

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 39 (13 August 2021)
SCA 66/2018
(Appeal from CS 06/2018)

Flossy Rita Confait

1st Appellant

Barney Confait

2nd Appellant

(rep. by Ms. Alexandra Madeleine

and

Agnette Port-Louis

1st Respondent

Jacquelin Port-Louis

2nd Respondent

(rep. by Ms. Kelly Louise)

Neutral Citation: *Confait & Anor v Port-Louis & Anor* (SCA 66/2018) [2021] SCCA 39
(Arising in CS 06/2018)
(13 August 2021)

Before: Robinson JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Delictual liability-Damages-whether the award of damages was manifestly harsh and excessive.

A party cannot seek relief outside their pleadings

Heard: 3 August 2021

Delivered: 13 August 2021

ORDER

There is no basis or justification for interference with the award of damages. Therefore, the appeal lacks merit and it is hereby dismissed with costs to the respondents.

JUDGMENT

TIBATEMWA-EKIRIKUBINZA, JA

The Facts

1. The 1st respondent (**Agnette Rita Port-Louis**) is a fiduciary of the co-ownership existing between herself and her siblings in parcel H1437. The 2nd respondent (**Jacquelin Port-Louis**) is the husband of the 1st respondent and owner of a motor vehicle bearing registration number S4701.
2. The 1st appellant (**Flossy Confait**) is the registered owner of parcel H1907 and the 2nd appellant (**Barney Confait**) who is now deceased was the wife of the 1st appellant.
3. In the plaint before the Supreme Court, the respondents averred that at all material times they were neighbors of the appellants who lived in a dwelling house adjacent to but at a higher level than the 1st respondent's property. That during the night of 7th March 2014, the appellants' retaining wall collapsed onto the 1st respondent's dwelling property and the 2nd respondent's vehicle. The respondents further averred that the said wall collapsed as a result of defects in the initial construction of the wall and due to its poor maintenance by the appellants. The respondents furthermore averred that by reason of the fault of the appellants they have suffered loss and damages to their house, its contents and the said vehicle to a tune of SR 734,551.48.
4. In their joint defence, the appellants admitted the fact that the respondents are their neighbours and that they live adjacent to and above the 1st respondent's property. They also admitted that on the night of 7th March 2014 their retaining wall collapsed on the 1st Respondent's dwelling house. However, the appellants denied the fact that the wall collapsed on the 2nd respondent's vehicle.
5. The appellants also denied the claim that the retaining wall collapsed as a result of defects in its initial construction and poor maintenance. They maintained that the wall was at all material times well maintained and that the collapse of the wall occurred as a result of an act of God, specifically bad weather resulting in landslides and the dislodging of boulders, which events were outside their control. The appellants also denied the respondents' prayer for damages and prayed that their plaint be dismissed with costs.

6. The trial Judge, R. Govinden, J, having addressed himself on the law of delict and tort under Article 1382 of the Civil Code of Seychelles, and the evidence before him including the appellants' defence of 'an act of God' or '*force majeure*' found that the heavy rainfall on the night of the 7th March 2014 was one factor that caused the collapse of the retaining wall. However, that this did not constitute the sole and immediate cause for the damage to the respondents' properties. The trial Judge found that the principal and immediate cause for the collapse of the retaining wall was the lack of maintenance by the appellants and the construction of the verandah that had been built four years prior to the collapse. The trial Judge further found that this new development caused additional pressure on the embankment behind the retaining wall. The Judge found that the appellants' defence of force majeure was not proved.
7. The trial Judge then entered judgment in favour of the respondents in the sum of SR 584,051.48 payable by both appellants jointly, with interest in the sum of 4% per annum as from the date of the plaint together with costs.
8. Dissatisfied with the judgment of the Supreme Court, the appellants appealed to this Court on the following three grounds:
 1. **The learned Judge erred in law on the evidence in awarding damages to the Respondents.**
 2. **learned Judge erred in law in holding that the Respondents had adduced evidence to prove the damages, awarded by the trial Judge.**
 3. **The damages imposed on the Appellants are manifestly harsh and excessive in all the circumstances of the case.**

Appellants' submissions

9. Counsel for the appellant argued the three grounds of appeal as one ground. In her written submissions counsel faulted the trial Judge for awarding damages to the respondents where no delictual liability occurred. Counsel relied on the case of **Emmanuel vs. Joubert**¹ and

¹ [1996] SCCA 49.

submitted that the three elements of fault, injury/damage and causal link have to be proved before holding a person liable.

