IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] Civil Appeal SCA 43/2020
SCCA 78 (16 December 2022)
(Appeal from MA 59/2020 out of CC4/2017) [2020] SCSC 647

In the matter between

ARNOUD MULLER **Appellant**
(rep. by Mr. S. Rajasundaram)

and

BENOITON CONSTRUCTION (PTY) LTD **Respondent**
(rep. by Mr. Basil Hoareau)

Neutral Citation:	*Muller v Benoiton Constructin (Pty) Ltd* (Civil Appeal SCA 43/2020) [2022] SCCA 78 (16 December 2022) (Appeal from MA 59/2020 out of CC4/2017 [2020] SCSC 647)
Before:	Andre, Twomey-Woods, Robinson JJA
Summary:	Appeal against a decision of the Supreme Court – Sections 69 and 183 of the Seychelles Code of Civil Procedure (Cap 213) – Setting aside of an ex-parte judgment
Heard:	1 December 2022
Delivered:	16 December 2022

ORDERS

The Court makes the following Orders:

(i) The Appeal is dismissed.

(ii) No order is made as to costs.

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising out of the notice of appeal filed on 21 October 2020 by

Arnoud Muller (Appellant) against Benoiton Construction (Pty) Ltd (Respondent), being dissatisfied with the decision of Judge M. Vidot given at the Supreme Court on 10 September 2020 in Civil Side No. MA 59 of 2020 dismissing the Appellant's application (MA 59/2020) to set aside the ex-parte judgement delivered in civil suit 04/2017.

[2] The Appellant has three grounds of appeal set out in paragraph 2 of the notice of appeal to be considered in detail below. The Appellant further seeks the reliefs set out in paragraph 3 of its notice of appeal namely, the setting aside and reversal of the impugned judgment; and that the Appellant be given a fair chance and opportunity of right of hearing on the merits.

[3] **BACKGROUND**

[4] On 14 March 2017, a Plaint was filed by the Respondent against the Appellant (CC 04/2017). The matter was initially fixed for a hearing on 11 October 2018 and at that instance, Counsel for the Appellant (Defendant in the court below) Mr S. Rajasundaram asked for an adjournment citing that his client was unable to attend owing to a heart attack he had suffered. A medical report was produced to support this averment and the trial Court granted the adjournment as sought.

[5] A hearing was set to ensue 8 months later on 10 June 2019 and 15 June 2019. Although the Appellant was not physically present at the time, his attorney Mr S. Rajasundaram was present. At that instance, counsel once again requested an adjournment of the hearing on the basis that the Appellant was unable to travel to Seychelles owing to health issues. At that juncture, the trial Court refused to grant the sought adjournment in the absence of supporting documents, and with this, the counsel withdrew his appearance from the case. The matter proceeded ex-parte on 10 June 2019 and a judgment was delivered on 17 February 2020 (*Benoiton Construction (Pty) Ltd. v Muller* CC04 of 2014 SCSC 131 (17 February 2020)).

[6] The Appellant on 30 March 2020 filed a motion to set aside the ex parte judgment dated 17 February 2020 and that the case be heard *inter-partes* on the merits. The application was made in terms of section 69 of the Seychelles Code of Civil Procedure and was supported by an affidavit sworn by attorney-at-law Mr. S Rajasundaram. The Respondent filed an affidavit in reply resisting the application.

[7] In the application, counsel for the Appellant set out the reasons for the non-appearance of the Appellant on the date the case was set for hearing. He stated that the Appellant (applicant in the lower court) was a foreigner and at all material times an aged person with ailing health problems. The Respondent resisted the application on the premise that despite claiming that the applicant had a medical predicament, no medical report nor affidavit was produced to court to support claims that the applicant was indeed medically unfit to travel to Seychelles to attend court. The Respondent also advanced the argument that counsel for the Appellant could have represented his client and cross-examined witnesses. Upon cogitating on arguments presented by both parties, the application was dismissed by learned Judge Vidot.

[8] It is against this background that this appeal arises.

