

SUPREME COURT OF SEYCHELLES

Reportable
[2024]
CS50/21

In the matter between:

PATRICK LESPERANCE
(rep. by Wilby Lucas)

Plaintiff

and

VIVIAN JEANNIE
(rep. by Guy Ferley)

Defendant

Neutral Citation: *Lesperance v Jeannie* (CS 50/2021) [2024]
(...22nd...May 2024).

Before: Pillay J

Summary: Nuisance – Environment Pollution – Smell - Farm

Heard: 16th March 2023, 25th May 2023, 1st September 2023 and 3rd October 2023

Delivered: 22nd May 2024

ORDER

- [1] The Plaintiff is hereby dismissed.
- [2] Each side shall bear their own costs.
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JUDGMENT

PILLAY J:

[1] The Plaintiff seeks an order for the following:

- (a) *to restrain the Defendant from using the present place to stock manure or any hazardous agricultural materials.*

- (b) *to restrain the Defendant to use any place in the close proximity of the Plaintiff's houses to stock manure or any hazardous agricultural materials.*
- (c) *to order the Defendant to remove the current stock of manure with immediate effect.*
- (d) *any order as this Court deems fit and reasonable in the circumstances*

[2] The basis of the Plaintiff's claim is that "himself and his family has a right to live in a safe and healthy environment therefore there is a cause of action against the Defendant to contaminate and pollute their environment of which the Defendant is liable and should be restrained."

[3] The Plaintiff claims as follows:

1. At all material time, the Plaintiff was and is the registered proprietor of land parcel T4248 and T4249 (sub-division of T30090) situated at Val D'endor, Baie Lazare, Mahe.
2. The Defendant is a farmer who live and carry out farming activities on a leased property from the government bearing title number T3076.
3. The Plaintiff's property T4248 and T4249 are adjoined the Defendant's leased property T3076.
4. The Plaintiff and the Defendant are not on good neighbourhood relationship.
5. The Defendant in the past used to keep stock of manure and local fertiliser on part of his property but away from the proximity of the Plaintiff main house.
6. The Plaintiff has constructed a new house for his son and his partner.
7. The Plaintiff avers that since August last year the Defendant has relocated the place where to stock manure and presently the Defendant stock the manure and local fertiliser in a corner of the boundary close to the new house occupy by the Plaintiff's son.

8. The Plaintiff further avers that his son has a 6 months old baby who is at risk of health consequences due to the bad smell of raw manure which has also attracted flies in the environment.
9. The Plaintiff has lodged complaint to various authority; the Seychelles agriculture Agency, the Police and the Health Authority regarding the place used by the Defendant to stock the manure.
10. The Health Authority has visited the place and verbally pronounced themselves that the stocking place of manure is not conducive which place at risk the health of the baby and other members of this household but nothing concrete has been done to stop the Defendant's action.
11. It is the Plaintiff's averment that the Defendant's action is intentionally and maliciously motivated the fact that there are other appropriate location that can be used by the Defendant to stock the manure and fertilizer.

[4] The Defendant admits paragraphs 1, 2, 3 and 6 of the Plaintiff. He denies the rest of the Plaintiff's claims and adds that he is a farmer duly permitted to carry out agriculture on his property and by extension it is necessary for him to stock manure for the purposes of his trade and occupation. He adds that he has always kept manure on his land for the purposes of agriculture and not for any intended or malicious motive towards the Plaintiff. He denies contaminating and polluting the environment of the Plaintiff.

[5] The evidence of the Plaintiff is that he is a resident of Val D'en dor, Baie Lazare. Parcel T3073 adjoins his property and is being leased from the Government by the Defendant. The Defendant is a crop farmer. The Plaintiff has been living at Val D'en Dor since 1974. He lives with his current wife, his son, his wife and their two sons. The Defendant has been in occupation of his plot for the same length of time. They are not on good terms. In 2021 he sought legal aid to prosecute the Defendant as he was being affected by the smell of green chicken manure. The Defendant stocks the manure at his boundary about 9 metres away from the Plaintiff's house. When his daughter-in-law had her baby in 2020 she could not come to live in the house as there were lots of flies and the smell of the green manure was too strong.

