IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 28/2017

Appeal from Magistrates Court Decision 163/2015

[2018] SCSC 230

RICKY HENRY

First Appellant**SHIRLEY HENRY**
Second Appellant

versus

WILFRED VIDOT
First Respondent

MAHE SHIPPING COMPANY LIMITED

Second Respondent

Heard: 7 January, 2018.

Counsel: S Roullion for appellant

E Wong for respondent

Delivered: 21 February 2018

JUDGMENT

Dodin J

[1] The Appellants brought a claim for faute against the Respondents in relation to the damage caused to their vehicle, claiming a sum of Seychelles Rupees Two Hundred and

Eight Thousand as moral damage only. They did not claim loss of use nor repairs in respect of the Vehicle. The Respondents raised a plea in *limine litis* maintaining that the Appellants had received a sum of money from the insurers of the Respondents and had signed stating that they would claim no further costs in respect of the accident hence the Respondents submitted that the Appellants could not claim again in respect of the accident from the Respondents themselves.

[2] The Learned Magistrate delivered judgment on the 12th of October 2017 reaching the conclusion that, the 2nd Plaintiff chose not to claim an excess amount and further declared that no further claims would be made in respect of the accident but the Plaintiffs were attempting to make further claims in respect of the accident which was in breach of the document signed by the 2nd Plaintiff. She concluded that the document signed by the 2nd Plaintiff extinguished the liability of the Defendants in relation to the Plaintiff.

[3] The Appellants appealed that Judgment raising three grounds of appeal:

> 1st ground; *that the Learned Magistrate failed to appreciate that an injured party to a tort can claim compensation from the author of the delict irrespective of the any payment they might receive from his insurance company or any other source.*
>
> 2nd ground: *that the Learned Magistrate failed to appreciate that the discharge form signed by the 2nd Appellant was for the repairs to the vehicle and therefore the Respondents were still liable for damages to the Appellant until the Appellants' claim is fully paid or so declared by the Court.*
>
> 3rd ground*: that the Learned Magistrate erred in her general approach to the case.*

[4] The Appellant made the following submission:

> *"In the case of Mounac and ors v Benoiton c.s. 102 of 2009, Burhan J confirmed the general principle in earlier decisions of the Superior Courts on this issue. The learned Magistrate failed to take into consideration the rules established by superior courts as set out for her in the Appellants written submission and it is necessary to set out extracts from the judgments of the authorities cited by the Appellant in that written submission to make the point clearer. In the Mounac case this was the statement in the judgment made by the court on the facts before making*

the legal conclusions shown above with my emphasis in bold on issues relating to this matter;

*"**When one considers the evidence led in this case, it is clear that the defendant admits under oath and does not seek to deny in his statement of defence, that the said accident was due to his fault but contests the claims of the 1st plaintiff on the basis that a sum of Rs10,000/- was paid by the insurance company, in full settlement of his claim for damages to furniture and equipment.***

When one considers the evidence of the 1st plaintiff in this regard, he admits that he received a sum of Rs10,000/- from the insurance company and that he did sign a discharge form. He admits that the discharge form he signed stated payment was being made for the "contents of the house", but further states that the insurance company informed him, it was for the furniture only and not for his antiques. He further admits that the house was repaired by the insurance company. He insisted that even though the claim he submitted to the insurance company was similar to the claim to the schedule to the plaint, the insurance company had settled only the claim in respect of the furniture. He further stated that the value of his antiques would be around Rs6000/- and this amount was not included in the settlement. Perusal of document P1 shows that the 1st Plaintiff did in his letter of claim to the insurance company dated 09th August 2006 include souvenir/antique in the list of household items damaged as a result of the accident. It is apparent that the settlement of Rs10,000/- by the insurance company which the plaintiff states was not sufficient to cover his loss, was in respect of the contents of the house as shown by documents D1 and D2 after consideration of document P1, submitted by the plaintiffs.

***When one considers the evidence in this respect, it is clear that the insurance company has made payment in respect of the contents of the house which judging by the document P1, was way below the sum claimed by the plaintiff and according to the 1st Plaintiff's evidence insufficient**.*

In the case of The Government of Seychelles v Charles Ventigadoo SCA No 28 of 2007 Houdoul JA at para 17 held,

"In our law cumul d'indemnites operates in favour of the victim and not the tort feasor. An injured party can claim compensation from the author of a delict irrespective of any payment he might receive from his insurance company or any other source (Sinon v.Chang Leng (1974) No 47)."

