

**Gill v Film Ansalt**

**(2013) SLR 137**

Domah, Twomey, Msoffe JJA

3 May 2013

SCA 28/2009

**Counsel** P Pardiwalla for the appellants

B Georges for the respondent

**The judgment was delivered by**

**DOMAH JA**

[1] The Supreme Court on 6 July 2009 delivered a ruling reinstating a plaint with summons lodged on 24 July 2000 whereby the respondent was vindicating its rights over two properties in Praslin. The plaint had been dismissed on 19 November 2007, after it had been called pro forma ten times previously and been part–heard on 18 March 2005. At the call of the case for the purposes of obtaining a date for continuation, neither the respondent nor his counsel was present. Counsel for the appellants, therefore, made a joint motion for the dismissal of the case. One of the reasons which was advanced by the appellants was the manner in which the case had been handled by the respondent dragging its feet with the case and dragging the appellants unnecessarily to court so many times. The Court allowed the motion and dismissed the plaint.

[2] Soon after the dismissal, and at the very same session, Mr Georges appeared before the Court, not as counsel for the respondent but as its prospective counsel and apologized for his absence when

the case was called. He explained that he had been present earlier but since the Court had not yet started, he proceeded to another division for a short matter. As ill luck would have it, the present matter was called in his absence. He, therefore, moved that the case be reinstated. The Court decided that it could not do so in the absence of due notice to the appellants. Counsel explained his predicament. First, his own appearance in the case had yet to be regularized as Mr Lucas who was still in the case had not yet withdrawn. The following exchange between the Court and counsel is worth reproducing:

Court: ... I am convinced that you were counsel for the Plaintiff.

Mr Georges: I am not, my Lord. I'm certainly not representing for the Plaintiff. I don't want to enter in an argument with the Court.

Court: Mr Georges, if you say you're not appearing I need not tell you and you can simply go free because you are not representing any parties.

Mr Georges: Of course, my Lord, I will be appearing in this case. I have been instructed to appear once Mr Lucas has withdrawn and what I want to know is ...

Court: If you read my order carefully, can you read my order?

Mr Georges: Yes.

Court: Neither the Plaintiff nor the Counsel appeared, that's why the case was dismissed, not necessarily you or x, y, z.

[3] In the light of those pertinent remarks by the Court and the clear legal position, we are mystified as to the reasons for which the Court still gave a date for mention to counsel, which was 4 February 2008. What it should have done was give until the end of the day for counsel to secure the attendance of the appellants and their green light for a reinstatement pursuant to s 150 of the Seychelles Code of Civil Procedure. The dismissal order could then have been varied. Short of that, the court becomes *functus officio*: see *Bouchereau v Guichard* (1970) SLR 35.

[4] We reproduce the entry in the case of *Bouchereau v Guichard* (supra) for the sake of showing the scope and limitation of the powers of the court with regard to a recall of an order for dismissal. It can only be done if parties, on the same day, present themselves to the court with the defendants not raising an objection to the reinstatement.

Court: It is now 8.45 a.m. Neither plaintiff nor learned counsel present. Under Rule 17 of the Magistrates' Court Rules, case dismissed.

Later on the same day, parties appear at 9.10 a.m.

Mr Rene for plaintiff

Defendant present

Defendant agrees to allow the present case to proceed.

Mr Rene thought that the case was for 9.00 a.m.

Case adjourned to the 8<sup>th</sup> for mention and defence.

[5] What took place in this case is exactly the contrary of what obtains in settled law and judicial process. On a plea by a prospective

counsel, the Court gave a mention date to 25 February 2009 in the absence of both the respondent and the appellants. On 25 February 2009, nothing more happened on behalf of the respondent. Counsel appearing for the appellants insisted that the case stood dismissed and the status was as at 19 November 2007. The Court quite rightly declined to overturn its order of dismissal. On 4 April 2008, however, four months later, the Court was in the presence of a motion that the matter be restored to the cause list. The procedure is one unknown to our law and our jurisprudence.

[6] The motion for restoration was set for hearing on 12 March 2009 on which day counsel sought an adjournment. The Court, in the circumstances, ordered that parties make written submissions and file them on 26 March 2009. On 26 March 2009, counsel found another impediment to the progress of the case. Mr Lucas had been playing a number of roles in the matter: that of representing the respondent, that of appearing as counsel for the respondent and that of deposing as a witness. The Court had made a clear comment on the propriety of his conduct as a result of which he had indicated his intention to withdraw but had still not done so. Mr Georges did not think it proper that he should stand for the respondent without Mr Lucas having first withdrawn. The Court must have been exasperated with the state of affairs characterized by the laches of the respondent – and rightly so. It proceeded to consider the submissions on the motion regardless and delivered its ruling on 6 July 2009, reinstating the case to the cause list. As it is, over seventeen months had elapsed between the dismissal date and the date for the reinstatement.

