

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 20
(26 April 2023)
SCA 02/2021
(Arising in CS 64/2018)
SCSC 905

H. SAVY INSURANCE CO. LTD

(rep. by Sundaram Rajasundaram)

Appellant

and

OCEANA FISHERIES LTD

(rep. by France Bonté)

Respondent

Neutral Citation: *H. Savy Insurance Co. Ltd v Oceana Fisheries Ltd* (SCA 02/2021 [2023] SCCA 20 (26 December 2023) Arising in CS 64 /2018) [2020] SCSC 905

Before: Twomey-Woods, Tibatemwa-Ekirikunbinza, André, JJA

Summary: insurance contract - exception of wear and tear- whether the breakdown of machinery was caused by the salinity of water in the plant provided by third party or wear and tear – objections to evidence

Heard: 17 April 2023

Delivered: 26 April 2023

ORDER

The appeal is dismissed with costs. The decision of the Supreme Court is upheld in its entirety.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Tibatemwa-Ekirikunbinza and André JJA concurring)

Background

[1] The appeal before this court relates to a claim made by Oceana Fisheries Ltd (hereinafter ‘Oceana’) under an insurance policy it held with an insurance company, H. Savy Insurance Co. Ltd (from now on, H. Savy).

[2] As part of their fisheries business, Oceana operated a refrigeration plant which they averred they had been using for over 27 years and maintained and serviced as recorded by their maintenance monitors. Some of the parts of the plant were replaced with new

ones in 2012. Over those 27 years no malfunctions were reported. On 25 April 2017, leakage of ammonia was reported at the plant. An inspection by the Seychelles Bureau of Standards resulted in the closure of the whole plant. Fish products stored in the plant started decomposing. Alternative refrigeration units were sought. Some containers from a company, Land Marine, were made available and some of the fish products were transferred into them. Another 115,633 kilograms of fish had to be destroyed.

The claim in the Supreme Court

- [3] Oceana averred in a suit filed on 22 May 2018 that as a result of the closure of its plant, it made a loss of SCR 3,059,960, comprising of the cost of repairs to its plant, rental of alternative refrigeration units, hire of plug in facilities and loss of stock. It claimed this loss under an insurance policy it held with H. Savy.
- [4] The claim was denied by H. Savy, who averred that the breakdown of the plant and the subsequent losses incurred by Oceana were a result of wear and tear and a lack of maintenance of its plant which was excepted under the insurance policy.
- [5] The learned trial judge decided that based on the expert evidence adduced it was the quality of the water provided to the plant by the utility company PUC, which caused corrosion to the condenser coils and the subsequent ammonia leak, and not wear and tear of the plant through the lack of maintenance. It granted the claim in its totality.

The appeal before this Court

- [6] It is from this decision that H. Savy has appealed on the following five grounds:
1. *The learned judge's basis of the decision that "the court has no alternative" (in paragraph 76, page 20 of the judgment) but to prefer the cause presented by the Plaintiff" is highly erroneous, devoid of merits while the learned judge failed to understand and appreciate the real reason of the Appellant's refusal on policy exclusions to entertain the claim that the Respondent's claim does not meet the criteria of the insurance policy [sic].*
 2. *The learned judge erred in his findings and completely overlooked the evidence of two experts on the issue of machinery breakdown as a result of wear and tear, the cause of leakage of ammonia, that resulted in the Respondent's claim, but wrongly concluded that the Appellant did not seriously challenge the Plaintiff's so-called expert evidence failing to distinguish the cause of corrosion and wear and tear (even salinity in water ought to have been detected by the Respondent in its normal maintenance but it failed) [sic].*

3. *The learned judge did conduct the case for the Respondent while the Respondent's claim failed to disclose the main requirements which the Appellant challenged during the course of the trial, thus arbitrarily caused the amendment of the Plaint even without the Respondent's initial intervention [sic].*
4. *The learned judge overlooked the Appellant's challenge/contest of the various invoices produced by the Respondent of various heads of claim but erroneously held that the Appellant did not contest; also failed to note the Respondent did not prove the claims required in law [sic].*
5. *The ratio decidendi of the case law discussed by the learned judge does not strictly apply to the facts of the case on hand but wrongly applied to the issue on hand on machinery breakdown [sic](Verbatim).*

[7] The grounds of the appeal are infelicitously drafted, as indicated at the end of every appeal ground above. While they are not so badly drawn as to amount to no grounds of appeal, they leave much to the court's interpretation. Unfortunately, the skeleton heads of argument have not provided any further enlightenment. The Respondent's submissions in answer are, therefore, also cryptic and vague and of minimal assistance to this court. This is regrettable both because the parties to the case are poorly served and because there is little clarity in what exactly is being appealed. That being the case, we state what we think the grounds of appeal intend to convey to the court.