[9] **GROUNDS OF APPEAL**

[10] The Appellant sets out three grounds of appeal which in the verbatim state as follows:

> "*Ground No. 1: The learned Judge erred in his findings and failed to appreciate the Appellant was set ex-parte and the decision was made in the absence of the Appellant without having given any opportunity to him on his right to a fair hearing.*
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> *Ground No. 2: The learned Judge failed to issue Notice to the Appellant when the matter was set ex-parte, the ex-parte hearing took place 10th June 2019 & 15.10.2019 without having served any notice to the Appellant and the judgment was given 17th February 2020. (notice ought to have been served on the Appellant).*
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> *Ground No. 3: The learned Judge failed to appreciate the reason for the absence of the appellant (a foreign national) namely ill-ness and hospitalization and was also out of the Republic of Seychelles at all material times of the hearing of the matter.*"

[11] The Appellant seeks three reliefs. First, it is prayed that the Ruling in the lower court be set aside, consequently setting aside the ex-parte Judgment of 17 February 2022 and simultaneously remitting the matter back to Supreme Court to re-hear the matter *inter-partes.* Secondly, it is prayed that this Court makes an order it finds just in the case. Thirdly and finally, it is prayed that costs be awarded for the Appellant at both the trial and appellate court.

[12]

SUBMISSIONS OF PARTIES

Appellant's Submission

[13] By way of submissions of 4 November 2022, the appellant in a gist submits as follows.

[14] The Appellant seeks to consolidate all three grounds of appeal on the basis that all the grounds revolve around one core issue of setting aside the ex-parte judgment given against the appellant and in favour of the respondent.

[15] It is submitted that the main grievance of the appellant, a foreign national and an aged person, is that the court below has not given him a chance to produce a medical certificate especially when the appellant's attorney had made an undertaking to produce the medical certificate on the second hearing date, namely 15 June 2019.

[16] That the court below justified refusing the motion for the appellant to adjourn the hearing on the basis that it was the second time the appellant moved for adjournment. With an unsuccessful motion for adjournment, counsel for the appellant could not proceed with the hearing in the absence of his client as he wanted his client to be present while the hearing took place. It is argued that under these compelling circumstances, the appellant's attorney had to withdraw his appearance for the appellant.

[17] It is further submitted that the court below grossly failed to issue a notice to the appellant before proceeding with the hearing. Therefore in proceeding to hear the case *ex-parte* without resorting to the procedure of issuing notice to the appellant, it violated the *audi alteram partem* rule. Reference is made to the cases of *Republic v Ladouceur and Ladouceur v Republic [2009] SLR 131, Registrar of the Supreme Court v Public Service Appeals Board and Others (SCA CL 06/2020) [2021] SCCA 13*, to illustrate the essence of the right to a fair hearing.

[18] It is further submitted that the court below failed to appreciate the necessity of the presence of the appellant. While the court below felt that the appellant's attorney could have proceeded only up to the level of cross-examining, it is submitted that the

court failed to appreciate that the appellant's attorney would have only been prompted to move for an adjournment in the absence of the appellant even if the hearing proceeded.

[19] The appellant submits further, citing section 183 of the Seychelles Code of Civil Procedure in support of the argument. That because the appellant was unaware of his attorney's withdrawal, he should not be penalized with the hearing proceeding without notice to him given the exorbitant sum claimed in the plaint and the subsequent ex-parte judgment for USD 127,664.14.

[20] The Appellant further cites section 69 of the Seychelles Code of Civil Procedure. According to him, section 69 contemplates various scenarios under which the court can set aside its judgment. One of those scenarios is namely, *"….or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment….."*. It is submitted that the appellant did not risk until the filing of the execution application to enforce the judgment given *ex-parte* against him, rather chose to rush to court well before the filing of the execution application against him.

[21] With regards to the appellant's attorney choosing to swear an affidavit in support of the appellant's notice of motion, it is submitted that it was purely to maintain the professional obligation and to maintain ethical standards towards his client. It is submitted additionally, that the law is not strict in prohibiting or barring the attorneys from swearing affidavits in support of the notice of motion. With this, it is submitted that the court below wrongly declined the notice of motion based on a defective affidavit.

[22] **Respondent's Submissions**

[23] By way of submissions of 24 November 2022, the respondent in a gist submits as follows.

[24] With respect to the first ground of appeal, the respondent submits that the ground of appeal is erroneous in that the appellant was granted the opportunity to be heard and his right to a fair hearing was observed at all times by the trial court. This Court has been referred to the proceedings of the court below of 11 October 2018 and 10 June

2019, which were annexed to the affidavit of the respondent sworn in reply to the application to set aside the judgment delivered by the court in the main case.

