

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 506
CS 31/2017

In the matter between:

MARINETTE SOOMERY
(rep. by Nichol Gabriel)

Plaintiff

and

EMIRATES LAND GROUP
(rep. by Kieran Shah)

1st Defendant

VIJAY CONSTRUCTION PTY LIMITED
(rep. by Bernard Georges)

2nd Defendant

Neutral Citation: *Soomery v Emirates Land Group and Anor* (CS 31/2017) [2020] SCSC 506
(29th July 2020)

Before: Pillay J

Summary: Claim for damages as a result of loss and damages caused by building construction

Heard: 26th November 2018, 29th November 2018 and 17th February 2020

Delivered: 29th July 2020

ORDER

The Plaintiff's claim is dismissed. Each side shall bear their own costs

JUDGMENT

PILLAY J

[1] The Plaintiff claims the sum of SCR 500, 000.00 from the Defendants for the loss of value to her house as well as moral damages resulting from the actions of the Defendants during the course of the construction of the H Hotel Resort at Bel Ombre.

- [2] The Plaintiff claims that she is the owner of land parcel V10114 along with the house thereon.
- [3] The first Defendant is the owner and operator of the H Resort Hotel at Bel Ombre and the second Defendant is one of the construction companies that was contracted to build the H Resort Hotel.
- [4] The construction took place from the year 2013 to 2015. It was her claim that during the course of the construction of the H Resort Hotel there was heavy dust and debris that affected her health and her property and thus subsequently caused damage to her house.
- [5] The Defendants denied any wrong doing though admitted that works were being done on the property next door to the Plaintiff's property. The second Defendant admitted being one of the contractors undertaking construction works on the site but denied being the one liable for any damage to the Plaintiff's property or health.

The Evidence

- [6] Dr Jawaya Krishnamurthy testified that he has been working in Seychelles with the Ministry of Health for 28 years. He examined the Plaintiff on 4th March 2015 at the occupational health clinic. She was diagnosed with a case of contact allergic dermatitis and allergic rhinitis. He attributed the cause of the allergy to cement, wood or causes through air.
- [7] The Plaintiff testified that she lives at Bel Ombre in her own house. She started building in 1996 and moved in in 1996. It was her evidence that it all started in 2013 when excavation works started. Red earth was piled like mountains next to the boundary. Her house vibrated because of the heavy machinery.
- [8] She produced photos of the damage caused to her property as well as her dog that she stated was taken ill and died as a result of the excessive dust that accumulated on her property as a result of the works undertaken by the Defendants. The photos were taken in 2014 or 2015.

- [9] The contractor was dumping building materials like concrete, crusher dust and aggregate. Her house was affected, dust was everywhere “outside, inside on [her] furniture everywhere on [her] patio under the veranda, in [her] bedroom everywhere.... On top of that with strong winds it was impossible to stay in that house.”
- [10] The Plaintiff testified that she was under a lot of pressure as a result of her health issues resulting from the dust allergies. She feared going home at the weekends because she did not know where to turn to. Her dog died and she had to pay people to bury the dog. Then around November after speaking to counsel she started cleaning her house.
- [11] In cross examination she accepted that at the time the construction started her house was 17 years old and 19 years old at the time of completion. She further accepted that when she renovated her house in 1996 she experienced dust debris around the house. She further accepted that her working hours were from 8 to 5pm and construction was mostly done between 7 and 4pm.
- [12] The Plaintiff insisted that she did not go to see the doctor prior to 2015 because the red earth did not affect her like the concrete dust did. She also insisted that she took proper care of her dog and the dog was buried in dust.
- [13] Mr. Kevin Furneau, an employee of H. Savy Insurance testified that H. Savy Insurance had insured the second Defendant. He admitted having the discussed the matter at hand with the Plaintiff and Mr. Patel. The insurance company was notified of the incident but no claim form was submitted nor was there any admission of liability by the insured. The witness admitted that the insurance company instructed a quantity surveyor to produce a report while they awaited submission of any claims from the insured.
- [14] In cross examination he admitted visiting the Plaintiff’s home and not finding any physical damage inside or outside of the house. He testified that in his experience loss of value of a house could not be ascertained without a quantity surveyor’s report.
- [15] Mr. Ian Charlette deponed that he is an environment consultant and was involved in the H Hotel project from 2013 to 2016, from the start of the project and for severing months after the hotel had been developed. His role was to monitor the construction and ensure

