

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 15 (26 April 2023)
Civil Appeal SCA 17/2021
(Arising in CS 150/2019) SCSC 246

In the matter Between

Audrey Kimberly Esparon

A minor herein represented by her mother
Margaret Marie D'Acambra
(rep. by Ms. Karen Domingue)

Appellant

And

Gerard Philo

(rep by Ms. Barbe)

Respondent

Neutral Citation: *Audrey Kimberly Esparon v Gerard Philo* (Civil Appeal SCA 17/2021)
[2023] SCCA 15 (26 April 2023) (Arising in CS 150/2019) SCSC 246)

Before: Robinson, Dr. L. Tibatemwa-Ekirikubinza, Andre JJA

Summary: Appeal against a decision of the Supreme Court – Delict – the burden of proof on Defendant when a criminal conviction is admissible in a civil trial.

Heard: 18 April 2023

Delivered: 26 April 2023

ORDERS

The Court makes the following Orders:

- (i) The appeal fails in its entirety.
- (ii) Costs are granted in favour of the Respondent as prayed for.

JUDGMENT

ANDRE, JA

INTRODUCTION

- [1] This is an appeal arising out of the notice of appeal filed on 25 June 2021 by Audrey Esparon a minor being represented by her mother Margaret Marie D'acambra (Appellant) against Gerard Philo (Respondent), being dissatisfied with the decision of learned Judge Pillay given at the Supreme Court on 10 May 2021 in Civil Side No. CS No. 150 of 2019, wherein the honourable Pillay J dismissed the plaint of the Appellant (Plaintiff in the Court below) with a further order that each side shall bear their own costs.
- [2] The appellant as per cited notice of appeal appeals against the said decision upon the grounds of appeal set out in paragraph 2 of the notice of appeal and to be considered in detail below. The appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, an Order allowing the appeal and setting aside the judgment of the Learned Judge Pillay by either ordering a re-hearing of the case or awarding the Appellant damages as claimed in her plaint, with interests and costs.

BACKGROUND

- [3] The Appellant, then a minor and a student at Plaisance Secondary School, averred that on the 13th May 2015, whilst cutting grass at his home, the Respondent, her neighbor, allegedly failed to take proper precautions against any probable danger thereby hitting the Appellant with a stone in her left eye.
- [4] The Respondent was charged in CR 419 of 2016 with the offence of Reckless and Negligent Act and convicted. He was fined SCR10, 000.00 on the 5th of July 2017. The Respondent appealed the conviction and sentence in the Supreme Court case CN 19 of

2017. The appeal was dismissed and the sentence of the Magistrates Court was re-affirmed by the Supreme Court on the 8th of March 2018.

[5] The Appellant approached the Supreme Court under case no. CS 150/2019 wherein she argued that as a result of the Respondent's reckless and negligent act, she suffered loss of her sight in her left eye, loss of amenities, pain, and suffering. She averred that she has suffered loss and damages which the Respondent was to compensate her for as follows:

- a. *Loss of sight in the left eye and continuing deterioration of eyesight* SCR1, 000,000
- b. *Pressure on right eye which will result in impairment sight of eye*
sight of right eye SCR 500,000
- c. *Pain by the side of the head* SCR 250,000
- d. *Loss of amenities and enjoyment of life because of*
permanent injury SCR1, 000,000
- TOTAL* SCR2, 750,000

[6] The Respondent accepted that he was convicted and sentenced in CR 419 of 2016 and CN 19 of 2019, however, claimed that he was innocent.

[7] In her judgment, Justice Pillay found in favour of the Defendant and dismissed the Plaintiff, setting the background for this appeal of her judgment. The relief sought by the Appellant is that the judgment of Justice Pillay is to be set aside by either ordering a re-hearing of the case or awarding the Appellant damages as claimed in her Plaintiff, with interest and costs.

GROUND OF APPEAL

[8] The Appellant filed an appeal on the following grounds:

Ground 1: *that the learned Trial Judge erred in considering evidence of the Appellant to be contradictory but rather decided to believe the evidence of the Respondent's witnesses, namely Ms. Lisa Chetty and Dr. Veshna Chetty.*

Ground 2: that the learned Trial Judge failed to consider in depth the evidence of Mr. Hermann Holst and Dr. Manasa Balajhi whereby both professionals testified that it was possible for the impact of a stone hitting someone in the eye to lead to Traumatic Neuropathy as was the case with regards to the Appellant.

