

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 587
CS 140/2018

In the matter between:

Darell Green
(rep. by A Amesbury)

Plaintiff

and

Sonny Benoiton
(rep. by G Ferley)

Defendant

Neutral Citation: *Green v Benoiton* (CS 140/2021) [2023] SCSC 587 (3rd August 2023)
Before: Govinden CJ
Summary: Civil Code – Claim for damages – Fishing Vessel
Heard: 17/10/2022; 12/10/2022
Delivered: 3 August 2023

ORDER

I order that the Defendant pays the sum SR399,000.00 as damages to the Plaintiff.

JUDGMENT

GOVINDEN CJ

Introduction

[1] The Judgment arises out of a Complaint dated 10 October 2018, in which the Plaintiff is suing the Defendant for a breach of a contract for service as a result of alleged failure to comply with his obligation to return the goods sent for repair in good working order.

The Pleadings

[2] The Plaintiff made a Complaint before this Court for damages sustained due to his vessel being damaged and submerged below the sea water while in the care, custody and possession of the Defendant.

- [3] The Plaintiff avers that he is a well-known businessman involved in the fishing and cargo transfer business on Praslin.
- [4] The Defendant is a boat builder and operates a boatyard/business premises on Praslin.
- [5] The Plaintiff avers that on or around the month of September 2017 he took his boat to the Defendant's premises to have minor repairs done to the boat.
- [6] The Plaintiff avers that the boat in question had two 140 HP engines, two 70 Amps batteries and a remote throttle and that the boat is used for the delivery of goods to Felicite Island.
- [7] The Plaintiff avers that whilst the boat was at the Defendant's business premises/boatyard, and in the Defendant's custody, care and control, that the boat was negligently handled by the Defendant, his servants, and/or agents and/or employees giving rise to the present claim for loss and damage.
- [8] The Plaintiff, therefore, claims damages from the Defendant for the damages caused by the *faute* and negligence of the Defendant, his servants and/or agents and/or employees who left the Plaintiff's boat in the ocean, where it sunk together with the abovementioned engines, batteries and remote throttle causing sea damage corrosion thereto.
- [9] The Plaintiff claims his loss and damages as follow:
- a) the HP Suzuki engines to the value of SR375,000.00;
 - b) the Amps batteries, throttle starter switch and remote cables hydraulic steering to the value of SR49,000.00;
 - c) loss of income from 8 months' loss of fishing activities to the value of SR60,000.00;
 - d) price paid to boat owners for trips from date of damage until October 2019 and continuing SR110,000.00;

The total value of the loss being the sum of SR594,000.00

- [10] The Plaintiff avers that the Defendant has failed to settle the claim despite a Letter of Demand being served on him.

- [11] On the other hand, the Defendant agrees that he is a business man and boat builder and that he had taken the boat into his business premises for repairs to be made as requested by the Plaintiff.
- [12] The Defendant denies that the boat was damaged as a result of his act or that of his prepose. In answer to the averments of *faute* and negligence in the Plaintiff he avers that he had finished work on the boat and put it on the pontoon in the evening for collection by the Plaintiff the next morning. At 6 a.m. in the morning the Defendant received a call from the Plaintiff's son informing him that the boat had sunk. When the Defendant had salvaged the boat he found a hole in it just above the waterline.
- [13] The Defendant offered to repair the two engines by cleaning and flushing after they were salvaged to prevent corrosion damage but the Plaintiff refused the offer and insisted on replacing them. According to the Defendant, the engines have corroded because they were not cleaned and flushed after the accident.
- [14] Finally, the Defendant avers that the claim for eight months' loss of fishing activities is denied because the boat was used for delivery of goods to Felicite Islands and not fishing.
- [15] For these reasons the Defendant pleads that the case be dismissed.

Summary of evidence

- [16] The Plaintiff testified that he is involved in the business of fishing and had also been transferring goods from Praslin to Felicite Island, though, he had stopped doing the latter. He had asked his son on or around September 2017 to take his boat, the "Dartagnan", to the Defendant's premises, a boatyard, to have it repainted, anti-fouling applied and minor works done inside. It was powered by two new 140 HP Suzuki engines, which were in working order.
- [17] The Plaintiff further testified that whilst the vessel was in the custody of the Defendant, one of his sons, named Graham, one morning whilst going fishing, called him and informed him that the boat was under water at the Defendant's premises. He went there and he was informed that it had sunk and the engines were submerged. The Plaintiff testified that the

Defendant had pulled out the boat in the presence of his sons who took the photographs of the underside of the boat revealing cracks, which apparently were made whilst the anti-fouling paint was being applied.