that the project was in compliance with the Environmental Authorisation issued. He visited the site about twice a week. He would spend about an hour to three hours on site and even return later to try and spot anything that could be happening. It was his testimony that dust is inevitable on a construction site. Measures were taken to reduce dust emission; a custom water tank was devised that went round and kept the soil moist, workers were asked to sweep the road if trucks carried soil onto the main road, a shelter was built for mixing concrete, netting was placed around the perimeter. The witness could not recall having received any complaints from neighbours of dust affecting their houses. He was happy with the provisions made to minimise dust affecting the development.

- [16] Mr. Kushal Patel, a director with the second Defendant testified that the second Defendant was one of the contractors on the construction. At the time of the construction the site was in the possession of the client's representative, Hooliman Project Overseas, who had control of the site and was full time on site. Construction started sometime in June or July 2013 and completed in June or July 2015. During that time they received a complaint from Berjaya Hotel about the noise, that was in 2013 and another time because they were working late, which they explained. In 2015 he received a call from the Plaintiff complaining about the noise and dust around her house. At that point the major construction of the buildings had been completed and the second Defendant was in the handing over phase.
- [17] It was Mr. Patel's evidence that when the second Defendant took over the site, the land had already been levelled and cleaned, by another contractor back in 2012 or 2013, and was ready for foundations works.
- [18] Following the complaint from the Plaintiff, the second Defendant's project manager and engineer visited her house but concluded that there was nothing abnormal there. No cracks were found though the patio and surroundings of the house needed cleaning. The second Defendant offered to paint her house though and pay her compensation of SCR 10, 000.00.

- [19] The witness accepted in cross examination by Learned Counsel for the first Defendant that in March 2015 the protective barriers that had been put up between the Plaintiff's house and the construction site was removed for a period of seven days for some works to be effected the drainage system and thereafter replaced. He accepted that during that time there could have been some dust.
- [20] Mr. Githad Vithani, a civil engineer working with the second Defendant for 14 years, testified that he was one of the engineers on the site of the H Resort Project working with the second Defendant for the duration of the project from 2013 to 2015. He was on site everyday. There were more than 10 other contractors on site during the construction. All the workers on site working with the second Defendant had yellow coloured hard-hat for safety and all the second Defendant's equipment has got the Vijay logo on there. It was his testimony that he had never received complaints with regards from people in the neighbourhood except for the day when they were laying concrete for the swimming pool which lasted from 830 – 9pm, there was a complaint of noise. The second Defendant explained to the people who complained that the base needed to be laid in one go.
- [21] During the construction cement was mixed in a big shed whereby the concrete machine would go in, cement would be poured in and then the machine would come out. That shed was placed more or less in the center of the building. It was his testimony that there was a debris net all around the property to stop non-workers from passing through and also to help protect the construction dust from going out from the work area.
- [22] The witness visited the Plaintiff's home towards the end of the project round the time of the handing over of the staff quarters. There was no accumulated dust, no structural or any other kinds of cracks in the building.

Submissions

- [23] Learned counsel for the Plaintiff submitted the Plaintiff's claim is based on "faute". He further submitted that witness Mr. Chirag Vithani made a judicial admission under oath when he related that offers were made to the Plaintiff with a view to settling the claim.

