

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 06/2016

[2018] SCSC 921

AGNETTE RITA PORT-LOUIS
First Plaintiff

JACQUELIN PORT-LOUIS
Second Plaintiff

versus

BARNEY CONFAIT
First Defendant

FLOSSY CONFAIT
Second Defendant

Heard:

Counsel: Ms Louise for plaintiff

Mr Chetty for defendant

Delivered: 15 October 2018

JUDGMENT

R. Govinden, J

[1] The Pleadings

[2] The first plaintiff is the fiduciary of the co-ownership existing between herself and her siblings in parcel H1437. The second plaintiff is the husband of the first plaintiff and owner of a motor vehicle bearing registration number S4701. The first defendant is the registered owner of parcel H1907 and the second defendant is the wife of the first defendant.

[3] It is averred in the plaint that at all material times the plaintiffs were the neighbors of the defendants who lived in a dwelling house adjacent to but at a higher level than the plaintiff's property. That during the night of the 7th of March 2014 the defendant's Retaining Wall collapsed onto the first plaintiff's dwelling house and the second plaintiff's vehicle. The plaintiffs aver that the said wall collapsed as a result of defects in the initial construction of the wall and due to its poor maintenance by the defendants. The plaintiffs further avers that by reason of the fault of the defendants they have suffered loss and damages to their house, its content and the said vehicle. The loss and damages are particularized as follows;

[4] Particulars of the damages

Reconstruction of Car Port SR 20, 595.00

Damage to dwelling house SR 125,588.00

Damage to rock wall and paved drive way SR 20, 500.00

Damage and loss to content of the house SR 67,868.45

Value of the vehicle written off SR 500, 000.00

Total_734,551.48

[5] The plaintiffs therefore pray to the court to enter judgment in their favour and against the defendants. In favour of the first plaintiff the sum of SR 334,551.48 and in favour of the second plaintiff the sum of SR 500, 000.00.

[6] On the other hand the defendants in their joint Statement of Defence admitted that the first plaintiff is the fiduciary of the co ownership existing between herself and her siblings in

parcel H1437 and that the second plaintiff is the husband of the first plaintiff and the owner of a motor vehicle registration number S 4701. It is also admitted that the first defendant is the registered owner of parcel H1907 and the second defendant is the wife of the first defendant.

- [7] The fact that the plaintiffs and the defendants are neighbors and that the defendants live adjacent to and above the first plaintiff's property is also admitted by the defendants.
- [8] The defendants admitted the fact that in the night of the 7th of March 2014 their Retaining Wall collapsed onto the first plaintiff's dwelling house, however the fact that it also collapsed onto the second defendant's vehicle is denied.
- [9] However, the defendants deny that their Retaining Wall collapsed as a result of defects in its initial construction and poor maintenance. They maintained that the wall was at all times well maintained and that the collapsed of the wall occurred as a result of an act of God, specifically bad weather resulting in landslides and the dislodging of boulders; such events occurring outside their control.
- [10] Finally, the defendants deny the particulars of damages of the plaintiffs and put them to the strict proof thereof. The defendants thereafter pray to this court to dismiss the Plaint with cost.

[11] **Undisputed facts**

The essential undisputed facts which transpire from evidence adduced by the parties are as follows;

- [12] It is not in dispute that the first plaintiff, Mrs. Agnette Rita Port Louis, is the fiduciary of the co-ownership existing between herself and her siblings in parcel H1437 and that the second plaintiff is the husband of the first plaintiff and the owner of a motor vehicle registration number S 4701. It is also not disputed that the first defendant is the registered owner of parcel H1907 and the second defendant is the wife of the first defendant.
- [13] It is not factually disputed that the defendants lives in an adjacent property lying on a higher level above the plaintiff's property. It is also not disputed that on the night of the 7th of

March 2014 torrential rain fell at Ma joie, Mahe, in the area where the parties are living and that it was during the course of this rainfall that the defendants property collapsed onto the first plaintiff's dwelling house and caused damages. However, it is in dispute that this collapsed caused damage to the car of the second defendant.

