

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 49 (13 August 2021)
SCA 15/2019 (Arising in CA 09/2017
out of CS 128/2011 SCSC 196)

In the matter between

1. PATRICK BONNE

2. LE CHANTIER DENTAL CLINIC

(rep. by Basil Hoareau)

Appellants

and

GILBERT CHARLES ELIZA

(rep. by Serge Rouillon)

Respondent

Neutral Citation: *Bonne & Anor v Eliza* ([2021] SCCA 49 (13 August 2021) SCA 15/2019 (Arising in CA 09/2017) out of CS128/2011 SCSC 196

Before: Fernando, PCA, Twomey, JA and Robinson JA

Summary: role of appellate court – substitution of finding of facts – inferences – what constitutes a judicial admission

Heard: 6 August 2021

Delivered: 14 August 2021

ORDER

The appeal is allowed with costs. The Orders of the Supreme Court are set aside

TWOMEY JA

Introduction

[1] I observe at the outset that the caption of both the appeal in the Supreme Court and in this Court which lists the Appellants as Patrick Bonne and Silvana Bisogni is wrong as the original plaintiff was filed against Patrick Bonne and Le Chantier Clinic (represented by Silvana Bisogni). I have for the sake of clarity corrected the caption.

[2] The Respondent, Mr. Eliza, in a suit filed in the Magistrates Court claimed that as a result of dental work carried out by an unregistered dental technician, the First Appellant, Mr.

Bonne, he suffered pain and injury for which he claimed SR 56,062 with interests and costs.

[3] The learned Magistrate dismissed the claim on the basis that Mr. Eliza's pain, which in any case was not borne out by the evidence, was not as a result of the work carried out on the tooth but as a result of periodontal disease.

[4] On appeal to the Supreme Court, the learned appeal judge, Govinden J, as he then was, reversed the learned Magistrate's decision, finding instead that there was a causal link between the carrying out of the dental procedure by Mr. Bonne who was not a dentist, and the pain and suffering of Mr. Eliza and that Mr. Bonne had failed to diagnose a pre-existing condition of Mr. Eliza. He entered judgment against Mr. Bonne and Ms. Bisogni jointly and severally in the sum of SR56,062 with interests and costs.

A preliminary objection

[5] It is noted that skeletons heads of argument for this appeal were filed late. Counsel for Mr. Eliza has raised a preliminary objection that the appeal ought to be dismissed for non-compliance with Practice Directions 1 and 2 of 2014 read with Practice Direction 2 of 2019 that state that the skeleton heads of argument must be filed within 30 days before Roll Call and extension only granted when good cause is shown.

[6] We indicated at the Roll Call that pursuant to Rule 11 of the Seychelles Court of Appeal Rules, dispensation with the Rule would be granted to all litigants given the circumstances arising from the Covid 19 pandemic which resulted in transcripts of proceedings being served late. We stand by this dispensation and therefore dismiss the objection.

The present appeal

[7] Dissatisfied with the decision of the Supreme Court, both Mr. Bonne and Le Chantier Dental Clinic (for the purpose of these proceedings, the Appellants) have appealed on ten grounds which can be conveniently summarised as follows:

(1) The findings of the first appellate court are not supported by the pleadings as set out in the plaint of the Respondent.

(2) *There is no evidence to support the findings of the first appellate court that the Appellants were liable in delict to the Respondent.*

(3) *The learned appellant judge erred in law and on the evidence in relying on part of the testimony of the First Appellant that there was a judicial admission by him.*

The pleadings and the evidence with respect to causal link

[8] The first and second grounds of appeal relate to the finding of Govinden J that:

“17 [F]rom the facts of the case relating to this pre-existing medical condition I find that the First Respondent failed to detect the chronic gum disease of the Appellant. He never even noticed it, put aside to diagnose it. (sic) As a result, he inserted and glued the "Maryland bridge" into the Appellant's mouth without being aware of an important medical condition that could have complicated this procedure. Moreover, a qualified dentist would have prescribed antibiotics for the infection as testified by the Second Respondent and Doctor Samsoodin. The disease would have been treated before the procedure was carried out. The First Respondent failed to do so. He inserted a "Maryland bridge" in an already infected mouth. This would have caused aggravation of the infection".

[9] Counsel for the Appellants has submitted that neither the pleadings of Mr. Eliza nor his evidence disclosed any material averments indicating that he was suffering from a pre-existing condition that was not detected and aggravated the reinsertion of the maryland bridge. In this regard, they submit, the findings of Govinden J are not supported by any material fact.

[10] Counsel for the Respondent has submitted in response that the details in the Plaintiff are sufficient for an inference of a pre-existing condition to be drawn and was not therefore a matter that had to be specifically pleaded. In any case, Counsel submits, relying on the authority of *Attorney General v Ernestine* (1980) SCAR 373, the evidence of the Appellants and Dr. Samasoodin with regard to what the Respondent required seems beyond belief and “justified the intervention of the appellate judge to look at things for himself.”