- [24] It was Learned counsel's submission that the first Defendant is vicariously liable on the basis of Article 1384 (3) of the Civil Code in view of its contract with the second Defendant to build the hotel at the site in question.
- [25] Learned counsel relied on the cases of **Francois Rose and Others v CCCL SCA 96 of 2012**, **Manuel Sullivan v Magnan and Another CS 134 of 2011**, **Elizabeth v Laporte CS 22/2000** as well as **Frederick Leon v Civil Construction Company Limited CS35/2012**.
- [26] Learned counsel for the first Defendant submitted that the first Defendant is not liable for the alleged fault on the basis that (i) it did not cause the damage whether by itself, its servants or agent; (ii) it was not in control and possession of the building site from where the dust emitted and (iii) the dust complained of did not exceed the ordinary obligation of the neighbourhood.
- [27] The Learned counsel for the first Defendant further submitted that the second Defendant was in possession of the site which it shared with several contractors and further that the second Defendant was hired by Hoolooman Services and not the first Defendant therefore there is no vicarious liability as there was no "lien de subordination" between the first and second Defendant.
- [28] Learned counsel relied on the case of **Green v Hallock [1979] SCAR 142** in which the Court of Appeal approved the principle in the Supreme Court case of **Desaubin v United Concrete Products (Seychelles) Limited (1977) SLR 164 -167** that "in cases where the plaintiff complains of noise, smoke, smell or dust...the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of the neighbourhood."
- [29] With regards to the issue of quantum, learned counsel submitted that there was no substantial proof of damage to the house of the Plaintiff and that the construction had nearly completed by 2015 when the Plaintiff suffered allergic reaction.
- [30] Learned counsel concluded that necessary measures were implemented to minimize any inconvenience but should the court find that there was nuisance, the contracts would be

liable for any loss and damage, the Plaintiff having failed to show that the first Defendant directly caused the nuisance.

- [31] For the second Defendant learned counsel submitted that the Plaintiff has failed to prove conclusively the causal link between the damages sustained to her house, her ailments and the loss of value to her house were due to the activities of the second Defendant. Learned counsel further submitted that if the Court is to use the approach in **Francois Rose & ORs v Civil Construction Company Ltd SCA 26 of 2012** of taking into account probability when establishing causation, the Court must be guided by expert evidence to establish the increased risk of what caused the damage to the Plaintiff's property of which there was none.

The Law

- [32] If I understand the submission of the Learned counsel for the Plaintiff, her case against the second Defendant is based on “*faute*” under Article 1382 (1) of the Civil Code of Seychelles which provides that:

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

- [33] whereas her claim against the first Defendant is based on vicarious liability, the law for which is found in Article 1384 (3) of the Civil Code of Seychelles which provides as follows:

“Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.”

- [34] The three elements required in order to establish liability under Article 1382 (1) are:

- (i) damage*
- (ii) a causal link and*
- (iii) fault.*

[35] In the case of **Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA 33 (14 December 2018)** it was established that liability under Article 1382 and Article 1384 of the Civil Code is different. A claim cannot be grounded on both articles. The Court of Appeal found as follows:

It is clear ... that the burden of proof in Article 1382 and Article 1384 is different. The claimant must only prove that the thing caused him damage or an injury under Article 1384. Under that Article the person who is the “custodian” of the “thing” is liable unless he can prove liability by an act exterior to the “thing” in his custody. “Custody” is defined by case law as “powers of use, control and management of the thing” (see Cass. Ch Reunies 2 December 1941).

[36] According to the case of **Desaubin v United Concrete Products Ltd (1977) SLR 164** the “*principle laid down by jurisprudence shows that there is “faute” if the damage exceeds the measure of the ordinary obligations of the neighbourhood*”

[37] In **Meriton v Etheve & Ors (CS73/2016) [2019] SCSC (30th May 2019)** the Court followed the decision in **Civil Construction Company Limited v Leon & Ors (SCA 36/2016) [2018] SCCA33 (14 December 2018) para 40**, it was said that employers are strictly liable for the damage caused by their servants and employees acting in the scope of their employment. Thus, there is therefore a presumption of fault on the part of employers for the acts of their employees.