[7] The appellants have put up six grounds of appeal against the order of reinstatement. They are as follows:

- 1) The learned judge erred in entertaining the application of the Respondent, filed on 4 April 2008 to set aside a dismissal order and restore civil side 182 of 2000 to the cause list (the Application”) inasmuch as the Application was bad in law and incompetent and in any event made out of time.
- 2) The learned Judge erred in his finding that no legal remedy was available under our laws to a litigant whose case has been dismissed for lack of representation on a date other than the date fixed in the summons, such as the Respondent, and in invoking the equitable powers of the Supreme Court to set aside his previous dismissal order and restore the Respondent’s case.
- 3) Even assuming an equitable remedy is available in such circumstances, the Respondent was not entitled to such remedy, given its conduct in the case, in particular its lack of diligence and chronic failure to secure the attendance of its witnesses and counsel, causing inordinate delay in the proceedings.
- 4) The learned judge erred in his account of the history of the case and his attribution fo the delay in the proceedings to the departure of a Judge. The case had to be reheard *de novo* not because of a change of Judge but because in 2003, (after the case was partly heard by Judge Judhoo) the Respondent joined seven (7) other defendants in the cause.

- 5) The learned judge erred in not considering the history of the case, including the delays, in determining the Application. If the learned Judge had properly construed and taken into account the history of the case he would have found that the delays were almost wholly the result of the lack of diligence of the Respondent in the prosecution of its case, and it is more than likely than not that the learned Judge would have come to a different determination of the Application.
- 6) The learned judge erred in not considering the evidence adduced and arguments submitted by the Appellants relating to the Respondents' chances of success in the main suit. Unrebutted documentary evidence adduced by the 1<sup>st</sup> Appellant in response to the Application showed that the Respondent had never existed as a legal person and as such has absolutely no chance of succeeding in the main suit.

[8] Mr Georges stated to us that if his appearance before the trial Court in the case had been prospective, his appearance in the present appeal relating to the same case was acquired.

[9] The appellants have combined grounds 1 and 2 together as well as grounds 3, 4 and 5. They have argued ground 6 on its own. We have gone through the written submissions of counsel for the parties, followed their oral submissions and obtained the answers we required of them in the exchanges that took place at the hearing before us.

## **Grounds 1 and 2**

[10] On ground 1 and 2, the contention of the appellants is that the application was bad in law and incompetent and, in any event, made out of time; and that the equitable jurisdiction of the court could not be invoked as the law already provided for remedies in the case of non-appearance of parties. We agree with those submissions. The application entered was anything but known to our law of procedure. It was also incompetent and out of time. There is also merit in their argument that by invoking the equity jurisdiction of the court, the Judge erred inasmuch as there was always a legal remedy available to the respondent whose partly heard case was dismissed on the day of mention.

[11] The manner in which our procedural law provides for starting an action “en revendication” is by way of plaint with summons. It is not by way of motion. Once the day of hearing ie 19 November 2007 was past, the Court was incompetent to be seized of that case, either on 4 February or thereafter, on a mere motion which was objected to. We have to say that the Registry of the Supreme Court should ensure that once a case has been disposed of, it should not be picked up from its archive route at the bidding of anyone and placed back on the original running court roll through the cause list or otherwise. In a number of cases which have ended up on appeal, we have noted the laxity with which cases have been brought back to some form of life from their grave by way of mere motions, with the indulgence of the court. We have noted that cases have been built upon cases built upon cases carrying the same cause number by a singular use of the procedure for motions. We would like to draw this to the attention of the Honourable Chief Justice so that this problem at the Registry, which is the nerve centre and the entry gate of the court system, be properly addressed so that no one crashes the gate to seize the jurisdiction of the Supreme Court using a procedure which is not

provided for in our rules of procedure. Courts and counsel are also under a duty to ensure that the procedure for motions is properly used and not abused.

[12] To come back to this case, the Judge took the view that the plaintiff was without a legal remedy in the case. That cannot be true. Where a part-heard case has been dismissed for want of prosecution and there is no common agreement between the parties reached on the same day for it to be restored to the list of cases, it is trite law that the plaintiff may re-lodge the case, subject to the plaintiff paying the costs of the case that has been dismissed. It cannot be said, therefore, that the plaintiff in this case was without a legal remedy for the Judge to invoke the equity jurisdiction of the Supreme Court, especially where the law is clear and the interpretation is also quite clear on the matter. The argument that the respondent would have been out of time would not hold because time would have stopped on the date of the lodging of the first case and not that of the fresh case.