10. Counsel examined each of the three elements mentioned above as follows:

Fault.

The respondents detailed the particulars of the appellants' fault as follows: "The said wall collapsed as a result of defects in the initial construction of the wall and its poor maintenance by the defendants."

11. Counsel submitted that the above particulars of fault were not proved by the respondents because each and every witness came to the conclusion that it was the heavy rainfall which was the primary cause of the damage. That the respondent themselves admitted in evidence that it had been raining heavily on the night the retaining wall collapsed. Furthermore, counsel contended that the damage did not arise from the defective construction of the wall because it was built with the permission from the Planning Authority.

Damage/Injury

12. Counsel also submitted that the averment made by the respondents that the appellants had failed to maintain the wall was unproved. Counsel relied on the testimony of Mrs. Barney Confait who testified that no defects in the wall were ever seen or reported to her by any of the persons who maintained her outdoor area. That the retaining wall had stood firm for 30 years without any incident despite previous heavy downpours.
13. The appellant's counsel also contested the findings in Mr. Wilbert's report who was brought as an expert witness and testified to the structure of the wall. Counsel argued that Mr. Wilbert's assessment was speculative because it was conducted solely from the respondents' parcel yet it was necessary for him to also visit the appellants' property to come to a proper conclusion. Counsel submitted that without visiting the appellant's parcel, Mr. Wilbert could not conclude with certainty that the appellants did not have an appropriate drainage or a manhole.

14. It was further argued by counsel that the 1st appellant's evidence to the effect that his drainage facility had been approved by the Planning Authority was not properly evaluated by the trial Judge.
15. On the premise of the above, counsel submitted that the respondents failed to prove their claim that the retaining wall was poorly maintained.

Causal link

16. Counsel submitted that the heavy rain was the primary cause of the damage and not the appellants' act of building a verandah over the retaining wall. That the trial Judge conceded to this fact when he stated: *"I am of the opinion that the excessive rain of that day caused the wall to collapse and the damage to the house of the first plaintiff and the car of the second plaintiff."*
17. Counsel argued that Mrs. Barney Confait stated in her testimony that she had purchased the property with a completed verandah 45 years ago. That the only structural changes she made to the building was tiling of the pillars. It could not therefore be said that the tiling caused collapse of the retaining wall. Counsel further argued that it was never proved by the respondents that the tiling was a direct contributory cause to the damage. Relatedly, counsel also argued that the cause of the collapsed wall could not be attributed to the appellants' discharge system because if at all it was faulty, it could not have waited until that fateful night to cause the damage.
18. For the above reasons, counsel submitted that the respondent failed to prove the necessary causal link.
19. As to whether the damages awarded were proved or not, counsel for the appellant submitted that the respondents had a duty to prove the loss but they failed to do so. Counsel contended that no receipts were tendered by the respondents to prove any material damage of the contents of the house. Furthermore, that the trial Judge gave no reason or analysis as to how he arrived at the sum of SR 67,868.48.

20. Counsel also faulted the trial Judge for awarding compensation to the respondents for their car which they claimed in their pleadings was written off. Counsel argued that the car was in fact still working albeit at a minimal capacity. In counsel's view, the trial Judge should not have awarded the compensation because the respondent's claim was **for** the value of a written off car. In support of this view, counsel relied on the case of **Rose vs. Civil Construction Company Ltd**² where it was held that the court cannot make an award of compensation which is outside the scope of the pleadings. Counsel also relied on the case of **Vel vs. Knowles SCA 41 of 1998**³ to argue that a court cannot formulate a case for a party after listening to the evidence or grant a relief not sought in the pleadings.

Prayers

21. The Appellants prayed that the decision of the lower court be quashed or the award be significantly reduced because it was manifestly harsh and excessive.

Respondents' reply

22. Counsel for the respondents submitted that the appellants committed a fault in law by failing to properly maintain a verandah they had built above the retaining wall as well as a proper drainage system which led to collapse of the retaining wall.
23. In reply to the appellant's argument that the damages awarded were not proved, counsel submitted that each of the claims in the plaint were proved and substantiated by expert evidence. The trial Judge was therefore right in awarding the damages.
24. As to whether the damages awarded were manifestly harsh and excessive, counsel submitted that they were not. She relied on the authority of **Ah Kong vs. Benoiton and anor**⁴ where it was held that:

"It is trite law that an appellate court will not alter damages awarded by a trial court merely because it thinks it would have awarded a different figure but rather the appellate court would interfere with the amount of damages awarded only if the trial court acted on

² (2012) SLR 207.