[14] **Testimonies**

The first plaintiff testified that she lives at Ma Joie on parcel H1437, which belongs to her two sisters, her brothers and herself. The first plaintiff is the fiduciary appointed in pursuance to article 823 of the Civil Code of Seychelles in respect of the said parcel. She testified that her property borders that of the defendants and the latter's property is a bit higher up. She was at her house on the 7th of March in the night from Thursday to Friday, it was around midnight and she was watching tv and then they went to bed. Whilst they were sleeping they heard a loud noise and it sounded like glass falling down. She woke up in order to verify and she noticed that the car had gotten in the house and that the car was previously under the car port. The house of the defendants is found behind and above the car port.

[15] She saw the Retaining Wall of the defendants crumbled down and one big boulder had rolled out of the wall and mud and debris had caused damages to the house and the car. According to her the content of the house was spoiled and damaged, damage had occurred to her souvenirs; crystal wares; electronic equipment and furniture. There were rain water and mud in the house, including in the living room and bedroom. . She said that she had to phone the emergency services and they had to make a hole in the house foundation in order to release the retained water and mud. The plaintiff did an inventory of all the damaged items in a document, produced as exhibit P3. The total loss from the list came to 3,315 Pounds Sterling.

[16] The witness testified that on the car there were bricks. The bricks came from the collapsed wall of her house. When the bricks fell it pushed the car into the plaintiff's house. The back of the house was completely damaged.

- [17] According to this witness she still live in the same house, but it is in a bad shape. She testified that the first defendant had built a patio on top of the retaining wall and that this had collapsed. It is the witness's evidence that the Retaining Wall collapsed after the defendant had built the patio on top of the retained land next to the wall. According to her the verandah has drain pipes that drained water into the Retaining Wall. She claimed that there exist a huge hole in the wall as a result of the dislodging of a boulder and that 6 inches bricks dislodged from the wall of her house by the collapsed Retaining Wall had landed unto the second plaintiff's car.
- [18] According to the first plaintiff, the car was eventually repaired but all the parts replaced are non-originals. She wants the court to order for reimbursement of the money they had spent on their properties as a result of the damages that had occurred. She said that she had not personally demanded any reparation from the first defendant as she claimed that the latter is unapproachable and has negative attitude.
- [19] The next witness called by the plaintiffs was the person who repaired the second plaintiff's vehicle, Mr. Tony Source. He testified that he is the manager at the ITAL CAR, which is a mechanical workshop that specializes in body works of cars. He repaired the 2nd plaintiff's BMW car, which according to him, was very damaged. The work done amounted to RS 150,000. That sum was paid by the first plaintiff.
- [20] The plaintiffs also called a qualified Quantity Surveyor, Mr. Nigel Stanley Valentin. He testified that he was instructed to evaluate the damages occurred due to the collapsed of the defendant's wall. According to his report produced as exhibit p5, the total amount of loss occurred to the house of the plaintiff amounted to SR 166, 682.58. The witness says that he could not however say how the damages occurred.
- [21] The plaintiffs also called Mr. Charles Clifford Morel. He is an expert vehicle assessor. He assessed the vehicle of the 2nd plaintiff shortly after the incident. He made a pre accident value and salvage value assessment. The pre accident value came to RS 500, 000 and the salvage value was RS 35, 000. He was not cross examined and his report was produced as exhibit p7.