[18] The Plaintiff also stated that he had personally spoken to the Defendant who informed him that he has insurance cover and that the insurance would pay for the damage to the boat. He then proceeded to write to the Defendant insurer to inform it of the incident; he produced a copy of this letter. He tried to get somebody to look at the engines to see whether they could be salvaged but the examination was stopped by the Defendant who reassured him that he was totally insured. The option of selling the engines for parts was also turned down by the Defendant for the same reason.

[19] The Plaintiff further testified that the boat sank because the workers of the Defendant mishandled it by allowing it to drop on the metal trolley, which caused cracks in the hull before they put it in the sea. As a result of this he is asking for compensation in the sums set out in his Plaint.

[20] Under cross-examination the witness stated that there were no cracks below the deck of his vessel when it was handed over to the Defendant, though, there were cracks on the deck. He denied that the boat was designed to be used with engines of lower speed and that it was the new engines that caused the cracks. He denied that the damages could have been caused by the tides. The Plaintiff testified that he bought the engines for SR175,000 each, though, he has no supporting documents. Mr Green goes on to state that after he wrote to the Defendant's insurer the latter informed him that the Defendant was not insured and he went and tried to secure compensation from the Defendant but to no avail. He insisted that he could have mitigated his loss by selling components of the engines but he refrained from doing that on the assurance that the Defendant gave him regarding his insured status.

[21] The Plaintiff was cross-examined on P1 with regards to the payments he had to make to other boat owners making his trips to the Felicite Island as a result of the loss of his vessel. He would sub-contract them and in return he would pay them with the money that he would have gotten under his original contract. The loss that he claims for each month following

the loss of his vessel is in respect of the difference between his profits on the earnings that he got before as compared to those after the incident.

[22] Craig Green is a son of the Plaintiff and he produced a number of photographs to the Court as exhibits. He took the photos in the yard of the Defendant and they show the “Dartagnan” and its engines after it was taken out of the water. On one of the photographs the witness pointed to a crack below the water mark.

[23] Graham Green is another son of the Plaintiff, he was the one who brought the boat to the Defendant’s yard for repair in 2017. It was brought via the sea side. The next time he saw the vessel, it was tied to a pontoon and the boat and engines were under the water; and that was two or three days after he had left it there. He called the Defendant and later Mr Padayachy, a mechanic. He showed the Court the vessel and the mechanic in the photographs produced as evidence.

[24] Ms Kelly Mothe, the Legal Risk Management and Compliance Officer of the Insurer, the Seychelles Assurance Company of Seychelles (SACOS) was called by the Plaintiff. She testified that she received a claim, from the Defendant with regards to a boat owned by the Plaintiff. The witness produced two documents being an Insurance Policy of the Defendant and a letter written by the Defendant to the CEO of SACOS on the 21st of October 2017. According to the witness, the policy did not cover damage to property owned or occupied by or in the care of or custody or control of the insured or any servant of the insured. In other words, according to her, the damages to the Plaintiff’s vessel were not covered by the policy; as a result of which the Defendant wrote the letter and sought clarifications as to how this can be covered. The witness also stated that according to their investigation the boat was damaged while the cradle was being positioned underneath it. Ms Mothe was not cross-examined by counsel for the Defendant.

[25] Roland Naya, the Sales Manager of Ace Marine Limited testified for the Plaintiff. He stated that he had sold two new 140 HP engines with the Plaintiff. He had paid SR175,000 for each, one by cheque and the other by cash. One receipt was produced as proof of the cheque payment.