- [6] The Plaintiff stated that he complained to the Minister of Agriculture but they could do nothing. Finally, he reported the matter to the Anse Royale Police Station. His daughter-in-law called the Public Health Department who came to check. The Police could not help as they said they had no authority to have the Defendant move his manure. In 2021 the stock of manure was still in the same area. The Plaintiff moved the Court to restrain the Defendant from using the present place to stock his manure and move the current stock from near his house.
- [7] In cross-examination the Plaintiff accepted that he had been living on parcel T4229 since 1974. At the time he kept chickens, around 8000 chickens. The area has always been agricultural land. His chicken coops were approximately 50 metres from his house. His coops were downwind so the smell was away from his house. He accepted that with farming there is always an element of smell but states that you cover with plastic. It is his testimony that when he came down to Court on the say to give evidence, the manure was covered with plastic but not before. He insisted that the Defendant only started to stock manure at the spot in question after he built his house in that area.
- [8] The Plaintiff accepted that he is now running a garage on his property. He disagreed that the garage is hazardous to his grandchild's health.
- [9] Corporal Issac who was called on behalf of the Plaintiff had no recollection of assisting the Plaintiff.
- [10] Charlotte Chetty's evidence is that she is a Public Health Officer based at the Anse Royale Health Centre until December 2022. She received a phone call from the Plaintiff who wanted to inform the Department of the situation at his home. However, she was not the one who conducted the visit.
- [11] Selvy Francois' testimony is to the effect that she is a Public Health Officer currently based at Les Mamelles Health Centre but previously based at Anse Royale covering the Baie Lazare District. It is her testimony that the Plaintiff lodged a complaint with their office at Anse Royale. The nature of his complaint was based on offensive smell at his premises because of his neighbour Vivian Jeannie was placing manure close to his premises. Site visit was effected to assess the situation on 9th September 2020. At the time of the

inspection no nuisance was found. The Defendant was not present at the time but he was advised to place his manure where his premises are.

- [12] The evidence of the Defendant is that he is a registered crop farmer and resides at Val D'endor. Since he was born he has been a farmer and at 18 years old he started to take care of his own farm. The Plaintiff is his foster-father. He agreed that he keeps his manure close to the Plaintiff's land and stated that he has always kept his manure in that specific area. He has been keeping manure in that area even before the Plaintiff built his house in that spot. It is his evidence that he scatters manure around his property because of the terraces and slopes.
- [13] It is his evidence that he uses, chicken manure, goat or sometimes pig manure. The Plaintiff was also farmer. He denied having been subjected to any visits from the Agricultural Agency or received any correspondence with respect to bad smell of other issues on his farm though he accepted that a few times the Police have come up to his place. However, he has never received any letter or anything asking him to remove anything. The Health Agency has never told him that there is a problem for anybody's health.
- [14] It is his evidence that the baby was born a while after the house was constructed while he has been placing his manure in that area for a long time. Any chemicals he keeps in a store which is not near the house in question. The area he lives in is a designated agricultural area since the English colonial times. He denied that his activities are causing health threats. The manure only smells for the first day.
- [15] In cross examination he re-iterated that he stocks manure all over his property because of the terraces. He further re-iterated that he has been stocking manure in that area before the house was built. He accepted that he lives on one of the parcels of land. His house is a distance from the area in which he stocks the manure. But he stated that even if he was to move the stock pile you would still get the smell when he puts the manure on the beds.
- [16] Kevin Nancy, the Principal Secretary for Agriculture, testimony is that he has always worked within the Agriculture Department. He came to know the Defendant when he was the Director of Research at Anse Boileau. He confirmed that the Defendant is a registered farmer, for crop farming. His files show that the Plaintiff had registered a complaint against

the Defendant about pig manure spread onto the Plaintiff's property from the Defendant's property and leading to flowing of dirty water onto the Plaintiff's property during the rainy season. The file shows that the Defendant had made a complaint against the Plaintiff that he was using an illegal road access on part of his agricultural parcel as well as illegally building a retaining wall on part of his agricultural plot. The assistance of the Ministry of Land Use was sought to show both parties their beacon. Whereas for the complaint of smell no action was taken.