[25] It is submitted that upon the court refusing the viva voce application to adjourn the hearing of 10 June 2019, counsel for the appellant decided to withdraw from the matter. That it was not the court who requested counsel to withdraw his appearance for the appellant, but rather counsel took it upon himself to withdraw his appearance, on the basis that he had no further instructions. That the right to a fair hearing of the appellant was at all times respected and it was the appellant's counsel who decided to withdraw his appearance. If at all, the appellant should take issue with the decision of his counsel to withdraw his appearance.

[26] With reference to the right to a fair hearing as per article 19 (7) of the Constitution, this court is referred to section 70 of the SCCP which provides that,

> *"A party to a cause or matter may, except when otherwise expressly provided by any law for the time being in force,* ***appear in person or by an attorney or barrister at law.*** *A party, not resident within Seychelles may appoint some other person by power of attorney to appear on his behalf: Provided that the court may for sufficient reasons allow any other person to appear on behalf of any party".*
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> (Emphasis is mine)

[27] It is thus submitted that the appellant in the exercise of his right to a fair hearing under article 19 (7) of the Constitution and section 70 of the Seychelles Code of Civil Procedure, elected to be represented by an attorney-at-law counsel Mr. S Rajasundaram. Since the appellant's counsel decided to withdraw his appearance on the day of the trial, any possible breach of the appellant's right would have been caused by the attorney-at-law and therefore, the appellant should claim any remedy against his counsel.

[28] In answer to the second ground of appeal, the respondent adopts the response for the first ground of appeal. It is further submitted that this ground of appeal is also erroneous in that the appellant is seeking to challenge the decision of the learned trial judge on 10 June 2019, through the backdoor. That this ground is misconceived as the appellant is out of time to seek to challenge the decision of the court on the above-stated date. On that basis, the court ought to dismiss this ground of appeal.

[29] In respect of the third ground of appeal that the arguments advanced for the first

ground of appeal are adopted. It is submitted that appellant is once again seeking to appeal against the decision of the learned trial judge through the backdoor. That in any event, there was no evidence adduced before the trial court on 10 June 2019 in support of the application, to establish that the appellant was indeed sick and hospitalized on 10 June 2019. In particular, there was no medical certificate produced before the court to confirm that the appellant was indeed sick and hospitalized. Furthermore, it was submitted that there was no notice of motion supported by an affidavit filed before the court.

[30] It is further submitted that the application, which was filed eight months after the hearing on 10 June 2019, was not supported by any affidavit from the appellant to confirm that he was indeed sick and hospitalized in on the day of the hearing of the main case. Moreover, there was no medical certificate exhibited in the affidavit of the attorney-at-law Mr. S Rajasundaram to establish that the appellant was indeed sick and hospitalized on 10 June 2019.

[31] The Respondent further submitted that there were certain aspects of the impugned judgment which was unchallenged namely in paragraph [9] and [13] of the judgment where the trial judge stated that –

> *"[9] [H]owever, in order to invoke section 69 the party against whole judgment is given must not have appeared in court on the date fixed in the summons. We are here dealing with a different situation; the Applicant did not fail to appear on the date fixed in the summons. He failed to appear only after the case had been fixed for hearing and that was not the first hearing date. There were previous hearing dates that were aborted and reason for such adjournment had been the ill health of the Applicant which was supported with medical report. In Biancardi v Electronic Alarm [1975] SLR 31, a case being relied upon by Counsel for the Respondent also, the following was observed*
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> > *"The final question is whether the defendant is entitled to invoke section 69. Reading section 69, it is clear that to satisfy its provision one of the essential requirements is that the party invoking the same must not have appeared on the date fixed in the summons for appearance before court. In other words, section 69 applies only in the case where the party, against whom the judgment has been given ex-parte, has not appeared on the date fixed in the summons for appearance under section 63. Section 6 deals with the requirement that on the date fixed in the summons for the Defendant to appear and answer the claim that the parties are in attendance at the court in person or by the representative attorney or agent. As pointed out by Counsel for the Respondent one has to also look at section 65 SCCP. Section 65 provides for procedure when the defendant does not appear on the date fixed in the summons. In such case, after due proof of service of the summons, the*

court may proceed to hear the suit and give judgment or may adjourn the case for hearing of the suit ex-parte".

