

Lefevre v Chung-Faye

(2013) SLR 607

Domah, Fernando, Msoffe JJA

6 December 2013

SCA/MA 8/2013

Counsel P Pardiwalla and J Bonte for the first appellant
 W Herminie for the second appellant

F Ally for the respondent

The judgment of the Court was delivered by

DOMAH JA

[1] A preliminary point has arisen prior to the proper hearing of the above two appeals which stand consolidated. We are called upon to determine whether under r 31(2) of the Court of Appeal Rules this Court should allow an application made for the admission of fresh evidence.

[2] It is the case of Mr Pardiwalla for the appellants that the facts of the case warrant the exercise of this Court's powers to do so. Mr Ally for the respondent in the two cases is of a different view and has objected to the application.

[3] Both parties have referred to the law and the principles that apply for the admission of fresh evidence for the purposes of appellate proceedings.

[4] Mr Ally's first argument has been that the affidavit which triggers this application has been sworn by a person who is not a party to the case and who has no personal knowledge of the facts of the case so that the procedural flaw is fatal to the application. He referred to the authority of *Zalazina v Zoobert* (2013) SLR.

[5] Twomey JA, in the case, with whom MacGregor PCA and Fernando JA agreed, decided that a witness, in an affidavit sworn by her pursuant to the Seychelles Code of Civil Procedure is "precluded from swearing an oath and making other statements regarding matters of which she has no personal knowledge and cannot prove." The comment related to facts proper to that case. But it was never meant to restrict the application of s 170 of the Seychelles Code of Civil Procedure in any way. The section reads:

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory application on which statements as to his belief, with the grounds thereof may be admitted.

[6] Counsel is correct in his submission that the content of affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. However, the ratio of *Zalazina v Zoobert* should not be carried to the extreme. A party in an affidavit may not be precluded from stating facts which are undisputed, or facts which are objectively ascertainable, or express beliefs which he or she holds, on good advice received, based on specified facts which have come to his or her knowledge.

[7] In this particular case, the deponent is the mother of the appellant who states: that she has the authorization of the daughter to swear the affidavit; that her daughter is abroad; that she has been

made aware of the fact that the Judge made comments on a particular document (Exhibit 10 dated 13 September); that the second appellant moved to undertake a forensic examination of the document; and that a report has been drawn up following that examination which the appellants wish to produce. There is nothing to suggest that she has no personal knowledge of the facts that she has averred. If the respondents doubted those facts, it was open to them to put in a counter-affidavit to say the contrary.

[8] Mr Pardiwalla has submitted that the person who has sworn the affidavit has the necessary power of attorney to do so; she is the mother of the plaintiff who has been put into the picture of certain facts in the pending case of her daughter who is abroad and who authorized her to swear the affidavit on her behalf. The deponent is only affirming as to a number of objective facts and which cannot be disputed.

[9] We hold, for the reasons advanced by Mr Padiwalla, that the affidavit is admissible subject to whatever weight may be given to the content depending upon whether the respondent will accept or deny, if the need arises, by a counter-affidavit.

[10] Now on the question of the admissibility of fresh evidence. We have looked at the purport of the evidence which the applicants are intending to adduce. The purport is to produce a copy of the forensic report which has been prepared to show that “the judge was wrong to have carried out his own examination of Exhibit 10 without the benefit of expert evaluation” relating to an issue on which there was no address by counsel.

[11] As can be seen, the applicants are intending to bring fresh evidence to prove a negative fact. The negative fact is that the Judge

did not have the benefit of an expert opinion when he made certain adverse comments surrounding the document. There are two reasons we would give for declining the application of the appellants. The first is that one does not need fresh evidence to prove a negative averment. One needs fresh evidence to make a positive averment. For example, if the Judge had come to the conclusion that the paper was not fake, then the need would have arisen to show that the paper was fake by fresh evidence. But, as it is, the Judge has commented that there has been a fraudulent use of the document. We do not need fresh evidence to show an omission: that is, he did not need to have the benefit of expert advice for that. If he was not competent to do it, he was not. It would have been otherwise if, for example, the Judge had ruled that the document was not a forgery. At that time, genuine fresh evidence would have been needed to show that it was a forgery.

[12] As rightly submitted by both counsel, the principles along which fresh evidence may be admitted are found in *Ladd v Marshall* [1954] 1 WLR 1489 namely that:

- (a) the evidence could not have been obtained with reasonable diligence for use at the hearing in the lower court;
- (b) the evidence would probably have an important influence on the result; and
- (c) the evidence was apparently credible.

We made the decision in *Ladd v Marshall* our own jurisprudence: see *Payet v R* [1966] SCA 21; *Charles v Charles*, Civil Appeal 1/2003.

[13] Second, fresh evidence would be needed where there is a need to add to the weight of the evidence so long as the above

conditions were satisfied. Here what is in issue is not evidence as such but the Judge's appreciation of evidence. The fresh evidence is not likely to have an influence on the outcome. There should be strong grounds for admitting fresh evidence: *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318; *Shaker v Al-bedrawi* [2002] EWCA Civ 1452. We are not satisfied that those strong grounds exist. The principle is that parties should advance their entire case at trial and not seek to make up for their trial deficiencies at the appellate stage in a bid, as it were, to have a "second bite at the cherry." The discretion to admit fresh evidence on an appeal has to be exercised in accordance with that overriding objective: *Evans v Tiger Investments Ltd* [2002] EWCA Civ 161, [2002] 2 BCLC 185.

[14] Whether the Judge reached the right or the wrong conclusion on document 10 dated 13 September can be decided on the existing evidence without the need for fresh evidence.

[15] For that reason we set aside the application.