IN THE SEYCHELLES COURT OF APPEAL

MR AUGUSTE JULIE — **APPELLANT**

VERSUS

MR JAMES LARUE — **1ST RESPONDENT**
MR RENE DESAUBIN — **2ND RESPONDENT**

Civil Appeal No: 16 of 2000

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MR JAMES LARUE — **CROSS APPELLANT**

VERSUS

MR. AUGUSTE JULIE — **CROSS RESPONDENT**

[**Before**: *Ayoola P., Pillay & De Silva, JJ.A]*

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Mr. R. Elizabeth for the Appellant
Mr. P. Boulle for the Respondent

JUDGMENT OF THE COURT

(Delivered byPillay, JA)

The appellant, then plaintiff, had claimed that, although he had been authorised by his wife, the owner of parcel of land (B618), to cultivate that land and had done so, both defendants, now the respondents, had unlawfully and wrongfully entered that land and caused substantial damage to his sugarcane plantations, vegetables and other produce. The appellant therefore claimed both material and moral damages from both respondents who were allegedly jointly and severally liable to him in law.

In his defence the first defendant, now the first respondent, claimed that he has had since July 1996 a right of way on parcel of land (B618) to get access to his own parcel of land (B602) and the right to clear an access road of 3 metres wide on parcel of land (B618) (Judgment of the Court, Civil Side

No. 169 of 1993). Moreover, he was not liable for any damage caused to the appellant. As for the second respondent, he denied all the allegations of the appellant.

In a counter-claim, however, the first respondent claimed that in December 1998 the appellant had built an iron gate, a concrete platform and a shed across the first respondent's access road over parcel of land (B618), preventing the latter from enjoying his right of way. Moreover, the appellant had also caused damage to the first respondent's parcel of land (B602) by demolishing a retaining wall, building a road on the first respondent's land, removing the beacon on the latter's boundary and stealing rocks from the retaining wall. The first respondent therefore claimed from the appellant not only both material and moral damages, but also an order that the appellant should demolish all constructions, gates and obstructions on the first respondent's right of way over parcel of land (B618).

In his reply to the defence of the first respondent, the appellant admitted that the first respondent might have a right of way over parcel of land (B618) but averred that the first respondent had no right to destroy his plantations without giving notice to the appellant. The appellant had accordingly committed "*a faute*".

With regard to the counter-claim, the appellant denied all the allegations of the first respondent.

The appellant appealed, in substance, against the trial Court's findings of fact in respect of the counter-claim filed by the first respondent and in respect of a procedural point of law with which we shall deal later while the

latter by means of a cross-appeal appealed against the quantum of damages awarded by the trial Court in respect of the appellant's plaint.

With respect to the appellant's plaint, the learned trial Judge made the following findings of fact:-

(1) Although the first respondent had a 3-metre right of way over parcel of land (B618) and could clear such a way, he had to "*cause the least possible damage to the plantations of the appellant*", pursuant to Article 683 of the Civil Code of Seychelles Act.

(2) The first respondent did not give any notice to the appellant before he proceeded to clear the plantations of the appellant, thus denying the opportunity to the latter of salvaging what he could. In acting as he did, the first respondent had not acted prudently.

(3) The first respondent had caused more damage than was necessary in cleaning his 3-metre right of way over parcel of land (B618). The first respondent had indeed acted in abuse of his right under Article 1382(3) of the Civil Code of Seychelles Act which provides that "*fault may also consist of an act or omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.*"

(4) The haste with which the first respondent acted and his general conduct in the matter evinced "*a dominant intention*" to cause damage to the appellant.

(5) Sugar plantations, vegetables and banana trees had been shown by the appellant to have been damaged. Moreover, the first respondent admitted having removed certain vegetables like chouchoux, pumpkin and cassava plants while clearing his right of way.

(6) Both respondents were consequently ordered to pay SR10,000 in damages to the appellant, together with interest and costs.

