

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC ... 77
CS 101/2017

In the matter between:

JACQUELINE BIJOUX
(rep. by Anthony Derjacques)

1st Plaintiff

ROBERT CICOBO
(rep. by Anthony Derjacques)

2nd Plaintiff

and

O-NIVO CONSTRUCTION (PTY) LTD
(rep. by France Bonte)

1st Defendant

JIN HUA ZHOU
(rep. by France Bonte)

2nd Defendant

Neutral Citation: *Bijoux & Anor v O-Nivo Construction & Anor* (CS 101/2017) [2019] SCSC (8 February 2019).

Before: Burhan J

Summary: Article 1382 of the Civil Code of Seychelles, Moral damages.

Heard: 19th and 22nd October 2018

Delivered: 8 February 2019

JUDGMENT

BURHAN J

[1] The 1st and 2nd plaintiffs in the prayer of their plaint seek the following relief:

“ a judgment ordering the 1st defendant as building contractor and the 2nd defendant as the property owner jointly or in solido pay the 1st and 2nd plaintiffs the total sum of SR 700,000/= with interests since the filing of the plaint and for costs”.

[2] The particulars of the loss and damage claimed are given in paragraph 7 of the plaint and read as follows:

i.	Moral damages for anxiety, distress, pain, humiliation and general unhappiness.	
a)	Dust pollution	300,000.00
	Excessive noise, especially during odd hours after working hours, weekends & public holidays	300,000.00
b)	Water pollution	50,000.00
c)	Unlawful trespass	50,000.00
	Total	<hr/> 700,000.00 <hr/>

[3] It is averred in the plaint and borne out by the evidence of the 1st plaintiff that for the past 10 years, she owned and lived in concubinage with the 2nd plaintiff in their home situated on land parcel V11742 at Nouvelle Valley Beau Vallon. The 2nd defendant had purchased the adjoining land parcel V7968 and proceeded to build a villa complex on the said land next to and alongside the plaintiff's house. It is averred in the plaint that during the said construction which was done by the 1st defendant, the 1st defendant trespassed into the plaintiff's property, caused excessive noise, pollution, dust, discharge of water into plaintiff's land which according to the 1st plaintiff's evidence occurred on occasions during weekdays, weekends and even public holidays.

[4] It is the contention of the plaintiff's as averred in the plaint that the above mentioned unlawful acts, constituted a *faute* in law rendering the 1st defendant and 2nd defendant liable in law to the plaintiffs. The plaintiffs are claiming a total sum of SR 700,000/= in damages as set down in paragraph 7 for loss and damages caused as a result of the conduct of the defendants.

[5] In their joint defence filed on the 11 of December 2017, the defendants denied the allegations contained in the plaint. In paragraph 4 of the defence, it is averred that they had secured their property fenced it and barricaded it to prevent intrusion from outside and that

works were being carried out with the necessary precautions and under strict supervision during normal working hours. i.e. 8.00 a.m. to 4.00 p.m.

- [6] The defendants therefore moved Court that the plaint be dismissed with costs.
- [7] The plaintiff in her evidence produced her title deed as P1 and also document P2 indicating that the 2nd defendant owned the neighbouring lot V7968 P2. These facts were not challenged by the defendants. She further stated that the construction which is still going on was very close to her boundary walls. Her complaints as mentioned in her evidence were that the construction of the said building by the defendants, resulted in dust emanating from the work site which affected her and the house she lived in. The cement would be mixed close to her bedroom and the dust would enter her bedroom. Further due to the construction, a large amount of water would come into her house when it rained. She stated there were many workers up to 15 and no proper toilet facilities. She further stated that workers would work throughout the week on Saturday and Sundays from 7.00 a.m to 6.00 p.m. and even on Public holidays. She stated on Wednesday and Friday, she would be at home and even on Saturday and Sundays and the noise and dust from the worksite would affect her. When she would hang her clothes out the dust would settle on her clothes.
- [8] She further complained that the workers had come over to her premises and property without her permission. They had built a scaffolding on her land without her permission and had to come to her side to complete the wall. She stated the empty cement bags and chunks of cement were also left on her land. They had used JCB's to drill the rocks which were in close vicinity to her house. She stated the construction had started around 2 years ago and was still going on and had not yet been completed. She had complained to the Environment Authority and the police. They had registered a case in Court.
- [9] The 1st plaintiff further stated she suffered from high blood pressure and was taking her medication for same. The noise and disturbance affected her peace and her husband too was affected. She stated she has not been happy for the past two years as these matters have affected her. She stated she was claiming a sum of SR 700,000/=from the defendants in damages.

