

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 55 (10 September 2021)
SCA 17/2019
(Appeal from CS 56/2017)

In the matter between

ALEX MONTHY
(rep. by Mr Frank Elizabeth)

Appellant

And

ANISSA PAYET
(rep. by Mr Guy Ferley)

Respondent

Neutral Citation: *Monthy v Payet* (SCA 17/2019) [2021] SCCA 55 (10 September 2021)

Before: Robinson, Tibatemwa-Ekirikubinza, Dingake JJA

Summary: Simple loan - admissions contained in recorded WhatsApp conversations - an extra-judicial admission against a party must be pleaded - the role of an appellate court in an appeal against findings of fact by a trial court - unjust enrichment – an alternative remedy in contract - Appeal partly succeeds with costs in favour of the respondent

Heard: 05 August 2021

Delivered: 10 September 2021

ORDERS

- (1) The appeal partly succeeds
 - (2) Orders *(ii)* and *(iii)* of the learned Judge’s orders are upheld
 - (3) For the sum of SCR712000 of order *(i)* of the learned Judge’s orders, the sum of SCR650000 is substituted
 - (4) With costs in favour of the respondent
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JUDGMENT

ROBINSON JA (TIBATEMWA–EKIRIKUBINZA, DINGAKE JJA concurring)

The background

1. This is an appeal from a judgment of the Supreme Court on the 20 March 2019, in which the learned Judge ordered the appellant (the defendant then) to pay the respondent (the plaintiff then) the sum of SCR907000 representing —

- "i. the sum of SCR712,000.00 used for the purchase of a boat and for expenses related thereto;*
- ii. the sum of SCR120,000 used for the acquisition of a car;*
- iii. SCR75000 as damages",*

with costs.

2. The respondent averred in her plaint that she loaned the appellant the sum of SCR832000 in two amounts of SCR712000 and SCR120000 on the 6 June 2015 and 13 March 2014, respectively.

3. The appellant purchased a boat - (a monohull (seaquest)) bearing registration number HC No: 210, named "*Rebecca*", with the sum of SCR712000. The appellant used the sum of SCR120000 to buy a vehicle bearing registration number S24515, which he registered in his name.

4. The respondent averred that the appellant's refusal to pay her the sums borrowed was tantamount to a breach of the agreements. In her plaint, the respondent claimed from the appellant the return of SCR932000, which has been particularised as follows —

"Rs

<i>(a Sums lost to Defendant for the purchase of motor fishing vessel (The Rebecca)</i>	<i>712,000.00</i>
<i>(b Sums lent to purchase vehicle reg no. S791 (S24515)</i>	<i>120,000.00</i>
<i>(c Moral damages (anxiety, depression, stress and anguish)</i>	<i>100,000.00</i>
Total	<i>932,000.00"</i>

5. The respondent prayed for a judgment ordering the appellant to pay the sum of SCR932000 with interest at the commercial rate of seven per cent per annum with effect from the date of judgment.

6. On the claims of SCR712000 and SCR120000, the appellant, in his pleas, admitted that

he had received the said sums from the respondent. He was unequivocal in his pleas that the respondent had given to him the said sums not as loans but as gifts. The appellant averred that the respondent, a cabin crew member with whom he had been in a relationship, at the material time, used to shower him with gifts all the time. The appellant averred that he used the sum of SCR712000 given to him as a gift by the respondent to buy the boat (a monohull (seaquest)) bearing registration number HC No: 210, named "*Rebecca*". He also averred that he used the sum of SCR120000 given to him as a gift by the respondent to purchase a vehicle bearing registration number S24515, which he registered in his name.

7. As he had contended that the respondent had given him the sums of SCR712000 and SCR120000 as gifts, the appellant claimed that the respondent had incorrectly alleged that there were oral agreements between them for him to pay back to her the "*value or cost or purchase price of those gifts*". He averred that the respondent had asked him to return the sums of SCR712000 and SCR120000 that she had gifted him after their relationship ended out of spite.
8. The appellant asked the Supreme Court to dismiss the plaint with costs.
9. The learned Judge concluded that the appellant and the respondent were agreed that the sum of SCR832000 had exchanged hands in two separate amounts of SCR712000 and SCR120000. The case turned on whether or not the sums of SCR712000 and SCR120000 given to the appellant were loans or gifts.
10. The learned Judge's assessment of the credibility of the appellant played an essential part in his judgment. After reviewing the entirety of the evidence, the learned Judge concluded that the respondent had given the sums of SCR712000 and SCR120000 to the appellant as loans rather than gifts. The learned Judge's conclusion was based on his finding that the respondent's version was the more plausible one and upon careful consideration of the demeanour of the appellant. The following passages are contained in his judgment —

"[12] The Defendant who denied having received the sum of SCR712000 or whatever with which he confessed that the Plaintiff came to his rescue when he was in a really difficult situation. He denied receiving SCR712000 but confessed receiving SCR300000 from her. [...].