- [26] However, the following transpired in cross-examination. First, the witness accepted that two receipts were issued on the same date for one engine with two different numbers. The witness testified that the receipt not produced in evidence was only a summary and an amendment of the produced receipt. Then the witness said that the other receipt, which had been disclosed to counsel and produced as Exh D1, only shows the last instalment of a payment for the second engine that was paid by cheque instead of cash. When confronted with the discrepancy the witness answered the following: *"I am trying to make sense of it"*.
- [27] In re-examination the witness further contradicted himself by stating that both receipts were for cheque payments, though, one was for down payment and the other was for instalments of seven cheques. Although, Exh D1 has a problem with the cheques numbers issued.
- [28] The Defendant testified that he has been in the boat repair business for 19 years and the Plaintiff was a regular client. With regards to the facts of the case, he remembered the boat being brought by Graham for repairs of cracks above deck and anti-fouling treatments. The repairs were done on the slipway. No repair was done on the hull. After that it was put to sea in the afternoon and tied to the pontoon for the owner to collect. Mr Benoiton stated that it is impossible for the boat to have been damaged when placed on the slipway as they put the boat on the trolley when its high tide in order to bring it aground. When Graham informed him of the sinking early next morning he saw the vessel sunk still tied to the pontoon. When the vessel was removed from the water and brought on the slipway he could see a hole beneath the water line about an inch and a half wide and he never worked on this part.
- [29] He testified that the "Dartagnan", which was quite old, being around 20 years since it was built, could have been damaged by the pontoon especially if it was tossed about by the waves. However, the damage was not caused in his care as it was tied properly under his supervision by experienced workers.
- [30] After taking the vessel ashore the mechanic, Steven Padayachy, came. With regard to batteries he informed him that new starter has to be bought costing SR35,000. However,

Graham informed him that they did not want repaired engines but wanted new ones. As it was impossible for him to buy new engines he made a claim to his insurer in order to compensate the Plaintiff. However, the claim was turned down as his policy did not cover the damage. The vessel was later towed away with its engines from his yard by Graham. As for the batteries, he does not know their whereabouts except that he has some electronic parts and starters. To him, only the electrical parts of the engines were damaged and if sold after repair each would have cost SR175,000. He denied that there were damages to the batteries, the throttles, starter, remote cables and the hydraulics system of the boat. He denied that the Plaintiff lost 8 months of fishing activities at SR60,000 as to him the vessel was not being used for fishing and he stated that the vessel was only used to carry goods to Felicite Island. He further denied that the Plaintiff would have paid other boat owners SR110,000 to do his trips whilst the vessel was under repair.

[31] Under cross-examination he stated that the vessel was removed from his premises after 14 months. He also admitted that the boat was damaged whilst tied to his pontoon and that he found a one and a half inch hole on the left hand side that was not there before and this had caused the boat to sink. He also admitted that the boat sunk under his responsibility.

Issues for determination

[32] The parties have agreed on the following facts:

- a) there was a contract for service between the Plaintiff and Defendant in respect of the repairs that would be made to the boat named "Dartagnan".
- b) the boat was thereafter left in the care, control and possession of the Defendant.
- c) before the boat was handed over to the Plaintiff and whilst still in the possession of the Defendant it suffered damages, which led to it being sunk and further damage sustained to the engines.

[33] Therefore, the issues for this Court to decide are:

- a) who is legally liable for the damages caused to the Plaintiff caused by the sinking of his vessel and;

b) what is the quantum of the damages sustained due to the aforementioned if liability is proven.

[34] While the victim of the damage benefits from a presumption of causality (responsibility) by the custodian, the latter may be exonerated fully or partially if he can show that there existed natural events (e.g. force majeure), the intervening act of a third party or the act of the victim himself (See: *Laramé v Antoine* (1982) SLR).

[35] The term "force majeure" designates an unforeseeable and insurmountable event, which prevents the debtor from performing his obligation. Thus, there are elements which are generally taken into account to determine whether force majeure exists, such as the impossibility of performing the contract for objectively justified reasons, the interruption of commercial relations or the total or partial destruction of the company.

Discussions and determination

[36] I have carefully considered the facts of the case in the light of the issues that are left for my determination. I have done this with a special emphasis upon the credibility of the different witnesses as tested under cross-examinations.

[37] First, I note that that the Plaintiff decided to pursue a cause of action based on *faute* rather than contract, even though, the alleged damages occurred during a contract for service. However, to my mind this is not fatal to the case in view of Article 1370 *alinéa* 2 of the Civil Code which provides:

"1370 (2) — When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However, if a law limits the liability in either of the two causes of action, the plaintiff shall be bound to pursue the cause of action, to which that law relates. A plaintiff shall not be allowed to pursue both causes of action consecutively."