Ground 3: the learned Trial Judge erred in stating that the Appellant and her mother's evidence were contradictory on minor issues but yet chose to believe the evidence of Dr. Pillay on which side of the eye the Appellant was hit.

Ground 4: that the learned Trial Judge erred in not attaching enough weight to the evidence that the Appellant only started losing her eye sight after she had been hit in the eye by the stone which flew from the Respondent's grass cutting machine.

Ground 5: that the learned Trial Judge in coming to the conclusion that just because there was no "damage to the outside of the eye of the Plaintiff...it is doubtful that the Plaintiff was struck in the eye with a stone from a moving grass cutter," since such was not pleaded by the Defence/Respondent.

Ground 6: that the learned Trial Judge erred in not considering the fact that the conviction of the Respondent should have been evidence to support the testimony of the instead of just holding that on a balance of probabilities the Defendant/Respondent did not commit the offence.

Ground 7: the Learned Trial Judge attached too much weight to the evidence of Dr. Barbe as against all other evidence led by the other professionals called by the Appellant.

Ground 8: that the Learned Trial Judge erred in all the circumstances of the case.- to strike out.

[9] In her skeleton heads of arguments filed on 24 February 2023, the Appellant opted to deal with **grounds 1 and 3** together and **2, 4, and 7 individually**, and **abandoned grounds 5, 6, and 8.**

SUBMISSIONS OF PARTIES

Grounds 1 and 3

[10] Under grounds 1 and 3, the Appellant posits a number of illustrations of what she envisages as flawed decisions of the trial judge. These are set out below, together with the Respondent's reactions to them. The Appellant argues that the Judge was wrong in her finding that the delay in taking the Appellant to the hospital was inconsistent with one who has suffered serious injuries and in serious pain as: i) at the time of the incident the Appellant was 13 years old and had to wait for an adult to accompany her to the hospital; ii) that neither of the Appellant's parents were at home at the time; iii) that before going to the hospital, Appellant attended to the police station to get a medical examination form to take with her to the hospital; and, iv) the fact that when one goes to the casualty ward, one has to wait prior to being attended to.

[11] In reply, the Respondent submits that at 13 years old, the Appellant could have attended to the hospital with her grandmother or her brother who were at home during the alleged incident immediately. Had the injury been as painful as the Appellant alleges, they would have immediately sought medical attention rather than reporting the incident to the police first. Further, the attending doctor on the day of the incident, Dr. Veshna Pillay mentioned in her testimony that she felt confident enough that there were no serious injuries sustained and thus sent the Appellant home.

[12] The Appellant argues that the trial Judge had no basis for wondering how, if the Appellant had been hit by the stone, the latter could still see the Respondent since the Appellant could have seen the Respondent with her other eye. The Respondent admits that the trial judge simply took note of the evidence and testimonies given by the expert witnesses, namely the ophthalmologist, and optometrist, and concluded that "there would have been a degree of pain that would have at the very least prevented her from seeing or taking note of anything happened after she was hit."

[13] Again, the Appellant opines that the trial judge's view was misguided when she found that there ought to have been visible evidence of the impact on the Appellant's eye by the attending doctor yet the Appellant's mother attested to seeing visible evidence of impact when she arrived home. The Respondent cites Dr. Pillay's credentials and experience

with trauma patients and attests that she is a credible witness, and that had there been a sign of impact, Dr. Pillay would have noticed it and recorded it. As such, there is no reason why the learned trial judge should not believe the evidence of Dr. Pillay.

[14] The Appellant also submits that there were inconsistencies in the manner in which the learned Judge referred to the left and right eye, arguing that Dr. Pillay stated she could not remember the patient as it had been a busy evening and admitted she might likely have made a mistake. That the fact of the doctor identifying the right eye might have been due to the police statement which contained a similar error, which cannot be relied upon as the police officer was never called as a witness and thus not subjected to cross-examination.

[15] In response, the Respondent posits that throughout her evidence, Dr. Pillay remained firm on what she observed. Even under cross-examination, she denied ever having been mistaken about the side of the affected eye but added “*Human errors happen all the time.*” The Respondent argues that this generic answer was in no way a suggestion that she herself had made a mistake. The Respondent further refers to the cross-examination of the Appellant before the Magistrate’s Court, where she herself testified that she was hit in the right eye. This is in addition to her statement to the police statement, given when she displayed a plaster on her eye.

