SUPREMECOURT OF SEYCHELLES

Reportable
[2019] SCSC 776
CA31/2018
Appeal from Magistrate Court128./2016

In the matter between :

PHILIP CUPIDON **Appellant**
(rep. by Mr Nichol Gabriel)

and

MARC ROSE **Respondent**
(Unrepresented)

Neutral Citation:	Cupidon *v Rose* (CA31/2018) [2019] SCSC776 (17 September 2019).
Before:	Govinden J
Summary:	Appeal from the Magistrate Court in its original civil jurisdiction; appeal dismiss in its entirety.
Heard:	28 March 2019
Delivered:	17 September 2019

JUDGMENT

GOVINDEN J

Introduction

[1] This is an appeal to this court against a judgment of the Magistrate court rendered in its civil jurisdiction. The decision dated the 9th of July 2018 is in respect of an action in delict brought by the Appellant, the then Plaintiff, against the Respondent, then the Defendant. Having heard the evidence the Learned Magistrate did not gave judgment in favour or against either of the parties, as he felt that neither of the parties had proven their cases on a balance of probabilities. He dismissed the case in its entirety.

The case before the Magistrate court

[2] The uncontested facts of the case shows that the Plaintiff was the owner of car bearing registration number S4088 and the Defendant was the owner of a garage. The Plaintiff on the 5th of March 2013, left his car at the Defendant's garage for the latter to repair it. The Defendant had to respray the car and replaced its seats. As part consideration for the work to be done by the Defendant, the Plaintiff had deposited RS 10,000 with the latter. A Tree fell on the Defendant garage and smashed the wind screen and damaged the body of the car. The Plaintiff contended that the Defendant had to make good for the loss of his car.

On the other hand, The Defendant denies liability and claim that no date was agreed between the parties for the completion of the work on the Plaintiff's car and that he was waiting for the Plaintiff to provide two new bumpers, which the Plaintiff had agreed needed to be replaced before the tree fell. At that time, according to the Defendant the respraying of the car and other works that had originally been agreed between the parties had been completed. The defendant makes a counter claim on this basis. This, consist of the contested facts of the case.

The original Court decision

[3] The Learned Magistrate found that the issues for his determination in the case were as follows; (1) Was the Defendant negligent in failing to complete the repair works on the Plaintiff's car in a timely manner leading to the car being damaged by the falling tree? (2) Has the Plaintiff's car perished as a result of the negligence of the Defendant?

On the first issue the Learned Magistrate found that the Plaintiff had failed to prove that the Defendant was negligent in failing to complete the repair works to the car He found that though there was no date agreed for the completion of the car the Plaintiff had admitted, when giving evidence, that the spraying of his car had been to his satisfaction and that only the bumpers needed repair by the time that the tree fell. The Learned Magistrate having also found that "force Majeure" having been established ruled that he is unable to conclude that the Defendant was negligent.

On the other hand, the Learned also found that the Plaintiff has failed to prove the total loss of his vehicle and that at any rate no proof of the actual value of the vehicle had been adduced before the court. As regards the claim of the SR 10,000 deposited, the Learned Magistrate view was that this is not refundable as it was used by the Defendant in carrying out the works on the Plaintiff's car.

In respect of the Counter claim of the Defendant for work done on the Plaintiff's car the Learned Magistrate found that there was no agreement as to price for the work to be done by the Defendant and that at any rate the Defendant has not managed to substantiate this claim through evidence. As such he dismissed this claim also.

The Appeal

[4] The Appellant being aggrieved by the judgment appeal to this court on the following grounds;

(1) That the Learned Magistrate erred in dismissing the Appellant's claim despite overwhelming evidence to show that the Respondent was indebted to the Appellant.
(2) That the learned Magistrate erred in dismissing the Appellant's claim over the issue of oral evidence
(3) That in all circumstances of the case the decision of the Learned Magistrate was wrong in law and in principle.

The submissions

[5] The Learned counsel for the Appellant in his oral submission relied heavily on article 1789 of the Civil Code. According to him this article provides for "almost strict liability" on the part of a workman, when an employer leaves his car for repair in the custody of a workman. And that in this case the work man, Mr Marc Rose, never tried to rebut this presumption lying on him. Accordingly, he submitted that the Learned Magistrate erred in holding that the Plaintiff had failed to establish negligent on the part of the Defendant.

The issue to be determined on appeal

[6] Looking at the grounds of appeal and the submissions of the Learned Counsel for the Appellant I find that there is only one principal issue arising for determination of this court on appeal. That is, whether the Learned Magistrate was right in dismissing the Plaint based on his consideration of the entirety of the evidence and in coming to the conclusion that there was no negligent on the part of the Defendant.

