

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2020] SCCA 18 December 2020

SCA 14/2018

(Appeal from MC 31/2014)

HIS ENTERPRISE (PTY) LTD

(rep. by Mr. Elvis Chetty)

Appellant

and

CARLOS BARRA

(rep. by Mr. Guy Ferley)

Respondent

Neutral Citation: *HIS Enterprise (Pty) Ltd v Barra* (SCA 14/2018) [2020] SCCA - (18 December 2020).

Before: Twomey, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Delict – employer’s liability for injuries of an employee sustained in the course of employment

Heard: 7 December 2020

Delivered: 18 December 2020

ORDER

The appellant was liable for the injuries sustained by the respondent since he was acting in the scope of his employment. The appeal therefore fails. Consequently, the judgment and orders of the trial Court are upheld with modification to the award of damages.

JUDGMENT

TIBATEMWA-EKIRIKUBINZA JA

Facts

[1] The appellant company was carrying on business as a building contractor and the respondent-Carlos Barra was employed as a handyman in the said company. On the 28th of

November 2008, while working at a storeyed building, Carlos fell off a storeyed building and fractured his jaw. As a result of the accident, Carlos sued the appellant company in the Magistrate's Court and claimed for compensation in the sum of SR 350,000/= as damages for personal injury and negligence as well as interest and costs. Carlos averred that the company was negligent in that it failed to provide a safe system of work.

[2] The appellant company refuted the claim and averred that Carlos did not sustain the injuries in the course of employment as he was neither requested by the construction foreman nor was it relevant for him to climb on the storeyed building. It was also averred that Carlos prior to climbing on top of the building had been smoking drugs.

[3] The learned Senior Magistrate held that Carlos-the respondent at his own motion and sole negligence and in the absence of any specific instructions to that effect decided to climb on to the said roof and fell as a result of not knowing which area was safe to stand on. Therefore, it could not have been the action and or omission of the defendant which led to the fall of Carlos.

[4] Furthermore, the learned Magistrate held that there was no evidence on record led by the plaintiff to prove on a balance of probabilities that he was instructed to perform works not within his job description and that the appellant company failed to provide a safe system of work which resulted into the injuries suffered. Carlos's suit was dismissed with costs.

[5] Dissatisfied with the decision of the learned Senior Magistrate, Carlos appealed to the Supreme Court on grounds inter alia that there was sufficient evidence on record for a proper finding of liability and that therefore the Magistrate erred in failing to find that he had proved his case on a balance of probabilities.

[6] The Supreme Court held in favour Carlos and found that there was no evidence on record to show that the construction foreman/ supervisor ever stopped Carlos from climbing up the roof since his services were not needed at that point. Furthermore, that there was also evidence on record by the appellant to the effect that his manager had asked him to work

on the roof with the supervisor. The Supreme Court therefore allowed the appeal and ordered the appellant company to pay Carlos his claim of damages in the sum of SR 350,000/=.

[7] The appellant company being dissatisfied with the Supreme Court decision appealed to this Court on the following grounds:

- 1. The learned trial Judge erred in law on the evidence in holding that the respondent had adduced evidence to prove the damages not awarded by the trial Judge.**

- 2. The learned trial Judge erred in law and on the evidence as to the employment relationship between the two parties was not properly considered.**

- 3. The learned trial Judge erred in law and on the evidence in relying on the testimony of the respondent in respect of the damages as the respondent was not a credible witness.**

Prayers

[8] The appellant company therefore prayed that the Court of Appeal reverses the decision of the trial Judge and dismisses the findings it made.

Appellant's submissions

Ground 1

[9] In most circumstances, the trial Judge is best placed to determine damages. That the Supreme Court Judge despite not having original jurisdiction ordered the appellant to pay SR 305,000/=. In making the award, the Judge failed to consider the evidence that was adduced before the Chief Magistrate.

Ground 2

[10] The respondent was employed by the appellant as a handy man and thereby had no business climbing on the roof because he was not skilled to perform the requisite duties required at the time. That it is the respondent who on his own volition failed to follow instructions given by his supervisor/employer.

Ground 3

[11] The Magistrate after examining the demeanour of all parties came to the following conclusion:

“In light of the latter finding, it is abundantly clear on evidence as led by the defendants that at no point in time was the plaintiff [Carlos] instructed to climb on to the roof of the said building either by Director Harold Stravens as alleged and or the relevant foreman Jeffrey Bristol for it was simply not according to the Plaintiff’s job description on the said date and that of the handyman who was not supposed to be on a roof performing the works of a skilled and qualified carpenter ...