[16] The Appellant also argues that Dr. Pillay’s report should be given very little weight for finding that all cranial nerves are intact when she had not performed a motility test as explained by Ms. Chetty. Further, Ms. Chetty, an optometrist, does testify that there was tenderness on palpation of the right temporal corner of the limbus, which would refer to the area between the cornea and the conjunctival sclera. That this confirms that the Appellant was hit in the left eye as per her testimony. However, Dr. Pillay mistakenly wrote right instead of the left eye.

[17] The Respondent submits that the Appellant’s argument is not a valid one. As per the Respondent, admittedly, Dr. Pillay could not recall every patient, but she could speak to the Appellant’s consultation and diagnosis based on her medical records. That in fact, Dr. Pillay explained that it was not necessary to do a penlight motility test as this is done

when a patient complains of blurry vision, which was not the case here; but an optic nerve examination was conducted which indicated that the Appellant's cranial nerve was intact.

Ground 2

[18] Under ground 2, the Appellant argues that the trial judge failed to consider in depth the evidence of Mr. Hermann Holst and Dr. Manasa Balajhi whereby both professionals testified that it was possible for the impact of a stone hitting someone in the eye to lead to traumatic neuropathy as was the case with regards to the Appellant. That Mr. Holst clearly stated: (i) that in 2014 the Appellant's vision was 100% in both eyes, but had deteriorated to 40% in July 2017 in the left eye, which according to the history given by the Appellant was because of having been hit in the eye; (ii) that a big hit in the eye may damage the eye; (iii) that it was unlikely that an internal disease would lead to the Appellant's loss of vision as was detected; and (iv) that the cornea normally heals "if it has a small scratch in 24 hours it is gone. It is a thing that heals very fast."

[19] The Respondent notes that the Appellant's case is that she was hit on the inside of the eye and not on the outside of the eye or eyelid. That Mr. Holst's suggestion that the Appellant could have been hit on the eyelid and that is why maybe there is no scratch on the pupil or cornea is outside the scope of this case and contrary to the evidence given by the Appellant. Therefore, the Respondent argues that this evidence should not be relied on and should not be given much weight. The Respondent submits that the doctor who examined the Appellant on the day of the incident did not see any scratch or evidence of impact. The Respondent notes that, after 2014, Mr. Holst only saw the Appellant in 2017 – two years after the alleged incident. That is three years after he first saw her in 2014. By then, her eyesight was deteriorating progressively. Mr. Holst stated that in 2017 the Appellant's vision dropped from 40% to 30% within two months. The Respondent notes that in her testimony Ms. Lisa Marie Chetty explained that in all her years as an optometrist, she has never seen a case where someone has suffered an alleged trauma in the eye similar to what the Appellant is alleging to later report that they are losing their eyesight because of the trauma.

[20] Further, that in her evidence, Dr. Manasa an ophthalmologist stated that vision loss as a result of a grievous trauma occurs almost immediately. In her cross-examination, Dr. Manasa stated that the vision loss manifests itself in a short period of time, whereas the Appellant's loss of eyesight deteriorated progressively within years and sped up in 2017 within a period of months from 40% to 30% to 15%. She observed that the damage, at the time, was unilateral. Dr. Manasa testified that there are multiple reasons for damage to the optic nerve, such as trauma, diabetes, multiple sclerosis, and tumors, which cause bilateral damage. The Respondent notes that after 2018, the Appellant's right eye started to follow the same pattern as the left eye. Dr. Manasa explained that "when a patient completely loses one eye it cannot be because of any small injuries, it has to be some kind of grievous injury." This includes bleeding inside of the eye, inflammatory reaction, discoloration, and loss of blood supplies to the eye. That no such damage was observed with the Appellant's left eye. Therefore, the Respondent opines, the trial judge did not err on the weight that she gave to Dr. Manasa's evidence given that the case was heard in 2021 when signs of bilateral damage had already started appearing. Further, that the decision of the learned trial judge must be based on the evidence before and after 2018. The Respondent submits that the alleged incident did not cause damage to the Appellant's optic nerve.