The grounds of appeal as we understand them.

[8] We understand the Appellant to be saying: in Ground 1, that the learned trial judge failed to consider the policy exclusions of the insurance policy; in Ground 2, that the learned judge failed to appreciate the expert evidence it adduced properly; in Ground 3, that there was active adjudication by the learned trial judge in that he conducted the case for the Respondent; in Ground 4, that the quantum of damages claimed by the Respondent was not proved; and in Ground 5 the law was incorrectly applied to the particular facts of the present case.

[9] We address the grounds and consider them in terms of the issues they raise.

Grounds 1, 2 and 5 -The application of the exclusion clause in the insurance policy, the expert evidence on the issue and the law applied by the trial judge.

[10] The nub of this case and the issue for determination in this appeal is relatively easy: We must decide what caused the breakdown of the plant.

- [11] Mr. Rajasundaram, Counsel for H. Savy, has submitted that it was due to wear and tear. Mr. Bonté, Counsel for Oceana, has submitted that it was due the salinity of the water supplied to the plant. We explore the more detailed submissions of Counsel.
- [12] Mr. Rajasundaram has submitted that the learned trial judge failed to appreciate that the term “wear and tear” included breakdown caused by inadequate maintenance and failure to carry out daily essential repairs to the refrigeration plant. He further avers that the evidence of high salinity in the water provided to the facility by the utility company should have been spotted and mitigated by Oceana. He contends that salinity of the water which caused the corrosion is just “a source of the wear and tear.”
- [13] He submits that H. Savy’s expert witnesses, Mr. Allam and Mr. Léon, both confirmed that the plant’s steel pipes had corroded due to a lack of proper maintenance and improper checks on the condenser pipes. Both experts observed rusty pipes and plugs applied to them where corrosion had occurred.
- [14] Mr. Bonté, on the other hand, has submitted in reply that the learned trial judge conducted a thorough analysis of the evidence and came to the conclusion that the damage that occurred was not due to wear and tear falling under the excepted clauses of the policy but instead due to the salinity of the water supplied to the plant.
- [15] It is pertinent at this stage to reproduce the reasoning of the learned trial judge in examining the evidence in relation to wear and tear. He states in relevant part:

“[67] Accordingly, the main question in the present matter is whether or not the corrosion was caused by ordinary wear and tear or as a result of the salinity of water.

[68] The expert evidence presented on [H. Savy’s] part vacillated. Take the evidence of Mr. Lovell Allam, the Insurance Surveyor and an Electrical and Electronics Engineer. On one hand, he stated that the degree of corrosion showed that the coils were not properly maintained, and that the ammonia leakage was due to wear and tear of the pipes...

[69] On the other hand, however, he made several concessions which seem to contradict the earlier evidence. Firstly, he admitted that he had inspected the premises on the 28 of June 2017, two months after the incident had occurred. So his

observations were based on the state of the coils two months after the incident happened.

[70] Secondly he seemed to agree with [Oceana] that the close proximity to the sea and the salt in the desalinated water could result in increasing the formation of rust or corrosion.

[71] Lastly and importantly, he admitted that the plant had been regularly maintained...

[72] Although his report seemed clearly to ascribe the corrosion to a lack of maintenance and by extension- wear and tear- his oral evidence went against this when he accepted that the plant had been regularly maintained...

...

[74] [Oceana's] expert evidence presented by Robert Rose, a refrigeration engineer, to the effect that the corrosion was caused by the salinity of the water was uncontroverted evidence...in the early days of operating the plant they would receive pure river water but subsequently salinated water was used which due to its salt content resulted in corrosion which damaged the system...Signs of corrosion were visible on the condenser water tank, showing the aggressiveness of the water being supplied to the plant by the utilities company.

