Michaelmas Term

[2018] UKPC 26

Privy Council Appeal No 0069 of 2017

JUDGMENT

University of Technology, Mauritius (Appellant) vGopeechand (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hodge

Lord Lloyd-Jones

JUDGMENT GIVEN ON

8 October 2018

Heard on 12 July 2018

Appellant	Respondent
Ravindra Chetty SC	Katherine Deal
	Emily Moore
(Instructed by Axiom Stone)	(Instructed by Hunchun Gunesh)

LORD HODGE:

1.
The University of Technology, Mauritius ("UTM") appeals with the permission of the Supreme Court of Mauritius ("the Supreme Court") against a judgment of the Supreme Court which held UTM liable in damages to the respondent, Ramraj Gopeechand ("Mr Gopeechand"). The claim for damages, which was pleaded as a breach of contract, was for injuries which he sustained in a road traffic accident on 9 March 2007 when he was being driven home after work by another employee of UTM, Mr Khemraj Singh Ramtohul ("Mr Ramtohul"). The accident was the result of "faute" (or negligence) on the part of Mr Ramtohul, who was criminally prosecuted as a result and had to pay a fine.

2.

At the time of the accident, section 18 of the Labour Act 1975 imposed an obligation on an employer to provide a worker with transport between his place of work and his usual place of residence, if he lived more than three miles from his usual place of work, or to finance his use of public transport if a bus service was available. UTM operated a system by which employees could apply to its office superintendent for the use of UTM vehicles, including to get home after work. UTM had an application form in which the applicant requested the use of a vehicle and specified both the reason for which a vehicle was required and the proposed itinerary. The applicants submitted the form to the office superintendent, who ascertained if transport was available, checked by an employee in the finance department and approved by the office of the UTM registrar. On the afternoon of 9 March 2007 Mr Gopeechand and a colleague, Mr Veeru Botia, applied for use of a UTM vehicle using this form and their application was approved. The form, which in the proceedings in this case has been described as Form A, is the only documentary evidence of the existence of a contract between Mr Gopeechand and UTM.

3.
Mr Gopeechand raised his action for damages in the Intermediate Court of Mauritius. In his proecipe, or claim form, he pleaded that UTM provided him with transport under contract or custom and that UTM "as employer and provider of the transport [had] failed to convey him safe and sound to his place of residence and therefore committed a breach of contract". In his answers to demand of particulars Mr Gopeechand explained that there was no express provision in his contract of employment which required UTM to provide transport but that it was its accepted practice to provide transport when employees worked into the evening and that UTM had provided the car under a verbal (ie oral) arrangement. In its pleadings UTM denied that it was in breach of contract and asserted that it was not bound to provide him with transport under his contract of employment.

4.
Mr Gopeechand's claim went to trial before the Hon Ms A Ramdin, Vice President of the Intermediate Court ("the Magistrate"). Mr Gopeechand alone gave oral evidence and produced documentation and medical reports in support of his claim for damages. No evidence was led on behalf of UTM. In his brief submissions counsel for Mr Gopeechand founded on Form A as evidence of a contract for transport between UTM and his client, pointing out that it specified the passengers, the time and the itinerary.

5.
The Magistrate in a judgment dated 30 May 2014, held that there was a contract of transport by which UTM undertook to provide transport to Mr Gopeechand and Mr Botia. She treated Form A not as a written contract but as a "commencement de preuve par écrit", ie as admissible evidence of both the existence of the contract and its terms. Such evidence can be supplemented by other evidence, such as that which Mr Gopeechand gave. In the light of all of the evidence before her, the Magistrate held that Mr Gopeechand had applied for transport after working hours in his capacity as employee and UTM had contracted to provide that transport. She held:

"… the employer UTM was under a duty to provide safe transport to the plaintiff as the latter worked overtime and the plaintiff was still under the employer's care until he reached his place."

She concluded that Mr Gopeechand had proved his case of breach of contract.

6.
It is not clear from the Magistrate's formulation (above) whether she had concluded that the contract imposed strict liability on UTM to carry Mr Gopeechand safely to his home or a less stringent form of

liability, such as an obligation that the driver, as UTM's agent, would exercise reasonable care in his driving. But that was not an issue at the trial, because, as the Board has observed, it was not disputed that Mr Ramtohul had been guilty of careless driving.