[38] The Court in **Meriton** went on to explain the criteria to be met under Article 1384 that in order “*[t]o establish liability for damages, the article sets out various elements. Firstly, there must an employment relationship. Second, there must be damages caused by the employees. Third, this must occur in the scope of their employment. If it is a deliberate act, contrary to the express instructions of the employer, and is unrelated to the employment, then the employer will not be liable.*”

[39] With the requirement for an employment relationship, a defendant cannot be held liable for the acts of an independent contractor who is in effect a third party.

[40] However in the case of **Dewea & Anor v Roucou Construction (Pty) (CS 17/1999) [2003] SCSC 10 (27 March 2003)** Perera J found that the was defendant liable for the

damage caused by the sub-contractor in the discharge of his duties entrusted to him by the Defendant company, relying in part on the decision in **Saisse v Serandat [1863] MR 170** that:

An employer is not only answerable for the negligence of his immediate "propose", but also of those who are appointed by that propose to act under him or with him, in the discharge of the business or work confided to him.

[41] In the case of **Dewea**, the defendant sought to evade liability on the ground that Vandange was an independent contractor and that hence he was not liable for anything done by him outside the scope of the duties entrusted to him. But the Court found that an independent contractor is one who does not take orders or instructions as to how he carries out his work whereas Vandagne was taking instructions directly from the defendant or his project manager.

[42] On appeal the judgment was set aside on a finding that Vandagne was an independent contractor in that he had been told what to do but not how to do it, per Silungwe J:

"It is settled law that an independent contractor (unlike a servant) is one who is his own master in the sense that he is employed to bring about a given result in his own manner and not according to order or directions given to him as to how the work is to be carried out. In other words, an independent contractor is one who is not under the control or direction of someone else as to how the work entrusted to him is to be performed."

[43] This would be in line with the findings in **Meriton** at paragraph 37 above in that a defendant would be liable for the actions and damage caused by a sub-contractor under the direction and control of the defendant.

[44] **Analysis**

[45] Learned counsel for the second Defendant canvassed the issues as follows:

(1) Was Vijay construction solely responsible for the heavy dusts and debris which caused damage to the Plaintiff's house?

(2) *Was Vijay Construction solely responsible for causing the Plaintiff to suffer health-wise due to the heavy dust debris?*

(3) *If Vijay Construction is liable to pay any damages to the Plaintiff, how much should this be?*

(4) *Did Vijay Construction act reasonably when made aware of the problems affecting the Plaintiff?*

[46] I propose to narrow the issues to two points:

(1) *Was there damage to the Plaintiff's house and health?*

(2) *Is the first Defendant or the second Defendant liable for the damage if any?*

[47] It is noted that the Plaintiff seeks to anchor her claim against each defendant under a separate article of the Civil Code. In my view Article 1382 (1) is not applicable in the case in view of the fact that the second Defendant cannot not act by itself but through its employees. I proceed therefore on the basis that the Plaintiff has to prove on a balance of probabilities that there was damage to her house and her health from the dust and debris coming from the construction site for which the first and second Defendants will be liable unless they can show that an exterior act caused the damage under Article 1384 of the Civil Code.

[48] To the first issue: *Was there damage to the Plaintiff's house and health?*

[49] The Plaintiff made her complaint in March 2015. As per her email dated 4th March 2015 (DE3) she had issues with dust for the 24 months of the construction which was exacerbated in February 2015 when aggregate was piled up on the tennis court foundation.

[50] It is in evidence that the protective barrier that had been put in place to minimise the dust was taken down round that time for a period of seven days and then put back up.

[51] It cannot be shown with certainty when the photos were taken. The photos though, more specifically PE2 (f), shows a cloud of dust rising from the pile of aggregate as it is loaded

in the cement mixer. The Court takes judicial notice of the fact that aggregate by its very nature being crushed and broken pieces of rock produces a lot of dust. It is noted in fact that the piles of aggregate are close to the fencing and boundary of the Plaintiff. The dust on the tiles in PE2 (i) is further noted as is the dust on the furniture in PE2 (j) and the kitchen counter top in PE2 (k). However, on a closer look at PE2 (l) and PE2 (m) and PE2 (j) it is clear that amongst the dust are lizard droppings and dead millipedes. This is indicative of an accumulation of dust and household debris instead of heavy dust and debris from the construction site next door. Indeed as submitted by counsel for the second Defendant there is no evidence of dust on the leaves of the plants outside her house. In PE2 (b) there is a plant right next to the fencing, closer to the pile of aggregate than the house and there is no sign of dust on its leaves.