[75] This evidence by [Oceana] was not seriously challenged by [H. Savy] in cross examination. They did not provide a contrary opinion on the effect that the salinated water might have on the coils. Instead, they persisted with their view that the plant was not properly maintained...

[76] In the circumstances, and on the evidence presented, the court has no alternative but to prefer the cause presented by [Oceana].

[16] It is pellucidly clear to us that the rationale for the judge's decision centered on the fact that the water's salinity caused the corrosion. He preferred Oceana's version of evidence over that of H. Savy's. He found that while corrosion would normally occur due to wear and tear over a long period, in the present case, it occurred notably because PUC provided salty water instead of fresh water to the plant, unbeknown to

Oceana. His rationale was that this piece of evidence was largely uncontroverted and that H. Savy did not present an alternative view of why the coils had become so quickly corroded, especially as the life expectancy of the condenser coil was 27 years. In the event, it only lasted five years, and the only variable between it and the one it replaced in 2012 was the quality of the water provided by PUC. Hence, this could not be regarded as wear and tear.

[17] The insurance policy in the present matter regarding what was covered and what was excepted provides for a “multi-peril insurance” regarding buildings, stock in trade, plant and machinery, furniture fixtures and fittings and miscellaneous items “*excluding wear and tear*”.

[18] The term *wear and tear* is not defined in the insurance policy. The learned trial judge examined the judicial interpretation in different jurisdictions. In *Taylor v Webb* [1937] 1 All ER 590, the term had been interpreted in the context of rented premises as “two classes of disrepair (a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather in contradistinction to abnormal or extraordinary events in nature...and (b) that brought about by the tenant...either intentionally or as a normal incident of a tenant’s occupation in the course of the ‘fair (or ‘reasonable’) use of the premises...”

[19] In the South African case of *Radloff v Kaplan* 1914 EDL 357 wear and tear was defined as the ‘dilapidation or depreciation which comes by reason of lapse of time, action of weather etc and normal [use]’.

[20] We find in Seychelles in this context, in the case of *Anscombe v Indian Ocean Tuna Ltd* (CS 203/2005) [2010] SCSC 66 (10 May 2010), the lease agreement contained a clause defining wear and tear as follows:

“the expression reasonable wear and tear shall include but not limited to the deterioration and degradation to the premises.”

[21] It is trite that the ordinary usage of the term “wear and tear” indicates deterioration that occurs as a thing ages or the expected decline in the condition of an item due to normal everyday use.

[22] In the present case, H. Savy’s expert witnesses did not contest that the new condenser coil with a life expectancy of more than two decades started to spring leaks when they were only five years old. The learned trial judge, based on this evidence, found that the breakdown of the plant was not due to ordinary wear and tear but rather from the supply of saline water as opposed to pure water.

[23] Moreover, H. Savy did not contest the evidence that the quality of the water was only tested after the plant broke down – instead, their argument was that the supply of saline water together with improper maintenance would just have caused wear and tear; such wear and tear being an exception in the policy. However, they brought no evidence to support this view. While it is trite that it is the plaintiff who should prove his case, where the defendant sets out to rebut the plaintiff’s evidence, it has a duty to adduce such alternative evidence. It did not. In the circumstances, the learned trial judge cannot be faulted for finding that on a balance of probabilities, Oceana had proved its case.

[24] H. Savy has also submitted that it was inappropriate for the learned trial judge to apply the Kenyan Court of Appeal case of *Masari Distributors Limited v UAP Provincial Insurance Company Limited* Civil Appeal No. 312 of 2013 [2017] eKLR as it involved a case involving the brakes on a vehicle and not corrosion.

[25] We disagree. Although not binding on this jurisdiction, a simple reading of the case of *Masari Distributors Limited*, provides valuable guidance on the issue of *maintenance*. In *Masari*, the owner of a motor vehicle which had been involved in a car accident claimed under its insurance policy. The claim was denied as the insurance company was of the view that the brakes of the vehicle had failed among other things due to improper maintenance. The High Court found in favour of the insurance company that the brake failure causing the accident was exempt under the insurance policy under its head of ‘mechanical or electrical breakdowns failures or breakages’.