[13] Sections 133 and 67 provide in no uncertain terms that the court shall dismiss the case if on the day to which the hearing of the suit has been adjourned by the court, the parties or any of them fail to appear. Section 133 reads:

If on the day to which the hearing of the suit has been adjourned by the court, ... the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the manners directed in that behalf by sections 64, 65 and 67 or make such order as it thinks fit.

Section 67 reads:



If on the day fixed in the summons, when the case is called, the defendant appears and the plaintiff does not appear or sufficiently excuse his absence, the plaintiff's suit shall be dismissed.

[14] A plaintiff comes willingly to court but a defendant is literally "dragged" to court by the coercive order of a summons issued at the request of the plaintiff. The defendant does not come to court leaving his home or business out of joy or out of choice unlike a plaintiff. What a court should do or not do, when a plaintiff has used the Court's summons to secure the attendance of a defendant in court and he himself has the temerity of not showing up on the day without good cause, is laid down in mandatory terms in our procedural law. Law provides in no uncertain terms that "the plaintiff's suit shall be dismissed." These provisions were interpreted by a 3-Judge bench in the case of *Petit v Bonte* SCA 9/1999. In that case, just as in the case in hand, both counsel and the plaintiff failed to appear on the day of the hearing. An application was made to set aside the judgment dismissing the plaint. The Judge granted the application. On appeal, the appeal was allowed and the order of the Judge to set aside the judgment was quashed with costs against the losing party.

[15] Nothing has changed since the decision of *Petit v Bonte* SCA 9/1999 and we find no reason to depart from that decision. The rationale behind the mandatory provision in the law and its strict interpretation lies in the court's responsibility to assume control of the judicial process under the rule of law and introduce the degree of certainty required for the courts, the profession and the litigating public.

[16] The indulgence given by the Court to Mr Lucas, both as representative of the respondent and as counsel for the respondent,

was manifestly excessive and unwarranted. The respondent had literally turned the court into a circus, taken control over the pace of the case with the court being led by the nose from the very beginning. The protest on the part of appellants had been regular but unheeded. The Court was unmindful of its own responsibility in assuming effective and complete control over the process for the purpose of ensuring that court fixtures are respected and the judicial time allocated to its proper use.

[17] When the time for deciding on the motion, it does not appear to us that the Court took all the above factors into account. The Judge, instead, considered, in his ruling, various provisions of the law which the respondent could invoke in the circumstances. Of s 69 of the Seychelles Code of Civil Procedure, he decided that this section deals with non-appearance of the plaintiff and this was a case of late appearance. On s 194(c) of the Seychelles Code of Civil Procedure, he decided that this section provided for the procedure for a new trial and in this case there was no trial as such. He mentioned ss 63–69 of Seychelles Code of Civil Procedure and ss 194–198 of the Seychelles Code of Civil Procedure without confronting the issue. Finally, he decided that he should invoke the equitable jurisdiction of the court and grant the reinstatement, commenting upon the fact that the history of the case, the repeated change of counsel, the delay and the chances of success were not matters which should influence his decision for reinstatement. We are not of this view on the facts and circumstances of this case. There were essential aspects of the proceedings which he should have taken into account, the more so in equity.

[18] We note that the Judge made a distinction between non-appearance and delayed appearance of the respondent. In actual fact, the respondent never showed up in the case so that one may hardly

speak of delayed appearance. Delayed representation of prospective counsel could not be equated with the non-appearance on call of a case by the respondent. The Judge also did not deal with the interrogation mark as regards the propriety of the appearance of Mr Georges before the actual withdrawal of Mr Lucas. Yet he had been so clear in his decision on the matter on 19 November 2007. To be fair to him, he was clearer in his law on 19 November 2007 than he was in his decision on 6 July 2009.

[19] Equity will kick in only where the law is silent. In this case the law is not silent. We have shown that s 133 coupled with s 67 of the Code of Civil Procedure as interpreted in the cases of *Biancardi v. Electronic Alarm SA* (1975) SLR 193 and *Petit v Bonte* SCA 9/1999 represents the law as it stands. Interestingly, these two cases were referred to by the Judge but without proper consideration.

[20] In fact, the law as it stands can be gauged in the exchange between Mr Georges and the Court when the Court invited him to file a proper application. His reply was:

I do not know if I can do that because the case has been dismissed so there is no case. I have to re-file and I am out of time that is the consequences of this case. It's not as if it has been adjourned sine die. It's been dismissed and my only recourse is to ask the court to reconsider its order which the court can do. Once the court rises, I am dead.

[21] The only explanation we can give to ourselves for Court and counsel to have changed their minds on the original legal and judicial position is their desire to be charitable. Mr Georges was bothering about a litigant who was little bothered about his own case and about

counsel who was little bothered about his client. Likewise, the Court. We have to say that it did not help them to be “plus royaliste que le roi.” They should not have bothered overly about parties who were not bothered about themselves and their own cases, unless court and counsel were minded to turn the judicial and legal practice into a charitable practice. A court of law is a court of law and justice is to be administered according to law.