"[13][T]he Respondent final bone of contention is that the affidavit in support of the Application sworn by Mr Rajasundaram, Counsel for the Applicant is defective. First, I note that it appears that Counsel is swearing an affidavit on behalf of his client, the Applicant, yet does not state that he is authorised to swear such affidavit. However, the fact that he is Counsel representing the Applicant and swears an affidavit for him that makes the affidavit defective. This is because Counsel cannot place himself in the position of a witness to the case and for that matter swears an affidavit. If Counsel has chosen to swear the affidavit he cannot himself represent the Applicant. I hold that in such circumstances, the Applicant should have sought the assistance of another counsel to argue the application"

[32] It was submitted that there are no grounds of appeal raised in respect of the two above-mentioned findings and hence, in essence, even if the appeal was to succeed on the grounds raised by the appellant, the judgment should be upheld based on the stated findings of the court, which have not been challenged.

[33] Respondent moves for the dismissal of the appeal with costs.

ANALYSIS OF THE GROUNDS OF APPEAL

[34] The Court takes note of the Appellant's heads of argument in which Counsel states that he seeks to consolidate the grounds into one. Having read the grounds, I am of the view that Ground 1 and 3 may be dealt with together, while Ground 2 is sufficient to stand on its own. As such, I proceed to deal first with Grounds 1 and 3 and then followed by Ground 2.

[35] **GROUNDS 1 AND 3**

[36] The essence of ground 1 is that the absence of the Appellant was justified. In those circumstances, the Court proceeding to hear the matter in the absence of the Appellant impinges on his right to a fair hearing. It was submitted that the Appellant could not be physically present because he was and remains in his home country, Netherlands, due to physical ailments. Notwithstanding physical absence for one reason or another, I find that a defendant in a matter may be considered present through representation of counsel. In the present case, the Appellant being domiciled in Netherlands, was duly represented by his counsel Mr. Rajasundaram up to the point where counsel formally withdrew.

[37] At the juncture of the withdrawal by Counsel, it can be said the Appellant (defendant

in trial court) was absent and thus failed to appear for the hearing. Counsel submits that in failing to give the Appellant notice following withdrawal of Counsel, the Appellant was denied the opportunity to be heard. Counsel has placed emphasis on the cases of Re: *Republic v Ladouceur* and *Ladouceur v Republic* [2009] SLR 13, as well as *Registrar of the Supreme Court v Public Service Appeals Board and Ors (SCA CL 6 of 2020) [2021] SCCA 11 (30 April 2021)* where both courts pronounced on the importance of courts to hear parties to a suit.

[38] It is the further submission of Counsel, that the Appellant has recourse under section 69 of the Seychelles Code of Civil Procedure. I shall explore this provision below.

[39] The Respondent through its counsel Mr B. Hoareau argued in skeleton heads of arguments filed 24 November 2022. Therein, arguments for the first ground are also adopted for the third ground.

[40] It is the contention of the Respondent that the Appellant was in fact granted the opportunity to be heard and his right to a fair trial was observed at all times by the Court. To support this, the Appellant draws in on the events that preceded the ex-parte hearing from which the impugned judgment was delivered. A hearing was set for the 10th of June 2019 following a previous adjournment of an 11th October 2018 adjournment. It is the submission of the Respondent that because a viva voce application to adjourn the 10th June 2019 hearing failed, counsel for the Appellant withdrew from the matter. It is also submitted that Counsel withdrew on the basis that he had no further instructions. In respect of the right to a fair hearing, it is the submission of the Respondent that the Appellant exercised the same through representation by Counsel. Therefore, where counsel withdrew his appearance, the Appellant must take issue and claim any remedy against said Counsel rather than the Court as he does so now.

[41] The Respondent adopts similar arguments for ground 3, and also argues that the Appellant did not produce a medical certificate to support his averments that he was hospitalized on the day of the hearing. Finally, the Respondent argues that the aspects of the impugned judgment that are not challenged in this appeal, namely paragraphs [9] and [13], and therefore the judgment should be upheld on the basis on the findings made in these paragraphs.

