

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 2/2013

Appeal from Magistrates Court Decision 57/2011

[2015] SCSC 213

H SAVY INSURANCE CO. LTD
Appellant

versus

ROLEX VENTIGADOO
Respondent

Heard: 11 August 2014
Counsel: Mr. Francis Chang-Sam for appellant
Mr. Anthony Derjacques for respondent
Delivered: 1 July 2015

JUDGMENT

Robinson J

[1] Background facts

[2] The appellant, H Savy Insurance, is an insurance company that insured, under third party cover, a car S7013 that was owned by the respondent, Mr. Rolex Ventigadoo. On the 19th July, 2008, car S7013, whilst being driven by Mr. Rolex Ventigadoo, was involved in an

accident with car S5457. The car S5457 belonged to Mr. Daniel Burka and was being driven by him at the time of the accident.

- [3] On the 9th September, 2008, Mr. Rolex Ventigadoo submitted a claim form, in relation to the accident with car S5457, to H Savy Insurance. In a letter dated the 13th October, 2008, from H Savy Insurance to Mr. Rolex Ventigadoo, the former refused to consider the third party claim for repairs to the car of Mr. Daniel Burka on the ground that Mr. Rolex Ventigadoo had been driving the car S7013 whilst under the influence of alcohol, within the disqualifying provision of the policy of insurance.
- [4] Mr. Daniel Burka filed a plaint in the Supreme Court, Civil Side no. 8 of 2009, dated the 16th January, 2009, against Mr. Rolex Ventigadoo, claiming damages against the latter for a total amount of Seychelles rupees (SCR) 100,000.00/-. Having failed to file a defence on the 16th November, 2009, the Supreme Court gave judgment *ex parte* against Mr. Rolex Ventigadoo for damages amounting to SCR 100,000.00/- plus interest and costs.
- [5] On the 21st December, 2009, H Savy Insurance, "*settled the claim for cost of repairs to Daniel Burka's vehicle*" in the sum of SCR 40, 000.00/-, without prejudice. H Savy Insurance advised learned counsel for Mr. Daniel Burka that the, "*[Mr. Rolex Ventigadoo's] policy does not cover loss like moral damage, loss of use and loss of earnings*". Mr. Daniel Burka, on the 14th October, 2010, started procedure to enforce the said judgment, in Civil Side no. 8 of 2009.
- [6] On the 27th January, 2011, Mr. Rolex Ventigadoo filed a plaint, Civil Side no. 157/2011, in the Magistrates' Court, claiming SCR 100, 000.00/- plus interest and costs from H Savy Insurance. On the 30th June, 2011, the trial magistrate dismissed the case for want of prosecution. On the 7th July, 2012, Mr. Anthony Derjacques filed motion for reinstatement of Civil Side no. 157/2011. On the 22nd August, 2011, the trial magistrate reinstated the case to the cause list. Because Mr. Francis Chang-Sam did not appear on the 22nd September, 2011, the trial magistrate fixed the case for mention on the 22nd September, 2011, with notice to Mr. Francis Chang-Sam. On the 22nd September, 2015, Mr. Anthony Derjacques did not appear. The trial magistrate adjourned the case for mention on the 5th October, 2011, for the purpose of fixing a date for hearing. Mr.

Anthony Derjacques was notified of the said date. On the 5th October, 2011, Mr. Anthony Derjacques did not appear and the trial magistrate dismissed the case for want of prosecution.

[7] On the 29th November, 2011, a second motion for reinstatement was set for hearing, on which date Mr. Anthony Derjacques was taken ill. The trial magistrate adjourned the case for mention on the 9th December, 2011. When the time came for considering the motion, Mr. Camille, instructed by Mr. Anthony Derjacques, informed court that, "*Mr. Derjacques has proposed to make a motion as settlement.*". The trial magistrate ordered hearing on the motion on the 20th February, 2012. The motion was not heard and on the 16th April, 2012, the trial magistrate again dismissed the case for want of prosecution.

[8] On the 12th June, 2012, a third motion for reinstatement was set for hearing. The trial magistrate reinstated the case to the cause list and ordered the defendant to file a defence on the 2nd July, 2012. No reason was given for the decision. The case was heard by the trial magistrate on the 17th October, 2012.

[9] In a judgment dated the 10th January, 2013, the trial magistrate entered judgment for Mr. Rolex Ventigadoo in the total sum of SCR 58, 000/- with costs.

[10] Appeal and grounds of appeal

[11] The appellant has appealed against the judgment of the trial magistrate on five grounds. This court has considered only grounds 1 and 2, of the grounds of appeal, as follows —

"1) The learned magistrate erred in law in allowing the reinstatement of the case.

2) The learned magistrate erred in law in failing to provide the reasons for reinstating the case."

[12] Discussion

[13] This court has dealt with the two grounds of appeal in combination. It is noted that learned counsel for the appellant did not address this court on grounds 1 and 2, of the grounds of appeal.

[14] The grounds of appeal questions the powers of the court with regards to recall of an order for dismissal. The Seychelles Court of Appeal in *Gill & Ors v Film Ansalt* SCA 28 of 2009, delivered on 5th March, 2013, stated that, "*recall of an order for dismissal can only be done if parties, on the same day, present themselves to the court with the defendants not raising an objection to the reinstatement*": see also *Bouchereau v Guichard* (1970) SLR 35: "*Short of that, the court becomes functus officio*": cases of *Gill & Ors* and *Bouchereau*, *supra*.

[15] In the present appeal, on the 30th June, 2011, the trial magistrate dismissed Civil Side no. 157/2011 for want of prosecution. Mr. Anthony Derjacques filed motion for reinstatement of Civil Side no. 157/2011 on the 7th July, 2011. On the 22nd August, 2011, the trial magistrate reinstated the case to the cause list. This court observes that the trial court became functus officio on the 30th June, 2011. The procedure adopted by the trial magistrate, reinstating Civil Side no. 157/2011 to the cause list, is one unknown to our law and jurisprudence.

[16] Decision

[17] In light of the above, this appeal is allowed. This court sets aside the decision of the trial magistrate to reinstate Civil Side no. 157/2011 and substitutes thereof the following order. Civil Side no. 157/2011 stands dismissed as at the date of 30th June, 2011.

[18] Each party shall bear its or his own costs.

Signed, dated and delivered at Ile du Port on 1 July 2015

F Robinson
Judge of the Supreme Court