It follows therefore based on the findings at paragraph (iv) that there is no evidence on record led by the Plaintiff to prove on a balance of probabilities that he was instructed to perform works not within his job description.”

[12] That the Supreme Court Judge failed to consider and take into account the findings of the trial Judge. Therefore the conclusion made by the Judge that Mr. Jeffrey Bristol could not be believed was wrong since he was not the trial Judge.

[13] Furthermore, that the credibility of the respondent was questioned by the Magistrate but the Supreme Court Judge failed to consider these remarks in his judgment.

[14] Counsel for the appellant also submitted that the Judge failed to give reasons before he arrived at the award of damages in the sum of SR 350,000/=.

Prayers

[15] The appellant prays that this Court allows the appeal.

Respondent's submissions

[16] The respondent argued grounds 1 and 3 together since they both relate to the issue of damages.

[17] The respondent submitted that the Supreme Court Judge followed all the evidence adduced before the court. That this is evidenced when the Judge in his judgment stated as follows: *"I have gone through the evidence on record and analyzed the facts in issue."*

[18] The respondent also submitted that a judge has a wide but reasonable ambit within which to make a finding both on the facts and quantum of damages awarded. That the Judge stated he had all the proceedings before him and the appellant had not adduced any contrary evidence before the court.

[19] Counsel relied on The Seychelles Digest 1982 by M.J Gerard Lalouette to argue that an appellate Court can only interfere with the findings of the trial Judge if the Judge acted on some wrong principle of law or acted on a fact which was manifestly wrong.

[20] In regard to the argument that the respondent was not credible, counsel submitted that the the fateful day, he had been asked by his manager to work with Mr. Jeffrey.

[21] That on the above premise, the Judge correctly ruled that there was enough evidence to prove that the appellant had suffered damages by reason of following the instructions given to him by his manager and is thereby entitled to the award of SR 350,000/= in damages.

Ground 3

[22] The respondent submitted that the Judge was right to find that Carlos was injured during the course of his employment with the appellant since there was no denial that he was employed

by the company. That in fact the appellant admitted that the respondent was employed as a handyman and the termination of employment letter which is on record speaks to this fact. Furthermore, that the written submissions of the appellant which were filed in the Supreme Court contain a statement that “*the appellant suffered an injury whilst at work.*”

[23] The respondent thus prayed that this Court finds in his favour and dismisses the appeal with costs.

Court’s consideration

[24] We will address all the three grounds raised in the Notice of appeal together.

[25] The case before us is a matter premised in delict governed by **Articles 1382-1384 of the Civil Code**. The relevant aforementioned provisions provide as follows:

Article 1382

- 1. Every act whatever 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.**

Article 1383(1) states:

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

Article 1384 states:

(1) A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.

(1)

(2) **Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.**

[26] **Article 1382 (supra)** clearly brings to light three elements necessary to establish delictual liability. These are: fault, damage and causality.

[27] In the case of **The Attorney General rep. Government of Seychelles v Jumaye (1978-1982) SCAR 348**, this Court, in distinguishing between the rules in French law applicable to Seychelles jurisdiction found that Articles 1382(1), 1383(1) and 1384(1) are literal translations of Articles 1382, 1383 and 1384 of the French Civil Code. The Court further observed that Articles 1382 and 1383 deal with human acts where liability is based on fault which consists of damage caused by one person to another by a positive act or an omission either by negligence or imprudence. The Judge however noted that the liability of a defendant under Article 1382 can be absolved totally or partially where there is an act exterior to the actions of the defendant or by reason of the acts of the victim. The principle in the latter part of the foregoing statement was followed by this Court in the case of **Civil Construction Company Limited vs. Leon & Ors (SCA 36/2016) at paragraph 32**. In that case, the Court in determining the question as to whether the claim before it was a delict observed that: *“liability of a Defendant under Article 1382 can ... be absolved totally or partially ... where there is an act exterior to the actions of the Defendant or by reason of the acts of the victim”*.