- [22] Alph Esparon testified next. He is a civil engineer who was working as the Principal Engineer at the Planning Authority. He said that soon after the incident he went onto the plaintiff's property in order to assess the probable cause or causes of the Retaining wall collapse. Following his visit he compiled an internal report for his Project Manager. In his report he concluded that it was raining quite heavily that night and he found that this was the probable cause of the collapse. He noticed certain down pipes from an open terrace from the property belonging to the defendants that were discharging water unto the embankment, according to him this was the additional factor that caused the wall to collapse. He recommended that a new Retaining Wall be built and that the open embankment that was left as a result of the collapse be covered, in the interim, with a plastic material and a soil hive at the bottom of the embankment be kept until a new Retaining Wall is built, as it provide a mean of support . This letter was produced as exhibit p8.
- [23] Mr. Shane Port Louis, the son of the two plaintiffs testified in favour of his parents. He testified that on the night of the 7th of December 2014, he was at his parents place at Ma joie. He was sleeping in his room and he heard a huge noise. He woke up and he saw his father's car in the house with its alarm on. In his room there was water coming in. He saw everything crushed. There were rocks in the house. The rocks had slide down. All the memorabilia and electronic devices were ruined, according to the witness.
- [24] Mr. Fred Houareau, the Deputy Registrar General testified that parcel H1907 belong to the first and second defendants.
- [25] Mr. Wilbert Herminie, gave evidence in his capacity as a Civil Engineer. His competency was not objected to by the defendants. He compiled a Structural Report based on an inspection that he carried out on the collapsed Retaining wall. His report was produced as exhibit p9. According to this witness the Retaining Wall of the plaintiffs was substandard and was not the normal design for the height of the wall. The wall was substandard for it to hold the embankment which was supporting a house over the top of it. According to him the capacity of the wall was not enough for it to support the amount of water due to persistent raining. The rain caused the wall to absorb the water and to collapse. He said that however he had not seen the pre collapsed state of the wall.

[26] The first Defendant was the only witness who testified in favour of the Defendants case. She testified that she has been living on H1907, a property that she owns together with the second defendant. She said that her place was inclined and so she built a Retaining Wall. On top of that Retaining wall she built a verandah. She tiled it and put concrete pillars around the edge. She claimed that she did not built any outlet in that verandah that would discharge water into the Retaining Wall. She recalled the night of the 7th March 2014. It was raining heavily. She woke up at 4 am. She testified that she heard people crying. She shouted for the second plaintiff and in turn the first plaintiff insulted her. At that time she was cleaning water that had accumulated in her house.

[27] She said that she was aware that due to all the water coming down from her property it dislodged a big boulder that was in within the Retaining Wall and the rock fell at the plaintiff's house. It is her evidence that she had never seen any cracks in that wall and that since the wall was built thirty years back that was is the first incident regarding that wall. She was of the view that her wall was built in accordance to Planning Regulations and that all her run off water from her dwelling house goes through a man hole and not in to the embankment .

[28] Under cross examination the first defendant admitted to have made structural improvements in the form of a verandah situated above the retaining wall. That verandah was partly of tiles; concrete blocks and balustrades. The improvements were done in 2012. She was of the view that the protruding pipes in the retaining wall were not water outlets but part of the structural design of the wall. She further claimed that the collapse occurred by an Act of God and nobody from the Planning Authority informed her that she had discharged water into the embankment.

[29] **Submissions**

In their submissions the Defendants contended that the wall fell because of an act of God; bad weather and heavy rain resulted in landslide and dislodging of boulders which the wall was built around. The dislodging of the boulder being the last act, which resulted in the wall collapse. Accordingly, the defendants submitted that these incidents cannot be attributed to the defendants and as such they cannot be liable.

[30] In their submissions in response, the plaintiffs submitted that evidence from the Planning Authority and the Structural Report in evidence do not support the claim advanced by the defendants. It is their submissions that in both accounts it has been made clear that the reason for the collapse was the poor drainage system installed and in used by the defendants, which weakened the structural integrity of the wall.

[31] **Determination**

[32] The case of the plaintiffs is based on delictual liability. The plaintiffs claim that the defendants committed a faute by building a defective Retaining Wall that was poorly maintained which led to its collapse following a heavy rainfall. This case therefore falls to be considered in pursuant to article 1382 of the Civil Code of Seychelles. The plaintiffs therefore has to prove that the acts of the defendants caused a damage to them or their properties; secondly that there is a causal link between their acts and or omissions and the damages and the actions and or omissions of the plaintiffs consisted of a fault in law.