Ground 4

[21] Under ground 4, the Appellant submits that the learned trial judge erred in not attaching enough weight to the evidence that the Appellant only started losing her eyesight after she had been hit in the eye by the stone which flew from the Respondent's grass-cutting machine. The Appellant submits that since her case was based on delict, the first consideration should have been "Was the Plaintiff hit in the left eye with a stone as a result of the Defendant's act and/or omission?" The Appellant and her mother testified that the Appellant was always healthy and always had good eyesight up to 2015. This is supported by other evidence whereby the doctors testified that no health condition was detected which could lead to the Appellant's loss of vision in her left eye. Further, the Respondent was convicted for the offence of reckless and negligent act. In addition, he had broken the Appellant's windows in the past.

- [22] The Respondent declares that the judge should not just consider the timeline but also consider, based on evidence, what is the cause of the loss of eyesight and whether the Respondent really caused the damage. In his evidence, Dr. Rolland Barbe explained that there are possibly other causes behind the predicament that the Appellant is currently facing such as an autoimmune disease or a tumor as was stated by Dr. Manasa.
- [23] The Respondent further states the fact that the Respondent was convicted in 2015 does not equate to liability for causing loss to the Appellant, and that there is no causal link between the Respondent breaking a window and the alleged loss incurred by the Appellant. In addition, **section 29 of the Evidence Act** provides for an opportunity for an accused person to prove that he or she did not commit the crime. The standard is on the balance of probabilities. As such, that the Appellant is mistaken in believing that the Respondent's conviction automatically equates to liability or corroboration of this matter.

Ground 7

- [24] The Appellant asserts that the trial judge attached too much weight to the evidence of Dr. Barbe as against all other evidence led by the professionals called by the Appellant such as Mr. Hermann Holst and Dr. Manasa. Dr. Barbe testified that Ms. Esparon came several times to the eye clinic between 2015 and 2018 and that the medical file was scanty. That as per the evidence of Mr. Holst had there been any laceration this could have been healed. Nevertheless, it is the Appellant's case that after having been hit by the stone her eye was blurry, watery, and painful. She argues that Dr. Barbe's evidence must be taken in context, namely that he saw the Appellant in late 2015.
- [25] Remarking on the above, the Respondent insists that the trial judge gave the appropriate consideration to the evidence and testimony of Dr. Barbe, Mr. Holst, and Dr. Manasa. She opines that Dr. Barbe's evidence is crucial as he is the only one who has attended to the Appellant from 2015 to 2018 – over a period of three years. In comparison, Dr. Manasa attended to the Appellant in 2018, three years after the alleged incident, and Mr. Holst saw the Appellant before the incident and then only saw the Appellant again two years after the incident. Dr. Pillay on the other hand attended to the Appellant on the day of the incident. Dr. Barbe's 10 years of experience as an ophthalmologist and 19 years as

a general doctor, renders him knowledgeable and credible witness. That this corroborates the evidence of Ms. Lisa Chetty wherein she stated that there would be a noticeable sign of trauma on the front of the eye, such as a foreign object, and the evidence of Mr. Holst when he referred to the analogy of a stone hitting a car and causing a dent. That even if Dr. Barbe saw the Appellant in late 2015, Dr. Pillay who saw her on the day, did not see any laceration as well.

[26] The Appellant prays the court to uphold the Appellant's appeal as she submits it has been established that the act of the Respondent caused the Appellant to lose her vision, and as such, the Respondent is liable to the Appellant.

[27] On the other hand, the Respondent contends that the trial judge did not err on the facts and the weight placed on the evidence of various witnesses. Therefore, the Respondent prays to this Court to dismiss the appeal with costs.

LEGAL ANALYSIS OF THE GROUNDS OF APPEAL

Grounds 1, 2, 3 and 7

[28] Grounds 1 and 3 are premised on a plethora of grievances by the Appellant against the trial Judge's decision to place more weight on certain evidence while finding other evidence less compelling; specifically the Respondent's expert witnesses vis a vis those of the Appellant. Under these grounds of appeal, as well as grounds 2 and 7, the supposed differential treatment of the evidence of the expert witnesses of the two sides is identified as the gravamen of the Appellant's objection.

