LAGESSE MARIE FRÉDÉRIQUE & ANOR v THE MAURITIUS COMMERCIAL BANK LTD & ORS

2022 SCJ 271

Record No. 1652 (6B/10/21)

THE SUPREME COURT OF MAURITIUS
(COURT OF CIVIL APPEAL)

In the matter of:

1. **Mrs Marie Frédérique Lagesse**
2. **Mrs Marie Bénédicte Henry**

Appellants

v.

1. **The Mauritius Commercial Bank Ltd**
2. **The Mauritius Union Assurance CY Ltd**
3. **Eagle Insurance Limited**
4. **Swan Insurance Company Ltd**

Respondents

JUDGMENT

Late Marie Gérald Lagesse (Mr. Lagesse) was employed as Customer Service Supervisor by the Mauritius Commercial Bank Ltd (the bank) since 1974. He was posted at the head office in Port Louis on 9 February 2005. He was called upon to perform the duties of a colleague in the main vault of the bank as the latter was on leave.

On 11 February 2005 during official banking hours there was a robbery at the main vault of the bank, Mr. Lagesse was found dead in the vault of the bank where he had been working, and his death was attributed to asphyxia by gagging.

Following his demise, four members of his family namely his father, his mother, his widow and his daughter entered a plaint with summons against the bank claiming damages for *'faute'.* They averred that the bank had acted negligently, recklessly, unprofessionally and in breach of its duty as an employer to ensure that its employees in general, and those working in the main vault in particular, work in a safe environment and that Mr. Lagesse's death was due to the *"defectiveness or substandard security prevailing at the bank at the material times."*

Three insurance companies, The Mauritius Union Assurance CY Ltd, Eagle Insurance Limited and Swan Insurance Company Limited were subsequently joined in the claim as defendants No. 2, 3 and 4 respectively (now respondents No. 2,3 and 4 respectively).

However, the focus of the claim has throughout been against the bank and the appellants' stand is that the *"MCB should be the first and possibly the only party to answer"* their case. Mrs. U. Boolell, Senior Counsel for the appellants, submitted that the insurance companies have been joined in the proceedings only because the bank had insisted that they be put into cause.

Mr. Lagesse's father passed away before the trial and the plaint proceeded with the remaining parties namely his mother, his widow and daughter. Mr Lagesse's mother passed away before judgment was delivered and his widow and daughter are the only appellants.

The appellants claimed that they had suffered loss and prejudice as a result of Mr. Lagesse's demise and prayed for moral damages in a total amount of Rs 35M; 5M for his mother, Rs 15M for his widow and Rs 15M for his daughter.

However, counsel submitted from the outset that the case was –

> *"… a very uneven match between penniless heirs represented "Pro bono" on the one hand, and a massively profitable banking empire with limitless resources on the other. However, this case is not about money – it is about human dignity in death and the necessity to have clarity on the circumstances*

of the death of Mr. Marie Gérald Lagesse ("Gérald Lagesse"), to bring closure to the grieving process."

The bank denied any *faute* or liability for Mr. Lagesse's death. It denied:

(a) that the security system of the main vault was either defective or substandard as contended by the appellants; or

(b) that Mr. Lagesse lacked the skills and aptitudes to perform the task he was called upon to perform in the vault.

The respondent No. 2, then defendant No. 2, averred that to the extent that defendant No. 1 had already provided a full discharge in its favour, it could not be liable in any way whatsoever in relation to the appellants' claim.

The respondents No. 3 and 4, then defendants Nos. 3 and 4, denied being concerned with the present claim inasmuch as there was no insurance policy between them and the bank at the relevant time.

The appellants and Mr Lagesse's mother deponed in court to justify their claim and they explained their trauma, pain, distress and heartache following the demise of M. G. Lagesse in such tragic circumstances in the vault of the bank.

The appellants had also *inter alios* called the following witnesses, namely Messrs Clifford Allet, Eddy Jolicoeur, Joseph Michel Russel, Joseph Clency Beeharry and Ange Michel Prosper in support of their case.