[52] Furthermore in PE2 (j) the rattan furniture shows signs of wear and tear rather than dust damage. Had the dust been the cause of the discolouration in the rattan furniture then the whole set would have been affected. That is not the case. The arms and back of the chair shows damage whereas the rattan table still shows what would seem the original yellow colour. It is in evidence that the furniture was purchased when the house was renovated in 1996.

[53] It is noted that in evidence in chief the Plaintiff testified that around November after she had been to see counsel she started cleaning her house “11 o’clock at night [she] was still outside with a hosepipe taking most of [her] furniture out pulling, pushing rubbing.” The implication of her evidence is that during the time that she was pursuing her claim she was not cleaning her house daily meaning that the photos cannot be said to show the state of her house day by day as the construction was being done. In fact on clarifications being sought by the Court the Plaintiff confirmed that the dust in the photos had accumulated over one month or two months.

[54] It was incumbent on the Plaintiff to clean the dust off daily instead of allowing the dust to accumulate.

[55] This leads me to the issue of the damage to her health. The evidence is that she suffered from respiratory allergies and skin infections. The Plaintiff sought treatment in March

2015, at a time when the record shows that the construction works were coming to an end. I am in agreement with the second Defendant's counsel that it is more probable that had the Plaintiff been prone to be affected by the dust from the construction site that would have happened earlier on in the project and not at the end. However I note that her health problems started as the construction progressed to the tennis court and came closer to her house.

[56] The Doctor explained that the allergies were caused by cement or wood or causes in the air. The evidence is that cement was mixed in a shed. There is no evidence that once mixed the concrete mixture produces dust. There is no evidence of any wood being used by the Defendants that could have caused the allergies. The medical report PE1, makes reference to a diagnosis of "contact allergic dermatitis". The accumulated dust may well have been a cause of the allergy. I am reinforced in this view in that had the allergies been caused by cement dust, then the house; the tiles and glass top table, would have shown signs of cement damage since cement dust solidifies as it comes in contact with humidity.

[57] As part of her claim for moral damages the Plaintiff stated that she lost her dog. In examination in chief she testified that her dog was her best friend and they were living together just the two of them. However in cross examination she stated that she did not have time to take the dog to the vet because she goes to work. Nor did she get a post mortem done to ascertain the cause of death of her dog. Without a cause of death, the death cannot be attributed to the construction activities. The fact that she did not make time to take her dog which according to her own testimony was her 'best friend' does not help her case.

[58] With regards the loss of value, no surveyor report was produced to show if the dust and debris from the construction site caused damage. At the end of his examination in chief Learned Counsel for the Plaintiff informed the Court that he would make a motion at a later date to have the witness recalled to produce the report. He commented that he had thought the report was with the Defendants and they would be producing it. I fail to see the logic of his argument since the Plaintiff has carriage of the case and it is for the

Plaintiff to prove that there was damage to her property which effectively meant it was for the Plaintiff to obtain and produce a surveyor's report in the same way she produced a medical report in support of her claim.

[59] Mr. Furneau for his part, who was called by the Plaintiff, testified that he visited the house of the Plaintiff following the complaint of damage. Though he is not an expert, he has over 20 years experience dealing with insurance claims, he sought a quantity surveyor's opinion, but noted that there was no signs of any physical damage inside or outside the Plaintiff's house.

[60] It is not in doubt that the Plaintiff suffered some inconvenience as a result of dust coming from the construction site. However on the above it cannot be said that the dust created by the construction, by itself, caused damage. In my view the damage was caused to the furniture as a result of wear and tear and to the Plaintiff's health by dust accumulating over a period of time as a result of the Plaintiff's own failure to clean daily.