³ (SCAR 1998-1999) 157.

⁴ SCA 03/2016.

a wrong principle or the amount of damages is extremely high or extremely low so as to make it an erroneous estimate.”

25. Counsel argued that in the present matter the trial Judge assessed the quantum of damages alongside the evidence adduced before him and came to a correct sum of SR 584,051.48.
26. Counsel therefore prayed that the appeal is dismissed with costs.

Court’s consideration

27. The appellants in their written submissions faulted the trial Judge’s decision on both liability and quantum of damages awarded. At the hearing of the matter, counsel for the appellants claimed that Ground 1 of the appeal was against both liability and quantum of damages.
28. I however find that a clear reading of the grounds contained in the Notice of Appeal shows that the appeal was only against the issue of damages. It is to be noted that indeed, the respondents’ written submissions in reply focused on the question of damages.
29. Under Rule 54 (3) of the Court of Appeal Rules, it is provided that:

Every notice of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of the appeal, specifying the points of law or fact which are alleged to have been wrongly decided ...
30. It is trite law that a party is bound by their pleadings. The appellants cannot go outside the scope of the pleadings they filed in court. A party cannot seek relief outside his grounds of appeal. Rule 18(8) provides that an appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal.

31. The appellant did not seek the leave of this Court to challenge the Trial Court's findings on liability but made submissions faulting the Judge's decision on both liability and quantum of damages awarded.

32. In Re Ailee Development Corporation and the Companies Act 1972 (SCA 13/2008) [2010] SCCA 1 (07 May 2010) CA stated:

We have a procedural impediment in addressing this issue on appeal.

We note that it was not raised below at any stage or on the face of the pleadings as per the affidavit of the appellant at Fl. Can it be raised now and would it be fair to do so?

By rule 18(8) of the Court of Appeal Rules the Court cannot entertain such ground without leave of the Court, which has not been sought nor granted.” (My emphasis)

33. Consequently the submission made regarding liability were ill founded. This Court will therefore address its mind on the aspect of damages only.

34. The essence of the appellants' arguments is that the trial Judge awarded damages to the respondents which were not supported with evidence and the damages were manifestly harsh and excessive.

35. It is imperative to note from the onset that it is a trite principle of law that before an appellate court interferes with an award of damages, the Court must be convinced that:-

(a) the trial court acted on some wrong principle of law; or

(b) the amount awarded was so high or so very small as to make it, an entirely erroneous estimate of the damage to which the plaintiff was entitled. (See: **Government of Seychelles vs. Rose SLR 2012, 365**)

36. The damages awarded in the present case arose from an action in delict. Delictual liability is governed by **Article 1382 (1)** of the **Civil Code** which provides that: “*every act of man*

*that causes damage to another obliges him to repair it.” Furthermore, **Article 1383(1)** provides that, “every person is liable for the damage it has caused not merely by his act but also by his negligence or imprudence.”*

37. Be that as it may, awards of damages must not be speculative but reasonably ascertainable from the evidence adduced. This principle was emphasized by this Court in the case of **Monica Kilindo vs. Sidney Morel & S.P.T.C**⁵ wherein it was stated that: *“it is trite law that only reasonably ascertainable, as opposed to uncertain damages are permissible.”*

38. A look at the plaint presented by the respondents shows the following particularized claims:

Reconstruction of Car Port	SR 20,595.00
Damage to dwelling house	SR 125,588.00
Damage to rock wall and paved drive way	SR 20,500.00
Damage and loss to contents of the house	SR 67,868.48
Value of the vehicle written off	<u>SR 500,000.00</u>
Total	SR 734,551.48

39. After evaluating the above claims, the trial Judge found that they had been proved and upheld the corresponding sums save SR 500,000 which was the figure claimed for the value of the written off vehicle. The trial Judge found that the vehicle had not been written off but that it had lost its optimal capacity by 60-65%. On that premise, the Judge reduced the claim of SR 500,000 to 200,000 and further awarded SR 150,000 which was the amount spent on repairing the vehicle. In total, the Judge awarded the respondents damages in the sum of SR 584,051.48.

40. Counsel for the appellant specifically faulted the judge for awarding SR 67,868.48 in damages for contents of the house when no receipts or photographs were tendered into evidence by the respondents to prove their claims. Furthermore, that the trial Judge gave no reason or analysis as to how he arrived at the sum of SR 67,868.48.

⁵SCA No.12 of 2000.