[38] This principle which runs contrary to that of *de non cumul de la responsabilité contractuelle et délictuelle* , which exist in the French law was reaffirmed in the case of *Hermitte v Attorney General and Anor* (SCA 48/2017) [2020] SCCA 19 (21 August 2020). Accordingly, the Court will proceed on the basis of the case being one founded on delict.

[39] First and foremost, the required standard of proof in this case is the balance of probabilities. The Plaintiff has to first establish that the Defendant committed a *faute* against him when the latter caused his boat to sink whilst it was in his custody. If that is proven then the issue of quantum of damages has to be addressed.

[40] The Plaintiff has to prove that there was a *faute*, damage and a causal link. This was affirmed by the Court of Appeal in *Emmanuel v Joubert* SCA 49 of 1996 LC 117. It was held in *Pierre v Attorney General* [2010] SLR 248 that fault is an error of conduct, which results from a breach of a duty of care. Articles 1382 and 1383 in general deal with liability of a person who causes damages to another or property of another.

[41] Article 1382 reads thus:

“1. Every act whether of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.

3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

4. A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

5. Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.

[42] Article 1383 (1) provides:

“1. Every person is liable for the damage it has caused not merely by his act, but also by his negligent or imprudence.”

[43] With respect to the evidence I note that the Defendant candidly took several decisions in the hearing that favors his opponent's case.

[44] First, he made the following admissions. He accepted that the boat of the Plaintiff was brought unto his premises for repair and that it was left in his care and custody. He accepted

that it was repaired as per the instructions of the Plaintiff and was thereafter placed at sea on a pontoon that he operates and usually uses to tie vessels under his care to. The Defendant accepted that before the Plaintiff had come to fetch his vessel from him, it was found sunk whilst still tied to the exact place where his agents left it. The vessel had sunk as a result of a hole found below its water line following it crashing into the pontoon. The Defendant seemingly took the position that this could not make him liable as the boat collided with the pontoon as a result of the movements of waves caused by leisure boats moving at a high speed.

[45] To this court, however, it is clear that the above constitutes a total admission of the Plaintiff's claim as it amounts to an acceptance that the damage caused to the vessel was caused by the Defendant during a period when it should have been in care and custody of the Defendant. There is a direct cause and effect between the acts of the Defendant and the damages caused to the Plaintiff's property. It constitutes *aveu judiciaire* of an error of conduct on the Defendant's part.

[46] The Defendant's attempts to blame the damage on third parties are ultra petita as this was not pleaded. At any rate, even if pleaded I am of the view that the alleged acts of third parties will not meet the test of force majeure as the waves that could have led to the vessel colliding with the pontoon could have been foreseen and were clearly predictable as the Defendant himself admitted in his testimony that he is aware that vessels go past his pontoon sometimes at high speed and cause waves.

[47] Secondly, another notable issue in this case is the fact that the Learned Counsel for the Defendant failed to cross-examine the representative of the Defendant's Insurer when she was called as a witness of the Plaintiff. The representative, Ms Kelly Mothe, stated that according to their investigation the boat was damaged by the Defendant while the cradle was being positioned underneath it. This was an apportionment of blame upon the Defendant by his own Insurer following an investigation. In the case of *Shree Hari Construction (Pty) Ltd v Boniface & Or* (SCA 26/2013) [2016] SCCA 24 (16 August 2016), Domah J held as follows:

"[31] The legal effect of an absence of cross examination is too well known to be rehashed here. A party which fails to cross-examine a witness in the box is deemed to have adopted the evidence of the untested witness. As such, learned counsel cannot be heard to say that he had objected to that report being taken into account before the ruling. There was a ruling against him to which he should have complied. He opted not to bow down to the Ruling, with legal consequences naturally flowing therefrom.

[32] . . . In the English case of Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879, this all-too-obvious principle was judicially consecrated in the following terms:

"a party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credibility by calling other witnesses, tacitly accepts the truth of that witness's evidence in chief of that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard."

