SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 544
CA20 OF 2021

In the matter between:

Ramajayam Docklands Supermarket (Pty) Limited **Appellant**

(rep. by Mr. Guy Ferley)

and

MUA Seychelles **Respondent**

(rep. by Mr. Bernard George)

Neutral Citation:	*Ramajayam Dockland Supermarket Pty Ltd v MUA Seychelles (*CA 20/2021) [2023] SCSC 544 (17 July 2023).
Before:	Esparon J
Summary:	Appeal from the decision of the Magistrate's Court.
Heard:	3rd November 2022
Delivered:	17th July 2023

ORDER

Appeal from the decision of the Magistrate's Court- Appeal dismissed with cost.

JUDGMENT

ESPARON J

Introduction

1. This is an Appeal from the decision of the learned Magistrate delivered on the 9th August 2021 dismissing the Plaint in CS 22/ 2022.

2. The grounds of Appeal are as follow;

    1) The Learned Magistrate erred in law and in fact that the Appellant has failed to discharge the evidential burden required on balance of probabilities in proof of its case.

2) The Learned Magistrate erred in law in failing to find that the evidential burden to prove that all the policy wordings were delivered to the plaintiff had shifted to the Respondent.

3) The learned Magistrate erred in law and in fact in failing to find that the Respondent's evidence in respect of the notice was at variance with its pleadings.

4) The Learned Magistrate erred in failing to find that the obligation under the insurance policy was for the Appellant to only notify the Respondent of the loss or damage informed to the Appellant.

Submissions of Counsel

3. The Appellant submitted to the Court that it had proved its case on the balance of probabilities since the Appellant as soon as it received summons notified the Respondent within a reasonable time in view that the victim never notified the Appellant of the accident which occurred on the 26th April 2016 and as such the learned Magistrate failed to take all these into considerations.

4. The Appellant also relied on clause 16 of the claims procedure and submitted to the Court that the Learned Magistrate erred in interpreting the said clause of which the trigger for the notification is on being informed of the said loss and that the Appellant was only informed when he received the summons of which the Magistrate gave a literal interpretation of the said clause. The Appellant relied on Article 1135 of the Civil Code, Article 1134 (3) of the Civil Code and Article 1156(1) of the Civil Code and further submitted to the Court that the learned Magistrate, in the face of the evidence should have read the contract, particularly clause 16 in the light of the above articles.

5. Counsel for the Appellant further submitted that the issue as to whether the entire policy was delivered or not was not part of the pleadings of the Appellant and was only mentioned by a witness for the Appellant and should not have formed part of the findings of the learned Magistrate.

6. On the other hand Counsel for the Respondent submitted to the Court as to grounds 1 and 4 of the Appeal that the Appellant had not proved its case on the balance of probabilities and that the learned Magistrate had correctly interpreted Clause 16 of the General Terms and conditions of the claims procedure and as such the Learned Magistrate correctly pointed out, that upon being notified of the claim via summons on the 2nd February 2018, the Appellant did not notify the Respondent of the claim during the 3 day period.

7. It is further submitted to the Court on this issue that the learned Magistrate had not interpreted the policy too literally since the learned Magistrate had addressed as to the issue of whether upon being informed of the loss, the Appellant had notified the Respondent of the loss and claim within 3 days and as such the Appellant had failed to abide to the terms of clause 16 of the general conditions and terms for claim procedure as they delayed by 12 days and furthermore did not submit full particulars of their claim.

8. It is submitted to the Court by Counsel for the Respondent that the issue as to whether the entire policy was delivered or not was raised by the witness for the Appellant in response to the statement of defence by the Respondent and therefore the learned Magistrate was correct to include it in her findings as it bore relevance to the Respondent's pleadings.

9. As to grounds 2 and 3 of Appeal, Counsel for the Respondent submitted to the Court that the Learned Magistrate did not erred in considering the evidence of DW1 and DW2 since the learned Magistrate did not base her findings on the evidence of DW1 and DW2 but on Clause 16 of Exhibit D1 as she interpreted the said clause in the Judgment to be running from the date of the insured was informed of the damage rather of what DW1 and DW2 stated in their evidence which was that it should run from the date of the occurrence of the incident giving rise to the event.