Mr. C. Allet produced 4 insurance policies contracted by the bank. Mr. E. Jolicoeur gave an outline of the job description of the vault supervisor and the security aspect of vaults in all branches of the bank. Mr. Russel testified as to the procedures at the bank with respect to the strong room management, the security system as well as Mr. Lagesse's aptitudes and his experience as an officer of the bank.

Evidence

The evidence had established that the main vault of the bank, where the incident took place, was found along a corridor next to the control room. At the end of this corridor there were two doors which opened on a metal staircase leading to the basement and the parking area.

There were two doors leading to the main vault. Both of these doors, when locked, could only be opened from the inside. The first one was an iron armoured door which was bullet proof as well as fire proof, it did not have any handles but was fitted with a padlock. The second door was a metal door, known as a "day gate" or *"porte grillagée"*. It could only be opened by means of a single key which, at all times, remained in the possession of the employee working in the vault. There were no other openings or access to the main vault.

The evidence of Mr. Russel, a former Operational Audit Coordinator at the MCB whose duty was to ensure that all procedures and internal control systems at the bank were followed, had revealed the following:

> *"(c) the day gate … did not have any handle and its opening and closing mechanism was built in such a way that it locked automatically when it was closed to ensure that it could not be opened from outside. The day gate had only one key and that remained in the custody of the Vault Supervisor and latter was the only person who could open the day gate whether from inside or outside; and*
>
> *(d) the day gate was under the sole responsibility of the Vault Supervisor and latter had to ensure that this door was kept closed and locked at all times …… no unauthorised persons could gain access inside the main vault through that door. On 11th February 2005, late Gérald Lagesse had custody of the key to the day gate."*

Findings

Following her analysis of the evidence on record, the learned Judge made the following observations:

> *"… Therefore, the only reasonable inference to be drawn from the evidence on record is that the intruders got access in the loading bay, the corridor and eventually in the main vault not as a result of the defectiveness in the security system or the lack of aptitude of Gérald Lagesse as contended by the plaintiffs but rather on account of someone from inside the bank having made it possible for them to do so."*

> *"… As the day gate was found opened when the dead body of Gérald Lagesse was discovered in the vault and there is no evidence that the day gate was forced opened coupled with the evidence that late Gérald Lagesse was the only person in whose custody was the key of the day gate, the only reasonable inference to be drawn from such evidence is that late Gérald Lagesse must have opened the day gate at some point in time. The question as to why he did so and under what circumstances have remained unanswered."*

On the other hand, she accepted Mr. Beeharry's testimony that:

> *"… all the safety measures and protocols that were in force were thoroughly followed and applied on the material day before, during and after the transfer operation…"*

She concluded that *"The preponderance of the evidence does not establish that the robbery and the death of Gérald Lagesse were due to the faute, negligence and recklessness of defendant no. 1. The plaintiffs have failed to substantiate their claim for moral damages and their averments that defendant no. 1 has failed in its duty to ensure a safe environment for its employees."*

She accordingly dismissed the plaint with no order as to costs.

The appellants have now appealed against the said judgment on three grounds.

Ground 1 is to the effect that the learned Judge had misdirected herself in law in failing to address the following legal issues:

> *"(a) the nature of the cause of action of the plaintiffs;*
>
> *(b) the constitutive elements of articles 1382 and 1383 of the Civil Code which were required to be satisfied;*
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> *(c) the nature and extent of the burden of proof to be satisfied by the plaintiffs to make out their case;*
>
> *(d) the possible application of the doctrine of res ipsa loquitur in the face of unexplained facts and the absence of any alternative explanation from the then defendant No. 1 as to how the death of Gerald Lagesse may have occurred;*
>
> *(e) the implications of the death of Gerald Lagesse having occurred in his capacity as an employee, at his place of work in what was supposed to be a highly secured zone, whilst in the employment of the then defendant No. 1."*

Grounds 1 (a),(b),(c) and (e) import the application of either Article 1382 or Article 1383 or both of the Code Civil Mauricien to the present case. These grounds question whether the learned Judge had properly directed herself as regards the constitutive elements of *faute*, the burden of proof and the obligations of the bank as an employer to provide a secure place of work to Mr. Lagesse in the vault at the bank at the material time.

