

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (President) , M. Twomey (J.A) , F. Robinson (J.A)]

Civil Appeal SCA 05/2018

(Appeal from Supreme Court Decision CS 17/2015)

Villa Veuvre (Pty) Ltd

Appellant

Versus

1. Roddy Ernesta

1st Respondent

2. Sheryle Ernesta

2nd Respondent

Heard: 06 August 2020

Counsel: Mr. A. Derjacques for the Appellant

Mr. B. Georges for the Respondents

Delivered: 21 August 2020

JUDGMENT

F. Robinson (J.A)

[1] This is an appeal from a judgment of the learned trial Judge, who dismissed with costs the appellant's (plaintiff's) plaint for a permanent injunction to prevent the respondents (the defendants) from blocking a public road, harassing, insulting and threatening the staff, invitees and guests of the appellant and damages resulting therefrom.

[2] The appellant's case was grounded on faute. The plaint averred that, on the 10 February 2015, the respondents blocked a public road, to wit LD800, belonging to the Government of Seychelles, which was the only vehicular access to parcel LD968, on which the appellant's hotel is situated. The plaint averred that the said road had been blocked to harm the business of the appellant.

[3] The statement of defence admitted that the respondents caused an access road to the appellant's property to be blocked, but denied the claim of the appellant that the respondents had blocked a public road, to wit LD800, belonging to the Government of Seychelles. The statement of defence claimed that the road the respondents blocked was on their property, through which they had allowed the appellant pedestrian and bicycle access. They averred that they were compelled to block access to the said road as a result of the poisoning of all their dogs in their yard.

[4] At the close of the appellant's case the respondents opted to make a submission of no case to answer: see *Bouchereau v Rassool* [1975] SLR 238 and *Victor v Azemia* [1977] SLR 195. There was no election put to the respondents.

[5] The appellant is appealing on the following grounds, namely that —

"1) *The Learned Judge erred in law in finding that the facts in evidence failed to reveal or prove faute by the Defendants.*

2) *The Learned Judge erred in law in failing to find that the pertinent road was a public road, a road commonly utilized by the Plaintiff, his guests and invitees and the public including tourists.*

3) *The Learned Judge erred in law in failing to find that the Plaintiff had a legal right of way or alternatively had the legal and undisputed right to utilize the road.*

4) *The Learned Judge erred in law in failing to safeguard the public access to the said road which will create confusion, arbitrary and wrongful conduct amongst the public who commonly utilize such roads on La Digue Island.*

5) *The Learned Judge erred in law in failing to find that the Defendants admission that they blocked the said road, curtailing use and access by the Plaintiff, its employees, guests, invitees and tenants was unlawful and constituted a faute in law".*

[6] We deal with the grounds of appeal in the following order, which appears appropriate.

Grounds 1, 2 and 5 of the grounds of appeal

[7] *Article 1382 of the Civil Code of Seychelles, so far as relevant, provides —*

"Article 1382

1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.

3. Fault may also consist of an act or an 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. [...]."

[8] Counsel for the appellant in his heads of argument combined grounds 1 and 5 together in the contention that *faute* was established in this case because the respondents admitted that they had blocked an access road, to wit LD800, and that the road they had blocked was on their property, through which they had allowed the appellant pedestrian and bicycle access. Thus, in the view of Counsel for the appellant, the learned trial Judge erred in concluding that the evidence fell short of establishing *faute* because the appellant had established that the respondents had blocked a public road, to wit LD800. Ground 2 contended that the learned trial Judge erred in failing to find that the road *in lite* was a public road, which ground shall be considered together with grounds 1 and 5.

[9] We have considered the grounds of appeal and the heads of argument of both Counsel with care. Grounds 1, 2 and 5 as framed have no merits. The learned trial Judge correctly found that the evidence adduced by the appellant did not establish on whose land the road access to the hotel was situated. Secondly, the evidence did not establish that the road to the hotel was a public road.