[13] In his defence he had pleaded that the car and the boat were given to him as gifts. All of a sudden, in Court he comes with a document to show that he had taken a loan of SCR200,000/- and paid for the car with that. This is in total contradiction with his pleadings as so rightly pointed out to him by Counsel for Plaintiff.

[14] The Defendant appeared nervous throughout trying to hide facts and very evasive most times. He simply cannot be believed.

[15] The Plaintiff was straightforward and convincing. She was put to tough scrutiny by Counsel for the Defence but she came out with clear, spontaneous answers that can very safely be believed.

[...]

[18] I have carefully analysed the evidence before me, the demeanour of the Defendant and also noted the contradictions in the evidence [...].

[19] [...]. In the light of the uncontradicted evidence of the Plaintiff and the various contradictions in the evidence of the Defendant, I have no difficulty in concluding that there was an agreement for the sum of SCR712000 to be returned to the Plaintiff. That [...] the sum of SCR120,000 used to purchase the said car is owed by the Defendant to the Plaintiff".

The Appeal

11. The appellant has raised five grounds of appeal against the judgment, which I have not reproduced. I have considered the grounds of appeal, the skeleton heads of argument submitted on behalf of the appellant and the respondent and the oral submissions of both Counsel prudently.

12. The grounds of appeal essentially contended that (1) the learned Judge erroneously placed reliance on the hearsay evidence of the respondent, (2) the learned Judge erred in concluding that there was evidence establishing the terms and conditions of the alleged oral loan agreements between the respondent and the appellant, (3) an action lies under Article 1381-1 of the Civil Code of Seychelles for unjust enrichment, and (4) the learned

Judge erred in awarding moral damages as the respondent has failed to adduce any evidence to justify her claim for moral damage.

13. First, I deal with the first issue. I deal with the submission that the learned Judge should not have relied on the hearsay evidence of the respondent. The evidence produced before the Supreme Court included recorded WhatsApp conversations between the respondent and the appellant concerning the alleged oral loan agreements. The learned Judge relied on the appellant's admissions in the admitted recorded WhatsApp conversations that he received the said sums from the respondent as loans. In the recorded WhatsApp conversations, the appellant never mentioned that the respondent had given the sums of money to him as gifts.
14. Article 1354 of the Civil Code of Seychelles stipulates that an extra-judicial admission against a party must be pleaded. Based on that Article, I accept Counsel's submission that the learned Judge should not have relied on the appellant's extra-judicial admissions as the plaint did not comply with Article 1354 of the Civil Code of Seychelles. I exclude the disputed recorded WhatsApp conversations.
15. I turn to the second issue. For his part, Counsel for the respondent contended that the learned Judge correctly assessed the evidence and came to findings of fact supported by the evidence.
16. It is essential to recall the role of an appellate court in an appeal against findings of fact by a trial Judge. In *Beacon Insurance Company Limited (Respondent) v Maharaj Bookstore Limited (Appellant)* [2014] UKPC 21 from the Court of Appeal of the Republic of Trinidad and Tobago, Lord Hodge, delivering the judgment on behalf of the Board, stated —

"12. In Thomas v Thomas [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488: "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come

to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in Yuill v Yuill [1945] P 15, 19:

"It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

It has often been said that the appeal court must be satisfied that the judge, at first instance has gone "plainly wrong". See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.

13. More recently, in In re B (A Child)(Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated: "This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an

appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).””.

17. The Court of Appeal in *Searles v Pothin Civil Appeal SCA07/2014*¹, which referred to the formulation of the Court of Appeal in *Akbar v The Republic Criminal Appeal SCA5/1998*², has adopted a similar approach. **Searles** observed that the role of an appellate court in an appeal against findings of fact by a trial court is not to *"rehear the case. It accepts findings of fact that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse"*.
18. In light of the above principles, I consider whether or not it was permissible for the learned Judge to make the findings of fact which he did in the face of the evidence as a whole. Pausing there, I find that the learned Judge did not place undue weight upon the respondent's hearsay evidence on careful consideration of the record. The learned Judge assessed the respondent's evidence in the context of the entirety of the evidence.
19. It is undisputed that the respondent borrowed 200000AED on the 28 May 2015, from the Emirates HQ NDB in Dubai, United Arab Emirates. Concerning that amount, it is also undisputed that she is paying 4,835AED monthly. She converted the borrowed sum of 200000AED into SCR712000 at Cash Plus retail counter branch at Market Street, Victoria, on the 6 June 2015 (exhibit P7). The appellant admitted having received the said sum as a gift from the respondent in his statement of defence. I note that there is undisputed evidence that the respondent received one payment in the sum of 4,865.80AED, an inward remittance to A/C No. 1014417817801 (Emirates HQ NDB Dubai), made on the 13 December 2016. I pause there to state that the evidence showed that the respondent had loaned the appellant the sum of SCR650000 from the sum of SCR712000 to purchase the boat. She gave evidence to the effect that she loaned SCR50000 to the appellant's mother from the remaining amount.