- [10] The evidence of witness Corporal Xavier Barra corroborates the evidence of the 1st plaintiff in that there were numerous complaints made by her to the Beau Vallon police in regard to the said construction work being done near her house by the 1st defendant's workers. He had gone to her premises to conduct investigations . He had gone on Sundays and Public holidays and observed lots of dust, and big machinery like JCB's working and foreign Indian and Chinese workers working on the building site close to her boundary. The noise was caused by the working machinery, mixer, JCB, hammers and drills.
- [11] Witness Andre Freminot stated he lived at Beau Vallon and stated he was working as a Chief Environment Police officer with the Ministry of Environment and Energy. He had the experience of being a police officer for 26 years, prior to joining the Environment Ministry. He too stated he had visited the said construction about 10 times during the year 2017 and 2018. He stated that workers usually were permitted to work till 4.00 p.m on Mondays to Fridays and till 1.00 p.m. on Saturdays while Sunday and Public holidays were not working days. He too corroborated the evidence of the plaintiff in that when he went to the site after 4.00 p.m. he would find about 15 workers working and he had to ask them to stop. He said grinders and mason chasers were being used and the main issue was the noise. He stated he observed further that the building that was being constructed was a storied building. The other witness Lindy Dufrene too referred to the complaints being made to the Environment Authority by the 1st plaintiff. She stated that while the environment was being developed they had to ensure that there was tranquility for the other persons in the vicinity. She had visited the scene and made her report and an Enforcement Notice P6 was issued which by the Administrator of the Environment Authority based on her report. Witness Sharon Gerry the Senior Legal officer at Environment further stated that the Environment Authority had acted on the complaints made by the plaintiff in this case and sent the file to the Attorney General. Action was filed in Court but the case was dismissed as Court had failed to get an interpreter on the said date of trial. Thereafter the plaintiffs closed their case.
- [12] On behalf of the defendants, Mr. Liu Hao stated that he was the Director and Project Manager of O-Nivo construction. He admitted he was in charge of the construction work going on at the Nouvelle Valley by O-Nivo Construction. He stated he was aware of

complaints been made by the plaintiff about noise from construction site and that work continued even after working hours. He stated that on being informed of the complaint, they had proceeded to work strictly according to the working hours 8 a.m to 4.p.m. They did not work on Sundays as well. He stated he was not aware of any damage being caused to the plaintiff's property. Under cross examination he admitted the owner of the land on which the construction was being done was Jin Hua Zhou. He stated that after receiving a warning they stopped working after hours. He admitted that when they were concreting there were instances when they were casting the concrete, they would work beyond the time limits imposed by environment. He admitted he had not explained the issue of concreting to the Environment Authority and had not got special permission to work beyond the working hours. He admitted they used drills and grinders. He admitted the construction was about 15 to 20 metres away from the house of the plaintiffs. He further admitted that they had gone over to her land to put the scaffolding for the boundary wall. It is clear from his own evidence that they the 1st defendant were building the villa complex for the owner of the land, the 2nd defendant and on his instructions. It is to be observed that both defendants filed a joint defence and no attempt was made by the 2nd defendant to distance himself from the acts of the 1st defendant.

- [13] Therefore on the facts before Court as borne out by the evidence of both the 1st plaintiff and 1st defendant admittedly O-Nivo Construction did construct a building shown in photographs 5 in close proximity to the premises of the plaintiffs, on the instructions of the owner of the land, the 2nd defendant. Liu Hoa as director of the 1st defendant Company in his evidence admits the said construction shown in photographs P5 was done by his construction company in close proximity to the premises of the plaintiff. It is clear from the evidence of the plaintiff that the said construction did result in dust and disturbance and noise to her and the 2nd plaintiff who were living in the adjoining premises to where the construction was being done. Such nuisance had resulted in the 1st plaintiff complaining to the Environmental Authority and police who had arrived on the scene and made their observations in respect of noise, dust, working after working hours and working on Sundays and Public holidays.