In support of the above Mrs. U. Boolell, S.C., submitted that the learned Judge had failed to consider:

> (1) whether the evidence disclosed acts and doings (or omissions) of the MCB capable of amounting to *faute*;

(2) whether the damages and prejudice suffered by Mr. Lagesse and collaterally by the appellants could be attributable to the *faute* of the MCB;

(3) whether there was a causal link between the *faute* averred and the death of Mr. Lagesse.

She submitted that substantial evidence had been adduced on behalf of the appellants to establish that there was a clear omission of the bank in ensuring the safety of its main vault against external intrusion.

According to counsel the Judge had failed –

(a) to address the "critical issue" whether the bank as Mr. Lagesse's employer, had any duty, *"devoir"* towards him in his capacity as an employee;

(b) to determine whether the bank had done everything required as an employer to secure the safety of Mr. Lagesse in his place of work;

(c) to give due consideration to the *"overwhelming evidence before the court of a "hopeless erreur de conduite"* on the part of the bank;

(d) to make an assessment of the burden of proof that had to be discharged by the then plaintiffs, now appellants.

A reading of the judgment in its entirety reveals that the learned Judge was perfectly alive that the claim before her was for *faute* pursuant to Articles 1382 and 1383 of the Civil Code. After analysing the evidence before her, in the light of the particulars of the *faute* averred against the bank, she concluded that the appellants had failed to establish any *faute* on the part of the bank with respect to Mr. Lagesse's death.

The appellants had given the following particulars of the averment of *faute* against the bank:

(i) the lack of a panic button in the vault;

(ii) the absence of surveillance camera inside the main vault or at the passage from the parking area to the main vault;

(iii) inadequate protection to bank employees entering the vault;

(iv) insufficient screening and/or control of the access leading in and out of the vault;

(v) absence of mechanism or any means to detect the incident which had occurred in the vault;

(vi) the defective or substandard nature of the security system in place at the bank;

(vii) the very fact that robbers entered the vault and murdered Mr. Lagesse; and

(viii) Mr. Lagesse's lack of skills and aptitude or training to work in the main vault.

In her judgment the learned Judge addressed the arguments put forward by counsel for the appellants. She mentioned *inter alia* that the appellants had contended that:

> *"…the death of Gérald Lagesse is a direct consequence of the total failure of the MCB to respect its obligations as a responsible employer. The MCB knew or ought to have known that GL was in an especially vulnerable situation and thus omitted to take the necessary precaution required for a staff to work at the vault. She* (counsel) *then referred to the ease with which the burglary occurred, i.e. within 29 minutes between 9.20 a.m.-9.40 a.m., given that the vault was meant to be the most highly secured place of the bank and found in a very 'restricted zone'; lack of training, inadequate security and no protection given to GL to work in such restricted area."*

The learned Judge then went on to set out *in extenso* the evidence adduced on behalf of the appellants as well as their arguments on each of the above issues regarding the alleged defective or substandard security measures in place at the bank and Mr. Lagesse's alleged lack of aptitude to perform the work in the vault.

She took note of the evidence adduced by the appellants to establish their case and reached the conclusion that the evidence adduced by witnesses called by the appellants had failed to establish their contentions.

She pointed out that the appellants had not adduced –

> *"…expert evidence to substantiate their averments that the security system of the main vault was either defective or below the standard required nor any evidence of what was the best and infallible security system that defendant no. 1 ought to have had in the circumstances…"*

She analysed the evidence namely that:

1. the day gate could only be opened from the inside;

2. there was only one key to that gate and that key was kept in the possession of the person working in the vault who, on the material day, was Mr. Lagesse;

3. the day gate was found open after the robbery and Mr. Lagesse found lying dead in the vault;

4. there was no evidence that the day gate had been forced open.

