[2014] UKPC 1
Privy Council Appeal No 0028 of 2012

JUDGMENT

Piganiol (Appellant) *v* Smegh (Île Maurice) Ltée (Respondent)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Kerr
Lord Wilson

JUDGMENT DELIVERED BY

Lord Wilson

ON

11 February 2014

Heard on 20 January 2014

Appellant	*Respondent*
Satyawan K Trilochun (Instructed by MA Law (Solicitors))	

LORD WILSON:

1. Rule 2(2) of the Supreme Court Rules 2000 ("the Rules") provides that in certain circumstances an action can be initiated in the Supreme Court "by way of motion supported by affidavit". The question raised by this appeal is whether the supporting affidavit is required to be made either by the mover of the motion or by his proxy and cannot be made by anyone else. In the present case, in which the grounds for the motion were that service of previous proceedings had been duly effected on the other party, the affidavit in support of the motion was made by the person who had allegedly participated in the service, i.e. by the mover's witness rather than by the mover himself or his proxy. On 23 June 2011 the Court of Civil Appeal (Mr Justice Matadeen, then the Senior Puisne Judge, and Mr Justice Hajee Abdoula) held that, in the absence of a supporting affidavit made by the mover or his proxy, the motion had been invalid and the order made on it should be quashed.

2. In this appeal, brought as of right under section 81(1)(b) of the Constitution, the appellant is Mr Piganiol ("P") . The respondent is SMEGH (Île Maurice) Ltée (the company"). The company has been served with notice of the appeal but takes no part in it.

3. In 2003 the company employed P, who is French, as a chef at its hotel in Turtle Bay. The contract provided that his employment should continue for three years but in 2004 he resigned from it and left the hotel. On 8 November 2004 he initiated proceedings against the company by way of plaint with summons. He alleged that the company had been in breach of the contract in numerous respects and claimed damages of Rs 4,869,380. He elected that service of the proceedings be by court usher.

4. The usher endorsed the following return on the plaint with summons:

> "The foregoing plaint with summons was duly served by me, the undersigned Usher upon [the company] by leaving a true and certified copy thereof, for the Manager of [the company], in his absence, with Mr Venkatachellum, Chief Security Officer found at the registered office of [the company] situate at Turtle Bay, Balaclava. The said Mr Venkatachellum promised to hand over same to the Manager of [the company].
>
> This 19th day of November, 2004.

(sd) A B Choony

Senior Court Usher, Supreme Court."

5. On 2 March 2006, being the date which had been fixed for the case to be made out, the company did not appear. Nor had it appeared at the three earlier hearings. In the light of the usher's return, Mr Justice Matadeen was satisfied that the proceedings had been served on the company. P gave brief (oral) evidence in support of his claim, whereupon the judge gave judgment in his favour for the sum claimed.

6. On 24 May 2006, by way of motion, the company initiated proceedings against P. The motion was for an order for a new trial of P's claim against the company. By a supporting affidavit made by one of its managers dated 24 May 2006, it alleged that, prior to 2 March 2006, it had not been served with the proceedings brought by P. It alleged that, contrary to the usher's return, the plaint with summons had never been left with Mr Venkatachellum (nor with any other officer of the company) and that accordingly he had never made the promise recorded therein.

7. On the advice of his counsel, given to him for reasons unclear, P did not oppose the company's motion. On 8 November 2006, Mr Justice Pillay, then the Chief Justice, set aside the order dated 2 March 2006 and directed a new trial ("the setting aside order").

8. On 26 September 2007, by way of motion, P initiated proceedings against the company. He sought rescission of the setting aside order. Three documents were lodged in the Registry on his behalf:

i) The motion paper, signed by his newly-appointed attorney and dated 26 September 2007. It said that counsel was instructed to move for an order of rescission of it "on the ground of false averment. And this for the reasons fully set forth in the herewith annexed affidavit."

ii) An affidavit made on 26 September 2007 by Mr Venkatachellum.

iii) The notice of motion, signed by P's attorney and wrongly dated 26 *October* 2007, which gave notice that the motion would be heard in court on 8 October 2007.

9. P elected that service of the proceedings be by court usher. On 29 September 2007 Mr Choony, the usher, endorsed a return on the notice of motion to the effect that

he had served it and the affidavit on the company that day. In due course the court rejected the company's contention that in various respects that service had been invalid.