We may at this stage dispose of the two grounds of the cross-appeal of the first respondent (the cross-appellant) which question in substance the quantum of damages awarded to the appellant. Having reviewed all the evidence on record, in the light of the relevant principles of law and of the arguments of learned Counsel on both sides, we have no hesitation in holding that the learned Judge's reasoning cannot be faulted and that he was perfectly entitled on the facts to find that the first respondent, together with the second respondent, was liable to the appellant in damages, pursuant to Article 1382(3) of the Civil Code of Seychelles Act. Consequently, the cross-appeal is dismissed, with costs.

With regard to the counter-claim of the first respondent, the Court also made the following findings of fact:-

(1) The appellant harboured a lingering sense of grievance over the fact that the first respondent had a right of way in respect of parcel of land (B618).

(2) The appellant had "*played more than a passive role*" in effecting the constructions (iron gate, concrete platform and a shed – vide: exhibit D4) over the first respondent's right of way and causing damage to

the first respondent's parcel of land (B602) e.g by demolishing a retaining wall, building a new road (exhibit D6) and excavating of the mound [vide: exhibits D5 and D9] Moreover, all this damage was seen by the Court on the visit to the locus.

In the light of his findings of fact, the learned trial Judge awarded –

(a) SR10,000 to the first respondent as "*a reasonable estimate*" for effecting repairs to the old road, given that, according to Mr. Ah-Tiff, the Managing Director of a building company, SR20,000 were estimated as costs of repairs;

(b) SR1000 in respect of damage to the excavation of the mound and a nominal sum of SR1000 with regard to rocks which had been removed from the retaining wall and not appropriated by the appellant.

(c) The sum of SR10,000 as moral damages to the first respondent.

The Court also ordered the appellant to demolish all constructions, gates, shed and all other obstructions on the first respondent's right of way over parcel of land (B618).

We may turn now to the grounds of appeal of the appellant. At the outset of the hearing of the appeal, we intimated to learned Counsel for the appellant that it was too late on appeal to make a submission that the counter-claim of the first respondent was in breach of section 80(1) of the Seychelles Code of Civil Procedure in that it does not arise out of the subject matter of the appellant's action. The appellant had pleaded to the

counter-claim and evidence had been adduced at the trial with regard to the counter-claim by both sides, without any objection on the part of the appellant. That being so, the appellant could not claim in the particular circumstances of the case that a miscarriage of justice had occurred or that he had suffered any prejudice.

All the other grounds of appeal question, in essence, the findings of fact of the learned trial Judge. With regard to the specific issue of whether the appellant had taken an active role in effecting the obstructions over the first respondent's right of way on parcel of land (B618) and causing the damage to the first respondent's parcel of land (B602), there is abundant evidence on record, to which learned Counsel for the first respondent had alluded in the course of his submissions, to bear out the learned Judge's findings of fact on that issue.

For instance, the appellant admitted having built a platform across the old road and had helped in the construction of a wall and a new road by his son. On more than one occasion the appellant referred to the fact that "*we*" built another new road and "*we*" dumped rocks from the retaining wall of the old road. That reference to *"we"* shows that he and his sons caused the obstruction and damages. Those facts as highlighted, must in our opinion, be viewed in the light of the trial Count's specific finding that the appellant had never come to terms with the Court's decision to allow the first respondent a right of way over parcel of land (B618).

The appellant, however, must succeed in respect of the trial Court's award of the nominal sum of SR1000 in respect of rocks coming from the retaining wall of the old road belonging to the first respondent. Since the first respondent had claimed that the appellant had stolen such rocks and

the trial Court had found that those rocks had not been appropriated by the appellant, this item of damage must be disallowed.

Having correctly found as it did that the appellant had caused obstructions to the first respondent's right of way on the parcel of land (B618), the trial Court could not, in our view, have taken any course other than ordering the appellant to demolish all those obstructions within a reasonable delay.

For the reasons given, subject to the award of one item of damage which we have disallowed, we otherwise affirm the judgment of the trial Court and dismiss the appeal of the appellant, with costs. For the date mentioned in the judgment for compliance of the order of the trial Court, we substitute "*on or before 30th June 2002.*"

E. O. AYOOLA	**A. G. PILLAY**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 19th day of ***April*** 2002.