10. Counsel for the Respondent further submitted to the Court that the Learned Magistrate correctly interpreted the 5-year prescription period in clause 21 exhibit D relating to prescription period for payment of claims from the date of occurrence of the event. That the policy and terms contained therein are to be read as a whole and that the 3 days' prescription period under the said clause 16 prevents the Appellant from applying a 5-year prescription period to notify the Respondent.

11. It is also submitted by Counsel for the Respondent that the Respondent cannot be found to be in breach of contract if the Appellant first failed to abide by the terms of the said Contract.

Analysis and determination

12. This Court shall now deal with ground 1 and ground 4 of Appeal.

13. The law as regards to Contract of insurance has been clarified in the case of **SACOS Insurance Company Limited and Justin Etzin SCA 49 2022, SCA 49/2022** whereby Twomey JA, at paragraph 12 stated the following;

'*As no specific insurance law has been passed, an insurance agreement is by inference now, therefore, governed only by the Seychellois law of contract as governed by the Civil Code'*.

14. This Court hence reproduces Article 1134 of the Civil Code;

Article 1134

(1) *Contracts lawfully concluded have the force of law for those who have entered into them.*

(2) Contracts cannot be revoked except by mutual consent or for reasons authorised by legislation.

(3) Contracts must be performed in good faith.

15. This Court shall now turn to clause 16 claims and procedure of the said contract of insurance namely exhibit D1 which reads as follows;

(a) On the happening of any loss or damage the insured shall;

i) On being informed of such loss or damage, and at the latest within 3 three days there from, notify the Company thereof. In case of theft this time limit is reduced to 24 Hours

ii) ....

iii) WITHIN 10 DAYS submit full particulars of the claim''

16. It is clear from paragraph 24 of the Judgment that the learned Magistrate did not erred in applying clause 16 of the above clause 16 claims and procedure of the insurance contract in holding that '' whilst I agree with the Plaintiff that the evidence of DW1 was that the 3-day period runs from the date of occurrence of the incident giving rise to the claim, a clear reading of clause 16 (a) 1. (i) of exhibit D1 shows that the 3-day period should run

from the date of insured is informed of the damage. Hence it is clear from paragraph 24 of the Judgment that the learned Magistrate correctly interpreted clause 16(a) 1 (i) referred to above.

17. It is also clear from the evidence on record that the Appellant had received the summons on the 2nd February 2018 and only informed its broker on the 14th February 2018 to notify the defendant of its receipt of the summons that is 12 days form the receipt of the summons by the Appellant. Hence it is evident that the Appellant did not inform the Respondent within 3 days on being informed of the loss or damage in accordance with clause 16 (a) 1. (i) of the claims and procedure of the said contract of insurance. Furthermore, the Appellant did not follow by submitting in writing full particulars of the claim to the Respondent

18. As a result of the above, this Court concludes that the learned Magistrate did not erred in law or on the facts of the case when it held that the Appellant had failed to discharge its evidential burden required on a balance of probabilities namely to prove that there was a breach of contract on the part of the Respondent/ defendant.

19. For the above reasons, I accordingly dismiss grounds 1 and 4 of the grounds of Appeal of the Appellant.

20. As regards to ground 2 of Appeal namely that the learned Magistrate erred in law and in fact in failing to find that the evidential burden to prove that all policy wordings were delivered to the Plaintiff had shifted to the Respondent. This ground of Appeal stems from the fact that the witness for the Plaintiff PW1 testified to the Court that she had never seen exhibit D1, the General terms and conditions before which she had not received and therefore no knowledge of the time limit for the claim.

21. The concept of evidential burden has been described in the case of **Jayasena V R (1970) AC 618, 624,** where Lord Devlin described the requirement as being for 'such evidence as, if believed and left un-contradicted and unexplained, could be accepted by the Jury as proof'.

22. Murphy on evidence (eleventh edition) at 4.3 at page 76 defines the evidential burden as;

'*the discharge of evidential burden of proof means, that the claimant has adduced enough evidence of evidential facts to establish a prima facie case as to the facts in issue, and thereby defeat a submission of no case to answer'*.

At 4.6 page 83 the author states the following;

> '*As we have seen, the legal and evidential burden of proof does not always coincide, or do not always continue to coincide. In the case in which the defendant merely denies the claim and therefore, has no legal burden of proof, if the claimant succeeds in establishing a prima facie case as to each element of his claim, the defendant acquires an evidential burden of adducing some evidence to contradict the claim. Thus, where the claimant in a claim for un-authorised sub-letting of the premises establish a prima facie case by showing that a person other than the tenant was in possession, ostensibly in the position of a sub-tenant, an evidential burden lay on the defendant to show that the occupier was there in some other capacity (vide: Doc d'Hindley V Ricardy (1803) 5 ESP 4)*'.