[26] In the Court of Appeal, the decision was upheld with the court finding that:

“the accident occurred because the insured motor vehicle suffered brake failure, which was a mechanical failure excepted by the policy. Brake failure could only occur where motor vehicle was not properly maintained as

required by the policy or out of mechanical failure which was excepted by the policy.”

[27] In the present case, the learned trial judge drew a distinction between *Masari* in which evidence had been adduced of improper maintenance and the present case, where it was common cause that the plant had been appropriately maintained as supported by its maintenance sheet adduced in evidence. The distinction between the cases is subtle but essential.

[28] In the circumstances, these grounds of appeal, therefore, have no merit and are dismissed.

Ground 3 – active adjudication by the trial judge or entering the arena?

[29] Mr. Rajasundaram has submitted that the learned trial judge was biased in his conduct of the case. He contends that Oceana’s claim could not have been supported unless the amounts claimed were amended as to match their documentary evidence. He supports this contention by drawing our attention to the fact that the *Plaint* was only amended due to his objections to the production documents not supported by the original pleadings. In his view, the court assisted Oceana in curing “the defective *Plaint*”.

[30] He highlighted other instances to show the court’s biases: (1) where the court allowed a witness to answer questions on a report which had been marked as an “item” and had not yet been marked as an exhibit on the production if the insurance policy only after he had informed the court that it had not yet been produced, (2) on the recall of Oceana’s witness, Mr. Hoareau from the Seychelles Bureau of Standards to produce the water sample test results after Oceana had already closed its case, and (3) on allowing Oceana to produce various invoices without calling the issuer of the invoices.

[31] Unhelpfully, Mr. Bonté has offered no submissions on this issue.

[32] Our jurisdiction has dealt with many instances of alleged bias by courts. The principles to apply where such grave allegations are made are set out in the case of *Government of Seychelles & Anor v Seychelles National Party & Ors; Michel & Ors v Dhanjee (SCA 4 of 2014) [2014] SCCA 33 (12 December 2014)*. Domah JA in defining the new test to applied states that:

“having ascertained all the circumstances bearing on the suggestion that the Judge was (or could be) biased, the court must itself decide ‘whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.’”

[33] In the Canadian case of *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)* [2010] O.J. No. 212 (C.A.) [Chippewas], the appellant grounded their appeal on reasonable apprehension of bias based on the judge’s interventions during the trial. Similar to the present appeal, allegations were made that the trial judge assumed the role of counsel when he asked witnesses questions and inappropriately commented on evidence to be expected from the appellant, and overall, there was an appearance of unfairness. They claimed that the cumulative effect of the judge’s interventions indicated that he was receptive to the respondents’ case and dismissive of the appellant’s.

[34] In its decision, the Court of Appeal of Ontario found that the trial judge did not engage in excessive and improper intervention in the presentation of evidence and during the closing argument to give rise to a reasonable apprehension that he was biased in favour of the respondents. The court established that the test for reasonable apprehension of bias (not unlike the one we have adopted in this jurisdiction) was ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.’ They ruled that the inquiry was fact-specific and must be related to the facts and circumstances of the trial. Ultimately, they ruled that looking at the trial as a whole and the effect of the interventions on the entire proceedings, the trial judge’s interventions were properly directed at managing the trial and controlling the process. An objective observer would not reasonably think that the trial judge was biased in favour of the respondents.

[35] The court established a practical list of reasonable interventions:

1. *the need to focus the evidence on matters in issue;*
2. *to clarify evidence;*
to avoid irrelevant or repetitive evidence;
3. *to dispense with proof of obvious or agreed matters, and;*
4. *to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.*

[36] We endorse this view and agree with the non-exhaustive list of possible interventions by the court. A trial court must have control of proceedings in its courtroom to ensure the constitutional principle of a fair trial.

[37] The interventions by the trial court in the three instances as contended by Counsel for H. Savy, fall within this list. Courts can intervene to ensure that trials are not protracted and hopeless objections do not hamper the flow of the trial, its efficient expedition or hinder the adduction of evidence.

[38] With respect to the allegation relating to the late amendment of the Plaint, we need only refer to section 146 of the Seychelles Code of Civil Procedure, namely:

“The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and substantially different character.”