[33] The defendants puts up a defence of an act of God or “*force majeure*”. This defence is founded on article 1148(1) of the Civil Code of Seychelles. For the operation of this defence , three factors must be present , ‘ *l’exterosite; l’imprevoisibilite et l’irresistibilite* (an inevitable; unpredictable act of nature, not dependent on the act of man) an illustration of “ *force majeure* ” was highlighted in the cour de cassation (chambre civile 2 , Audience Publique du 12 Decembre 2002 , no de pourvoi 98-19111), where it was held that the external element , in that case the rain which caused the abundance of water was external act and exceptional, but not one that could not be foreseen. Vide, *Public Utilities Corporation V/S Elisa SCA 36 /11*.

[34] I have perused the pleadings and examined the evidence on record, including the documents produced as exhibits in this matter and the submissions of counsels for both parties. I have analysed the contentious issues and the relevant provisions of the law. To my mind the following are the fundamental questions that arises for determination in this case;

- [35] Did the defendants, as owners of their parcel and dwelling house committed any fault under article 1382 by building a defective Retaining Wall and failing to maintain same after it was built and hence abusing their rights of ownership resulting in or causing damage to the plaintiff's properties.
- [36] Was the damage caused by the property that the defendants had in their ownership or custody at the material time.
- [37] Are the defendants liable for the damage caused to the plaintiffs by the property held in their custody
- [38] What is the quantum of damages that the plaintiffs are entitled to, if any.
- [39] Before I proceed to find the answers to these issues of fact it is important first to ascertain the position of the law relevant to the issues at hand.
- [40] The right to use; reap the fruit of and alienate properties have been alleviated to a constitutional right since the promulgation of the 1993 constitution. This is clearly spelt out in article 26 of the Constitution. The abused of the right of ownership is however a fault under article 1382 of the Civil Code. Something which is also clearly recognized as a permissible derogation to this right under article 26 (1) (a) of the Constitution.
- [41] There are three elements required to establish such liabilities. The court must be satisfied of the following;
- [42] There was damage to the plaintiffs properties.
- [43] There is a causal link between the alleged acts of the defendants and the damage that occurred to the plaintiffs properties , and
- [44] The defendant failed to have all reasonable care to ensure that the acts would not cause damage to the plaintiffs.
- [45] It is also the law that the alleged acts of the defendants must be the sole and immediate cause for the plaintiff's damage .The acts must be the primary cause and not simply a cause

amongst other possibilities. Further owners of land who carries on an activity on the land which causes prejudice to a neighbor, which prejudice goes beyond the measure of the ordinary obligations of the neighborhood, commits a faute under article 1382 of the Civil Code. *Shami Properties v/s Oliaji Trading (2008) SLR ,176.*

[46] I take note that there is no liability where the defendant exercised due diligence. Fault under article 1382 of the Civil Code depends on what precautions were taken to foresee the occurrence of an event and adopt measures to prevent consequences.

[47] It is also trite law that there can be no fault where there is diligence in dealing with predictable or unpredictable events. *Emmanuel v/s Joubert SCA 49/1996 . Attorney General v/s Labonte SCA 24/2007.*

[48] The Damage

In this case it is not disputed that the 1st plaintiff's house sustained damages due to the collapsed of the Retaining Wall belonging to the two defendants. The wall in turn collapsed due to abnormal rain water accumulation caused by torrential rain. I believe the plaintiffs in their testimonies regarding the damages caused to their property by the collapse of the wall of the defendants. I find that on evidence that the 1st plaintiff did suffer material loss and damages due to the collapsed of the wall of the defendants. The material loss and damage were caused to the house of the first defendant and moveable found therein. The wall collapsed caused damages and flooding. This was as a result of the movements of the collapsed debris from the defendants Retaining Wall. I find that this aspect of the case is not being disputed by the defendants.