[10] Section 2 of the Road Act (Chapter 205) provides that, *"public roads" shall be the roads, streets, and paths mentioned in the First Schedule, and such others as may be constructed or repaired under this Act and from time to time proclaimed by the Minister*". Section 3 (1) of the said Act provides that, *"All public roads and bridges shall be constructed and kept in repair by the Ministry responsible for land transport"*. (2) *The Ministry responsible for land transport shall have control and superintendence over all public roads and bridges*". No title to parcel LD968 was produced and no evidence was led that the road in question had been prescribed under the said section 2 of that Act, or was a public road mentioned in the Act's Schedule. It is worthy of note that attempts to get the witness, a planning officer, to state that the road which was blocked was a public road failed.

[11] We therefore dismiss grounds 1, 2 and 5.

Ground 3 of the grounds of appeal

[12] Ground 3 contended that the access road constituted an easement in favour of the appellant's parcel LD968. We observe that this was not made a live issue in the pleadings nor canvassed in the course of the hearing at first instance. In that regard, we accept the contention of Counsel for the respondents that it was not appropriate for Counsel for the appellant to raise this issue for the first time on appeal. Section 71 of the Seychelles Code of Civil Procedure provides, in part, that: *"71. The plaint must contain the following particulars:- [...] (d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action; (e) a demand of relief which the plaintiff claims; [...]"*.

[13] In *Gallante v Hoareau [1988] SLR 122*, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"[t]he function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of

action and where and when it arose and of the material facts which are necessary to sustain the action".

[14] Ground 3 is accordingly dismissed.

Ground 4 of the grounds of appeal

[15] With respect to ground 4 of the grounds of appeal, it appears that Counsel for the appellant has founded his contention on the basis of Article 1382 *alinéa* 3 of the Civil Code of Seychelles. We note that Counsel for the appellant in his heads of argument did not address us on the basis of Article 1382 *alinéa* 3 of the Civil Code. It appeared that Counsel for the appellant was relying on the averments contained in the plaint, which have been repeated at paragraph 2 hereof.

[16] Counsel for the respondents submitted in his heads of argument, that the appellant's first and fourth grounds of appeal raised the possibility that a case may yet have been made out on *abus de droit* in terms of Article 1382 *alinéa* 3 of the Civil Code of Seychelles. In this respect, he contended that the delict of *abus de droit* under the Civil Code of Seychelles requires the exercise of a right with the aim specifically to harm: Article 1382 *alinéa* 3 speaks of the *dominant purpose* of the act being to harm.

[17] In *Seychelles Broadcasting Corporation v Andre Beaufond & Anor SCA 29/2013 [2015] SCCA21* (delivered on the 28 August 2015), the Appellate Court *agreed* that there is a general delict of *abus de droit*.

[18] This is made explicit by *Précis Dalloz, Droit Civil Les Obligations*, par F. TERRÉ, P. SIMLER, and Y. LEQUETE, 6^e 2002 n^{os} 742, 743 —

"742 Critères de l'abus de droit — La théorie de l'abus des droits s'applique à la plupart de ceux-ci. Mais les difficultés les plus sérieuses apparaissent alors, car il s'agit de déterminer le moment après lequel l'exercice d'un droit devient abusive. Nécessairement dominées par des considerations d'ordre philosophique ou politique, les opinion sont assez diverses. Schématiquement, il est possible de distinguer deux courants de pensée.

1° Certains auteurs s'en tiennent à des critères subjectifs, liés à la recherche de la faute dans l'exercice des droits. Le seuil de l'abus peut être situé à deux niveaux différents :

- a) Ou bien, de manière assez restrictive, on estime que seule la faute, intentionnelle – c'est-à-dire le délit – rend abusive l'exercice d'un droit ; il ne serait tel que s'il était exercé dans l'intention malicieuse, voire dans la seule intention malicieuse de nuire à autrui [...];
- b) Ou bien, plus largement, tenant compte de l'assimilation du principe du délit et du quasi-délit, l'on admet qu'il puisse y avoir abus du seul fait que le droit a été exercé avec imprudence ou négligence, sans les précautions nécessaires qu'aurait prises un être raisonnable, envisagé *in abstracto* [...].

