IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2021] SCCA 70 17 December 2021
SCA 27/2019
(Appeal from CS 105/2015)

Jose Pool **Appellant**

(rep. by Mr. France Bonte)

and

H. Savy Insurance **Respondent**
(rep. by Ms. Alexandra Benoiton)

Neutral Citation:	*Pool v H. Savy Insurance* (SCA 27/2019) [2021] SCCA 70 (Arising in CS 105/2017) 17 December 2021
Before:	Tibatemwa-Ekirikubinza JA, Dingake JA, Esparon JA
Summary:	Quantum of damages, evidence and burden of proof in relation to damages and quantum
Heard:	6 December 2021
Delivered:	17 December 2021

ORDER

The appeal is dismissed. There is no order as costs.

JUDGMENT

DR. O. DINGAKE, JA

INTRODUCTION

[1] The Appellant, Mr Jose Pool filed a Plaint in 2015 against the Respondent, H. Savy Insurance Co. Ltd (the "Insurance") for loss of vehicle (due to write off state); loss of use; and moral damages.

[2] Mr Pool averred that the vehicle was stolen and involved in the accident whereby the vehicle was a complete write-off. As per the Plaint the Insurance refused to meet Mr Pool's insurance claim on the grounds that there was "no violent and forcible entry" into Mr Pool's vehicle and as a result his claim could not be entertained.

[3] The suit proceeded *ex-parte* and Judgment was delivered on 1st June 2016 dismissing the Appellant's claim. The Court stated that it was not convinced that the vehicle was stolen by Hubert Mothee, a friend of the Appellant's son, who had invited a few friends over the night of the alleged theft and accident.

[4] The Court held that there was no evidence on record other than that of the Appellant on which the Court could rely in favour of the Appellant's contention that Hubert Mothee had stolen his vehicle. With respect to the claim for damages, the Court held that the Appellant offered no evidence in support of his claim. On this basis, it was held that the Appellant has not established his case on a balance of probabilities.

[5] Following this decision, the Appellant has filed an appeal on the grounds that the Learned Judge erred in not giving judgment by default upon the failure of the defendant, the Insurance, to file its defence on date due and that the Learned Judge erred in not considering the exhibit, i.e. insurance policy.

[6] The Appeal was allowed. The Judgement delivered on 31 August 2018 focused mainly on the issues of the Respondent's conduct, namely: non-appearance on summons to appear; no pleadings in defence; no conduct of defence; no application to set aside ex-parte application. The Court of Appeal however found that with regard to the quantum of damages there was not enough evidence produced to make a finding on it. Therefore, the Court of Appeal sent the case back to the Supreme Court for a determination on the issue of quantum.

[7] The Supreme Court's Judgement on the issue was delivered on 23rd May 2019 dismissing prayers for damages as the Court found no evidence on which it, on a balance of probabilities, can say that the Appellant was entitled to the sums claimed, having failed to provide any proof to support his claim for loss of vehicle, loss of use and moral damages.

[8] The Appellant has now appealed the 2019 Supreme Court decision.

GROUNDS OF APPEAL

[9] The Appellant submitted 3 Grounds of Appeal:

> ***Ground 1*** – The Learned Judge erred on the fact that there was no evidence;
> ***Ground 2*** – The Learned Judge erred in disregarding the insurance policy;
> ***Ground 3*** – The finding of the Learned Judge is against the weight of the evidence.

[10] We pause here to note that the second Ground of Appeal is similar to the one that was argued in the previous Court of Appeal case (2018 Judgment) and the Court of Appeal already held that there was not enough evidence produced. The Insurance Policy is for the period of 2010-2011 cover (see page B15 of the Court of Appeal Bundle), whereas the alleged theft and accident occurred in 2014. All three grounds of appeal relate to evidence with regards to the quantum of damages issues.