Here we have two issues mentioned in the judgment. There is reference to the "full settlement of the claim" and the "signing of a discharge form for the full settlement of the claim"

In Jacques v Property Management Corporation SLR 7 of 2011, Karunakaran J, restated the law (although to some extent bound by the Superior Court judicial pronouncement in Ventigadoo);

Mr Derjaques, counsel for the plaintiff contended that the insurance money the plaintiff admittedly received from SACOS cannot and should not be considered or taken into account by this Court in the assessment of quantum in the award of damages to the plaintiff in this matter, as it is a settled position in case law that "an injured party could claim compensation from the author of a "delict" irrespective of any claim he might have been paid by his insurance company" vide Sinon v Chang Leng (1974)SLR 301 and as per Venchard 's The Law of Seychelles through the Cases, p 504. On the issue as to assessment of damages, Mr Derjaques invited the Court to apply the principle that was formulated by this Court in the case of C Ventigadoo v Government of Sevchelles Civil Side No 407 of 1998, which had the backing of the first order, namely, the Seychelles Court of Appeal vide its judgment in SCA Case No 28 of 2007 delivered on 25 April 2008. In the circumstances, the plaintiff urged the Court to enter judgment against the defendant as prayed for in the plaint.

The facts of Sinon (supra) are these. Plaintiff Ms. Sinon claimed compensation from defendant Chang Leng for damage to her car caused by the fault of his préposé, driver of a pick-up which collided with plaintiff's car. The plaintiff's car had been insured with an Insurance Company of whom Messrs Hunt, Deltel Company was the agent. This company paid the sum of R320.50 as damages to the plaintiff, the insured -so to say its own client -presumably, under the comprehensive motor insurance policy that covered any damage caused to the plaintiff's own car. The defendant denied the claim contending that he was not liable to pay damages to Sinon since she had already been paid compensation by her own insurer, who had indemnified her against any damage to her car. However, the Court rejected that contention of the defendant, applied the doctrine of "cumul d'indemnites" and held that the "injured party (Sinon) could claim compensation from the author of a "delict" (Chang Leng) irrespective of any claim she might have been paid by her insurance company".

Hence, it is clear from the facts above that when the insurance company paid compensation to Sinon (the injured party), the company paid its own debt payable under her own contract with the insurance company. In fact, the company did not pay her the debt of Chang Leng, the tortfeasor, or that of any third party; nor did it pay her the debt on behalf of any third party whom it had indemnified under any contract of insurance which is made compulsory in terms of the Motor Vehicle Insurance (Third-Party Risks) Act. Hence, in such cases, the tortfeasor is not exonerated from his tortious liability. The doctrine of "cumul d'indemnites", or the "entitlement of double claim" if I may say so, applies and the injured party may benefit

twice.

However, this doctrine shall not apply to cases where the claimant had already received compensation either directly from the tortfeasor (the author of a "delit") or indirectly from the insurance company of the tortfeasor as has happened in the instant case. Legally speaking, when an insurance company pays the debt to the claimant, it makes payment for and on behalf of its client, the insured. In such cases, the liability of the tortfeasor is extinguished or reduced in proportion to the amount received by the claimant from the insurer of the tortfeasor. At the same time, it should not be misconstrued that any payment received by the claimant from the insurer of the tortfeasor would automatically exonerate the tortfeasor from total liability. Only when the claim is fully paid or so declared by the court, the tortfeasor's liability shall extinguish.

The above propositions are completely in favour of the Appellants' claims for tortious damages they have incurred /suffered as a result of the accident which are over and above the payment received from the Insurance Company for purely correcting the damage to their vehicle. The Appellant's' claims discount the amount already paid by the Insurance company for the repairs and only covers the outstanding tortious liability of the tortfeasers to the Appellants. The signing of the indemnity form (Exhibit D1) by the 2nd Appellant, being a former employee in the insurance industry, has clearly avoided words which exonerates the Respondents as tortfeasers from further claims.

It should be further noted from the record consistently as pleaded in the Plaint that the claim which has been settled by the insurance is clearly for the damage to the vehicle and the labour cost for repairs only, There is no settlement of any moral damages which in itself is repugnant to the delictual proposition that "Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it."