Interference with a trial court's decision

[29] Prior to getting into the issues raised by the appeal, it is important to establish whether this Court can interfere with the decision of a trial Judge. It is trite law that a trial court's discretion ought not to be interfered with by an appellate court if the exercise of the

discretion is based on a correct principle of law, even though the appellate court could have come to a different decision. In the case of *Verlaque v Government of Seychelles* (2000-2001) SCAR 165, this Court held that the Court of Appeal will not interfere with the discretion of a court unless there was an error of law, the discretion was made without proper appreciation of the facts, the decision was so unreasonable that it was erroneous, or it was made unjudicially.

Discretion

[30] Defining the concept of discretion, in *Birkett v James*,¹ the House of Lords found that there can hardly be any justifiable reason for exercising discretion upon imprecise facts. That it is the nature and strength of facts made available to the court that provides the tonic for the proper exercise of discretion, and that the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. On the other hand, Pauline T. Kim added:²

“But discretion also implies something more than mere choice. It suggests that a decision should be made not randomly or arbitrarily, but by exercising judgment in light of some applicable set of standards, guidelines, or values. Those standards or norms may rule out certain options while still permitting the decision maker to exercise some choice.” [Emphasis added]

[31] Thus in deciding whether the trial court exercised its discretion properly/judicially, this Court will have to determine if it gave weight to irrelevant or unproven matters or it omitted to take into account matters that are relevant, or whether it exercised or failed to exercise the discretion on wrong or inadequate materials.

¹ [1977] UKHL J0525-1.

² Pauline T. Kim. “Lower Court Discretion” <\\server05\productn\N\NYU\82-2\NYU202.txt>, 18 April 2007, 408, accessed online at <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-82-2-Kim.pdf> on 7 April 2023.

Expert evidence

[32] On the critical role of expert witnesses, the South African Court of Appeal in *Jacobs and Another v Transnet Limited t/a Metrorail and Another*³ held that “*It is well established that an expert is required to assist the court, not the party for whom he or she testifies.*” This owing to, according to *Pricewaterhousecoopers Inc v National Potato Cooperative Ltd*⁴ that expert witnesses:-

“... by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.”

[33] This was certainly one of these cases where the court had to delve into the medical field, medical jargon, and physiological process and the effect of injury thereto, in the present situation being the eye area. That being so, the Appellant challenges the trial judge’s decision on the basis of the expert evidence presented on behalf of the Appellant compared to that which was presented on the Respondent’s behalf. Using the medical records presented before the court and witness testimonies this Court will be able to determine the accuracy of the trial Judge’s finding, and thereby addressing some of the questions raised under grounds 1, 2, 3, and 7 as stated above.

[34] **Dr. Veshna Pillay** was the attending doctor on the date of the incident. When she gave evidence before the court she relied on her notes to recall her treatment of the Appellant. She testified that she conducted tests to determine the extent of the Appellant’s injuries but found that the latter’s cranial nerves were intact. Nor were there any optic nerve lesions. Dr. Pillay insisted she hadn’t made a mistake in identifying the right eye as the one affected by the stone and that she has a manner in which she works, and would not have confused the impacted eye. Further that the police report identified the right eye as well but admitted that human errors occur all the time. She attested to the fact that the golden hour is the first hour following the incident and that they have to watch the patient

³ (803/13)[2014] ZASCA 113; 2015(1) SA 139 (SCA) (17 September 2014).

⁴ 2015 JDR 0371 (SCA).

then to ensure that there is no further deterioration in her condition. She said that such was the case in the present matter such that the Appellant was sent home following observation. This Court's view pertaining to Dr. Pillay's diagnosis is that given her proximity to the patient, firstly; having attended to the emergency a number of hours following the incident, Dr. Pillay would have been well placed to see the Appellant's deteriorated condition, and if there was any from the get-go. Dr. Pillay's was a first-hand experience and the trial court justifiably placed more weight on her testimony which did not contain contradictions as the Appellant alleges, but concessions by the doctor of the reality of mistakes occurring in the medical field, particularly in emergency situations. Further, the fact that the patient was one of many should not detract from what transpired on the day as a medical practitioner she relied on the medical records to conjure memories of the said patient, diagnosis, and subsequent treatments.