41. It is on record that the 1st respondent gave oral evidence regarding the house contents which were damaged as a result of the events on the night in question. She testified that on the day following that night she prepared a list of “damaged items”. During examination in chief counsel for the respondents told the witness to enumerate the items on the list and she mentioned numerous items among which were electronics, a description of different kinds of “glasses”. During examination in chief, the witness testified that she included figures on the list. After the document had been admitted as Exhibit P3, the trial judge guided that the court would attach necessary weight to the contents subject to cross examination and corroboration by other evidence.
42. A look at the record shows that during cross examination of the plaintiff (1st respondent), counsel for the defendant did not specifically cross examine the plaintiff regarding the items and/or values attached to the contents on the list in issue. Another witness who testified regarding the contents of the house which were damaged was the son of the respondents. He made specific mention of some items such as the fridge, the Play Station, souvenirs from the UK but also lumped some together like “crystal glasses and electronics.” The list he enumerated had fewer items than the list by the first respondent but their testimonies corroborated each other. This witness was not cross examined. Cross-examination would have perhaps succeeded to create doubt about the truthfulness of the witnesses’ testimony, especially as it applied to the “contents of the house” rather than raising the absence of receipts on appeal.
43. It is the trial judge who had the opportunity to watch the witnesses as they testified in court. It is the trial judge as a fact finder who determines in every case with respect to every witness whether the witness is credible. Based on the witnesses’ oral evidence and the inventory which was prepared by the first respondent and tendered in court, the trial judge awarded damages as pleaded. As an appellate court we will not overturn the trial judge’s findings of fact **unless firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous** or “arbitrary and capricious.” There is no evidence on record that the trial judge acted illogically.

44. I now move on to discuss damages awarded under the other claims: reconstruction of carport, damage to dwelling house, damage to rock wall and paved drive way, damage to the vehicle.
45. It is on record that at trial the case for the defence depended solely on the testimony of the first appellant. On the other hand, in addition to their own oral testimonies in court, the respondents called expert witnesses and relied on reports authored by the experts to prove their case. Some of the experts were cross examined by Counsel for the defendants. The Trial Judge was alive to the legal principle that a court is not bound by the evidence expert witnesses and stated that: *“This court had the assistance of experts ... I note that (in the court’s fact finding exercise) the court has the insight and wisdom to gauge into such opinions and make its own determination. It is not absolutely bound to accept the conclusions of the said experts”*
46. The judge applied his wisdom to gauge the opinion of the experts to arrive at the damages he awarded for specific claims. In some instances the court awarded sums as pleaded by the respondents and quantified by the experts. In some instances, the judge reduced the amounts pleaded and explained the justification for departing from what had been pleaded by the plaintiffs/respondents.
47. Arising from the above, I hold that the trial Judge did not arbitrarily award damages. They were premised on evidence adduced which included valuation reports from the Quantity Surveyor and the vehicle assessor.
48. I will now move on to address the argument that the award of damages was manifestly excessive and harsh.
49. In law, an award of damages should be compensatory in nature such that it covers as nearly as possible the loss suffered but not exorbitant as to cause the person who bears the loss to make a profit.⁶

⁶ Jacques vs. Property Management Corporation (2011) SLR 7.

50. In determining damages this Court should not substitute its own judgment of appropriate damages for that of the trial court. Rather, it should decide if the trial court's award was manifestly high and excessive.⁷
51. It is my considered view that in determining whether the damages awarded in a particular case are excessive, recourse should be made to the evidence adduced to support the claim. According to the Quantity Surveyor who was instructed to evaluate the loss, the total amount was SR 166,682. However, the respondents claimed a lower amount of SR 67,868.48 and it is this that the court awarded.
52. The wall also shattered the 2nd respondent's vehicle that it had to be replaced with spare parts of another car model to make it roadworthy. The person who repaired the vehicle testified that repair of the car amounted to SR 150,000. The vehicle assessor who made a value assessment of the car before the incident stated that it was worth SR 500,000. However, this sum was reduced by the trial Judge to SR 200,000.
53. Following the above, I am of the view that the award in the present case was far from being manifestly high or excessive.
54. On the whole, I hold that no principle was violated by the trial Judge in assessing the damages awarded. Consequently, there is no basis or justification for this Court to interfere with the award of damages.
55. For the reasons stated above, I find no merit in this appeal and it is hereby dismissed with costs to the respondents.

Dr. L. Tibatemwa-Ekirikubinza, JA.

⁷ Michel v Talma (2012) SLR 95

I concur

F. Robinson JA

I concur

Dr. O. Dingake JA

Signed, dated and delivered at Ile du Port on 13 August 2021.