- [14] Having considered the evidence of the Corporal Xavier Barra of the Beau Vallon police and, officers from the Environment Authority who had visited the scene namely Andrew Freminot and Lindy Dufrene and the report of Lindy Dufrene produced as P6, I am satisfied that the evidence of the 1st plaintiff in respect of noise being caused as a result of grinders, drillers and cement mixers being used after the stipulated working hours and on Sundays and Public holidays, has been corroborated by the evidence of these witnesses. I will proceed to accept the corroborated evidence of the plaintiffs. It is clear that such conduct on the part of the 1st defendant had resulted in inconvenience, ill health and breach of peace and tranquility for the plaintiffs and nuisance to the 1st and 2nd plaintiffs. In addition the Enforcement Authority Enforcement Notice P6 issued to the 2nd defendant specifies that the conduct of the defendants referred to above constituted an offence under section 44(6) of the Environment Protection Act.
- [15] It is clear from the evidence in Court that despite complaints being made and warnings being given to them, the defendants conduct continued unabated and this resulted in an Enforcement Notice being served on the defendants and a case being filed against them according to the evidence of the Senior Legal Officer Environment witness Sharon Gerry. The case according to the evidence before Court and in the view of this Court had been unfairly dismissed due to an interpreter not being present and not due to any fault of the plaintiffs and on a ground beyond the control of them. Therefore the fact that the case filed by the Environmental Authority was dismissed does not in any way benefit the defendants.
- [16] When one considers the evidence on behalf of the defendants Mr. Liu Hoa admits that they had to work after working hours on weekdays and on Saturdays, Sundays and Public holidays. He admittedly did not get special permission to do so. He admitted they did go on to the land of the plaintiffs without consent and erected their scaffolding. He admits the use of drills grinders and heavy machinery and the fact that dust and water emanated from the building site. He also admits the villa complex was being built on the land of Jin Hua Zhou. Therefore for all the aforementioned reasons, this Court is satisfied that the 1st defendant was constructing the Villa complex on the orders and instructions of the owner of the land the 2nd defendant.
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[17] The law of delict or tort is contained in article 1382 of the Civil Code of Seychelles which sets out the underlying principle in the law of delict and reads as follows:

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

[18] The provisions of this article clearly indicate that the three elements necessary to establish delictual liability are fault (*faute*), damage and causality also refer **Legal Metissage in a Micro Jurisdiction: the Mixing of Common Law and Civil Law in Seychelles pg102** by Dr. Mathilda Twomey Chief Justice. Therefore the burden exists on the plaintiff to establish on a balance of probability that it was the fault of the defendants that caused or resulted in an injury, loss or pain and suffering to the plaintiffs.

[19] When one consider the evidence as analyzed above, it is clear that the corroborated evidence of the plaintiffs, clearly establishes on a balance of probability that it was the faulty and offence creating acts of the defendants that caused or resulted in loss, pain and suffering to the plaintiffs in respect of their health, tranquility and peace of mind, resulting in unnecessary and unwarranted inconvenience being caused to them. I am therefore satisfied that the plaintiffs have established their case on a balance of probabilities.

[20] In regard to the claim of damages, article 1149 (2) provides for the payment of damages under the circumstances referred to above. The damages could be classified under material and moral damages. In regard to moral damages as claimed in this case, moral damages are more difficult to assess unlike material damages which is more easily ascertainable. However difficulty in their assessment is no bar to their award **Cable and Wireless v Michel (1966) SLR 253 and Vidot v Libanotis (1977) SLR 192**. Moral damages should always be compensatory and never punitive in nature **Sinon v Sinon (1977) SLR 209**.

[21] In the *Vidot case* (supra) Sauzier J took into consideration the pain, suffering and inconvenience caused and awarded a sum as moral damages. It is clear that the plaintiff has to establish the degree of pain and suffering for Court to make an estimate in respect of the moral damages claimed. In this instant case it is in evidence that the said faults of the defendant continued for a period of time since 2016 and are continuing up to date as the buildings have not been completed yet. Further despite them being warned by the

relevant authorities, the defendants failed to take remedial action. I also note the length of time the inconvenience lasted. Considering all the aforementioned factors, I proceed to enter judgment in favour of the plaintiffs and against the 1st and 2nd defendants jointly and severally in a total sum of SR 200,000/= (Two hundred thousand) awarded as moral damages together with costs. The breakdown of the total moral damages awarded for inconvenience caused, in proportion to the length of time the inconvenience lasted is, Dust pollution SR 75,000/=, Excessive noise as per paragraph 7 of plaint SR 75,000/=, excess water coming into premises SR 25,000/= and unlawful trespass SR 25,000/= totaling in full to the aforementioned sum of SR 200.000/=. Legal interest to accrue on the said amount from the date of filing plaint till the date the award is paid.

Signed, dated and delivered at Ile du Port on 8 February 2019



Burhan J