[35] **Dr. Barbe** first saw the Appellant in late 2015. He testified that they could not explain what was causing the reduction in the Appellant's vision, despite conducting an MRI test to determine this very question. He explained that the optic nerve is situated at the back of the eye and that for it to be damaged there must be serious damage to the front part of the eye. He stated that for there to be damage to the optic nerve if Respondent's conduct caused the damage, the Appellant should have suffered a blunt force so strong as to affect the optic nerve. Owing to that kind of impact, the front part of the eye would have bled and would have been a gruesome sight. But this was not so. The doctors could not even record a scratch on the Appellant. The conclusion that can be drawn from this is that the Respondent could not have caused damage to the Appellant's optic nerve as no gruesome injury was observed following the incident, and thus the subsequent deterioration of the Appellant's sight. He also referred to other possible causes of optic nerve damage, including hypertension and diabetes. This vindicates the trial court's conclusion that the later bilateral damage could have arisen from one of these conditions.

[36] The Appellant's own witness **Dr. Manasa** in his record dated 14 September 2018 states that the Appellant was diagnosed with Le-Traumatic Optic Neuropathy, and has a "history of trauma to the left eye." This is a restatement of what has been reported to them by the Appellant as the cause of the defect, not necessarily that this trauma was

caused by being hit by a stone. Dr. Manasa also admitted there are multiple reasons for damage to the optic nerve, including trauma, diabetes, multiple sclerosis and tumors. Further, that these cause bilateral damage, which would explain, though at varying degrees the Applicant's diminution of the right eye as well. Based on these facts, the Respondent's fault was not established on a balance of probabilities to find him liable for the loss suffered by the Appellant.

[37] Further, Dr. Manasa's testimony is that for a patient to completely lose one eye it cannot be due to a small injury, but "some kind of grievous injury." Loss from trauma, he added would take a maximum of a month to deteriorate to loss of sight. He added that there would have been signs of such trauma such as bleeding inside of the eye, or some inflammatory reaction, discoloration, and loss of blood supplies to the eye. That no such damage was observed with the Appellant's left eye supports Respondent's argument that Appellant's condition could not have resulted from being hit by a stone as asserted by the latter.

[38] **Ms. Lisa Chetty** never examined the Appellant but was presented with Dr. Pillay's record. She expressed confusion with Dr. Pillay's record, as at one point it referred to the left eye and also the right eye. She testified that when a patient is hit in the eye, they present with redness, watery eyes, and sensitivity to light. She also testified on how trauma to the eye such as caused by a stone could lead to the damage that the Appellant suffered. She admitted, however, that at a minimum, there would be a scratch to the eye. She also stated that such conditions as glaucoma, diabetes, and trauma could cause the Appellant's present condition/damage to the optic nerve. She further admitted that optic neuropathy is gradual.

[39] Ms. Chetty's testimony leads to one conclusion, that the evidence of one who was closer to the facts, and examined the patient, will have more weight than that of the expert who relies on documentary evidence prepared by that person with first-hand experience with the patient. Thus Dr. Pillay and Dr. Barbe were more conversant with the facts and they spoke to reports that were prepared by themselves having assessed the Appellant's condition personally. The trial Judge was right in assessing the evidence of Ms. Chetty. In fact, it largely supports what Dr. Barbe, Pillay, and even Dr. Manasa had testified to is

so far as they testified that there must have been some visual trace of trauma to the eye such as lacerations at the minimum to cause the impact allegedly caused to the Appellant.

[40] **Mr. Holst** testified that they only saw the Appellant two years after the incident. In a report prepared on the 8th of September 2020, it stated that the reason for a reduction in the Appellant’s vision in her left eye was that the Appellant herself had “explained she was hit in the eye with a stone in 2015.” Just like in the other records of the other doctors and specialists, none of the doctors could conclusively state “she was hit in the eye” or even that there were traces/fragments of stone to attest to a foreign object being the cause of the harm to the Appellant. When Mr. Holst was queried on the impact on the eye of an object hitting it, Mr. Holst stated that the Appellant might not have had a scratch on the eye as she could have reflexively closed her eye, thus avoiding being hit directly in the eye, but on the eyelid. This correctly poses a challenge as the allegation had been that the Appellant had been hit in the eye. When Mr. Holst was asked about the impact of the stone on the eye, and if this would not have had an impact in two years as the optic examination in 2017 had returned normal, Mr. Holst stated that “*the eye is not as the same as the other one, so you cannot see any damage in 2017 at the back of the eye.*” When Mr. Holst was asked if there had been a such huge impact in 2015, why it is that the impact could only be sensed two years later as opposed to immediately? Mr. Holst’s response was “*You need to ask the doctor. For this, you need to ask the ophthalmologist.*”