She found that:

> *".. On the contrary the evidence of the witnesses called by the plaintiffs* (now appellants) *to explain the security systems, measures and protocols which were in force at the material time, in particular with regard to the vault area,*

> *shows that they were quite strict. They were followed and applied meticulously and none of the witnesses voiced out any shortcomings."*

Her ultimate finding after having considered the whole of the evidence was that the door to the vault could only have been opened by Mr. Lagesse.

In the circumstances it cannot be seriously contended that the learned Judge had failed to consider or had misdirected herself on any of the issues invoked in the above ground. She meticulously addressed all the evidence notably the evidence with respect to the security system at the vault which, as was pointed out by the learned Judge, had been adduced by the appellants themselves, before concluding as she did.

She pointed out that the evidence adduced by witnesses called by the appellants revealed that the systems, measures and protocols at the bank, in particular in the vault area, were strict; they were followed and meticulously applied and the appellants' witnesses could not pinpoint any shortcomings in the system.

Regarding Mr. Lagesse's alleged lack of aptitude and skills to work in the vault, the learned Judge found that the appellants' witnesses, namely Messrs Jolicoeur and Russel testified that Mr. Lagesse was a bank officer with some 25 years' experience. He had worked as manager at several branches of the bank which were fitted with vaults and he was fully conversant with the security aspect and procedures of the main vault.

She accordingly found:

> *"… the plaintiffs' complaint that late Gérald Lagesse required special skills, that he was not given adequate training and was therefore unfit to work in the main vault are unfounded."*

Her reasoning and conclusions cannot be faulted inasmuch as they are amply borne out by the evidence. We accordingly find no merit in grounds 1 (a),(b),(c) and (e) which must therefore fail.

As regards ground 1(d) which is to the effect that the learned Judge had failed to consider the *"possible application"* of the doctrine of *res ipsa loquitur* in the present case, we decline to pronounce ourselves on this issue inasmuch as it was never raised before the trial court and the Judge had not been called to make any pronouncement thereon; it is a new issue which is being raised for the first time before us on appeal.

Further the appellants' claim was grounded in tort for *faute* and pleadings were accordingly exchanged in the present case on that basis. Before the trial court, the issue to be determined was whether the bank was liable in tort as particularised in the pleadings. The doctrine of *res ipsa loquitur* was never invoked and adjudicated upon.

Ground 1(d) also fails.

Ground 2

> *"The learned Judge erred in her appreciation of the whole of the evidence brought before her and reached a perverse conclusion in her findings on the facts of the case in:*
>
> *(a) drawing a number of inferences from non-established facts;*
>
> *(b) concentrating on selective aspects of the security in the vault area of the premises of the then defendant No. 1's main branch, whilst disregarding the overwhelming evidence before her which pointed to the existence of a highly deficient and loose security system;*
>
> *(c) failing to consider the whole of the evidence brought before her."*

Under this ground counsel submitted that the learned Judge had erred by basing herself exclusively on the evidence of Mr. Clency Beeharry, who was the then Chief Security Officer at the bank at the relevant time.

Mr. C. Beeharry had deponed as to the security systems and the measures in force at the bank and more particularly as regards the vault at the material time. He also gave evidence regarding access to the vault and described the functioning of the two doors leading to the vault. He described the procedure in place for the removal of money from the vault for transfer to other branches of the bank and more particularly the conduct of such transfer on 11 February 2005. He stated that the whole operation had been carried out under his supervision in strict compliance with the safety protocols existing at the bank. He had been present throughout and only left the vault area after the completion of the operation.

The learned Judge accepted the testimony of Mr. Beeharry and found *"no reason to disbelieve* Mr. Beeharry *that the established safety procedures and measures were scrupulously followed and applied on that fatal day".* She also accepted his evidence that after the loading operation the first door leading to the corridor was locked as was the day gate and at the time that he left the area, he had seen Mr. Lagesse working inside the vault.

In her judgment, for the reasons already alluded to earlier, the learned Judge *inter alia* inferred from the evidence adduced that Mr. Lagesse himself must have opened the day gate.