[22] We accordingly hold that, on the existing case law, the Judge erred in his appreciation of the facts and the interpretation of the law. Grounds 1 and 2 succeed.

### **Grounds 3 and 4**

[23] On grounds 3 and 4, counsel for the appellants argue that even on equitable principles, the Judge should have found that the case did not deserve a reinstatement. Again, we agree with counsel.

[24] The reinstatement was not a decision which could have been sustained. All the well-known principles of equity were confused on the facts of the case. Equity follows the law. Equity serves the diligent and not the indolent. Those who come to equity should do equity. The case is characterized by a lack of diligence, a chronic failure to secure the attendance of witnesses and counsel, scant regard to law, procedure and propriety and an abusive use of court process. The respondent has been guilty of laches. This case had been called 41 times since it was lodged in 2000. In 2009, it was still part-heard, with a couple of short hearings. Until the case was dismissed, it had already been called 32 times. The main reasons for postponement had been the respondent and counsel for the respondent. They were the cause of delay for postponements as many as 13 times.

## Ground 6

[25] Counsel submitted on Ground 6 on its own. His argument has been that the chance of success in the case was an important factor because the plaintiff never existed as a legal person. Procedure is only the handmaid of justice. It should not be made to become the mistress. That is true. But, if the analogy is to be pursued, there is no handmaid if there is no mistress. In a number of cases, the courts will not look at the merits of a case for the purposes of deciding whether a mere procedural lapse should be condoned or not. The idea is not to lock the court door to a litigant but to allow him his chance, at his expense and at his risk and peril.

[26] In this sense, the Judge was right in considering recalling this principle in his decision making: see *Brisbane City Council v Attorney-General* [1979] AC 411. The rule to close the door of the court to a litigant:

... ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

[27] However, where he erred was where he failed to investigate further for the purposes of ensuring that the case fell, considering its particular nature, on one side of the line or the other. The court becomes a vehicle of unjust outcomes in the hands of those who advertently or inadvertently abuse the justice system. Organized society in a democratic set-up needs a minimum of discipline which, for all the rights and liberties guaranteed, goes to secure the rule of law on sure foundations. Abuse of process was developed by the courts to protect the judicial process from abuse and misuse. Courts

have a duty to intervene to put a stop to such misuse of legal and judicial process: see *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482; *House of Spring Gardens v Waite* [1990] 2 All ER 990; and *In Re Norris* [2001] 1 WLR 1388; *Gomme v Morel* SCR 06/2010. There was a duty on the Judge to look beyond.

[28] Another of the up-front issues he should have considered is the very legal personality of the respondent. That threshold issue had been raised from the very beginning of the case. Serious doubts lingered on without the respondent having adduced evidence in the case. Was the respondent Film Ansalt? Film Prod Ansalt? Croninvest Establishment? As at 4 October 2006, there was no firm Film Ansalt by name registered in the Liechtenstein Public Register; nor, as at 13 June 2007, Film Ansalt Company or Ansalt Film. An amendment had been proposed to set the record right on 7 November 2007. No motion had yet been made. The applicant was a foreign company. It was registered in Liechtenstein and its legal personality was still in grave doubt without the respondent having yet clarified it.

[29] Counsel also argues imaginatively that the decision on the day when he appeared to move for reinstatement amounted to a mere suspension of the order for dismissal so that the Court gave him a lifeline to pursue his motion for restoration. He relied on s 150 of the Seychelles Code of Civil Procedure. We have dealt with this aspect above. We do not consider this to be a valid argument inasmuch as s 150 provides for an alteration, variation or suspension of its judgment or order “after hearing both parties” and “during the sitting of the court at which such judgment or order has been given.” Neither of these conditions was satisfied in the case.

[30] In the light of the above, we reverse the decision of the Supreme Court. To allow the decision to stand in the name of justice

of the case would be to do injustice to the very idea of justice. It would be tantamount to a court:

- a) condoning levity on the part of a litigant and his counsel in the conduct of their case;
- b) encouraging them to assume control over legal and judicial process;
- c) abdicating and surrendering its responsibility over court process to parties and counsel, any of whom could thereby hold everyone else to ransom by a strategic use.

This is not a comment on the conduct of Mr Georges who even if not briefed put up a brave fight in trying to flog a dead horse before the trial court and before us on the lifeline as he stated afforded to him by the mention date given to him by the Court on 19 November 2007.

[31] This appeal is allowed. We set aside the decision of the Judge to reinstate the case and we substitute thereof the following order. The case subject-matter of the present appeal stands irrevocably dismissed as at the date of 19 November 2007. With costs.