[41] Dr. Holst’s testimony underscores what was said in ***Michael and Another v Linksfield Park Clinic Ltd and Another***⁵ thus: “*what is required in the evaluation of such evidence is to determine whether and to what extent their opinion advanced are founded on logical reasoning.*” Speaking of the liability of a defendant, the court went on to state in paragraph 39 as follows:

“A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable. However, it will very seldom be right to conclude that views genuinely held by a competent expert are unreasonable. ... Only where expert opinion cannot be

⁵ 2001(3) SA 1188 (SCA).

logically supported at all will it fail to provide ‘the benchmark by reference to which the defendant’s conduct falls to be assessed’.” [Emphasis added]

[42] Based on the above court’s reasoning, it would be inconceivable to hold that the Respondent was liable based on the evidence that was presented by the Appellant’s witnesses. Firstly Ms. Chetty and Mr. Holst not having examined the patient and thereafter made suppositions on what could have been the cause of the optic nerve damage to the Appellant. Dr. Manasa saw the patient two years after the incident. All to a certain extent corroborated Dr. Barbe and Dr. Pillay’s evidence on firstly; that the cause of the Appellant’s condition was a mystery. They only could rely on what they were informed by the Appellant to draw the conclusion that the condition was caused by the impact of the stone. Dr. Manasa and Ms. Chetty confirmed that there could have been other triggers such as diabetes or cancer and others. Other than the Appellant and her mother, none could support their stance that there was visible evidence of the trauma from the stone on the eye. There were admissions as well that only a devastating injury could have led to damage of the optic nerve, which injury was not recorded by the attending doctor, nor did any subsequent doctors detect this until 2017. These only lead to the conclusion that there are other possible reasons that could have led to the Appellant’s condition other than the Respondent’s grass cutter.

Grounds 1 and 3

[43] Pertaining to the Appellant’s argument that the trial Judge’s finding that the Appellant’s conduct were inconsistent with one who suffered grievous injuries, this Court is of the view that this was merely an observation made by the Judge, based on the plausibility of one having been seriously injured to wait for hours before seeking medical attention, particularly where such injury is accompanied by pain and more so at a delicate organ such as the eye, and where there were persons available to take the Appellant to hospital. Common sense dictates that when one is in pain they would first seek to alleviate such pain by seeking immediate medical attention, and thereafter to seek redress by ensuring that the proper authorities are alerted and so forth. So too was the trial Judge’s observation of the lack of signs of trauma on the Appellant given the evidence that injury

to the optic nerve would have resulted from grievous injury to the patient which was lacking in the present circumstances.

[44] In ascertaining the above, the trial judge exercised her discretion, appealing to a set of standards, guidelines, values, and indeed common sense given the set of facts and evidence that was before her. This Court cannot find that the trial Judge abused her discretion as the evidence produced was consistent with her findings. In all consciousness she could not deduce that what transpired on the day of the incident was a possible trigger for the Appellant's condition. The totality of the evidence makes it difficult to believe that the trial Judge made an error in finding the Respondent not liable.

Ground 2

Ground 2 has been amply covered under grounds 1, 2, 3, and 4 accordingly and the same analysis and conclusions are adopted.

Ground 4

Previous criminal conviction

[45] The question raised by the Appellant's argument is whether by virtue of the Respondent's conviction on the offence of Reckless and Negligent Act, that it should amount to an automatic liability on the part of the Respondent. The law addressing this subject came in the form of section 68 of the English Civil Evidence Act of 1968 following the case of ***Hollington v Hewthorn. (1943) 2 All ER, 35*** which purported to re-establish, as a basic evidentiary principle, that a previous conviction is no proof whatsoever of the facts adjudicated upon when these same facts come in question in a subsequent civil action against the former accused.