The Law - Court of Appeal – review of damages

[11] It is established by Seychelles case law that an appellate court is *"reluctant to review damages unless it is satisfied that there are good and valid reasons for doing so"* (*Seychelles Breweries v Sabadin* SCA 21/2004 (Reported in SCAR (2006 -2007); *Philoe and Another v Ernesta* (17 of 2004) (17 of 2004) [2005] SCCA 22 (24 November 2005); *Mousbe v Elizabeth* (1993-1994) SCAR 207; *Civil Construction Company Limited v Leon & Ors* (SCA 36/2016) [2018] SCCA 33 (14 December 2018); *Theresia Melanie v Clifford Marie & Anor* (Civil Appeal SCA19/2017) [2019] SCCA 33 (23 August 2019)).

[12] The case of *Seychelles Breweries v Sabadin* SCA 21/2004 followed the decision in *Flint v Lovell* [1935] 1 K.B. 354 and it was held that good and valid reasons for reviewing damages are when the trial court acted on a wrong principle of law, or when the amount awarded is so large or so small that it is, in the judgment of appellate court, an entirely erroneous estimate of the damages.

[13] In *Jonathan Geers v Nadin Dodin* (Civil Appeal SCA 7/2017) [2019] SCCA 9 (10 May 2019) it was stated that, *"It follows that an appellate court should not normally interfere with it* [quantum of damages], *unless either the Judge has made some error of principle or misunderstood the facts, or the award is manifestly insufficient or excessive* […]*".*

[14] In the case of *Seychelles Yacht Club v Changyumwai* (SCA 14/2019 (Appeal from CC 22/2017)) [2021] SCCA 40 (13 August 2021) it was stated that, *"on the question of damages generally, the law accepts that it is possible that on the same evidence two different minds might reach different conclusions, often by significant margins, without either being appealable, unless it is manifestly plain that such an award was wrong in principle, or unproven"*.

[15] In this case the question is whether there are good and valid reasons for the Court of Appeal to review the damages awarded, namely, whether the trial court acted on a wrong principle of law or misunderstood the facts, or whether the amount awarded is manifestly insufficient or excessive that it is an entirely erroneous estimate of the damages.

STATEMENT OF ISSUES

Whether the trial court acted on a wrong principle of law or misunderstood the facts

[16] The Appellant claimed for damages for loss of vehicle (due to write off state) in the sum of SCR397,000; loss of use in the sum of SCR50,000; and moral damages in the sum SCR200,000

[17] Evidence in support of his claim are Insurance Policy (pages B4-B17 of the Court of Appeal Bundle); his own testimony (as was noted at paragraph [14] of the judgment); and the Police Statement (pages B18-B19).

Loss of vehicle due to write-off

Insurance Policy

[18] With regards to the proof of loss of the vehicle (write-off), the Trial Judge stated at paragraph [14] that Insurance Policy states that the value of the vehicle was SCR397,000 and that the Defence cannot dispute the value since that is the sum for which they insured the vehicle.

[19] The Trial Judge proceeded to analyse whether the Appellant has actually shown that any damage was done to the vehicle and concludes that apart from the Appellant stating that it was a write-off there is no evidence as to the extent of the damages (paragraphs [15]-[16]). At paragraphs [19] the trial Judge also notes that the period of cover in the Insurance Policy provided by the Appellant was for 2010-2011 and not 2014, the year when the vehicle was stolen.

[20] The Trial Judge then found that, *"this Court cannot pronounce itself on the legitimacy of P1 since it has no bearing on the issue of quantum in itself, other than to show the sum for which it was insured, albeit in 2010"* and found no evidence on which the Court can, on the balance of probabilities, say that the Plaintiff was entitled to the sums claimed (paragraphs [20]-[21]).

[21] A careful reading of the Insurance Policy seems to suggest that the Appellant appears to have been insured in 2010-2011 only for loss or damage due to fire and theft.

[22] It should also be noted that the Insurance Policy is not for the relevant year, and the finding by the court below that, the Policy *"has no bearing on the issue of quantum in itself, other than to show the sum for which it was insured, albeit in 2010"* is correct. The amount it was insured for in 2014 is not known. The condition and the value of the vehicle in 2014 prior to the accident is also not known. Its value and/or condition could have depreciated over the years. The insured value of the vehicle in 2014 could have been less than in 2010. Therefore, if the Trial Judge would have based the award for loss of vehicle as it was in 2010, it would have been incorrect and unjust.