[49] I note that the defendants denies that the Retaining Wall fell on the second plaintiff's vehicle. On the evidence I however find that there exist overwhelming evidence that the vehicle of the second defendant was severely damage by the collapsed of the Retaining wall of the defendants.

[50] In the circumstances, I conclude that the first element required for establishing liability is present in the instant case.

[51] The causal link.

The most important issue in this matter is whether there has been a causal link between the construction of a patio or verandah on top of a stone retaining wall by the defendants and the lack of maintenance thereof and the retaining wall collapsing causing damages to the properties of the plaintiffs. In other words whether the development above the retaining wall which caused excessive water to flow into an already defective stone retaining wall solely caused or was the principal factor that caused the damages to the properties of the plaintiffs. This, the establishment of the causal link in this case is vital given the defence of *Force Majeure* put forth in the case by the defendants. If the wall collapsed as a result of a force majeure the causal link will not be established. This court had had the assistance of experts in the field of Civil Engineering, in order to assist it in making a determination on this issue of causality. I note however that this is another aspect of the fact finding exercise by the court. This court has however the insight and wisdom to gauge into such an opinion and make its own determination thereon. It is not absolutely bound to accept the conclusion of the said experts.

[52] On this issue of fact I believe and accept the evidence of the first plaintiff on the cause and effects of the retaining wall collapse. She was at her house during the night of the 7th of March 2018. I believe her evidence when she said that the defendants had built a verandah on top of the retaining wall and that this was built at around 4 years before the wall collapse. I also believe the first plaintiff evidence that the immediate reason for the collapse was that the water discharge from this new verandah was discharged straight into the embankment of the Retaining wall. As a result of this I am of the opinion that the excessive rain of that day caused the wall collapse and the damage to the house of the first plaintiff and the car of the second plaintiff.

[53] I also choose to accept and rely upon the evidence of the second plaintiff that this retaining wall was never maintain since it was built. I accept his evidence that though his car had been subsequently repaired. It is 65 percent of its optimal condition.

[54] I accept and rely on the evidence of witness Tony Source that the work he carried out on the second plaintiff's car amounted to RS 150,000.

- [55] I further find that the evidence of the Quantity Surveyor, Mr. Nigel Valentin, to be believable. He has assess and evaluate the damage done to the first plaintiff house and find that the total amount damage amount up to a sum of SR 166,682.56. I therefore rely on this Report.
- [56] I also accept and rely on the evidence of Mr. Charles Morel who testified that the pre accident value of the car of the second plaintiff was RS 500,000 and that its salvage value come to the sum of RS 35,000.
- [57] Mr. Alph Esparon is a Civil Engineer working as the Principal Engineer at the Planning Authority. His competence was not disputed by the defendants. As such he is competent to give his expert knowledge on the reasons for the collapsed of the Retaining wall. He testified that the probable cause of the collapse of the Retaining wall was that it was raining heavily that night. He examined the scene of the collapse soon after the incident and he noticed certain down pipes from an open terrace from the property above the plaintiff's property belonging to the defendants and that the pipes were discharging water into an embankment. According to him this was an additional factor that caused the wall to collapse. He recommended that a new Retaining wall be built and for an interim measure to be adopted to stop further collapse of the open embankment.
- [58] Mr. Wilbert Herminie as another expert Civil Engineer. His competence was again not challenged by the defendants. His Report was produced as exhibit p9. According to the witness the Retaining wall of the defendants was substandard and it was not the normal design for the height of the wall. And it was beside that retaining a house on top of it. The capacity of the wall was not enough for it to support the amount of water. The capacity of the wall was not enough to support the amount of water due to persistent rainfall. I find his evidence to be credible and trustworthy and I accept his assessment of the technical defects of the wall and the reasons for its failure.
- [59] For these reasons, I am of the view that the heavy rainfall in the night of the 7th of March 2016 was one factor that caused the collapse of the Retaining wall. However it did not constitute the sole and immediate cause for the damage to the plaintiffs properties. The principal and immediate cause of the collapse of the Retaining wall was the lack of

maintenance of the Stone Retaining wall by the defendants and the construction of the verandah that had been built 4 years prior to the collapse. This new development caused additional pressure on the Retaining wall and caused open water from the verandah to flow into the embankment behind the Retaining wall. Hence I find on the evidence that there exist a nexus and a causal link between the acts and or omissions of the defendants and the damage caused to the plaintiff's properties.