This is a case of two young persons who have imported their first vehicle brand new and it goes without saying that they have been affected by the event of seeing their brand new vehicle being damaged by a drunken individual while they were sitting at a friend's place close by having dinner on Sunday afternoon. A judicial mind should be able to look at simple scenarios and put themselves in the position of a litigant to some extent to see that anyone in such circumstances must have been affected beyond the mere claim for labour and repairs especially in such a case where the Magistrate had the benefit of hearing the uncontested evidence of the Appellants of their claim and no rebutting evidence from the Respondent and no findings in her judgment to the contrary on what the Appellants have said about their loss and damage. The 1st Respondent was not called to give evidence or explanation of the accident so we only have the Appellants' version of events. It should also be noted that

probably all the cases involving the insurance companies cited above each party making a claim was probably asked to sign this the standard discharge form.

It is submitted in conclusion that the key words are as stated above repeated here for emphasis;

"In such cases, the liability of the tortfeasor is extinguished or reduced in proportion to the amount received by the claimant from the insurer of the tortfeasor. At the same time, it should not be misconstrued that any payment received by the claimant from the insurer of the tortfeasor would automatically exonerate the tortfeasor from total liability. Only when the claim is fully paid or so declared by the court, the tortfeasor's liability shall extinguish"

A mere signature on a discharge form is not sufficient to close such a matter and there are many examples where there have been payments on claims for compensation and discharge forms signed and where the injured party discovers they have claimed too little for the gravity of the damage the law allows them to come back to the court for further damages. Please see the case of Dr. Erna Athanasius v Hunt Deltel Company (Pty) Ltd and another Civil Side No 293 of 2002. This an example where a person was paid for repairs for damages to a vehicle and who came back to claim moral damages from the court.

Secondly the insurance company and its forms should not be above legal rights of injured parties to claim against tortfeasers. The insurance company in this case has an agreement with the tortfeaser not with the Appellant who can also claim from the tortfeaser regardless of what happened between them with the insurance company, hence the final statement that "a matter is closed only when declared so by the court." This seems a logical interpretation otherwise claimants who require the use of their vehicles for the work, as in this case, may be blackmailed and lured into signing such forms just to mitigate their loss and get back to work.

Wherefore the Appellants pray for a judgment in their favour reversing the judgment of the learned Magistrate with costs."

[5] The Respondent's submission is also reproduced without repeating the introductory part which is already set out in paragraphs 1and 2 above:

"The Appellants' first Ground is that the Learned Magistrate failed to appreciate that an injured party to a tort can claim compensation from the author of the delict irrespective of the any payment they might receive from his insurance company or any other source.

It is the Respondents' humble submission that it is possible for a tortfeasor to extinguish his liability towards the injured party if that injured party has been paid a sum of compensation from the insurance of the tortfeasor. This is because of the principle of subrogation, wherein the tortfeasor subrogates their rights and obligations towards their insurer under an insurance contract. If a tortfeasor's insurance pays the victim of the tort on behalf of the tortfeasor, this means that the tortfeasor's obligations towards that victim has been extinguished as this payment is as if the tortfeasor himself had made that payment. This is different from a situation where the victim of the tort claims from his own insurance; in this situation he is not estopped from claiming against the tortfeasor as the tortfeasor has not made any payment towards him, nor has any payment been made to the victim on the tortfeasor's behalf. The Respondents would like to rely upon the case of Jacques v State Pro perty Management Corporation (2011) SLR 7 which distinguishes the case of Sinon v Chang Leng (1974) SLR 301. In the Sinon, the victim of the tort was able to claim against the insurance of the tortfeasor as the victim had only made a claim against her own personal insurance. In the case of Jacques, the victim had been paid by the insurance of the tortfeasor, who had essentially stepped into the shoes of the tortfeasor and therefore paid the tortfeasor's obligations towards the victim.

At page 6 of the Jacques case, Karunakaran J. stated, "Hence it is clear from the facts above that when the insurance company paid compensation to Sinon (the injured party) the company paid its own debt payable under her own contract with the insurance company. In fact, the company did not pay her the debt of Chang Leng, the tortfeasor, or that of any third party ..... However this doctrine [of cumul d'idemnites] shall not apply to cases where the claimant had already received compensation either directly from the tortfeasor (the author of a delit") or indirectly from the insurance company of the tortfeasor as has happened in the instant case. Legally speaking, when an insurance company pays the debt to the claimant, it makes payment for and on behalf of its client, the insured. In such cases the liability of the tortfeasor is extinguished or reduced in proportion to the amount received by the claimant from the insurer of the tortfeasor." In the case of Jacques, Karunakaran J. stated, that there were therefore instances when the victim of the tort could not claim against the tortfeasor after having received a payment from the tortfeasor's insurance.

