

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (J.A) , B. Renaud (J.A)]

Civil Appeal SCA 15/2016

(Appeal from Supreme Court Decision CS 105/2015)

Jose Pool

Appellant

Versus

H. Savy Insurance Company

Respondent

Heard: 23 August 2018

Counsel: Mr. France Bonte for the Appellant

Ms. Alexandra Benoiton for the Respondent

Delivered: 31 August 2018

JUDGMENT

F. MacGregor (PCA)

1. This is case of an insurance claim by an Insured individual (Appellant herein) for a motorcar which was apparently stolen and got totally wrecked in the process.
2. The Insured lodged a claim with the Insurance Company, this claim was apparently refused or ignored by the Insurance Company, and hence the Insured filed a Plaint against the Insurance Company, per the insurance policy seeking damages and costs.
3. The Court below dismissed it on the ground that the Plaintiff (now Appellant) had not established his case on a balance of probabilities. The trial Judge based her ruling on there being no evidence on record other than that of the Appellant on whether the Court could rely in favour of the Appellants' contention that Hubert Mothee had

stolen the jeep and driven away. In her judgment, Appellant did not convince her that Hubert Mothee has stolen his jeep and driven away.

4. The Appellant appeals against this judgment on the following grounds;
 - 1- The Learned Judge erred in not giving judgment by default upon the failure of the Defendant to file its defence on date due.
 - 2- The Learned Judge erred in not considering the exhibit i.e. the insurance policy as produced by the Plaintiff
5. This appeal then centres or turns on the question as to why there was not a judgment given by default upon the failure by the Defendant (herein Respondent) to file its defence on date due. A history of the sequence of events and its significance is appropriate from hereon to grasp what transpired between the parties.
6. Following a summons attached to the Plaint, Insurance Policy and a Police Statement duly served on the Defendant, the Insurance Company was to appear to that Plaint for a sitting at 13th January 2016 to answer the said Plaint. The Respondent for reasons never stated failed to appear.
7. The summons had specifically stated “you are summoned to answer the plaint” and “that in default of appearance the case may be heard and judgment given in your absence”.
8. On that failure to appear the Appellant applied for an ex-parte hearing which was set for 20th January 2016; although on the record the case was on 20th January 2016 before the Judge was to set a hearing date.
9. On 20th January 2016 the Respondent then appeared through Counsel. Counsel for the Appellant declared that he had no objection to setting aside the ex-parte Order. The application for setting aside appears not to have materialized although Counsel for Respondent on record says she did file such an application.

10. A date for ex-parte hearing on that very day on the 20th January 2016 was fixed for 3rd May 2016, more then 3 months' time later!! This time lapse gave ample time to the Respondent to file to set aside the *ex-parte* hearing and file its defence. The Respondent in utter disregard to procedure choose not to.
11. On 3rd May 2016, both Counsel for Respondent appeared and instead talked of settlement explorations but yet no application to set aside the *ex-parte* hearing was filed, or intention to defend the case by filling its defence was entered on record.
12. On settlement Counsel is quoted at page 5 of the record as follows:

“Mrs. Burian: My Learned friend and I are trying to explore settlement. I believe there is a strong chance we may be able to come to a middle ground somewhere. I have put some proposals to my client and I tried to contact them before this morning to get feedback, unfortunately it has been a bit difficult. In the circumstances I do not know what my learned friend’s position is.”
13. Counsel also states that she did file application to set aside the *ex parte* hearing, Court declares no application is on file and that Counsel for Defendant was given enough time for application and proceeds to *ex-parte* hearing. At that juncture there is not an iota or hint of Respondent’s Counsel to defend or oppose the plaint.
14. A summary of the Respondent’s conduct then show:

Non-appearance on summons to appear on a fixed date to answer plaint

No pleadings in defence

No conduct of defence

No application to set aside
15. Consequently we consider various Sections of the Civil Code Procedure. (In reference to the Code of Civil Procedure), and its possible application on the Respondents’ said conduct:

“63. *Parties appear on date fixed in summons*

On the day fixed in the summons for the defendant to appear and answer to the claim, the parties shall be in attendance at the Court House in person or by their respective attorneys or agents.

65. *Procedure if defendant does not appear*

If on the day so fixed in the summons when the case is called on the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant, or may adjourn the hearing of the suit ex parte.

66. *Procedure if defendant appears subsequently*

If the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

69. *Setting aside judgment given ex parte*

If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.

75. *Statement of defence contents*

The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.

76. *Statement of defence must be filed in registry*

The statement of defence shall be filed in the registry and shall form part of the record and the defendant shall in addition supply one copy to the plaintiff, or if there be more than one plaintiff, to each plaintiff, unless the court directs otherwise.

16. In particular, failure to submit a Statement of Defence per Section 75 for material facts alleged in the Plaint must be distinctly denied or they will be taken to be admitted.
17. It is well known that a case is made or unmade by the pleadings. Both parties to a suit are bound by their pleadings. It is also trite that whatever is not denied in a plaint is deemed to be the truth.
18. At that juncture faced with such an undefended and implied liability the balance of probabilities is arguably tilted towards the Appellants and when Appellant gives evidence which is unrebutted and contested, the balance is more tilted towards the Appellant. The authorities and precedence in the following cases expound what proof on a balance of probabilities mean. (*Mclver v Power [1998] P.E.I.J No.4, F.H. v McDougall [2008] S.C.J. No. 54, Roseanne Conley v Keel Construction, [2005] NBQB 263, Bhullar v I.C.B.C [2009] BCPC 44, R v Oakes [1986] 1 SCR 103*)
19. The conduct also shows Respondent guilty of laches by allowing so much time and proceedings to go by without exercising his rights of defence or setting aside the ex-parte hearing.

20. I consider in all those particular circumstances, particularly the;
- a) deemed admission as per Section 75 of the Code of Civil Procedure,
 - b) uncontested evidence of the Appellant,
 - c) cumulative implication of Respondents' conduct listed in paragraph 14 of this Judgment,
 - d) and furthermore weighed in with the conduct of latches, there was a balance of probabilities in the Appellants's favour, and so we find in favour for the Appellant on the grounds of appeal raised. Accordingly the appeal is allowed to that extent.
21. On the quantum of damages I consider there was not enough evidence produced to make a finding on it.
22. Whereas the Appellant may have not done enough there because the case was undefended inter-alia and in fact there were attempts to settle but nowhere is there something to say what happened to those settlement explorations nor was there a substantiated amount provided at the lower court.
23. Accordingly we send it back to the Supreme Court for a determination on that issue of Quantum, of which Appellant's Counsel conceded to.

F. MacGregor (PCA)

I concur:. A.Fernando (J.A)

I concur:. B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018