[60] I am also of the view that torrential rain is a common factor in Seychelles. It cannot amount to an act that was “*imprevisible*” or unforeseen . If that be the case most damages caused by heavy the North West monsoon rainfall would have constituted an Act of God. For torrential rainfall to consist of an act of God it must be exceptional, unforeseen and out of the ordinary. No evidence have been led before this court that this was the case here.

[61] Fault

[62] The defendants who built or caused to be build the verandah above the retaining wall and who failed to properly maintained the retaining wall failed to reasonably foresee the consequences of their acts and or omissions to the properties of the defendants in the event of heavy rainfalls. They failed to make provisions for the proper drainage of water running or accumulating on their property so that the flow of their accumulated water would not accumulate in the retaining wall that could cause a potential collapse.

[63] I am of the opinion that the defendants failed to take the necessary precaution on reasonable care into the exercise of their right of ownership.

[64] In the case of *Desaubin vs UCPS 1977, SLR 164*, the court held that on the issue of “*abus de droit*”, that here in Seychelles this would be of strict liability. There might be no need to show imprudence or negligence, Therefore, I find defendants in this case are *a fortiori* liable also on the strict liability principle of “*abus de droit des voisinage*”.

[65] Force Majeure

[66] The defendants put a defence of *force majeure* or Act of God. As I have find previously for such defence to be proven on a balance of probabilities, the evidence , taken as a whole

should show that the act or omission that caused the damage had the element of inadvertence, unpredictable nature and not dependent on the act of men. Having carefully examine the evidence in the light of the different submissions in this case I find that the collapse of the Retaining wall was not inevitable , unpredictable and did not happened independent of the act of men . The rain that fell on the faithful night of the 7th of March 2017, as I have found, does not amount to one that was not inevitable or unpredictable as to pass the test of Force Majeure. I therefore find that on a balance of probabilities that the defendants have not managed to prove their defence of force majeure in this case.

[67] Quantum of Damage

[68] Having scrutinized the different heads of claims of damages in this case I find that the particulars of damages for the reconstruction of the carport; damages to the dwelling house and the damage to the rock wall and paved -way proven and I hold that the plaintiff did suffer loss and damages as follows;

Reconstruction of Carport SR 20, 595.00

Damage to dwelling house SR 125, 588.00

Damage to rock wall and Pave Driveway SR 20,000


Damage and loss to the content of the house SR 67, 868.48


Repair to car registration SR 150,000

[69] I find that the vehicle of the second plaintiff is not written off. The original value was SR 5000,000. It is now 60 to 65 percent of it optimal capacity. I would take it that it has therefore been devalued by 40 percent. I would award damages in the sum of SR 200,000 for the loss of value of the said vehicle. This award goes to the second plaintiff.

[70] In my final analysis I would therefore enter judgment for the plaintiffs in the sum of SR 584, 051.48 payable by both defendants jointly, with interest in the sum of 4 percent per annum as from the date of the Plaint and cost of this action in favor of the plaintiffs.

Signed, dated and delivered at Ile du Port on 15 day of October 2018


R. Govinden, J.
Judge of the Supreme Court



The seal of the Supreme Court of Seychelles is circular. It features a central emblem with a bird and a tree. The text around the emblem reads "SUPREME COURT" at the top, "SEYCHELLES" at the bottom, and "Supreme Court Judge" at the very bottom. The name "Justice Rony. J. Govinden" is written in a smaller font above the emblem.