of Appeal of 18 June 1995. The defendant had terminated the plaintiff's employment. The plaintiff lodged a grievance under the Employment Act and was awarded compensation in accordance with the provisions of that Act. The plaintiff then brought an action before the Supreme Court for damages under the general law.

On appeal, the Court of Appeal had to consider whether the Employment Act<sup>30</sup> provided remedies in relation to employment contracts which were substitutional or additional i.e. did the statutory rights for compensation co-exist with the right to damages under the Civil Code? It was held that the Employment Act was a unique statute and made "comprehensive provision in regard to contracts of employment".<sup>31</sup> It was held in the result that:<sup>32</sup>

The whole tenor of the Act is fully to define the rights and liabilities of parties to a contract of employment upon termination of such contract in the provisions of the Act without recourse to the provisions of the Civil Code, the common law or any other law.

The Court of Appeal held that once compensation had been awarded under the Employment Act no further relief was available. Wrongful termination of an employment contract was held to be a breach of contract, not a delict. However, if a delict were committed in the course of the employment that delict would give rise to a separate action but would not arise as an employment matter.

### **D Nolin v Attorney-General**

The subject of the Court of Appeal decision of *Nolin v Attorney-General*<sup>33</sup> was the role of the Constitution in employment matters. The dispute arose out of termination of a contract of employment; the employee was paid compensation but was not reinstated. She then went to the Constitutional Court which ruled that the process followed under the Employment Act 1990 was not unconstitutional. On appeal from that decision the Court of Appeal held: (1) that art 35 of the Constitution recognised the right to work under just and favourable conditions, and that that right implied the freedom to practise the profession or engage in the trade business or economic activities of one's own choice; (2) that the right under art 35 did not mean that an unemployed person had a right to a job; (3) that the right under art 35 includes the freedom to lawfully end the

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29 *Rosette v Union Lighteridge Company Ltd* (1995) SCAR 2 (CA).

30 The predecessor of the current Employment Act 1995.

31 *Rosette*, above n 29, at [6].

32 At [12].

33 *Nolin v Attorney-General* (1996-1997) SCAR 127 (SC).

employer/employee relationship; and (4) that employers are not obliged to reinstate employees whose contracts are terminated unless there is a statute which imposes that obligation. The Court stated:<sup>34</sup>

Although the right to work is not capable of exact definition, the underlying principle of the right is freedom. A passage cited with approval in *Larkin v Long* [1915] AC 814 and taken from the essay of Sir W Erle on *Trade Unions* (p 12) encapsulates the essence of that right. It stated:

Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every person is subject to the correlative duty arising therefrom and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.

Another reinstatement case heard in the Court of Appeal was that of *Rabat v Government of Seychelles*.<sup>35</sup> The plaintiff was employed as a public servant in the Ministry of Health. His employment had been terminated wrongfully and the Ministry of Health was ordered to reinstate him. The Ministry had already filled the plaintiff's post but offered him another job on the original salary. The Court of Appeal held that an order that a person be reinstated as a mortuary assistant is not complied with by engaging that person as a medical porter. However where the employer has acted prudently in the circumstances, the employer cannot be held liable in delict.

In considering whether the failure to reinstate the employee in his original position amounted to fault under the Civil Code, the Court said it was not sufficient to show that there had been a failure to comply with the reinstatement order of the Public Service Appeal Board:<sup>36</sup>

It is not sufficient to prove that there had been an omission to comply with the order of the Board. [The appellant] must go further to show that the omission was imprudent in the special circumstances of the case. Seen in this light, the relevance of the trial Judge's consideration of the prudence of the respondent's conduct becomes evident. "Practical difficulties" and other "exigencies" ... became relevant factors to consider.

## ***E Chio v Tave***

Finally, beyond the public service and local private sector there is another substantial body of workers whose presence is indicated by the case of *Chio v Tave*.<sup>37</sup>

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34 At [9].

35 *Rabat v Government of Seychelles* (2002) SCAR 17 (CA).

36 At [11].

37 *Chio v Tave* (2011) SLR 157 (SC).