[46] The trial Judge quoted Article 1351 of the Civil Code which states that "*The admissibility and effect of judgments given by a court of criminal jurisdiction shall, in civil matters be governed by and decided in accordance with the principles of English law.*" With the adoption of the English Evidence Act in Seychelles, **section 29 of the Evidence Act**

becomes relevant for present purposes. **Section 29(2) of the Evidence Act** which provides as follows:

“In a trial, other than in a civil trial for defamation, in which by virtue of this section a person, other than, in the case of criminal trial, the accused, is proved to have been convicted of an offence by or before a court in the Republic, he shall be taken to have committed that offence unless the contrary is proved.” [Emphasis added]

[47] The above provision creates a presumption that the matter exists **unless the contrary is proved**. Section 29(2) thereof requires that the Respondent adduce evidence to prove his innocence. Under the *prima facie* rule, the record of conviction in the criminal case is admissible in the subsequent civil case as *prima facie* evidence of the facts stated therein, thereby shifting the burden of disproving such facts to the accused. The trial Judge affirmed that a legal burden of proof was on the defendant in such a case, which must be discharged on the balance of probabilities. This was explained in the case of **Sovereign Camp W.O.W. v. Gunn**⁶ that *“the other party should not be entirely concluded and shut off from showing there was a miscarriage of justice in the criminal case.”* The trial Judge in this matter went through the evidence of the witnesses including the expert witnesses of both the Appellant and Respondent and concluded, *inter alia*, that:

“Taking into account the evidence of Dr. Manasa and Dr. Barbe, along with that of Dr. Pillay, the cause of the loss of vision as alleged by the Plaintiff is left very much in doubt, more so as the Plaintiff describes the current loss of vision in the right eye as following the same pattern as the left eye.”

[48] This Court concurs with the above finding and concludes same to be reasonable. Notwithstanding the Respondent’s acceptance of his conviction, there is no evidence that his conduct led to the said damages and the loss suffered.

Delict

[49] On the Appellant’s argument that the trial court failed to make a query into the delictual claim raised, this Court will now address that issue. In *Emmanuel v. Joubert*, [1996] SCCA 49, 5, Ayoola JA stated:

⁶ 7227 Ala. 400, 150 So. 491 (1933).

“The three elements which therefore make a claim arise in respect of a delictual act are fault, injury or damage and the causal link. The claim arises at the earliest time when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has thus arisen...A claim in respect of an act or omission arises when facts on which liability can be founded exists.” [Emphasis added]

[50] As established above, the Appellant utilised witnesses to adduce evidence of fault on the part of the Respondent. However, it has not been established that the condition suffered by the Appellant was attributable to Respondent’s conduct. The evidence led was not enough to persuade this Court that a mistake was made by the trial court. A causal connection has not been proved by the evidence led by the Appellant in so far as he was to demonstrate that a link between the Respondent’s conduct and the damages suffered by the Appellant. The legal test for causation has been formulated in a number of cases. In **ZA v Smit** 2015(4) SA 574 (SCA) at paragraph 30, the court at paragraph 30 held that:

*“The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, e.g by Corbett CJ in **International Shipping Co (Pty) Ltd v Bentley**. What it is essentially lays down is the enquiry – as to whether, but for the defendant’s wrongful and negligent conduct, his or her harm would not have ensued.”*

[51] It has been demonstrated that the cause of the Appellant’s condition could not be established even by the expert witnesses themselves, and other possible reasons for the Appellant’s optic nerve damage were suggested, with no irrefutable conclusion. That being said, the trial court could not have found in the Appellant’s favour based on a delictual claim as the appellant failed to discharge the onus of proving a causal connection between the alleged wrongful act of the respondent, on the one hand, and the condition of the Appellant, on the other.

[52] Accordingly, we believe that the trial Judge’s finding is in line with our assessment of the facts and evidence of the case as illustrated above from the different testimony given at the trial court. On the basis of the above, the Appellant’s appeal should be dismissed.

CONCLUSION

[53] In conclusion, arising from the analysis above, the appeal should fail in its entirety.

ORDER

[53] It follows that this Court orders as follows:

- (i) The appeal fails in its entirety.
- (ii) Costs are granted in favour of the Respondent as prayed for.

Signed, dated, and delivered at Ile du Port on 26th April 2023.

S. Andre, JA

I concur _____
Dr. L. Tibatemwa-Ekirikubinza, JA

I concur _____
F. Robinson JA

Signed, dated, and delivered at Ile du Port on 26th April 2023.