[61] On the basis of **Leon** that would be the end of the matter, but for the sake of completeness I will consider the second issue: *Is the first or the second Defendant responsible for the damage, if any?*

[62] The second Defendant admitted that it was the builder of the resort though it denied being the sole contractor on site. The evidence of the second Defendant's witness, Mr. Patel, was that "various contractors were contracted to do various types of job, it was a massive project". The witness further testified that there were nominated sub-contractors but the site was in the possession and control of the client's representative, Hooloomann Project Overseas.

[63] There is no evidence as to who nominated or contracted those sub-contractors. Nor was there any evidence that those sub-contractors were under the direction of either Defendant.

[64] The evidence shows that the equipment, inclusive of the trucks, owned by Vijay bears the logo of the company. The trucks and mixer identified in the photos, bears no logo of the second Defendant.

[65] In cross examination of Mr. Patel, learned counsel for the Plaintiff focused only on the email exchange between Mr. Patel and the Plaintiff and on the offer of SCR 10, 000.00 by the second Defendant to the Plaintiff. The one challenge he made with regards to the replacement of the tiles were refuted by Mr. Patel's "no question of compromising or taking blame." Learned counsel for the Plaintiff relied on the said offer made as being a judicial admission hence establishing liability between the Plaintiff and the second Defendant.

[66] A judicial admission is defined in Article 1356 of the Civil Code as follows:

"A judicial admission is the declaration which a party ... makes in the course of legal proceedings. It shall be accepted against the persons who make it. It may not be admitted only in part to the detriment of the person making it. It may not be revoked unless it be proved that it resulted from a mistake of fact. It shall not be revoked on the ground of a mistake of law."

[67] The second Defendant clearly stated in its Defence that it made an offer to assist with external paint work on the Plaintiff's house and make a lump sum payment of SCR 10, 000.00, out of good faith and without prejudice. The said offer was made in April 2015 (per DE3) while the parties were in discussion. In fact per DE3, the second Defendant accepted to paint the external of the house but disputed causing any damage which Mr. Patel again disputed in cross examination.

[68] Learned counsel's argument that the said offer was a judicial admission is rejected.

[69] It is in evidence that the second Defendant's services were retained by Hoolooman Projects Overseas who had possession and control of the site and who is not a party to this case. The first Defendant admitted having financed the construction of the hotel. However there is no employment relationship established between Hoolooman Project Overseas and the first Defendant or the second Defendant or between the first Defendant and the second Defendant or for that matter between the workers and equipment in the photographs (PE2) and the second Defendant, per **Meriton**. Neither has it been established that the second Defendant was subject to the control or direction of the first Defendant per **Dewe** above.

[70] With that said it is the finding of this Court that the Plaintiff has failed to establish that the first and/or second Defendants actions caused any damage to the Plaintiff's house or her health.

[71] Accordingly the Plaintiff's claim is dismissed. Each side shall bear their own costs.

[72] Before I take leave of this matter I would like to address learned counsel's submission that the case of **Frederick Leon v Civil Construction Company Limited CS35/2012** is one authority that cannot be overlooked. The judgment was appealed to the Court of Appeal which allowed the appeal on behalf of the Defendant. In any event the damages which the trial Court accepted as having been caused by the Defendant company were a lot more extensive than that alleged by the Plaintiff in the present case, including structural damages. In addition the global sum of SCR 737, 500.00 awarded by the trial court, which counsel refers to were inclusive of SCR10, 000 as moral damages for each of the six plaintiffs, a sum of SCR 300, 000.00 for depreciation of the property, cost of repairs to the newer house at SR113, 750.00 and to the second house at SR263,750.00. The sums awarded for depreciation of property and cost of repairs were based on the report of the quantity surveyor which was not available in this case.

Signed, dated and delivered at Ile du Port on ...

Pillay J