[28] In the present matter, the contentious element is: *whether the damage sustained by Carlos was caused in the scope of employment or by his own actions.*

[[29] In **Civil Construction Company Limited v Leon & Drs (supra) at paragraph 40**, it was held that employers are strictly liable for the damage caused by their servants and

employees acting in the scope of their employment. It follows therefore that there is a presumption of fault on the part of employers.

[30] The Court however held that if it is a deliberate act, contrary to the express instructions of the employer, and is unrelated to the employment, then the employer will not be liable.

[31] The appellant's counsel in this matter argued that Carlos acted outside the scope of his duties when he climbed up the roof and fell from which he sustained injury. Furthermore, the appellant argued that Carlos on his own volition without the foreman's instruction climbed up the roof. That on this premise, the appellant company was not liable for the injury sustained by Carlos.

[32] A careful reading of the evidence on record shows that Carlos was indeed an employee of the appellant company as a casual worker/ handy man. **Section 19** of the **Employment Act** *inter alia* provides that employment of a casual worker amounts to a contract of employment. The appellant's representative director—Mr. Harold Stravens does not dispute this fact. He testified that at all material times the respondent was employed by the appellant company.

[33] Having established that Carlos was an employee, the next step is determine whether he sustained the injuries within the scope of his employment. Mr. Harold Stravens denied ever giving the respondent any instructions to climb and or work on the roof on the said fateful date. That the respondent was instructed to remain on the ground and hand over corrugated iron sheets to skilled workers on the roof. He further testified that on the said date, Mr. Belle did report to him that the plaintiff went on the roof on his own motion.

[34] On the other hand, the respondent testified that they were using an extension wire to obtain electricity for the instructed works and had a problem with the extension as it was too short so he tried to pull the extension wire and it got stuck and he thus pulled the wire which got loose from the extension instantly, he lost control on the roof and fell through the unscrewed corrugated iron sheet. In cross-examination he testified that he fell as a result

of the instructions of Mr. Harold Stravens and the wire of the extension they were working with.

[35] The Supreme Court Judge in finding the appellant company culpable held as follows:

“... the evidence of the supervisor Jeffery Bristol cannot be believed. It was his duty to supervise. It was always open for him to call the appellant to order and ensure that he did what he was required to do. There is no evidence that he did that and to that extent there was failure on the part of the supervisor.”

[36] I agree with the learned Judge’s findings. I note from the record that the respondent was instructed to work on the site by passing on corrugated iron sheets. The testimony of Micky Belle brings to light this fact. He testified that on the said date he saw the respondent at 1p.m during his lunch break smoking something rolled in a piece of paper and he was asked together with other colleagues to go back to work. He later saw the respondent climbing the scaffolding.

[37] It can therefore be safely concluded that the respondent was in the course of employment when he sustained the injuries.

[38] I also note that for a party to sustain a claim in delict, they need not prove negligence as required in English tort law. It is enough if fault is established. It is illogical to argue that the respondent climbed the scaffolding without the requisite skill because he was not instructed to do so and yet there was a foreman in charge of the workers at the site. The question that lingers is: Where was the foreman to stop the respondent from climbing on to the scaffold? It is this omission that makes the appellant company liable.

[39] As regards the credibility of the respondent, I find that this argument which was raised by the appellant is not sustainable. The Supreme Court re-evaluated the evidence given by both the appellant’s witnesses as well as the respondent. After having re-evaluated the evidence in its entirety, he found that the evidence given by Mr. Jeffrey Bristol-the foreman and Mickey-a co-worker was unbelievable.

[40] Regarding the award of damages, the Supreme Court Judge based his decision on the sum pleaded in the plaint vide SR 350,000/=. I carefully looked through the receipts attached to the plaint and did not find any evidence to support the said sum. I however found a document marked exhibit P2 from Medent Specialised Dental Clinic indicating the total sum of restoration of the respondent's teeth as SR 155,250.00/=. I also found on record a signed receipt marked exhibit P3 from Medent clinic showing that the respondent expended SR350/= for medical consultation. Thus, the total sum proved by the respondent was SR 155,600/=. I therefore set aside the award of SR 350,000/= made by the trial Judge and substitute it with the proved sum of SR 155,600/=.

[41] Arising from the analysis above, I hold that on the whole, the appeal fails save the ground relating to damages. Accordingly, the judgment of the trial Judge is upheld. The orders made by the Judge are also upheld with modification of the award of damages.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020.



Tibatemwa-Ekirikibinza JA

I concur

Twomey JA

I concur

Dingake JA