[17] He confirmed that the area in question is an agricultural zone. But some of the plots were sold to the farmers resulting in them building their homes which is why now there are residential plots on agricultural land leading to conflict. He stated that definitely on farms there will be manure smells which is why farmers are encouraged not to have residential plots on those properties. When there are incidents the Ministry makes recommendations such as to alleviate the smell using such mitigating ways like covering the manure or building a manure shed. He agreed that definitely manure is an essential part of farming as you cannot grow without manure.

[18] In cross examination he stated that the visit by the agricultural officer was done in 2010. It is further his evidence that according to the report the manure was kept in one place next to the Plaintiff's house.

[19] When asked by the Court if the smell of manure on a farm can ever get to be too much Mr. Nancy stated that if a manure heap is not tended properly, exposed to the weather and not covered, then the smell can be a bit too high.

[20] Neither counsel opted to file submissions. The matter is one purely of facts.

[21] A locus in quo was conducted on 3rd October 2023. It was observed that the Defendant's farm is spread out across a number of terraces. Furthermore, the pile of manure at issue was not too far from the house of the Plaintiff but within an area where the Defendant had some beds.

[22] What is the issue for determination by the Court?

[23] According to the Plaintiff his cause of action against the Defendant is not to contaminate and pollute their environment.

[24] In the case of *Sunset Beach (Pty) Ltd v Dorsi Raihl and another (Civil Suit No. 176 of 2011) [2012] SCSC 39 (16 November 2012)* CJ N'tende found as follows:

Boodhoo v Prefumo [supra] followed Ramgutty and Co Ltd v Hanumathadu [supra]. Following from the foregoing it is clear that for an action trouble de voisinage to lie the activities of the defendant complained of must be resulting in an abnormal inconvenience, be it noise or smell or whatever, that is over and above that which is normal or ordinary or unavoidable in the circumstances between the two neighbours.

It is not such inconvenience as is over and above what one would expect between the 2 neighbours. That is what is actionable and not just any noise as has been contended in the plaint.

[25] In the case of *Roucou v Zialor & Anor (CS 160 of 2018) [2023] SCSC 245 (3 April 2023)* Govinden CJ

In the English common law there is a tort of trespass to land. There, if an individual physically (e.g., light or smell doesn't count) invades an owner's real property or causes an object or a third person to invade it, he or she may be liable for trespass to land. In Seychelles this cause of action would consist of the faute of abus des droits as it was held in the case of Villa Veuve (Pty) Ltd v Ernesta and Anor (SCA 05/2018) [2020] SCCA 21 (21 August 2022). Where the Appellant was claiming that the Respondent had committed a faute under Article 1382 by blocking his right of way. In its decision the Court of Appeal, following French jurisprudence, whilst accepting the existence of such faute based on the concept of abus des droits, emphasized that the intention to trespass or block the a right of way is very important and must be established by the Plaintiff and held in that regard that if, “the road been blocked with the dominant purpose to harm the business of the appellant, we agree with Counsel for the respondents that this may have constituted a faute even in the absence of a proven easement.”. She made direct reference to, Dalloz Répertoire de Droit Civil Tome I Abandon – Crédit foncier Abus de Droit at nos 14, 17, which states that “l’abus du droit quand l’acte du titulaire est uniquement motivé par le dessein de nuire à autrui”.

[26] In the case of *Kumar v Low-Hang (SCA 6 of 2022) [2023] SCCA 44 (25 August 2023)* Dr. Twomey-Woods JA found as follows:

- [14] *As I have alluded to above, it is necessary to set out the law of civil trespass in Seychelles at this juncture. While English common law developed the law of trespass from a limited approach linked to its unique procedural, writ-centered history to constitute tortious liability in specific and nominate torts such as negligence, detinue, and nuisance, French law developed broad and general provisions of liability through the concept of fault on the part of the tortfeasor. Hence, the nominate torts of negligence, trespass or nuisance are not specifically provided for in the Civil Code; instead, they are encapsulated in the general delict provisions under Article 1382.*
- [15] *The complication arising from our laws of trespass is the often-misunderstood connection between the definition of ownership as contained in Article 544, the principles of delictual liability in Article 1382 and those of neighbourhood obligations as developed in Seychellois jurisprudence (see *Albert & Anor v Vielle, Green v Hallock, and Desaubin v United Concrete Products (Seychelles) Limited*).*
- [16] *I pause to observe that Seychelles has developed its own principles and regime of troubles du voisinage within the framework of Article 1382 and not as a separate cause of action derived from French jurisprudence as stated in the case of *Sunset Beach (Pty) Ltd v Dorsi Raihl & Anor*. The Mauritian jurisprudence cited in *Sunset Beach* on this issue only serves to illustrate the obligations of neighbours towards each other and standards for permissible inconveniences. (underlining my own)*
- [17] *While these principles and obligations cannot be conflated, a fair summary of how they interface with each can be stated as follows: the rights established by Article 544 of the Civil Code are limited by the obligation not to cause harm to others, but when such damage is caused one can obtain redress under the regime of Article 1382.*
- [18] *To succeed in such an action, the claimant has to prove fault, damage and a causal link between the tortfeasor and the damage. Specifically, the rules regarding trespass are derived from the Roman *actio negatoria*, an action to protect property rights.*

[27] It is the evidence of the Plaintiff that the Defendant moved his pile of manure from where he was keeping it to the place where he keeps it currently, next to the new house. The

Defendant on the other hand insists that his pile of manure has always been kept in that exact location.

[28] The evidence of Selvy Francois is that there was no nuisance found because at the time that the visit was conducted there was no manure at the spot in question.

[29] PS Nancy accepted that “you are going to have smell on farms.” It was his evidence in chief that “you cover manure because once you have sun on the manure like I have said at 1pm or after you have the rain then you have the slurry with the manure flowing down then it is going to be a nuisance, there should be mitigating ways to control the nuisance for manures.”

[30] Indeed, I would have to agree with PS Nancy, that by its very nature of business, you will have smells on a farm, be it of manure or fertiliser or animal excrement. I distinctly recall going to the Seychelles Polytechnic at Anse Royale which was in an area with a number of crop farms. Routinely we had the smell of manure and fertiliser blowing over to the school and would evaporate within a day or two. To this day in the area one can still smell the manure and fertiliser as one drives past or stops by to buy vegetables from the stalls or shops in the area.

[31] However, the issue is this; does the smell amount to contamination and pollution of the Plaintiff’s environment? To my mind, similar to a case of nuisance the consideration for the Court is whether the smell goes over and beyond what is acceptable and whether the Defendant intentionally placed his manure stock in that area to cause some nuisance to the Plaintiff.

[32] I noted the demeanour of the Defendant in Court. He was sniggering and generally treating the whole matter as if it was a joke. I note that some people by nature are grumpy and it is likely that the Defendant is by nature not a person prone to smiles or pleasantness. Generally, noting the topography of the Defendant’s farm and the fact that the Defendant does keep manure in a number of areas around the farm it is fair to say that the pile at issue is not in isolation. Furthermore, it is noted that during the locus the Court was shown an area where the Defendant makes compost and burns wood to get ashes for his garden. That area, which was a fairly big area, was within metres from the Plaintiff’s house though

granted not as near as the pile of manure in issue. Interestingly though, the Plaintiff does not complain of the smell from the compost or the burning wood which one would expect from both.

[33] It is further noted that on the day of the locus the pile of manure was covered. In any event the smell that the Defendant complains of is not with the day to day smell of the manure so much as the green manure when it is delivered to that spot.

[34] Noting the terrain and the fact that the land is zoned as agricultural land, in addition to the fact that the Plaintiff knew when he built the house that he was doing so in an area where farming is done it is unfair to ask the Defendant to incur extra cost or effort in order for the Plaintiff not to be impacted by the smell.

[35] The evidence is to the effect that some smell is expected and is in fact normal for farms.

[36] On the basis of the evidence on record there is no case made out against the Defendant. The Plaintiff is hereby dismissed.

[37] In as much as the Plaintiff has not made out a case against the Defendant, in order to foster good neighbourly relations, the Defendant would be minded to consider placing the pile of fresh green manure in the area where he keeps his compost and ashes before transporting them to the different points on his farm when they are ready to be placed in his plants.

[38] In view of the nature of the case and already frayed relations between the two neighbours each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on *22nd May 2024*