23. In the present case, it was the obligation of the Plaintiff/Appellant in the discharge of its evidential burden to adduce prima facie evidence to show that all policy wording was not delivered to the Plaintiff/Appellant by the defendant /Respondent of which only then would the defendant acquire the evidential burden of adducing some evidence to contradict such evidence.

24. From the evidence on record, it is clear that the Appellant had gone through a broker as regards to the contract of insurance with the Respondent and therefore the involvement of a third party. Hence the failure of the Appellant to call the broker Miss Mirose to give evidence to the fact that she had not received the exhibit D1 being the General terms and conditions from the Respondent or had not handed it over to the Appellant/Plaintiff thereby producing to Court the said documents she received is fatal to plaintiff's/ Appellant's case. This Court is of the view that to say that the Appellant/ Plaintiff had discharged its evidential burden by adducing prima-facie evidence without calling the broker would be fallacious since there was the involvement of a third party namely the broker who would have received the necessary documents on behalf of the Plaintiff who had the obligation of either handing over the said documents to the plaintiff or informing them of its contents.

25. As a result of the above, this Court finds that the learned Magistrate did not erred in law and in fact in failing to find that the evidential burden to prove that all policy wordings were delivered to the Plaintiff had shifted to the Respondent since the Appellant/ Plaintiff had failed to discharge its evidential burden by adducing evidence prima facie to show that the Appellant/Plaintiff had not received the documents. Therefore, it is this Court's view that the evidential burden cannot shift on the defendant/ Respondent in view of the fact of Appellant's failure to discharge its evidential burden in order for the defendant to have acquired the obligation to adduce some evidence to contradict. Therefore, for the afore-mentioned reasons, I accordingly dismiss ground 2 of Appeal.

26. As to ground 3 of Appeal namely that the learned Magistrate erred in law and in fact in failing to find that the Respondent's evidence in respect of the notice was at variance with its pleadings. This Court has perused the pleadings of the Respondent/defendant especially at paragraph 2 of the amended defence of the Respondent/ defendant which made the following averments;

'*Paragraph 5 of the plaint is denied, the defendant avers that the Plaintiff had notice of the plaint of Marie- Celine since the 2nd February by virtue of her Plaint, but also received notice through a mise en demeure before the Plaint was filed*'.

27. The learned Magistrate stated at paragraph 23 in her Judgment the following:

'*However, from the evidence of DW1 and Dw2 claims are to be made within 3 days of the occurrence of the event giving rise, and from exhibit D1 which production was not objected by the Plaintiff, claims for damage under clause 16 (a) 1. (i) and (iii) of the general conditions are to be made within 3 days of notice followed by claim in writing setting out the full particulars of the claim. The Plaintiff having had 1st notice of the claim on the 2nd February 2018, only informed its broker on the 14th February 2018 to notify the defendant of its receipt of summons and plaint 12 days prior and not within 3 days of its notice. Moreover, this was not followed by submitting in writing the full particulars of the claim to the defendant*'.

28. At paragraph 24 of her Judgment the learned Magistrate stated the following;

'*Whilst I agree with the Plaintiff that the evidence of DW1 was that the 3-day period runs from the date of the occurrence of the incident giving rise to the claim, a clear reading of clause 16(a) 1. (i) of exhibit D1 shows that the 3-day period should run from the date the insured is informed of the damage'*.

29. As a result of the said paragraphs 23 and 24 of the said judgment, this Court is of the view that ground 3 of Appeal has no merits in view of the fact that the learned magistrate in her judgment did not rely on the evidence of DW1 and DW2 since it interpreted clause 16(a) 1.(i) as the 3 days period of the notice should run from the date the insured is informed of the damage and hence the learned magistrate did not erred in law and in facts in failing to find according to the Appellant that the evidence in respect to the notice was at variance with its pleadings. As a result, I accordingly dismiss ground 3 of Appeal.

30. As a result of the above paragraphs of this Judgment, I dismiss this Appeal with cost.

Signed, dated and delivered at Ile du Port on the 17th July 2023.

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Esparon Judge