2° Un autre courant de pensée de caractère plus socialiste, fait valoir que les droits subjectifs, à supposer qu'on en admette l'existence, ne sont reconnus aux individus que comme des fonctions sociales ou, tout au moins, à certaines fins sociales. Dès lors, si le titulaire du droit le détourne de son but, il commet un abus et ne mérite plus protection.

743 **Applications** — Si, dans la plupart des cas, la jurisprudence s'en tient à ces critères, elle n'en reste pas moins rébelle à une systématisation. Diverse raisons sont à l'origine de cette variété, voire de cette casuistique. Raisons juridiques : les droits subjectifs sont plus ou moins structurés, plus ou moins "accusés", ce qui peut mettre de manière variable obstacle à la condamnation des

exercices abusive. Raisons philosophiques, notamment dans la mesure ou l'équité imprègne les situations. Raisons sociologiques, car l'analyse des relations entre les "roles" et les "statuts" varie selon les situations ; ainsi peut-il y avoir plus facilement un abus dans l'action que dans l'abstention.

Il en résulte que, selon les cas, la jurisprudence subordonne la condamnation pour abus de droit qui peut résulter non seulement d'une action, mais aussi d'une abstention [Cass. 3^e civ., 17 jan. Bull. civ, III, n^o 41, p. 33, D. 1978, Inf. Rap. 322, RTS civ. 1978.655, obs. G. Durry], à l'existence d'une intention de nuire ou à la mauvaise foi patente, ou, au contraire, se montant plus libérale, se contente d'erreurs légère, celle que ne commettrait pas un être raisonnable, envisagé in abstracto.

On signalera les solutions suivantes :

a) Les droits réel, spécialement le droit de propriété [V. Précis Dalloz, Les biens, par F. TERRÉ et P. SIMLER, 6e éd., n^{os} 320, 919 ...] donnent lieu à l'abus lorsqu'ils sont exercés dans l'intention de nuire...". Emphasis supplied

[19] Dalloz Répertoire de Droit Civil Tome I Abandon – Crédit foncier Abus de Droit at n^{os} 14, 17, states —

"Art. 3. — ACTES ACCOMPLIES DANS L'INTENTION DE NUIRE

[...]

14. Il appartient à la victime de l'acte dommageable d'établir l'intention de nuire qui anime l'auteur de l'acte. La preuve d'une

telle intention est difficile à faire. Elle résulte le plus souvent de l' inutilité de l'acte pour celui qui l'a accompli. Encore faut-il que cette inutilité ne soit pas la conséquence d'une erreur de calcul. Le titulaire d'un droit doit avoir conscience, quand il agit, que son acte n'a d'autre but que de nuire à autrui.

[...]

17. Il y a aujourd'hui unanimité dans la doctrine et dans la jurisprudence pour admettre l'abus du droit quand l'acte du titulaire est uniquement motivé par le dessein de nuire à autrui".

Emphasis supplied

[20] We opine that the appellant's evidence did not reveal that the road had been blocked with the dominant purpose to cause harm to the appellant's business. Had the road been blocked with the dominant purpose to harm the business of the appellant, we agree with Counsel for the respondents that this may have constituted a *faute* even in the absence of a proven easement. However, we observe that the case for the appellant was based on the wrongful blocking of a right of way, or of a public access.

[21] Thus, ground 4 of the grounds of appeal fails.

Decision

[22] All the grounds of appeal having failed, we dismiss the appeal with costs.

F. Robinson (J.A)

I concur:. A.Fernando (President)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020