¹ Delivered on 21 April 2017

² Delivered on 3 December 1998

20. The learned Judge rejected the appellant's evidence and treated him as an untruthful witness mainly based on the blatant variance between the allegations in his statement of defence and his evidence at the trial. Careful consideration of his evidence showed that the appellant was making things up. For instance, in his examination-in-chief, the appellant testified that the respondent gave him the sum of SCR712000 when he was facing a difficult financial situation. After that, he testified that he never received the sum of SCR712000 from the respondent. He stated that they did not use the respondent's money to buy the boat. Later in the proceedings, the appellant added that the respondent, his mother, and he contributed financially towards the boat's purchase price. The appellant and his mother contributed SCR200000 each, whereas the respondent contributed SCR300000.
21. I am also of the view that the learned Judge did not form the wrong opinion in concluding that the respondent had loaned the appellant the sum of SCR120000 for him to purchase a car. It was undisputed that she sent the sum of SCR120000 to the appellant through one of her work colleagues on the 13 March 2015. The respondent testified that the appellant told her that he would pay back to her the sum loaned to him.
22. In his statement of defence, the appellant claimed that the respondent gave him the said sum as a gift. Nonetheless, he oddly testified that the respondent never gave him the said sum. He stated that "*X&M Supplies*", his business activity involved in importing stationery, took a loan of SCR200000 from the Seychelles Credit Union to pay for the car. He curiously added that he paid the balance of SCR25000 out of his pocket. Moreover, he testified that the respondent did not contribute financially towards the car's purchase price.
23. Clearly, the appellant's evidence is disturbing. The learned Judge had a sound basis, therefore, for his conclusion that the appellant "*simply cannot be believed*". In summary, I am satisfied that there is a proper basis for the learned Judge's findings that the respondent had loaned the appellant the sums of SCR650000 and SCR120000, which

loaned amounts the appellant had received, and that the appellant has to pay back to the respondent the sums of SCR650000 and SCR120000.

24. With respect to the third issue, Counsel for the appellant contended that the facts do not disclose a cause of action based on contract but rather one based on unjust enrichment under Article 1381-1 of the Civil Code of Seychelles. Assuming that it is correct that the facts could have given rise to an action based on unjust enrichment under Article 1381-1 of the Civil Code of Seychelles, I accept the submission of Counsel for the respondent that she could not have instituted such action as she has an alternative action in contract. Article 1381-1 of the Civil Code of Seychelles on the action *de in rem verso* stipulates —

"If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it".

See, for example, *Tree Sword (Pty) Ltd v Puciani SCA9/2014*³.

25. I turn to the fourth issue. I accept the submissions of Counsel for the respondent that the learned Judge was correct in awarding the sum of SCR75000 as moral damage. The learned Judge found the respondent's evidence as to the prejudice caused to her as a result of the appellant's persistent failure to return the sums of money owed to her to be credible, and he acted on it.
26. The learned Judge accepted the respondent's evidence that she stopped working for about a year when she got pregnant. She gave birth on the 28 July 2018, and that she struggled to pay the loan when she was not working. She deferred payment of the loan for a few times. She is still paying the loan. Moreover, the learned Judge accepted her evidence that she travelled to Seychelles on various occasions to talk to the appellant about paying back to her the loaned amounts. As mentioned above, the learned Judge accepted her evidence that, due to the aforementioned matters, she experiences anxiety,

³Delivered on 12 August 2016

suffers from distress, stress, and a lack of sleep and inconvenience.

The decision

27. For the reasons stated above, the appeal partly succeeds. I have accepted the appellant's contention that the learned Judge erred on relying on the respondent's hearsay evidence in recorded WhatsApp conversations. The contentions raised in the other grounds of appeal fail.
28. I make an order upholding orders (ii) and (iii) of the learned Judge's orders, rehearsed in paragraph [1] hereof.
29. With respect to order (i) of the learned Judge's orders, I make an order substituting for the sum of SCR712000, the sum of SCR650000.
30. With costs to the respondent.

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 September 2021

Robinson JA



I concur

Tibatemwa-Ekirikubinza JA

I concur

Dingake JA