[23] With regards to the quantum of damages, it was stated in *Nourrice v Florentine & Ors* (CS68/2016) [2019] SCSC 919 (21 October 2019):

> *[51] The Court has several concerns about the damages sought and the evidence (or lack thereof) provided by the Plaintiff. To determine the quantum of damages, the court must consider the evidence and the awards given in comparable cases. (See: Seychelles Breweries v Sabadin SCA 21/2004, LC 278). Awards based on uncertain damage are not permissible and this as clearly held in the case of Kilindo v Morel SCA 12/2000, LC 196.*

[24] In that case, the plaintiff claimed damages of SCR85,000. In support of the claim for damage the plaintiff provided several invoices and quotations for the repairs, which did not cover the whole amount claimed and the issue of damages was not covered further during examination in chief. Nevertheless, the Court also noted the decision in *Low-Ken v Fanny* (CA8/2015) [2016] SCSC 726 (06 October 2016), which highlighted the need to look beyond the estimates and quotes and look at all the evidence before the Court. After analysis of the invoices and quotes the Court took into consideration the total amount paid for repairs of the vehicle and ordered such amount to be paid by the second Defendant (person who collided with the vehicle), not the insurance though.

[25] Although, *Nourrice v Florentine & Ors* was a case involving claim for damages to the vehicle, and not loss of it, it highlights the need for the plaintiff to prove damages and that uncertain damages are not permissible. The Court in that case at least had some evidence of sums paid for repairs.

[26] In *Souffe vs Cote D'or Lodge Hotel Limited* (Commercial Case No. 24 of 2012) [2013] SCSC 25 (27 March 2013), the Court emphasised the necessity to prove damages and quantum. It was stated that where the plaintiff is entitled to recover from the defendant, in order to do so he still has to prove the loss that he has suffered and the quantum thereof. The Court concluded:

> *[26] Now that is the only evidence in support of the claim for loss of profits. All the plaintiff does is to say: 'This is what I have lost. Give it to me.' This does not amount to proof that the plaintiff lost the said sum as profit. It is not in question that he lost the profits to that contract. But he has not shown that the sum of US$17,400.00 was the profit on that contract. He needed to show what his expenses would have been and the profit element in the contract sum. He made no effort to do this. He has failed to prove the quantum of his loss in this regard. I therefore award him nothing.*

[27] In the present case, considering that there was no other evidence, in particular regarding the value of the car prior to the accident in 2014 and after the accident, the Trial Judge's

finding that, there was no evidence on which the Court can, on a balance of probabilities, say that Mr Pool was entitled to the sums claimed is correct. Therefore, even though the liability was decided by the Court of Appeal, the Appellant still had to prove damages and quantum and he has not done so.

Loss of use

[28] With regards to the "loss of use" damages, the Trial Judge found the following:

> *"[18] Furthermore it was the Plaintiff's evidence that the vehicle is now in use. Even if one was to accept his evidence that he could not use the vehicle for two years, there is no other evidence to support his testimony."*

[29] To sum up Mr Pool's testimony, he stated that after the accident his opinion was that the vehicle was a write-off. He stated that insurance agreed with him; but he has not provided any copy of the Insurance's findings. Two years after the accident in 2016 his friend Mr Tom Hoareau embarked on a mission to attempt to fix the car. The car was partially fixed but the vehicle is still with Mr Hoareau.

[30] In the present case, the Appellant has not substantiated his claim for loss of use with any other evidence apart from his testimony. No witnesses were called, no invoices provided. Accordingly, it appears that the Trial Judge did not err.

Moral Damages

[31] With regards to moral damages, the Trial Judge held the following:

> *"[17] As regards the claim for moral damages the Plaintiff merely stated he was claiming for moral damages without expanding on that."*

[32] From the testimony of Mr Pool (see pages 18-20), during cross-examination in reply to a question regarding moral damages, the sum and *"how this morally affected you"*, Mr Pool replied that he was in shock when he was informed that his vehicle had been in the accident, that it worried him a lot, that the driver had ran away and that he *"was also implicating one of my minor children to see all of that"* and that for a long period of time he could not use the vehicle.

[33] During re-examination in chief, the Counsel for Mr Pool appears to put to Court that the reason for moral damages is that the Insurance has not paid him since 2014 and in 2019 he was still waiting to be compensated.