7.
UTM appealed to the Supreme Court against the Magistrate's order that it pay damages and costs to Mr Gopeechand. In a judgment dated 23 May 2017 the Supreme Court (Judges A F Chui Yew Cheong and O B Madhub) concluded that the Magistrate had not come to the wrong conclusion when she held that UTM had been under a duty to provide safe transport to Mr Gopeechand and that it had failed to do so. UTM's arguments before the Supreme Court were (a) that it did not breach the parties' contract of employment which did not extend to the provision of transport, (b) that it was not bound to provide transport facilities to Mr Gopeechand's residence and (c) in any event Mr Gopeechand was not bound to travel in the car.

8.
The first of the arguments is not now in issue as Mr Gopeechand's counsel does not assert that the obligation to convey him home was part of his contract of employment. The third argument provoked a discussion by the Supreme Court as to whether the accident occurred in the course of Mr Gopeechand's employment, which the Board respectfully considers to be beside the point for reasons which it discusses in para 16 below. In the Board's view, the critical question which UTM raises in this appeal is whether or not it breached a contractual obligation to convey Mr Gopeechand to his home.

9.
In presenting UTM's appeal on this central question, Mr Ravindra Chetty SC made three principal submissions. First, in his written case he submitted that, as it was agreed that the contract of employment did not cover the provision of transport, there was no evidence of another contract by which UTM as employer of Mr Gopeechand contracted with him that Mr Ramtohul would use his own car to convey him home. Secondly, he advanced an argument, which was closely related to the first submission, namely that there was uncertainty as to the terms and conditions of the contract as Form A provided for the use of a vehicle provided by UTM (ie a vehicle in the ownership or control of UTM) but Mr Gopeechand's counsel had sought to establish that there was a contract which allowed him to be driven by, and in the car belonging to, another of UTM's employees. Thirdly, he argued that a contract of transportation in this case could not give rise to an "obligation de résultat" (ie an obligation to achieve a specified result) but merely an "obligation de moyens" and pointed out that the Supreme Court in their judgment had stated that article 1779 of the Civil Code, which specified a circumstance in which the former type of obligation would arise, did not apply.

10.
The Board is satisfied that there is no substance in the first and second submissions. There was no dispute that Mr Botia and Mr Gopeechand applied in Form A to be conveyed home because they were working late on 9 March 2007. It is not disputed that that application was approved by the relevant officers of UTM. It is not disputed that on that evening Mr Ramtohul, an employee of UTM, picked up Mr Gopeechand and Mr Botia in his car and set off to take them to their homes. UTM's counsel did not suggest in his cross-examination of Mr Gopeechand that Mr Ramtohul acted on his own initiative or at the request of anyone other than UTM in providing that transport. UTM chose to lead no evidence. In those circumstances the Magistrate was entitled to infer that UTM had requested Mr Ramtohul to assist it by providing and driving his car. It is to be recalled that the Magistrate did not treat Form A as a complete written contract but merely as a "commencement de preuve par écrit" and made her findings having regard to all the evidence.

11.
Mr Chetty also submits that the contract of transport was not an “obligation de résultat”. Mauritian law, like French law, distinguishes between such an obligation and an “obligation de moyens”. This distinction was proposed by Professor René Demogue in Traité des Obligations (1925) vol 5, chapter 19, section 1237 and vol 6, chapter 6, section 599 and has gained general acceptance as a characterisation of contractual obligations. The “obligation de résultat” requires the obligant or debtor to achieve the contracted result. Thus, using the example to which the Supreme Court referred, a carrier contracts to convey the passenger safe and sound to his destination. This rule which is derived from Roman law and has come to be reflected in the Mauritian Civil Code is a derivation from the strict liability of a sea carrier in the receptum nautarum cauponum stabulariorum, a praetorian action to enforce the guarantee by a sea carrier, an innkeeper or a stablekeeper that their customers’ goods would be safe while on their ship or premises subject to a defence of vis major (force majeure): Zimmermann, The Law of Obligations, Roman foundations of the civilian tradition, (1996) pp 514-515. It has been received in the Civil Code of Mauritius in the obligations imposed on carriers by land or sea of persons or things in Title 8, section 4, chapter 3, articles 1779 and 1782-1786. Thus, in article 1784 it is provided that the voituriers par terre et par eau “sont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu’ils ne prouvent qu’elles ont été perdues et avariées par cas fortuit ou force majeure”.