[39] The amendment of the Plaint in the present case falls squarely between what is allowed by the above provisions. We, therefore, need not say more on this issue.

[40] Having scrutinised and carefully examined the transcript referred to us by Counsel and applying the bias test, we are not satisfied that the court was biased in this case. There was active adjudication by the judge but we do not feel he unduly entered the arena.

[41] In the circumstances, ground 3 of the appeal has no merit and is dismissed.

Ground 4 – quantum of damages unproved by Respondent

[42] On this issue Mr. Rajasundaram has submitted that the learned trial judge rushed to the conclusion that H. Savy did not contest the evidence on the quantum of damages. He contends that he challenged the quantum by questioning Mr. Hoareau from the Seychelles Bureau of Standards, who stated that he adopted the weight of the stock as provided to him by Oceana and that he did not himself weigh them. He further contends that the weight of the decomposed fish was exaggerated and that the Oceana’s witness Julienne Valentin confirmed that she was not present when the weighing process was done.

- [43] Again, unhelpfully, Mr. Bonté has failed to make any submissions on this issue.
- [44] We examine each of the claims in turn.
- [45] Oceana claimed SCR 374,172 for the cost of repair to the refrigeration plant. Their Accountant and Financial Director, Ms. Julienne Valentin, produced invoices (Exhibits p2 – P5) to support the cost of the condenser coils. In respect of its claim for rental of alternative refrigerated storage, Oceana claimed SCR 1,844 456 and supported this claim through the testimony of Ms. Valentin and the corresponding bill for the rent of the containers from Societé Seychelloise des Navigations. For the plug-in facility connection and disconnection of electricity by Land Marine Limited to the refrigerated containers it had rented, Oceana claimed and, again through its accountant, produced the bill for SCR 354,600. Finally, for the loss of stock, the company claimed SCR 2,742.191.96 which is supported by the testimony of various witnesses, the weigh bills, the unwholesomeness certificate from the Seychelles Bureau of Standards for the fish products that were destroyed.
- [46] Mr. Rajasundaram made various challenges to the production of the documentary evidence relating to Oceana’s claims. These ranged from the fact that the documents were copies and not originals, were not authentic or were being adduced by persons who had not authored them. With respect to the weight of the destroyed stock, he objected on the grounds that these were not properly witnessed or authenticated.
- [47] These objections were, in our view, rightly dismissed by the trial judge. It would be preposterous to insist that the issuers of invoices -in this case, European manufacturers come to court to produce them. The trial judge ruled that the invoices with attached certification documents or declaration of conformity with issued standards could be produced by persons who had received them. He ruled that in respect of all the invoices, including the destroyed stock, none of H. Savy’s witnesses had dealt with the invoices.
- [48] Having objected to the documentary evidence and addressed the court on his objections, Mr. Rajasundaram did not offer any evidence to support his objections. These objections were rightly overruled as time-wasting efforts.

[49] We have on countless occasions referred to the principle of *reus is excipiendo fit actor* – that is, the defendant, by a plea, becomes the plaintiff. Article 1315 of the Civil Code provides:

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

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

[50] In *Marengo & Ors v Anderson* (SCA 9 of 2016) [2019] SCCA 6 (09 May 2019), we stated:

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

[51] This remains good law and is applicable to the present case. When Oceana’s claims were proved by the documentary and testimonial evidence and countered by H. Savy as being false, it was incumbent on the latter to offer an explanation about the various invoices and bills to support their allegation that these were falsified or not authentic. Courts are right to put defendants to the test of proving their allegations.

[52] In the circumstances, we cannot fault the trial judge for accepting the evidence on quantum. For these reasons, this ground of appeal also fails.

Decision

[53] Based on our reasoning above, we find that, altogether, the grounds have no merit.

Order

[54] We, therefore, make the following orders:

1. The appeal is dismissed in its entirety.
2. The decision of the Supreme Court that H. Savy Insurance Company Limited should pay Oceana Fisheries Company Limited the total sum of SCR 5,315,419.00 is upheld.
3. The whole with costs of both courts.

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

Dr. M. Twomey-Woods, JA.

I concur

Dr. L. Tibatemwa-Ekirikubinza JA

I concur

S. André, JA