

VICTOR v HOAREAU

(2011) SLR 147

E Chetty for the applicant
N Gabriel for the respondent

Judgment delivered on 3 June 2011 by

BURHAN J: This is an appeal by the defendant-appellant (hereinafter referred to as the appellant) against the order of the Magistrate (Mr Brassel Adeline), where the Magistrate entered judgment in favour of the plaintiff-respondent (hereinafter referred to as the respondent) in a sum of R20,000 with costs.

The background facts of this case are that the respondent filed a plaint in the Magistrates' Court seeking in total a sum of R 20,000 as damages for a fault committed by the appellant. It was further averred in the plaint that the appellant had on 30 August 2008 threatened the respondent and thereafter proceeded to smash a glass bottle on the respondent's vehicle resulting in the right-hand side of the said vehicle being damaged.

It is the contention of counsel for the appellant that the Magistrate erred in law in failing to hold an ex parte hearing and entering judgment for the respondent. It is his contention that an ex parte hearing should have taken place and the Magistrate erred in entering judgment without proceeding to hold an ex parte hearing.

It is the contention of counsel for the respondent that in terms of rule 18 of the Magistrates' Court (Civil Procedure) Rules the Magistrate had acted correctly and thus could not be faulted.

Rule 18 of the Magistrates' Court (Civil Procedure) Rules reads as:

If on the day so fixed in the summon when the case is called on, the plaintiff appears but the defendant does not appear or sufficiently excuses his absence the court after due proof of service of summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant or may adjourn the hearing of the suit ex parte.

It is therefore clear that the options available to the Magistrate in the event of a summons being served and the defendant not appearing or insufficiently excusing his absence would be to:

- a) proceed to *hear* (emphasis added) the suit and give judgment in the absence of the defendant; oR
- b) adjourn hearing of the suit ex parte.

It is to be noted that option (a) envisages a hearing of the matter in dispute. It places a discretionary power on the Magistrate to do either but if he/she chooses option (a) a hearing of the suit is mandatory. This is because after an ex parte hearing of a suit the Magistrate could assess to which extent judgment should be entered in favour of

the plaintiff. If the Magistrate is of the opinion after an ex parte hearing that the quantum claimed in damages is excessive it is well within his/her purview to award a sum lesser than that claimed. It therefore cannot be contended that the said rule grants the Magistrate power to enter judgment without holding a hearing.

When one considers the journal entries the appellant was present in court on 18 August 2009 and in his presence time was given for the appellant to file a defence. On the next date ie 6 October 2009 he failed to file a defence and further time was given. On the next date the appellant failed to appear and file a defence and the case was fixed for ex parte hearing on several occasions. Finally on 29 December 2009 in the presence of the appellant the Magistrate set aside his order for ex parte hearing on the grounds that the Court could not proceed to hear the claim an ex parte when the defendant (appellant) had failed to file a defence and proceeded to enter judgment for the respondent as prayed for. In doing so it appears the Magistrate proceeded to act under rule 51 of the Magistrates' Court (Civil Procedure) Rules which reads as;

On the day to which the suit has been adjourned under the last preceding rule the parties shall appear and the court shall then adjourn the suit to a date to be fixed by the court for the hearing. If the defendant has neglected to file his statement of defence within the time ordered by the court, the court may either give judgment for the plaintiff on his claim or grant further time, subject to such order as to costs as to the court may seem fit.

It is clear that according to the said rule the Court may use its discretion and either gives judgment for the plaintiff or grant farther time. The rules clearly empower the Magistrate to enter judgment without proceeding to a hearing. Therefore this Court is satisfied that the Magistrate was acting in accordance with the rules in doing so. Further it is to be noted the appellant was present at the time and when Court queried about the defence replied "What defence. I don't know."

The next question to decide is whether the Magistrate could be faulted for using his discretion unfairly. When one considers the background facts of this case it is clear that ample opportunity had been provided for the respondent to prepare his case and file his defence. In fact the journal entry of 6 October 2009 indicates he was represented by counsel. Several adjournments have been granted to the respondent and on the face of the record it appears the respondent had failed to make use of any of the several opportunities provided to him to file a defence. When one considers the number of opportunities given by the Magistrate to the respondent to prepare his defence, the Magistrate cannot be faulted for having acted under the first limb of rule 51 as the respondent had clearly neglected to file his defence though ample and sufficient time had been given.

For the aforementioned reasons the appeal is dismissed with costs.