IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (JA) , M. Twomey (JA) F. Robinson (JA)

Civil Appeal SCA 09/2016

(Appeal from Supreme Court Decision 29/2013 from Magistrates Court Decision 215/2011)

John Marengo — Appellants
Rose-Marie-Marengo
Andre Marengo

Versus

Fred Charles Anderson — Respondent

Heard: 25 April 2019
Counsel: Olivier Chang-Leng for the Appellants
Pesi Pardiwalla for the Respondent
Delivered: 03 May 2019

JUDGMENT

M. Twomey (J.A)

[1] This is a second appeal from a case filed in the Magistrates Court between the parties in which the Respondent had claimed that his vehicle had been damaged by contaminated fuel supplied by the Appellant at the petrol station it operated at Anse Royale. It was the finding of the learned magistrate that a delict had been committed by the Appellant in supplying the Respondent contaminated fuel which caused damage to his car. In the event, she ordered the Appellant to pay the Respondent the total sum of SR 49,915 as damages.

[2] The Appellant appealed this decision to the Supreme Court on the grounds that the learned magistrate had erred in her examination of the evidence and the award of damages. The Supreme Court endorsed the findings of the Magistrates Court. It found that that on the

main issues raised, the Magistrate had rightly concluded that the fuel had been purchased from the Appellant, that the same was contaminated with water, and that it had damaged the Respondent's vehicle. It found the appeal devoid of merits and dismissed it.

[3] From this decision the Appellant has now appealed to this Court on the following summarised grounds:

1. The learned appellate judge was wrong in admitting Exhibits 10(a) to 10(c) failing to take into consideration the legal burden of proving that the signatures therein belonged to the plaintiff's employees.

2. The learned appellate judge erred in law in failing to appreciate and give proper consideration to all the evidence which would have indicated that the damage to the Respondent's car was not caused by fuel the Respondent had bought at the service station operated by the Appellant.

3. The learned appellate judge had erred in law in concluding that the Respondent had discharged the burden of proof under Article 1315 of the Civil Code.

[4] We shall deal first with the issue of the admission of signed documentary evidence. It is the submission of the Appellants that they had denied that Exhibit 10 (a), a fuel receipt, had emanated from them and that the learned magistrate despite their objection to its production not only allowed its admission but also allowed the admission of two further related documents. It is their submission that once they had denied that the document contained the signature of their employees the learned trial judge was wrong to admit it without the Respondent proving that the signature was indeed that of the Appellants' employees.

[5] In response, the Respondent has submitted that although the Appellants objected to the production of the receipts they did not extensively cross examine the Respondent on them, so in effect did not object to their production.

[6] It must be stated at the outset that this is not a case in which the handwriting of the maker is being impugned but rather that the handwriting is not recognised by the Appellants. The

proceedings of the case make this clear. In the transcript the following exchange takes place:

> *"Respondent: "On 24/02/2006 I purchased fuel at Anse Royale Petrol Station. The fuel was for 400 Rupees… May I pray to tender the receipt as exhibit?*
>
> *Mr. Changsam (for the Appellants): I have objection, maybe the receipt could be admitted as an item.*
>
> *Court: Admitted receipt and marked as item 1" (verbatim, Page H10 of the transcript of proceedings).*

[7] Later, the First Appellant testified that he could not recognise the signature as being that of his workers and when further questioned by Counsel he states:

> *"That is the phone number on the receipt, it comes from my station. But anyone would print it or make forgery on it…*
>
> *I do not object to the receipt but someone can make the same receipt like that" (verbatim Page H30 of the transcript).*

[8] The items, all fuel receipts, were admitted at this stage as exhibits. In re-examination the First appellant again accepted that the receipt came from his service station but states that the signature on it was not one he recognised as being that of his employees (transcript p. H32).

[9] The Second Appellant also testified that the receipts indeed were theirs but that she did not recognise the signature of the employee. She also stated that no duplicates of receipts were kept. It must be noted that no further evidence was brought with respect to the authenticity of the receipts.

[10] It is our view that it is the Appellants in this case who seem to be alleging a forgery releasing them from any obligation they might owe to the Respondent if indeed the fuel had been sold from his station. In this regard, Article 1315 provides:

"A person who demands the performance of an obligation shall be bound to prove it.

Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation."

[11] It follows from the provisions above that a plaintiff in an action must support his claim by proof (*actori incumbit probatio* – the burden of proof is on the plaintiff). The second limb of article 1315 imposes on the defendant a choice of either simply denying the obligation (in the expectation that the plaintiff will not be able to prove his claim) or countering the claim by disproving it. Hence, once the plaintiff has supported his claim, the burden of proof then shifts back to the defendant who has countered the plaintiff's claim by an exception or explanation (*reus is exipiendo fit actor* - the defendant, by a plea, becomes plaintiff). Hence, throughout a trial, the burden of proof shifts from one party to the other (See *Gopal & Anor v Barclays Bank (Seychelles)* (2013) SLR 553, *Kozhaev v Eden Island Development Company (Seychelles) Ltd* (SCA 35/2013) [2016] SCCA 34).

[12] In the present case therefore, the Respondent's burden of proof was discharged according to the learned magistrate by his testimony, that of his witness and the petrol receipts. When the Appellants countered the claim by stating that the receipts did not emanate from their service station they had to discharge a burden of proof as well – to offer an explanation about the receipts to support their allegation that these were not signed by his employees. They could, for example, have produced the signatures of their employees for comparison or perhaps tendered an explanation as to why the Respondent would want to forge a petrol receipt. In the circumstances this court cannot fault the findings of the learned magistrate or the appellate judge.

[13] In any case, the credibility of the Appellants in respect of the genuineness of the receipts was a matter to be assessed by the trial judge, in this case, the learned magistrate. It is trite that an appellate court will not interfere with a finding of fact by a trial judge unless such findings are perverse. We have no indication that this was the case. The first ground of appeal is therefore devoid of merit and is therefore dismissed.

[14] With regard to the other grounds of appeal, the issue raised concerns the consideration of the evidence by both the learned magistrate and appellate judge. Counsel for the Appellants submitted that they successfully rebutted the Respondent's s evidence. He submitted that the Appellants gave uncontroverted evidence that daily tests were carried out for water contamination of fuel sold and the Respondent was the only consumer to complain.

[15] In this regard we are in the same position as the appellate judge that is, once removed from the trial without the benefit of appreciating the credibility of the witnesses who testified. When a challenge is made to a trial court's finding of facts, it is trite that the appellate court should not interfere with a trial judge's conclusions on primary facts, unless satisfied that the judge was plainly wrong (See *Akbar v R* SCA 5/1998, *Beeharry v R* SCA28/2009, *Searles v Pothin*, *Shree Hari Construction (Pty) Ltd v Boniface & Or* SCA 26/2013) [2016] SCCA 24, *Camille v Morin* (Civil Appeal SCA 12/2016) [2018] SCCA 26).

[16] In the circumstances, we are of the view that the appeal is without merit. It is dismissed with costs.

M. Twomey JA

I concur:. **…….** A.Fernando (J.A)

I concur:. **…….** F. Robinson (J.A)

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Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019