*[33] . . . As **Peter Murphy on Evidence, 8th Ed., p. 586-8**, comments. There are two direct consequences of a failure to cross examine a witness. One is purely evidential in that "failure to cross examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness's evidence in chief." The other is a tactical one: "Where a party's case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross examination why he is giving evidence about matters which were never put in cross examination on his behalf."*

[48] Bearing all these in mind I find that the Defendant has admitted the evidence of Ms Mothe, when it comes to both the outcome of the SACOS report relating to how the damage to the Dartagnan occurred and also the fact that he was not insured at that time because his Insurance Policy would not cover the kind of damages caused to the Plaintiff's vessel.

[49] Accordingly, the Court finds that the Plaintiff has proven that the Defendant committed a *faute* on a balance of probabilities.

[50] In his Statement of Defence the Defendant attempted to mitigate the quantum of damages that he might be required to pay by averring that he offered to repair the two engines by cleaning and flushing after they were salvaged to prevent corrosion damage but the Plaintiff refused the offer and insisted on replacing them. As a result the engines have corroded because they were not cleaned and flushed after the accident. This is, however, denied by the Plaintiff who says that he was informed that there was no need to repair the engines by the Defendant as he was fully insured with the SACOS. I have considered the content of the letter that the Defendant wrote to his Insurer, which clearly shows that he was under the impression that he was fully insured so as to cover the damages caused to his client's

vessels, such as that caused to the “Dartagnan”. Further, he confirmed in his evidence that Graham Green had informed him that the Plaintiff wanted new engines and that it was because of this that he made an insurance claim. This leads me to conclude on a balance of probabilities that the Plaintiff is telling the truth when he denied the fact that he had asked the Defendant to repair the engines but that rather he had instead asked for two new engines to be provided to him.

[51] This leaves the Plaintiff to prove the value of the engines. It transpired before the Court that the Plaintiff attempted to establish that the engines were worth SR175,000 each, whilst in his pleading he had averred that they costed him SR187,500. Mr Naya, the person who sold the engines to the Plaintiff produced proof of payments, which shows that only two engines each costing SR175,000 were bought by the Plaintiff. Though, there are some inconsistencies in his evidence I am of the view that he was a truthful witness and any issues with regards to his testimony can be reconciled as his evidence was given after a considerable amount of time post sale and that a genuine error could have taken place when the two receipts were issued. Both the Plaintiff and his son Graham were consistent on the purchase price. I found, therefore, that this aspect of the evidence has been proven by the Plaintiff and that the engines lost as a result of the sinking of his vessel came to the total value of SR350,000 only.

[52] The Plaintiff also claims two batteries of 70 Amps each; a throttle starter switch and remote cables hydraulic steering of the total value of SR49,000. The Defendant testified that the boat and the engines were taken away by the Plaintiff and that in his possession are the electrical parts. He also testified that when the boat was sunk there was nothing with regards to the throttle or hydraulics. Having assessed the totality of the evidence with regards to this loss I find that the *faute* of the Defendant did lead to the destructions of the items mentioned under this claim and some, if not all of them, are still in the possession of the Defendant. I accordingly award the Plaintiff the sum of SR49,000.00.

[53] With regards to the claim of loss of income from 8 months’ loss of fishing activities to the value of SR60,000.00, I find it was not proven as the vessel was not involved in fishing when it was berthed for repair with the Defendant.

[54] This leaves only the prayer with regards to price paid to the sub-contacted boat owners for trips from date of damage until October 2019 and continuing, which is SR110,000.00. Here, the Plaintiff has not made any attempts at substantiating this head of damages. He only produced a handwritten list of alleged trips that the contacted boats did to the Felicite Island and amount of payments, purportedly made by one of his sons. The two sons were called as witnesses, however, none were examined on the contents of the list. Beside that not one single receipt of payment was produced to support the Plaintiff's evidence and prove the veracity of his averments. In the alternative, he could have called any one of those boat owners who purportedly assisted him with the different trips and corroborate some of the items in the list. As a result this Court finds that the Plaintiff has failed to prove that he had to pay for boat trips in the sum of SR110,000.00 as a result of the *faute* committed by the Defendant.

Final determination

[55] Having come to the above determinations, accordingly, I order that the Defendant pays the sum SR399,000.00 as damages to the Plaintiff.

[56] The Plaintiff shall be entitled to costs of these proceedings.

Signed, dated and delivered at Ile du Port on 3rd day of August 2023



Govinden CJ