[11] An examination of the Respondent's Plaintiff reveals the following relevant averments:

“5. The Plaintiff avers that the First Defendant's act [in carrying out dentistry work on his tooth when he was not a qualified dentist] amounts to a fault in law

for which the First Defendant is liable and the Second Defendant vicariously liable to make good to the Plaintiff in law.

6. *The Plaintiff further avers that as a result of the First Defendant s unlawful work on his tooth he has suffered pain and injury...*

7. *By reason of the matters aforesaid the Plaintiff has suffered loss and damage.*

(a) Moral damage for excruciating pain, mental anguish, trauma and inconvenience R 50,000

(b) Cost of corrective surgery R6062

R56, 062”

[12] Given these averments, we cannot agree with Counsel for Mr. Eliza. It is clear from the pleadings above that the fault imputed to the First Defendant is his unqualified work which caused the excruciating pain allegedly suffered by Mr. Eliza. The learned Magistrate addressed her mind to this issue finding that:

“On the basis of the evidence [as set out] I find there is no link between the Plaintiff’s pain, of which there is only his word, and the re-fixing of the maryland bridge by the defendant. Whether or not the First Defendant was a dentist is not relevant since the Plaintiff could not show that what the First Defendant did ... caused him pain.”

[13] It is our view therefore that the learned Magistrate correctly addressed her mind to the lack of a causal link between the fault alleged and the injury as was claimed. It cannot be overemphasised that to succeed in a claim for delict three elements must be proved by the claimant: fault, injury or damage and the causal link. The claim arises at the earliest time when these three co-exist (See *Emmanuel v. Joubert* (1996-1997) 235).

[14] In the present case, there was no causal link between any injury suffered by Mr. Eliza and the insertion of the maryland bridge by the First Appellant. It was therefore incorrect for the appellate court to substitute its finding of fact for that of the trial judge when there was neither averment nor evidence on the issue of the insertion of the maryland bridge causing the injury complained of.

[15] In this respect, we also agree with Counsel for the Appellants that although an appellate court can form an independent opinion about the proper inferences of fact to be drawn, it should be slow to reject a finding of fact, especially where the finding could be founded on the credibility of witnesses. This is what the authority of *Ernestine* states. (See also *Rose v R* (SCA 06,15&16/2014) [2016] SCCA 29 (09 December 2016) with respect to the duty of the appellate court not to retry the case and the limited role of appellate court with regard to facts).

[16] The appeal on these grounds therefore succeed.

What constitutes a judicial admission and what is the effect of a judicial admission

[17] Counsel for the Appellants also submits that the appellate court erred in relying on part of the testimony of the First Appellant to find that there was a judicial admission by him to the effect that the First Defendant should not have done the work to Mr. Eliza's teeth.

[18] Although we are not of the view that any pronouncement on this issue by the appellate court could have had any bearing on the case given the fact that we have already pointed out there was no causal link established by Mr. Eliza between the injury he suffered and the work carried out by Mr. Bonne, for the sake of completeness and given the importance of the legal issue raised and the scarcity of local jurisprudence on the same we address the issue.

[19] In terms of Article 1356 of the Civil Code of Seychelles, both the Court and the makers of a judicial admission would be bound by it. In the context of the present case, it is important to decide whether Mr. Bonne's statement amounts to a judicial admission.

[20] Mr. Bonne stated he should probably not have done the work in Mr. Eliza's mouth and added that he did not accept that the work was badly done. The appellate court only referred to the first part of Mr. Bonne's statement in court.

[21] In *Opportunity International General Trading v Krishnamart (Pty) Co. Ltd* (2015) SLR 459, Domah JA gave a very clear explanation of what constitutes a judicial admission (*aveu judiciaire*) as follows:

“[15] ... A judicial admission or aveu judiciaire is a statement made in court process whereby a person recognises the truth of an averment of fact made against him which is taken to be binding upon him and is of such a nature as to produce legal consequences:...

[15] An aveu judiciaire is a method of proof which is governed by rules autonomous to itself. It overrides all other methods of proof in civil law, even where article 1341 would be applicable...

[16] Three consequences flow from such a judicial admission. It is good against the person making it. It is irrevocable and it is indivisible.”

[22] In terms of irrevocability and indivisibility, in *Husser v Larue* (1998) SLR 89 the court found that if a judicial admission is qualified, the admissions will not accrue to the benefit of the plaintiff in establishing its case. In the present case, we agree with Counsel that the admission was qualified.

Our decision

[23] In any case, as we have already pointed out, once it is found that the Respondent's claim is unenforceable in law, as we have already stated it surely is, there can be no question of judicial admission in the matter.

[24] There is, therefore, merit in this ground which must also succeed.

[25] For all the above reasons, this appeal succeeds and the Orders of the Supreme Court are set aside.

Dr. Mathilda Twomey JA

I concur

A. Fernando, President

I concur

F. Robinson JA

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