The other issue left for consideration is whether the Learned Magistrate was right in finding that the defence of "force majeure" was proven in this case.

Discussions and determination

[7] The appeal before us is inviting this court to reverse findings of fact by the trial court.

The law regarding the power of the Supreme Court in reversing a finding of fact by the original court is well settled in this jurisdiction. In the Court of Appeal case of *T Searles vs W Pothin, SCA 7 /15*, the court held.*" It is instructive to observe from the outset that in this appeal the Appellant is essentially asking this court to contradict or upset the findings of fact made by the court below which had the opportunity of hearing the evidence at first hand. The law on this aspect is as stated in Akbar v R SCA 5/198, where this court held; "An Appellate court does not rehear the case . It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings are perverse"*.

The decision in Akbar finds support in many other English decision and the decisions of this court. In the Privy Council case *of Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd [2015] 1 LRC 232* on an appeal based on facts held, *"The rule that an appeal court would only rarely even contemplate reversing a trial judge's finding of primary fact was traditionally and rightly explained as being because the trial judge had the benefit of assessing the witness and actually hearing and considering their evidence as it emerged, so that where a trial judge had reached a conclusion was one which there was no evidence, or which no reasonable judge could have reached, that an appellate court would interfere with it. Further grounds for appellate caution were that the trial judge*

had sat through the entire case and his ultimate judgment reflected that total familiarity with the evidence; the insight gained by the trial judge who had lived with the case for days, weeks or even months, could be far deeper than that of appeal court whose view of the case was more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged. An appellate court should also be slow to reverse a trail judge's evaluation of facts because the specific findings of fact, even by the most meticulous judge, were inherently an incomplete statement of the impression made upon him by the primary evidence. His expressed findings were always surrounded by imprecision as to emphasis relative weight, minor qualification and nuance of which time and language did not permit exact expression, but which could play an important part in judge's overall evaluation. Where a judge drew inferences from his findings of primary act which had been dependent on his assessment of the credibility or reliability of witnesses who had given oral evidence, and of the weight to be attached to their evidence, an appellate court might have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole".

[8] It is with these words of caution in mind that I approach the grounds of appeal raised in this case. Having so caution myself I found that the Learned Magistrate had drawn inferences from his findings of primary facts which had been dependent on his assessment of the credibility and reliability of the Plaintiff and the Defendant and of the weight to be attached to their evidence. As I do not have the privilege to carry out this operation sitting on appeal, I am therefore limited in my capacity to discern the issue of credibility and reliability of their evidence.

[9] I have considered the findings of the Learned Magistrate and I find no error in the Learned Magistrate assessment of fact on the issue of who was the indebted party in this case. I agree with the trier of fact decision that the Plaintiff had failed to prove that the Defendant was negligent in failing to complete the repair to the car and for the decision that he gave in coming to this determination. His decision are reasoned out and supported by facts on record. I furthermore, agree with his findings and consideration on the oral evidence led before him. I therefore dismiss the first and second grounds of appeal.

[10] On the other hand the Learned Magistrate found that there was “force majeure”, proven in this case. He found that is the tree that fell on the Plaintiff car was as a result of “force majeure” and as a result and on that basis the Defendant cannot be made also liable.

[11] This defence exist in our law by virtue of article1184 of the Civil Code of Seychelles. However, it is a defence that has to be specifically pleaded in the Statement of Defence. In this case it was not pleaded by the Defendant. Though this was the case, the Learned Magistrate found it proven. I am of the view that in so doing the Learned Magistrate erred as he acted ultra petita and went beyond the pleadings. However, in view of the fact that the Court below found that “force majeure” was proven additional to the lack of negligence on the part of the Defendant and bearing in mind my findings regarding this aspect of his decision, I find that this error does change my overall view of his appreciation of fact in his judgment.

[12] As far as the third ground of appeal is concern, it is a loaded ground of appeal, it is alleging that the decision was “wrong in law and in principle”. This ground is too vague and general and invites this appellate court to embark on a voyage of scrutinizing every aspect of the judgment, with the hope of seeing an error of law. I cannot condone such a ground. A ground of appeal has to be drafted with sufficient clarity and precision of thought so as to allow the Appellate court to gauge the alleged underlying error of the trial court without the need for it to strain itself in such a way. I therefore dismiss this ground of appeal due to its vagueness and lack of clarity.

Final determination

[13] This court, therefore, bearing all the above aspects into consideration dismiss all the grounds of appeal in this matter. I make no order as to cost.

Signed, dated and delivered at Ile du Port 17 September 2019

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Govinden J