IN THE SUPREME COURT OF SEYCHELLES

GUNTER FRITZ AWEGE **1st Plaintiff**

MARIJA ZLATKOVIC **2nd Plaintiff**

VS

CHRISTINE LAPPE **1st Defendant**

HEIKO LAPPE **2nd Defendant**

YVES CHOPPY
of Ministry of National Development,
Planning Authority **3rd Defendant**

Civil Side No.323 of 2007

Mr. Basil Hoareau Attorney at Law for the Plaintiffs

Mr. France Bonte Attorney at Law for the 1st and 2nd Defendants

Ms. A Madeline State Counsel for the 3rd Defendant

JUDGMENT

Burhan J

The 1st and 2nd plaintiffs filed an amended plaint seeking the following reliefs from the 1st, 2nd and 3rd defendants in this case:

i) that the defendants joint/severally pay a sum of SR 80,000/= to the plaintiffs, along with interest and costs.

ii) that the defendants jointly/severally pay a sum of SR 50,000/= to the 2nd plaintiff along with interest and costs.

iii) declare that the plaintiff has the permission and licence to build the walkway and consequently that the 1st plaintiff is allowed to rebuild the walkway.

The plaintiff's aver in their plaint that having obtained permission from the Ministry of Land Use and Habitat, they had constructed a walkway on the fore shore at Glacis, in order that there would be easy access from their house to the nearby beach. The plaint further states that the 3rd defendant by letter dated 21st August 2007 addressed to Dr. Jost.V. Shoenebeck had wrongfully stated that the walkway constructed by the plaintiffs should be removed as permission had not been obtained from the Planning authorities. It is averred that the 3rd defendant in writing the said letter had committed a faut while the 1st and 2nd defendants too in illegally, unlawfully and unjustifiably dismantling a part of the said walkway, had committed a faute.

The particulars of the damages claimed by the 1st plaintiff are:

Cost to repair the walkway	SR 30.000
Moral damages	SR 50.000

The particulars of the damages claimed by the 2nd plaintiff are:

Moral damages	SR 50.000
Total	SR 130.00

The defence filed on behalf of the 1st and 2nd defendants avers that as the 3rd defendant had granted approval for the construction of the said walkway on a

temporary basis, to be removed two years from the date of the letter of 17th May 2004, their act of dismantling the said walkway would not amount to a faute. Thereafter the 1st and 2nd defendants in an amended defence further averred that as the plaintiffs had failed to dismantle the said walkway as required by letter dated 21st August 2007, it was the plaintiffs who had committed a faute as they were causing disruptions and stopping the 1st and 2nd defendants who were neighbours from peaceful enjoyment of their property. On this basis the 1st and 2nd defendants made a counterclaim in a sum of SR 19.000 for cost incurred by them in removing the said walkway and moral damages in a sum of SR 200.000. They also prayed that the plaint be dismissed and that the court not make an order that the 3rd defendant grant permission to the plaintiffs to build another walkway. The plaintiffs denied the counterclaim and prayed that it be dismissed.

The 3rd defendant in his defence dated 22nd of July 2008 stated that the Ministry of Environment, Natural Resources, Pollution Control and Environmental Impacts Division wrote a letter dated 17th May 2004 (which the plaintiff admits he received) stating that the access (walkway) to the beach built by the plaintiff was temporary and that it was to be removed two years from the date of the said letter. It is further stated in the defence of the 3rd defendant that at the time the letter of 21st August 2007 was written, the two year approval given by the Ministry of Environment had lapsed and therefore the 3rd defendant had not committed a faute in writing the letter dated 21st August 2007 to Dr. Jost.V. Shoenebeck, informing him that there was no Planning permission for the existing walkway.

The 1st, 2nd and 3rd defendants in defence also took a “plea in limine litis” that the 1st and 2nd plaintiffs had no “locus standi.” By a Ruling dated 29th March 2010 this

court ruled that the 1st and 2nd plaintiffs did have “locus standi” to proceed with the case.

By affidavit dated 6th August 2009 counsel for the plaintiff moved that the 1st plaintiff Sven Gunter Awege be substituted by Gunter Fritz Awege. The said application was granted by court. It appears by an oversight that the amended plaint of 23rd October 2010 the said amendment has not been formally incorporated in its caption. Considering the Ruling of 29th March 2010 and evidence given in court this court will proceed on the basis that the 1st plaintiff is Gunter Fritz Awege.