[42] The learned Judge took cognisance of the Appellant's arguments in the lower court in respect of those arguments advanced for section 69 of the SCCP which reads as follows:

> *"69. Setting aside judgment given ex parte*
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> *If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that* ***the summons was not duly served*** *or* ***that he was prevented by any sufficient cause from appearing when the suit was called on for hearing****, the court* ***shall set aside the judgment*** *upon such terms as to costs, payment into court or otherwise* ***as it thinks fit*** *and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side."*
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> (Emphasis is mine)

[43] The trial judge rejected that the Appellant may rely on section 69 of thereof the Seychelles Code of Civil Procedure. He states, at paras [9] and [10], as follows:

> *"[9] However, in order to invoke section 69 the party against whom judgement is given must not have appeared in court on the date fixed in the summons. We are here dealing with a different situation; the Applicant did not fail to appear on the date fixed in the summons. He failed to appear only after the case had been fixed for hearing and that was not the first hearing date. There were previous hearing dates that were aborted and reason for such adjournment had been ill health of the Applicant which was supported with medical report. …*
>
> *[10] ….section 69 has no application to the Applicant's situation as he did appear on the on the day fixed in the summons."*

[44] In refusing the applicability of section 69 to the present case, the learned judge was of the view that the section applied only in those instances where the defendant failed to appear on the date fixed in the summons. It was his view that the Appellant could not rely on section 69 mainly because he had in fact appeared on the date fixed for summons.

[45] On a closer reading of section 69, it is clear that the Court ought to be satisfied of one of two things to move on an application made under section 69. Either the defendant was not duly served the summons or was prevented from appearing when the matter was called for a hearing. However, before progressing to this, indeed a party who seeks relief under section 69 must have also failed to appear on the date fixed for summons. In essence, a party must have (i) failed to appear on the date

fixed for summons; and (ii) satisfy the court that he or she was not duly served *or* was prevented by good reasons from appearing at the hearing. While it is clear that the Appellant relies on the fact that he was prevented from appearing for the hearing, he fails to satisfy the first part of the test which requires him to show that he did not appear on the date fixed for summons.

[46] In the circumstances, the Appellant cannot rely on section 69 of the SCCP. What is therefore apparent is that the law as it stands does not cater for instances where a party has appeared for the date fixed for summons, but fails to then appear on the date fixed for the hearing with good cause. In that instance, the Court may be moved by a party to exercise its equitable jurisdiction under section 6 of the Courts Act, which ensues when there is no legal remedy available. Equity would have been especially relevant in this case owing to the fact that the party does have a right to be heard as canvassed by the Appellant supra.

[47] I take note that in the supporting affidavit of the application under section 69 of the SCCP, Mr Rajasundaram on behalf of the Appellant, attempted to move the Court to exercise rules of natural justice, employ equity and show understanding that the Appellant was suffering from ailments. While the arguments do have some merit, the trial Court was correct in rejecting the affidavit in support by virtue of the same being sworn by Counsel on behalf of the Appellant (paragraph [13] of the Ruling refers).

[48] In the circumstances, Ground 1 has no merits. In view of this, Ground 3 pertaining to the weight of the reasons advanced for absence would also fall away and need not be discussed lengthily. In any regard, I note that while the Appellant submitted that he was suffering from ailments, it was also necessary that he produces the necessary documentary evidence of a medical report. In the absence of such, I do not see how the trial court or this Court should be moved in his favour.

GROUND 2

[49] The Counsel for the Appellant argues that following his own withdrawal and that the Appellant was also not physically present, the matter ought not to have proceeded without notice to the latter. It is argued by Counsel that section 183 mandates that notice be given to the defendant by the Registrar. With this, Counsel submits that the

trial Court failed to apply section 183 of the Seychelles Code of Civil Procedure.

[50] Counsel for the Respondent argues that ground 2 is erroneous in that the Appellant is seeking to challenge the decision the trial Court taken on 10 June 2019 through the backdoor. It is the contention of the Respondent that this Ground of appeal is misconceived because the Appellant is out of time to challenge the impugned decision.

[51] Suffice it to say, I am not persuaded that section 183 of the Seychelles Code of Civil Procedure finds application in this instance. I note that the trial judge took cognisance of the fact that section 183 applies in instances where a plaintiff discontinues a suit in terms of section 182 and the Registrar is called to issue notice to the defendant. I agree with the learned judge in this regard and find that the use of section 183 has no relevance in the present case. As such, Ground 2 has no merits.

DECISION

[52] Having found no merit to each of the grounds of appeal as raised by the Appellant, the appeal is dismissed and the reliefs sought cannot be granted. The judgment of the lower court is thus upheld in its entirety.

[53] **ORDER**

[54] As a result, this Court orders as follows:

(i) The appeal is dismissed and the judgment of the lower court is thus upheld in its entirety; and

(ii) No order is made as to costs.

Signed, dated, and delivered at Ile du Port on 16 December 2022.

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S. Andre, JA

I concur

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Dr. Twomey-Woods

I concur

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Robinson, JA