The appellants' submission under this ground to the effect that the learned Judge drew the inferences from *"non established facts"*, is incorrect.

She made the inference that Mr. Lagesse himself must have opened the day gate on the basis of the evidence on record that:

(a) there was only one key for the day gate;

(b) that key remained with the employee working in the vault and was in Mr. Lagesse's possession on the relevant day;

(c) the day gate could only be opened with the key from the inside;

(d) the day gate was found open at the time that Mr. Lagesse's body was discovered in the vault; and

(e) there was no evidence that the day gate was forced open.

There was thus sufficient evidence for the learned Judge to draw the reasonable inference that the day gate must have been opened by Mr. Lagesse himself.

There was also on record:

(i) uncontradicted evidence that once the door to the loading bay, the two doors at the end of the corridor and the day gate are closed and locked, outsiders could not gain access in the loading bay, the corridor and the vault;

(ii) the testimony of Mr. C. Beeharry whom the learned Judge had found to be a truthful witness and which had established that:

(a) all safety measures and protocols in place at the bank had been thoroughly followed and applied throughout the transfer operation on that day;

(b) as he was leaving the vault area after the transfer operations had been completed, he saw Mr. Lagesse working inside the vault, with the day gate closed.

It is significant to note that Mr. C. Beeharry was a witness called by the appellants themselves but whose testimony, however, counsel for the appellants sought to impeach and to challenge as his evidence was clearly supportive of the bank's contentions and which unequivocally rebutted any allegation of *faute* on the part of the bank.

The learned Judge chose to believe Mr. C. Beeharry and we find no reason to interfere with her decision. Further, as was found by the learned Judge, the appellants had not substantiated the contentions to the effect that the security systems in place were inadequate or defective in any way.

In the light of the above it cannot be said that the learned Judge had made the above inference on the basis of non-established facts.

The inferences indeed were drawn from relevant facts established in evidence and cannot be said to be perverse, irrational or unsustainable in any manner whatsoever.

We accordingly find no merit in the arguments under this ground. The learned Judge considered the totality of the evidence, she relied on established facts as well as on evidence which she accepted as true, to draw the above inferences, which in our view are reasonable and fully justified in the circumstances.

Ground 2 also fails.

It is averred under ground 3 that the appellants have been denied a fair hearing within a reasonable time pursuant to Section 10(8) of the Constitution.

Counsel submitted that there had been inordinate delay in the determination of the present case. The case was lodged on 30 January 2008, completed on 11 May 2017 and judgment delivered four years later on 27 April 2021.

Counsel for the appellants *inter alia* referred to:

1. the 13 years' delay between the lodging of the case on 30 January 2008 and the delivery of judgment on 27 April 2021;

2. the 4 years' delay between the completion of the trial (11 May 2017) and the delivery of the judgment (27 April 2021);

3. the conduct of the case before the trial court including:

    (i) the number of unnecessary postponements and general lack of diligence in the completion of the hearing;

(ii) the delay of 3 years and 14 postponements on the part of the then defendant No. 1 in filing its plea and initiating third party procedures against then defendants No. 2, 3 & 4;

(iii) the delay of 6 years between the case being lodged and it being in shape for trial;

(iv) the general lack of diligence of the case to be concluded within a reasonable time, resulting in 2 of the then 4 plaintiffs passing away before judgment was delivered;

(e) the apparent impairment of learned trial Judge's memory of the details of the trial leading to an over reliance on the minutes of proceedings and an incorrect appreciation of the evidence."

Counsel therefore submitted that the appellants had been denied a fair hearing within a reasonable time by reason of delay and *"the apparent impairment of learned trial Judge's memory of the details of the trial leading to an over reliance on the minutes of proceedings and an incorrect appreciation of the evidence."*

The appellants have accordingly moved in view of *"the inordinate time which has lapsed in the determination of this case"* that the appeal be allowed and the judgment delivered by the learned Judge quashed. Further it is the appellant's case that as a result, the Court of Civil Appeal should proceed "*to determine the liability of the respondents and apportion any damages as it may deem fit amongst the respondents inasmuch as the court is in presence of evidence adduced in respect of different claims before the trial court."*

True it is that there has been a substantial delay in the hearing and determination of the present case.