10. In that the crux of the present appeal relates to the fact that the only affidavit in support of P's motion was made by Mr Venkatachellum, it is important to note the content of his affidavit. He averred that:

i) The company had employed him as the chief security officer at the hotel between 2004 and 2007.

ii) Mr Soobramanien, the company's human resources manager, had instructed him to accept service of all proceedings on behalf of the company and to deliver them to him.

iii) Mr Choony had (on a date not identified by Mr Venkatachellum, who nevertheless clearly intended to refer to 19 November 2004) delivered to him the plaint with summons issued by P and he (Mr Venkatachellum) had then delivered it to Mr Soobramanien.

iv) The affidavit made on behalf of the company on 24 May 2006 had been untrue in denying both that Mr Venkatachellum had received the plaint with summons and that he had assured Mr Choony that he would deliver it to the manager.

v) Following the entry of judgment in favour of P, he (Mr Venkatachellum) had informed the company's attorney and counsel that he had been served with the plaint with summons and had delivered it to Mr Soobramanien.

vi) In having moved for a new trial, the company had been guilty of a delaying tactic and it had not come to the court with clean hands.

vii) P was therefore praying that the setting aside order had been made on false averments.

viii) It was urgent and necessary for it to be rescinded.

Underneath Mr Venkatachellum's signature P's attorney subscribed that she had drawn up the affidavit.

11. At the hearing on 8 October 2007 the company did not appear. Mr Justice Yeung Sik Yuen, then the Chief Justice, acceded to P's motion. He made an order rescinding the setting aside order ("the rescission order").

12. On 4 December 2007, by way of motion, the company initiated proceedings against P. The motion was for the rescission order to be quashed and therefore for the trial of P's plaint with summons again to be allowed to proceed. The motion was supported by an affidavit made by Mr Soobramanien on behalf of the company. He contended that the rescission order had been wrongly made on each of ten grounds. The first ground was the absence in support of P's motion dated 26 September 2007 of any affidavit made by P himself or his proxy. The third ground was an allegation that in 2007 the company had dismissed Mr Venkatachellum for gross misconduct. Several other grounds related to alleged deficiencies in P's notice of motion dated 26 September 2007 and in the purported service on 29 September 2007. But what did Mr Soobramanien state in relation to the substance of Mr Venkatachellum's affidavit, which had been to the effect that on 19 November 2004, as by his return the usher had originally asserted, P's plaint with summons had been duly delivered on Mr Venkatachellum, who had delivered it to Mr. Soobramanien? The only statement of conceivable relevance is Mr Soobramanien's impenetrable eighth ground, namely "A main action pending before the Supreme Court cannot be disposed of by an order for new trial obtained in chambers on the grounds of false averments." The reference to "false averments" seems more likely to have been a reference to P's allegation that the company had made false averments; but, even if taken as an allegation that Mr Venkatachellum had made false averments, the fact remains that Mr Soobramanien offered no specific refutation of Mr Venkatachellum's evidence about service on 19 November 2004. In effect the fact of service was not denied.

13. On 13 October 2009 Mrs Justice Balgobin refused the company's request for the rescission order to be quashed and thus she set its motion aside. She gave reasons for rejecting all ten of the grounds. In relation to the first, she said that, in that Mr. Venkatachellum's affidavit contained the grounds for P's motion, there had been no need for P himself or his proxy to make an affidavit in support of it.

14. On 23 June 2011, by the order now under appeal, the Court of Civil Appeal upheld the company's appeal against the order dated 13 October 2009 and, in substitution for it, quashed the rescission order and gave directions for the trial of P's action. Having dismissed two of the company's grounds of appeal, it upheld the third in the following terms:

> "Nowhere is it indicated in the affidavit that Mr Venkatachellum was representing [P] or that he had been authorised to do so. So that his affidavit could only be qualified as one from a third party. No doubt such an affidavit could have been annexed to an affidavit from [P] or his proxy.

> So that there was only a motion which was not supported by any affidavit from the mover of the motion or his proxy. In the circumstances the absence of such an affidavit by [P] or his proxy in support of his motion was fatal and the application for the quashing of the order of new trial should not have been granted. There is also the fact that Mr Venkatachellum might have had an axe to grind inasmuch as he had been dismissed by the [company] a few months earlier."