12.
The responsibility of the carrier is not the only example of an “obligation de résultat”. Article 1147 of the Civil Code imposes on the debtor of obligations to which it applies the burden of showing that his non-performance of a contractual obligation results from a “cause étrangère”, which cannot be imputed to him.

13.
The “obligation de moyens” on the other hand, which is also known as the “obligation générale de prudence et de diligence”, is an obligation to use the care and diligence of a reasonable man in pursuit of a contracted result. Thus, article 1137 of the Civil Code speaks ofthe obligation to use “tous les soins d’un bon père de famille” to achieve the contracted result.

14.
The principal distinction between the two characterisations of contractual obligation appears to be the burden of proof. In each, the creditor must prove non-performance. In an “obligation de moyens” the creditor must prove a failure to take the requisite care because that failure is an essential part of the non-performance. In an “obligation de résultat”, once the creditor has established that the stipulated result has not been achieved, the debtor must show that his failure was the result of a “cause étrangère”.

15.
The Supreme Court held that the case did not concern a normal contract of transport between a carrier and a passenger which imposed an obligation “de résultat” for the safe and sound conveyance of passengers. The contract for transport which Mr Gopeechand entered into was with his employers, who were not carriers. The parties did not advance detailed arguments before the Supreme Court as to the proper characterisation of the contract. But in the Board’s view it does not matter on the facts of this case if the obligation which UTM undertook were an obligation to use care and diligence in the performance of the contract of transport through Mr Ramtohul who was acting as its agent to that end. The factual background, which was not in dispute, was that Mr Ramtohul had not driven with the requisite care. He, acting as UTM’s agent, thereby put UTM in breach of its contract with Mr

Ramtohul. The matter thus becomes a pure pleading point. A statement in Mr Gopeechand's proecipe that the breach of contract was caused by Mr Ramtohul's lack of care in driving would not have resulted in either party leading different evidence. In any event, UTM did not argue at the trial before the Magistrate that the contract was an "obligation de moyens". Instead its counsel argued first that there was no contract and secondly, there was no connection between UTM and the car which Mr Ramtohul drove. To allow UTM to take the point on appeal would be productive of a serious injustice.

16.
There remains only the third argument mentioned in para 8 above, namely whether the accident occurred in the course of Mr Gopeechand's employment. This argument arose as a result of UTM's submission to the Supreme Court that it could not be liable unless it had imposed an obligation on Mr Gopeechand to travel in Mr Ramtohul's car. UTM sought to support this submission by referring to the English case of Vandyke v Fender [1970] 2 QB 292 and the Mauritian case of The Mauritian Eagle Insurance Co Ltd v Corona Clothing Co Ltd [1999] SCJ 70. In the Board's view those cases cannot assist UTM. Vandyke was not concerned with establishing the employer's liability for the negligence of its agent which it engaged to bring its employees in to their work. That was a given. The question, which the Court of Appeal addressed, was whether the employer's insurers were liable under an employer's liability policy which gave the employers an indemnity against liability in law for damages and costs "if any person under a contract of service … with the insured shall sustain bodily injury … arising out of and in the course of such person's employment by the insured in the business" (emphasis added). The Court of Appeal held that an employee travelling to or from work was not "in the course of his employment" unless his employment contract obliged him to travel in that way: Lord Denning MR pp 304-306. As Mr Vandyke was not so obliged, the employer's liability insurers were not liable to indemnify the employers. Mauritian Eagle Insurance Co Ltd raised essentially the same question of the liability of the employer's liability insurer. Neither case is relevant to determining the liability of an employer which arranges for the transport of its employees to and from work.

17.
The Board, albeit for somewhat different reasons, agrees with the Supreme Court that the Magistrate did not err in her judgment that UTM were liable to Mr Gopeechand in damages for breach of contract.

Conclusion

18.
The Board dismisses the appeal. The Board invites written submissions as to costs within 28 days of the promulgation of this judgment.