However, we need to point out in the first place that the appellants' contention that the Court of Civil Appeal should proceed to determine the case after quashing the judgment of the

trial Judge cannot be entertained. As was stated by Sir John Coleridge in **R v. Bertrand (1867) LR I PC 520 at 535**, which was quoted with approval by the Judicial Committee in **Sip Heng Wong Ng and Ng Ping Man v R [1985 MR 142]**:

> *"… a note of this evidence is, or may be, "the dead body of the evidence, without its spirit; which is supplied when given openly or orally, by the ear and eye of those who receive it…"*

In **Ng (supra)**, the Judicial Committee of the Privy Council, taking into consideration the right of an accused to a fair hearing guaranteed by section 10(1) of the Constitution, explained the rationale behind this principle as follows:

> *"The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed…"*

In view of the rationale explained by Sir John Coleridge as quoted in **Ng**, the same reasoning and principle would apply to a civil case such as the present one. This is borne out by the following dictum from **Samputh v R [1987 MR 144]**:

> *"… their Lordships in the Privy Council placed their decision in Ng on the footing that section 124 of the Courts Acts is contrary to section 10(1) of the Constitution which guarantees to a person charged with a criminal offence a fair hearing. Since the same requirement of a fair hearing is enshrined in section 10(8) of the same text regarding civil matters, the decision is now of general application."*

Following a perusal of the record, we consider that the Court of Civil Appeal would not, despite any delay, be better placed than the trial Judge to decide the issues of fact which would determine liability in the present matter.

We need also to point out that delay *per se* is not a sufficient ground to challenge a judgment. The party who raises the issue of delay must pinpoint particular findings which would be open to question by reason of delay, as was explained by the Judicial Committee in the following passage:

> *"… the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay." (*Underlining ours)
> **(Tex Services Ltd v Shibani Knitting Co Ltd (in receivership) [2015 PRV 57])**

In the present case the appellants have failed to pinpoint any findings of fact which, in the light of the present review, would be open to question by reason of the delay.

Our attention was not drawn to any specific instance which could support the appellants' contention, nor have we come across any evidence which would show that the Judge's memory *"of the details of the trial"* had been impaired by the passage of time. The learned Judge was in presence of a full transcript of the proceedings at the time of writing the judgment and she made a thorough analysis of the evidence and the arguments submitted before her.

In her judgment, the learned Judge recounted in detail the evidence of all the witnesses called by the parties, the contentions of each party as well as the submissions made by the respective counsel, following which she proceeded to analyse the evidence and to make her findings.

A reading of the judgment reveals clearly that the learned Judge had a good grasp of the evidence and the issues involved. She made a critical analysis of the evidence in the light of the

submissions by counsel for the respective parties before reaching the conclusions that she did. She set out her reasoning in detail and her judgment is fully motivated. There is indeed nothing which may suggest any shortcoming or defect in her appreciation of the evidence which may be attributed to the delay.

For the above reasons we are of the view that the appeal cannot succeed under this ground.

Conclusion

We find no merit whatsoever in this appeal and we accordingly dismiss it. With costs.

B. R. Mungly-Gulbul
Chief Justice

D. Chan Kan Cheong
Judge

HEARD ON : 20 June 2022

DELIVERED ON : 5 August 2022, by Honourable B. R. Mungly-Gulbul, Chief Justice

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For Appellant : Mrs F. Maudarbocus-Moolna, SA
Mrs U. Boolell, Senior Counsel, together with
Mr F. Soreefan, of Counsel

For Respondent No. 1 **Mr T. Koenig, SA**
Mr E. Ribot, SC, together with Mr M. Sauzier, SC,
Mr H. Bansroopun and Mr L.E. Ribot, of Counsel