The case proceeded to trial and in his evidence the 1st plaintiff stated that he is a permanent resident in the Seychelles and has been residing in Glacis for the past 8 years and for the past two years had been operating a guest house at Glacis. The 2nd plaintiff Dr, Marja Zlatkovic was his common law wife. He stated that his wife had undergone a hip replacement operation and had been recommended swimming as a part of her therapy. As his wife could not access the beach in her condition due to the access having rocks, he had decided to obtain approval and construct a walkway to the said beach. He had made a request to Mr. Rayston Meriton the Director of Land Use and Habitat by letter dated 29th April 2004 marked P7. It is apparent Mr. Joseph Rath Ag Director of Ministry of Environment and Natural Resources Pollution Control & Environmental Impacts Division by letter dated 17th May 2004 marked P8 had granted approval to the plaintiff to build the walkway for a period of two years. Paragraph 3 of the letter reads as follows:

“Please note that we have no objection to grant approval for the construction of the access. We do not foresee any negative impacts that the proposal will impart on

the coastal area. However since the access is meant to be temporary we would request that it be removed in two years from the date of this note of authority."

Paragraph 4 of the said letter further reads as follows:

"We request you liaise with the Director for Development Control in the Ministry of Land Use and Habitat for final approval of the construction."

It is apparent that as he had liased with the Director General of Development Control, the Director General Mr. Terry Biscornet had thereafter by letter dated 28th July 2004 marked P9 informed the plaintiff as follows:

"Kindly be informed that your proposal is considered as a partial reclamation on the foreshore of another property for which you should obtain the land owners undertaking in writing that they have no objections to this prior to further consideration."

It is apparent that the plaintiff had been unable to obtain the said approval as the said landowner had left Seychelles 20 years prior with no intention of returning and intimated same to Mr. Terry Biscornet by undated letter marked P10. The last paragraph of the said letter P10 reads as follows:

"In case the land owner, sometimes in the future, appears and does not like what I have done, I always can dismantle the area in question, respectively find a compromise and a mutual agreement."

Mr. Terry Boscornet had replied by letter dated 30th August 2004 marked P11. The 2nd paragraph of P11 states as follows:

"Kindly be informed that there are no objections conditional to the last paragraph of your letter (last paragraph of P10 quoted above) and there should also be no removal of rocks by any means on the property."

Thereafter the Ministry of Environment had inspected the said walkway and paragraph 3 of the said letter dated 13th January 2005 marked P12 reads as follows:

"It was observed during the visit that all the conditions of our original letter had been complied with and as such we are of the opinion that the works had been undertaken to our satisfaction."

On the 21st of August 2007 Mr. Yves Choppy the Secretary to Planning Authority wrote to Sven Gunter Awege, the plaintiff admits receipt of the letter and paragraph 1 of the said letter marked P14 reads as follows:

"RE; CONSTRUCTION OF WALKWAY ON THE FORESHORE
Reference is made to the above matter whereby the Sub Committee of Planning Authority visited the site and found that you have constructed a walkway leading to the foreshore without planning permission. This should be removed in view that the permission granted by Environment was only for 2 years (see attached)."

By letter dated 21st August 2007 marked P15, the Secretary Planning Authority Mr. Yves Choppy the 3rd defendant wrote to Dr. Jost.V. Shoenebeck, intimating their decision in respect of the complaint made by him. Paragraph 3 reads as follows:

"The Planning Authority has decided as follows:

1. *The walkway should be removed by Mr.Awege since he does not have Planning permission.*
2. *With regards to the building along the boundary wall with the Cairns property (Parcel H1366) he should remove the door that has been installed on that elevation."*

It is the position of the 1st plaintiff that he was granted permission to build the said walkway by letter marked P11 dated 30th August 2004 by Mr. Terry Biscornet Director General of Development Planning Division and the only two conditions he was subject to were those stated in the said letter namely:

1) that he would dismantle the walkway if the land owners appeared and objected to same,
2) that there would be no removal of rocks by on the property.

He states that it was not the Ministry of Environment that gave him permission to build but the Development Planning Division of the Ministry of Land Use and Habitat.

It is to be noted that the letter issued by the Ministry of Environment marked P8 dated 17th May 2004 grants approval to the plaintiff to build the walkway only for a period of two years it specifically states:

"…. However since the access is meant to be temporary we would request that it be removed in two years from the date of this note of authority."

Paragraph 4 of the said letter further refers to final approval for construction being granted by the Director for Development Control in the Ministry of Land Use and Habitat. The 1st plaintiff accepts and admits having received letter P8 from the Ministry of Environment and therefore was fully aware of the condition contained therein. He has not sought to clarify or contest same. Therefore it could only be inferred that he impliedly accepted the condition contained therein that it be removed two years from the date of the said letter. Having set down this condition, the said letter P8 also refers to a "final approval" for "construction" being granted by the Director of Development Control. It is clear from the correspondence that the "final approval" for "construction" to be granted by the Director of Development Control was an additional approval required to the conditional approval granted by the Ministry of Environment as set out in letter P8. It is apparent therefore that there were two approvals given one from the Ministry of Environment subject to a condition that it be removed in two years and another for "construction" from the Director for Development Control. Having received both letters, it was the duty of the plaintiff in the event of there being any ambiguity, for him to have clarified same from the relevant Ministries concerned. Therefore the 1st plaintiff's contention that he is subject only to the conditions contained in letter P11 and not P8 bears no merit.