The Respondents therefore humbly submit, that the Learned Magistrate did not err in law and at paragraph 15 of her Judgment, she stated that, " Both sides appear to agree that payment received by the claimant from the insurance of the tortfeasor would not automatically exonerate the tortfeasor from total liability but that only when the claim is fully repaid or so declared by the Court that the tortfeasor's liability shall extinguish. " Thus, if the claim made by the victim of a tort had been fully repaid (in

full and final settlement), the tortfeasor's liability would extinguish; at which point the Learned Magistrate proceeded to examine whether the Appellants claim had been satisfied in full, which the Respondents respectfully and humbly submit, was the proper exercise.

The Appellants' second Ground was that the Learned Magistrate failed to appreciate that the discharge form signed by the 2nd Appellant was for the repairs to the Vehicle and therefore the Respondents were still liable for damages to the Appellant until the Appellants' claim is fully paid or so declared by the Court.

The Learned Magistrate at paragraph 18 of her Judgment came to the conclusion that as the motor discharge from showed that the 2nd Appellant opted to not claim any further claim in respect of the accident, this was an acceptance that their claim had been fully repaid and therefore extinguished the Respondents' liability; for the Appellants to make any further claim was a breach of the discharge form signed by the 2nd Appellant.

The Respondents respectfully and humbly submit that the Learned Magistrate's position is sound in law. The discharge form, Exhibit D1, clearly allowed the 2nd Appellant to indicate whether any further claims would be made in respect of the accident. By opting to leave that part of the document blank, it is respectfully and humbly submitted that the Appellants accepted that their claim in respect of the Vehicle had been fully repaid. As stated in Jacques since the claim had been fully repaid, there was no need for the Court to declare the claim fully repaid so the liability of the Respondents was extinguished. The discharge form was admitted by the 1st Appellant as having been signed by the 2nd Appellant, there was no objection raised that the Appellants were unaware of what they were signing. The Respondents would respectfully and humbly submit, that the Learned Magistrate was correct to hold that by making a claim for moral damages against the Respondents, the Appellants were making a further claim in respect of the accident and were in breach of the discharge form.

The third Ground of appeal was that the Learned Magistrate erred in her general approach to the case. There is no indication of where or how the Learned Magistrate is meant to have failed in her approach to this case. The Appellants were allowed to call their witnesses, they were allowed to cross-examine the Respondent, all the norms of the correct approach in a case were taken in this instance so it cannot be said that the Learned Magistrate's approach was wrong in law.

If the Appellants are objecting to the fact that the case was heard afresh, which they did not object to at the hearing, the Respondents submit that as the Magistrates Court is not a court of record, it was important for the

Magistrate to observe the demeanour of the witnesses, given that this was a new Magistrate and there are no transcribed proceedings in the Magistrates Court, only notes of the Magistrate themselves.

[6] With respect to the prayers of the Appellant, Learned counsel for the Respondent submitted:

"The Respondents respectfully and humbly submit that as the Learned Magistrate did not make any findings on the merits of the case, there can be no assessment by this Court on damages that ought to be awarded to the Appellants. The Respondents rely upon the case of Philoe and Another v Ernesta SCA 17 of 2004, wherein Ramodibedi JA states, at paragraph 12, "Secondly, it must be said at the outset that as a general principle the assessment of damages is pre-eminently a matter within the discretion of the trial judge and an appellant court is accordingly reluctant to upset such assessment unless: 1. there is a considerable disproportion in the quantum of damages awarded; such damages have been awarded on an improper basis or for a wrong purpose."

As there was no assessment of damages made, the Respondent humbly submits, there can be no area upon which this Court can make a determination that the Learned Magistrate was wrong in awarding the damages it did; as stated above, an appellate court, ought to be reluctant to upset an assessment of damages as that is entirely within the discretion of the trial judge. In this case, the trial judge, who observed the demeanour of the witnesses, did not make any order as to damages, and the Respondents humbly submit, that any determination of damages would require the case to be heard afresh; damages cannot be decided for the first time merely on proceedings and submissions.

WHEREFORE, the Respondents pray this Honourable Court to dismiss this appeal with costs to the Respondents."

[7] Learned counsel for the Appellant addressed one single and fundamental aspect of the case which encompassed all three grounds of appeal which can be encapsulated as follows: That the Appellant is entitled to moral damage in addition to [emphasis mine], the full costs of repair which has been settled by the Respondents' insurers despite having signed a motor discharged form for full and final settlement for cost of repairs to vehicle S5769. The argument is that the full and final settlement for repairs, does not cover moral damage to the Appellants for the damages cause to their first new vehicle that they managed to purchase. The second limb of the Respondent's submission is that the insurance company in this case has a separate agreement with the Appellants for payment

of repairs and labour costs hence the Appellant can also claim from the tortfeasors regardless of what happened between them with the insurance company.