[34] The case of *Nourrice v Florentine & Ors* (CS68/2016) [2019] SCSC 919 (21 October 2019) captures the reasons why a court may not award moral damages:

> *"[57] Finally, the Plaintiff seeks moral damages of Seychelles Rupees Two Hundred Thousand SR200,000. Twomey CJ considered the approach taken to the assessment of damages in road vehicle accidents in the case of Mathiot v Camille & Ors (CS 64/2012) [2017] SCSC 1001 (30 October 2017). The cases referred to in that case indicate that moral damages of the amount sought tend only to be granted where the individual has suffered a serious personal injury. In the Mathiot case, for instance, the Plaintiff was awarded Seychelles Rupees One Hundred Thousand SR100,000/- but the Plaintiff sustained a head injury, a fracture of the left femur, a laceration on the forehead and facial bruises. He was cared for in intensive care at the hospital and had to undergo ongoing therapy for the injuries sustained.* ***Here, the Plaintiff has only suffered inconvenience as a result of her vehicle being damaged.*** *The Court accepts that it may be appropriate to order moral damages for the inconvenience suffered for keeping a motor vehicle in the garage of a repairer. (See**: Adeline v Ernesta (1992) SLR 13). Such damages are not, however, always considered appropriate: Low-Ken v Fanny (CA8/2015) [2016] SCSC 726 (06 October 2016).** The Court considers that this is one such case. The Plaintiff allowed a vehicle to be driven that did not have a valid road fund licence.* ***She was not driving the car at the time of the accident, so she has not suffered any mental and physical trauma as a result of the accident. The evidence also suggests that the first Defendant assisted with the repairs at no cost to the Plaintiff, reducing the burden on her****. Awarding moral damages in such circumstances would therefore be inappropriate."* (emphasis added)

[35] In the present case, the Appellant stated that he was in shock that his vehicle was involved in an accident. However, that was caused by the person who allegedly stole the vehicle, not the Insurance company. It was later put to Court that moral damages against insurance are due to delay in payment. Similarly, to above cited extract from *Nourrice v Florentine & Ors* the Appellant's friend has taken on the repair of the vehicle and as it appears from Mr Pool's testimony he also has not paid anything yet to his friend (see page 21 of the CA Bundle).

[36] The Appellant has expressed the reasons for his sufferings, however, it appears that they are mostly addressed to the person who allegedly stole the car. With regards to the moral damages due to the alleged delay in payment by Insurance, nothing further was averred. Accordingly, there is also lack of evidence and the Trial Judge did not err.

Whether the amount awarded is manifestly insufficient or excessive that it is an entirely erroneous estimate of the damages

[37] In our respectful opinion it is not necessary to consider this issue since the damages were not awarded not due to erroneous estimate but due to the lack of evidence.

CONCLUSION

[38] It is settled law that an appellate court is reluctant to review damages unless it is satisfied that there are good and valid reasons for doing so. Good and valid reasons for reviewing damages are when the trial court acted on a wrong principle of law, or when the amount awarded is so large or so small that it is, in the judgment of appellate court, an entirely erroneous estimate of the damages.

[39] The Appellant claimed for damages for loss of vehicle (due to write off state) in the sum of SCR397,000; loss of use in the sum of SCR50,000; and moral damages in the sum SCR200,000. Evidence in support of his claim are Insurance Policy (2010-2011 cover, whereas the alleged theft and accident occurred in 2014); his own testimony; and the Police Statement.

[40] Based on the analysis of the evidence and case law cited herein, it is our considered view that the Trial Judge did not err in her findings and all three grounds of appeal, should fail. There is no evidence of the value and condition of the vehicle pre-accident in 2014; there is no evidence of insured value of the vehicle in 2014; there is further no evidence of post-accident value of the vehicle and whether it was indeed a write-off as averred by the Appellant or it could have been repaired.

[41] In the result, this appeal is without merit and it is dismissed. We make no order as to costs.

Dr. O. Dingake, JA

I concur

Dr. Lillian Tibatemwa-Ekirikubinza JA

I concur

Esparon JA

Signed, dated and delivered at Ile du Port on 17 December 2021.