When one considers the letter marked 3D1 dated 12th July 2006, it is apparent that that one Mr. Philip Colling had queried regarding the approval given for the construction of the said walkway. The said letter refers to the agreement by the plaintiff to dismantle the walkway if a land owner objected. Considering all these factors this court is of the view that Mr. Yves Choppy was justified in requesting that the said walkway be dismantled and in sending the said letter dated P15 dated

21st August 2007 to Dr. Jost .V. Shoenebeck another complainant informing him of their decision.

Therefore this court proceeds to dismiss with costs the case against the 3rd defendant.

The 1st and 2nd defendants do not seek to deny the fact that it was them who had dismantled a part of the said walkway and they rely on the letter received by Dr. Jost. V. Schoenebeck to condone their act. It is to be noted that the said letter P15 does not in any way give permission or approval to Dr. Jost.V. Shoenebeck or the 1st and 2nd defendants to dismantle, break down or cause damage to the said walkway. Mr. Yves Choppy the 3rd defendant in evidence referred to a procedure to be adopted in the event of the plaintiffs not complying with his request to dismantle the said walkway. He stated that the Planning Authority would serve an enforcement notice to instruct the offender to remove it within a given time limit. If he failed to do so the Planning Authority could move to the site and undertake the works that is in this instant case dismantle the said walkway and claim the costs from the offender. It appears that the 1st and 2nd defendants have decided to circumvent all these procedures and act on their own giving scant regard and respect to proper procedure laid down by law. The 1st and 2nd defendants have not sought to give evidence in defence of their acts in breaking down and dismantling a part of the said walkway nor have they sought to deny same. In fact they admit doing it and seek by way of a counterclaim a sum of SR 19.000 for costs incurred by them in dismantling the said walkway. Therefore for the aforementioned reasons this court is satisfied on a balance of probabilities that the 1st and 2nd defendants did commit a faute in dismantling the walkway constructed by the plaintiffs.

The 1st plaintiff is claiming a sum of Rs 30.000 as costs to repair the said walkway. Considering the 1st plaintiffs evidence, vide page 23 of the proceedings of 26th October 2009 9.00 a.m. where he states he spent a sum of SR 20.000 to construct the said walkway. This fact has not been contested or disputed by the defendants. Further it is in evidence and photograph P16 supported by the evidence of the 1st plaintiff shows that the defendants having dismantled the said walkway thereafter "removed the evidence" of what they did by taking away, the stones and rocks removed by them. Therefore this court proceeds to award a sum of SR 20.000 to the plaintiff for damage caused to the walkway constructed by him.

The 1st and 2nd plaintiffs also claim that due to the actions of the 1st and 2nd defendants in demolishing the said walkway they were and still are, unable to go to the beach and thus have been affected morally and claim a sum of SR 50.000 each as moral damages. Considering the evidence before court, the evidence of the 2nd plaintiff clearly indicates that the use of the beach for swimming was a recommended form of therapy and treatment, as she had undergone hip replacement surgery and the acts of the defendants in dismantling part of the walkway on the 28th of September 2007 had thereby caused much inconvenience to her. It is apparent that the act of the 1st and 2nd defendants in dismantling the said walkway has caused much inconvenience to both plaintiffs as they were denied access to the beach which admittedly was for public use and therefore unable to enjoy the benefits of the beach frontage they had due to the acts of the 1st and 2nd defendants.

In the case of ***Aglae v Vidot [1989] SLR 165*** it was held that the plaintiff was entitled to moral damages for the breach of the covenant of quiet enjoyment and in the case of ***Adeline v Ernesta [1992] SLR No. 16*** it was held that an individual

who experienced inconvenience could be awarded moral damages. Considering the faute committed by the 1st and 2nd defendants which would have caused in addition to the above, much mental anguish to the 1st and 2nd plaintiffs, as the walkway constructed by them at their expense had been deliberately dismantled by the defendants, this court awards for the aforementioned reasons a sum of SR 20.000 as moral damages to the 1st plaintiff and a sum of SR 30.000 as moral damages to the 2nd plaintiff considering the fact she was additionally inconvenienced in respect of her recommended treatment.

A breakdown of the damages to be paid by the 1st and 2nd defendants jointly or severally is as follows:

The particulars of the damages awarded to the 1st plaintiff are:

For damage caused to the walkway	SR 20.000
Moral damages	SR 20.000

The particulars of the damages awarded to the 2nd plaintiff:

Moral damages	SR 30.000

In total a sum of SR 70.000 (Seventy thousand) is awarded as damages to both plaintiffs together with interest and costs. For the aforementioned reasons prayer (iii) of the amended plaint stands dismissed. The counterclaim of the 1st and 2nd defendants stands dismissed.

M.N BURHAN

JUDGE

Dated this 13th day of September 2011