

IN THE SEYCHELLES COURT OF APPEAL

IN THE MATTER BETWEEN:

GASTON MORIN

APPELLANT

AND

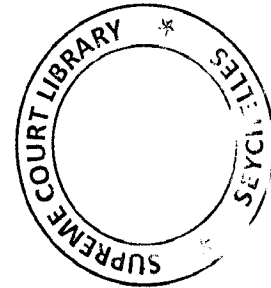
JOSE POOL

RESPONDENT

Civil Appeal No. 7 of 2003

[Before: Ayoola P, Silungwe & De Silva, JJA]

Ms. D. Zatte for the Appellant
Mr. J. Hodoul for the Respondent



JUDGMENT OF THE COURT
(Delivered by Silungwe, JA)

This is an appeal against a judgment of the Supreme Court in which the appellant's claim of a right of way over the respondent's parcel of land was dismissed with costs.

Although the record of appeal runs into two volumes, covering 386 typed pages, the point at issue, both in the court below and in this court, was/is so simple that it could have been disposed of without much ado or expense, namely: whether the appellant's parcel of land was enclaved, thereby entitling him to a right of way over the respondent's land, in terms of Article 682(1) of the Civil Code. This Article stipulates that:-

"682(1) The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full

use of such property, subject to his paying adequate compensation for any damage that he may cause."

Indeed, a reading of the judgment appealed against demonstrates that the learned trial judge was alive to the issue when he stated that:-

"The initial determination should therefore be whether the defendant, or his predecessor in title Mrs. Martha Morin, had authorised a right of way to the plaintiff to enter his property, parcel C948 over parcel C768 as parcel C948 was enclaved as claimed."

In the Supreme Court, the appellant and the respondent were plaintiff and defendant, respectively. The parties are owners of adjoining parcels of land. The appellant's amended plaint reads:

1. *The plaintiff and the defendant are and were at all material times the owners of adjoining parcels of land registered as Title No. C948 owned by the Plaintiff and Title No. C768 owned by the Defendant.*
2. *The Plaintiff has and had at all material times a right of way over the defendant's land above-mentioned to the public road, by virtue of the fact that his property above-mentioned is enclaved.*
3. *At all material times the Plaintiff had been exercising his right of way by the use of a vehicular access road on the Defendant's land.*
4. *The abovementioned road was built by the Plaintiff at his own expense with the consent of the previous owner, namely Mrs. Martha Adeline nee Morin.*
5. *On the 25th day of May 1999, six years after the Defendant had acquired ownership of the abovementioned land, i.e. Title No. C768, the Defendant blocked the access road abovementioned by digging trenches across it, and this has prevented the Plaintiff from exercising his right of way.*

6. *The Plaintiff is and was at all material times a farmer and has used the access road, inter alia, to exploit his property, bringing in raw materials and transporting his produce to market and to his customers.*
7. *As a result of the unlawful acts and fault of the Defendant mentioned in paragraph 5 above, the Plaintiff has suffered loss and damage for which the Defendant is liable as follows:-*
- | | | |
|------|--|--|
| (i) | <i>Loss of earning for 7 months
from June 1999 to December 1999
at R.30,000.00 per month</i> | <i>R210,000.00</i> |
| (ii) | <i>Moral Damages</i> | <i><u>R 40,000.00</u>
<u>R250,000.00</u></i> |
8. *Despite repeated requests the Defendant has failed to unlock the access road and thereby allow the Plaintiff to exercise his right of way.*

WHEREFORE the Plaintiff prays this Honourable Court for a judgment ordering the Defendant to:-

- (a) *declare that the Plaintiff has a right of way on the Defendant's land, Title No. C768 exercisable by the use of a vehicular access road on the Defendant's land which has been blocked by the Defendant.*
- (b) *unblock the access road and restore it to its original state,*
- (c) *pay to the Plaintiff the sum of R.250,000.00,*
- (d) *pay to the Plaintiff the sum of R.30,000.00 per month from January 2000 to the date of the Judgment,*

with interest and costs."

The respondent did not file an amended defence as he relied on the original one in which all the allegations by the appellant were denied. The second paragraph of the defence reads:-

“(2) Para 2 of the plaint is strictly denied. The defendant avers that he is the sole and absolute owner of title C768; that the Encumbrance Section in the land Register reveals that his property is not burdened by a right of way as alleged and that he has not granted any easement for the land comprised in Title C948 which, from time immemorial, has its own passage.

Notwithstanding his pleadings, the respondent paradoxically produced in evidence a plan (Exhibit D3) which clearly depicts that the appellant's parcel of land – C948 – is enclosed on all sides.

On the facts of the case, it is undeniable that the appellant built a vehicular road on the respondent's land and thereby gained access to a public highway. Being a farmer, he was able to market his farm produce by utilising the said road. It is further not in dispute that the respondent blocked the access road by means of trenches dug across it.

Mr. Hodoul argues on behalf of the respondent that the learned trial judge found there was overwhelming evidence that parcel No. 968, though “enclosed on all sides” had since 1986/1987 and recently, following the blocking of the access road, been served and continues to be served by a “foot path shown in plan D3”, which was observed during the locus in quo. Hence, continues Mr. Hodoul, there is access on to the public highway. He concedes, however, that the learned trial judge did not make any specific pronouncement as to whether the foot path was “sufficient” or “adequate” in terms of Article 682(1) of the Civil Code.

On the basis of Article 682(1), it is inevitable that the appellant is entitled to a declaration sought in his prayer that he has a right of way on the respondent's land - parcel No. C768 - to accord him access to the public highway. This immediately raises the question whether the blocked road, the footpath or an uncharted route, would provide the shortest access to the highway. Pursuant to the provisions of Article 683 of the Civil Code, this is a matter of evidence that would have to be led before the Supreme Court. Similarly, the issue of damages which could not be the subject of adjudication in the *court a quo*, would have to be

canvassed there, if need be. Pending a determination, in terms of Articles 682 and 683, we believe it is just that the vehicular access road be restored to its original state by unblocking it to enable the appellant to enjoy the use thereof.

In conclusion, we make the following order:-

1. the appeal is allowed, with costs, to the extent that it is hereby declared that the appellant has the right of way over the respondent's land parcel No. C768;
2. the matter is remitted to the Supreme Court:
 - (a) for a decision as to which would be the shortest route to the public highway, in terms of Articles 682 and 683 of the Civil Code; and
 - (b) for the assessment of damages, if any.

Delivered at Victoria, Mahe, this 5th day of December 2003