There are many hundreds of guest workers in Seychelles. Hundreds are in the construction industry. The other important group of guest workers are those in the service sector in the tourist industry. The rights of the guest workers are strictly controlled, not least because of their limited immigration status.<sup>38</sup>

The parties in *Chio v Tave* were in Seychelles on Gainful Occupation Permits (GOPs). He was a wine master and his wife was a dependant. The husband's employment had been terminated by his employer on 21 December 2005; the Ministry of Foreign Affairs therefore ordered them to leave and provided them tickets back to the Philippines. The husband lodged a grievance with the Department of Employment and applied to stay until his employment grievance had been dealt with. The couple were forcefully expelled on 12 January 2006. On the application of the workers to have the deportation decision quashed the Court held that:<sup>39</sup>

If an employer terminates the contract of employment of a non-Seychellois worker during the period that he had been given a GOP at the request of that employer to reside and work in Seychelles, at least that worker should be given the right and the opportunity to take up his grievance to the appropriate body. It is obvious that if that course of action is not followed it would defeat the whole purpose of natural justice. Employers should not be allowed to throw out of this country a non-Seychelles worker without affording that worker any possibility to challenge the righteousness of the decision.

The Court issued a writ of certiorari quashing the decision of the Government authorities and issued a writ of mandamus to compel the respondent to hear the petitioner's appeal.<sup>40</sup>

### **III CONCLUSION**

The progression of employment law in Seychelles has been from a relationship of owner and slave, to master and servant, to employer and employee, and from dealing with the exploitation of objects to the hire of services and then to something more in the nature of a sale transaction.

As the cases discussed indicate the issue of vicarious liability is a matter of concern, particularly in relation to the activities of the police and staff in the hospitals. The liability of the Government in

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38 The population of Seychelles in 2017 was 94,000. There were at the same time approximately 300,000 tourists per year. Also, there were 20,794 non-Seychelles workers as at August 2017. Some of those would be professional business people but the bulk, which is a substantial proportion of the Seychelles labour force, were on gainful occupation permits (GOPs). See Immigration Civil Status "Gainful Occupation Permit" <[www.ics.gov.sc](http://www.ics.gov.sc)>; and *Seychelles in Figures: 2017 Edition* (National Bureau of Statistics, November 2017).

39 *Chio*, above n 37, at 173.

40 This is consistent with s 67 of the Employment Act which states: "[n]on Seychellois workers, not exempt from the provisions of this Act, shall enjoy the same terms and conditions of employment as are applicable to Seychellois workers but may be given such additional benefits and privileges as the competent officer may authorise."

particular is acknowledged but the aggrieved often have trouble obtaining relief, not least because of the statutory limitation on the bringing of cases against the government.<sup>41</sup>

The cases involving the rights of de facto partners and spouses at the termination of the domestic relationship exemplify a serious social difficulty<sup>42</sup> not addressed by the current legal system. Only married couples have property rights on the dissolution of the relationship. Those in de facto relationships have at best a right to some relief under the general rules relating to unjust enrichment, arguing that one party is the employee of the other does not resolve the matter.

The transition over the nearly two centuries of Seychelles employment law is well marked by the fact that in the beginning, the workers were property and had no rights while in the modern republic, workers have entrenched rights set out in the Constitution and the special protections in modern legislation. As in the other areas, the Employment Act and the Constitution continue to be a prime area of exploration by litigants in the courts and an area of continuing development as the full nature of the entrenched rights in the Constitution are established.

Finally, beyond the public service and local private sector there are the workers whose presence is indicated by the case of *Chio v Tave*.

These sets of cases in the employment law field provide insights not only into the employment law of Seychelles but also cast light on the broader constitutional, cultural and social context in Seychelles.

Go Gordon! Celebrate.

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41 The Public Officers (Protection) Act 1976 defines "public officer" as a person so described in the Constitution. In particular the Act prevented claims for liability of public officers unless the "the action is commenced not later than six months after the claim arose". This limitation period was extended to five years by the Public Officers Protection (Amendment) 2017 (Act 2 of 2017). Further, by virtue of s 4, if the public officer acted in the execution of their office and "upon reasonable and probable cause" then even on proof of the wrong a plaintiff "is not entitled to more than nominal damages or to any costs of the action". This is a serious restriction on actions against the Government.

42 In Seychelles the majority of those in stable domestic relationships are unmarried. For comment see Twomey, above n 1, at 65