15. In explaining its conclusion the Court of Civil Appeal did not refer to rule 2(2) of the Rules which, as set out in the opening sentence of this judgment, does not expressly say that the affidavit in support of a motion is required to be made by the mover or his proxy. The court must have considered that the requirement was to be implied; but it did not explain why it was to be implied. No doubt motions are usually supported by affidavits made by the mover himself (including, in the case of a company, by one of its authorised officers) or by his proxy; and affidavits made by the mover's witnesses are conventionally annexed to his own affidavit.. But there is no logic behind a conclusion that what usually happens equates to what is always required. We must ask: what is the purpose behind the requirement of an affidavit in Rule 2(2)?

16. In answering the question some assistance is derived from rule 22 of the Rules, which provides:

> "These rules shall apply to any proceedings before the Court by way of motion… as if –
>
> …
>
> (c) the affidavits exchanged between the parties constituted the pleadings in the case."

Part II of the Rules, entitled "Pleadings", provides that, in the case of a plaint with summons, the pleadings constitute (a) the plaint part of the document (as opposed to the summons part of the document), of which the defendant may seek particulars (rule 10), (b) the plea including any counterclaim (rule 11) and (c) the reply to the plea (rule 12). Rule 3(1) governs the content of the plaint with summons and provides:

> "A plaint with summons shall –
>
> (a) state the names, occupations and addresses of the parties;

(b) state the substance of the cause of action;

(c) call upon the defendant… to appear… on a date and time specified in the summons…;

(d) be accompanied by a notice describing the documentary evidence which the plaintiff intends to adduce…"

The content of the plaint is therefore prescribed by (a) and (b); the content of the summons is prescribed by (c); and the content of the accompanying notice is prescribed by (d). Rule 13(1) governs the content of each of the three species of pleading and provides:

> "Every pleading shall clearly and distinctly state all matters of fact that are necessary to sustain the plaint, plea or counterclaim as the case may be."

It follows therefore that, in the case of the initiation of an action by motion, the supporting affidavit must state the names, occupations and addresses of the parties, the substance of the cause of action and all matters of fact necessary to sustain the motion. In two words, the affidavit in support of the motion must set out its *factual basis.*

17. P's motion paper dated 26 September 2007 expressly linked Mr Venkatachellum's affidavit to the motion by stating that it set out the reasons for the allegation that the company had obtained the setting aside order by false averments. In that light let us recall that, in his affidavit, Mr. Venkatachellum

i) set out the parties' names and addresses;

ii) omitted to set out P's occupation (it was well known to the company, which was wise not to rely on this omission, of which it had also been guilty in both of its motions);

iii) alleged in clear and direct terms that on 19 November 2004, through himself, the usher had served the company with P's plaint with summons; and

iv) averred, however inappropriately in the light of his status only as a witness, that the company's application for the setting aside order had been a delaying tactic and that the order had been made on false averments and should be set aside.

So the affidavit of Mr Venkatachellum clearly and comprehensively set out the factual basis of P's motion. There was nothing which either P, who by 2006 had left the island, or his proxy could have added. For the rules to have required P or his proxy to have made an affidavit, presumably annexing that of Mr Venkatachellum, would have required expenditure in terms of time and costs to no purpose whatever. Happily the Rules make no such requirement whether expressly or – in the opinion of the Board – by implication.

18. It remains only to address the final observation of the Court of Civil Appeal that Mr Venkatachellum might have had an axe to grind against the company. The Board agrees with the observation. But how would the possible axe to grind be relevant? It would be relevant to any inquiry into the truth of his account of service upon the company on 19 November 2004. But the arresting feature of this case is that the court was never called upon to inquire into the truth of his account because the company never put it in issue. Although in his affidavit dated 4 December 2007 Mr Soobramanien made ten points, he did not dispute Mr Venkatachellum's account of service on 19 November 2004, which in any event did no more than to confirm the record of the usher. There was a baleful aridity about the company's motion dated 4 December 2007 and, notwithstanding its respect for the judges in the Court of Civil Appeal who upheld it, the Board is pleased to have concluded that the motion had no merit whatever. The Board will allow P's appeal; will set aside that court's order dated 23 June 2011 (including the order for costs); in substitution for it, will provide for the dismissal, with costs, of the company's appeal against the order dated 13 October 2009; and will order the company to pay P's costs of and incidental to the appeal to the Privy Council.