[8] The clauses in contention are worded as follows:

> *"I Ms Shirley Brigitte Henry hereby agree to accept the sum of SR 31,378/- from H Savy Insurance Co, Ltd in full and final settlement for ….costs of repairs to my vehicle S5769 that was involved in an accident on 02/8/2014"*
>
> *"I further declare that no further claims will be made by me in respect of the above mentioned accident EXCEPT for the excess amount of ……which may be refunded to me upon the outcome of the Court Case."*

[9] The submission of the Respondents is that there was one agreement to fully repair the damage to the Appellants' vehicle, inclusive of all labour and spares costs as full and final settlement of any claim arising from the accident. The claim for moral damage originating from the damage caused to vehicle S5769 is a claim arising from the accident and is therefore not sustainable as a separate claim against the Respondents. Learned counsel recognises that the law allows for additional claims where such has not been covered at all or adequately by the insurance settlement but maintains that such exceptions do not cover the instant case where the two clauses taken together extinguish any additional claim in respect of the accident.

[10] Neither party made specific reference to whether the Appellant had been estopped from making any further claim in respect of the accident where there is a close similarity in reasoning and which could have ben of assistance to the parties in the sense that it is not only the written or spoken words that matters but the understanding of and reliance on the undertaking by a party.

[11] In the 1837 case on equitable estoppel, *Pickard v. Sears, 1837 112 Eng. Rep. 179*, the court held that:

> *"The rule of law is clear, that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."*

[12] Before one can conclude that a clause in an agreement is binding and watertight allowing for no exception, one must also consider the intention of the parties and what effect the parties understood or intended that clause to have. Hence going literally by the wording of the clause may lead to injustice if the clause did not cover all eventualities but one party was of the opinion that it did whilst the other party was of the opinion that it did not. Without a meeting of mind, there cannot be an agreement.

[13] The law is more or less settled as submitted by both learned counsel in their lengthy submissions above. The case of *Jacques v Property Management Corporation [2011] SLR 7* seemed to have put the final nail by giving clear guidance on the issue. The Appellants in this case had an agreement with the 2nd Respondent's insurers to pay the Appellant the costs of repairs including spares and labour costs but not for other damages such as moral damages. The insurers paid as per that agreement on behalf of the Respondents under the 2nd Respondent's insurance. As far as this head of insurance cover goes, the Appellants cannot make additional demands arising out of the accident against the Respondents because that liability has already been met by the Respondents through the 2nd Respondent's insurers in full. To that end, the second limb of the Appellants' submission that the Appellant can make any further claim it wishes against the Respondents is erroneous and cannot be upheld.

[14] On the other hand the claim for damages which was not addressed by the parties or by the insurers even if arising out of the accident cannot be extinguished in total as such claim could have been made against either Respondent without including their insurers and such claim for moral damages was not specifically covered by the motor discharged form agreement on behalf of the Respondents by the insurer of the 2nd Respondent. The Appellants are therefore entitled to claim for any damages arising from the accident not covered at all or in full by the Respondents' insurers on their behalf. Such claim will only be extinguished when fully settled by the parties or by order of the Court. Hence the learned Magistrate erred in concluding that the agreement contained in the motor discharged form estopped the Appellants from making any further claim or that payment made was in full satisfaction of all possible claims that could have been raised by the Respondents.

[15] On that ground, I allow the appeal against the decision of the learned Magistrate on the plea in *limine litis*. However since the learned Magistrate by reason of her finding did not make any determination on the merits or quantum of damages claimed, this Court shall not venture into making such determination in lieu of the learned Magistrate who had the full opportunity to hear the Appellants evidence and observed their demeanour and therefore being in the best position to reach a fair and reasonable finding on the merits and quantum of damages.

[16] I therefore make the following orders:

i. I allow the appeal and quash the decision of the learned Magistrate on the plea in limine litis;

ii. I remit the case to the learned Magistrate to make appropriate findings on the merits of the claims of each Appellant and to make awards of damages as appropriate.

[17] I award the costs of this appeal to the Appellants.

Signed, dated and delivered at Ile du Port on 21 February 2018

G Dodin
Judge of the Supreme Court