

**Confait v Allied Builders Pty Ltd
(1998) SLR 174**

Frank ELIZABETH for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 11 December 1998, by:

PERERA J: The plaintiff is a co-owner and occupier of a guest house in Praslin. The defendant was a building contractor carrying out construction work from December 1996 to May 1997 on an adjoining guest house called the “Indian Ocean Lodge” which, admittedly, was about 10 metres away from the plaintiff’s guest house. The plaintiff avers that the defendants wrongfully caused or permitted noxious and offensive asbestos fumes and dust to pollute the surrounding atmosphere, and also caused undue noise when engaged in construction work at night thereby causing his personal health to deteriorate and his business to be adversely affected. He therefore claims a sum of R210,000 as damages.

The defendants denied that they caused any nuisance as alleged either by themselves, their servants or agents. They further averred that whenever work was carried out after 5 pm, such work was limited to work that did not cause any noise or was capable of disturbing any reasonable person. It was further averred that work had to be done after 7 pm to keep to the stipulated period, and that such work was done furthest away from where the plaintiff’s guest house was located.

The plaintiff produced a letter dated 27 January 1997 (Exh P1) whereby he complained to the managing director of the defendant company about the noise which affected his clients who could not “sleep and relax in the early hours of the morning” consequent to work being done between 7 am and 7 pm. He further complained that due to this noise, most of his clients had left the guest house. In his testimony however he stated that work started around 7:30 am and went on till 7 pm in the beginning and later, as the work progressed, the time was extended to 9 pm and later to 11 pm. He further stated that he complained to the police and the member of the National Assembly for relief, but to no avail. He claimed that this disturbance he complained of lasted about five months ending on 3 or 5 May 1997. In his examination-in-chief he admitted that tourists who had made bookings through travel agents continued to occupy his guest house, but those who made individual bookings left after a few days. He produced a bundle of letters allegedly from some of the clients complaining about the noise and their consequent decisions to leave (Exh P2). He also produced a medical certificate dated 4.5.97 from Dr K S Chetty certifying that he had high blood pressure since 1995 and that for the last 2 – 3 months (March-May 1997) it had been difficult to control, “probably because of stress and insomnia”. Neither the writers of the letters (P2) nor Dr Chetty were called to testify regarding the contents of their documents.

The plaintiff testified further that during the period complained of, he lost about 10% of his clients. In answer to the Court he stated that the usual bed and breakfast rate at that time for a double room was R375 per day but he received less from clients coming through tour operators.

On being cross-examined, the plaintiff stated that the guest house consisted of 9 rooms, and that the guests usually left after breakfast around 8 am and came back around 5 pm. He further stated that he did not complain about the noise during the daytime, but it was the noise of hammering, wood cutting and electric planing done in the night that affected him and his guests. In his letter of 27 January 1997 (P1) however he complained of early morning noise, He claimed that the noise at night came towards the end of April and beginning of May 1997 when the workers working overtime to complete the job in time.

ASP Eugene Poris of the Praslin Police Station testified that about seven complaints were made by the plaintiff regarding the noise emanating from the building construction site of the Indian Ocean Lodge. He stated that on each occasion the building supervisor was warned, but he stated that they had to complete the work in time. The witness stated that these complaints were made during the period January – March 1997.

A Denousse (PW3), the tax agent of the plaintiff, stated that the gross annual income of the business in 1996 was R435,663 and in 1997 it was R381,519, a diminution of R54,144. He was, however, unable to give the actual loss of earnings from the guests. In any event the income for the year 1997 was for a period of 12 months ending in December, while the period relevant to the instant case is January to May 1997.

Georges Norah (DW1), the project manager of the Indian Ocean Lodge at the relevant time, stated that the plaintiff complained about the noise at night and the obstruction of the view of the sea front from his guest house. As regards the obstruction of the view, he constructed a “chain-link fence” to minimise the effect. As regards the noise, he advised the contractors, the defendants in the case, to adjust the timing of work done so that there would be less noise at night. He further testified that he told the plaintiff that Masons Travels whom he represented, would compensate at their expense any relocations needed consequent to complaints of guests. He stated that to his knowledge there was only one such complaint. Mr Norah further testified that January – May was considered a “low season” for tourists. He however admitted that there would have been some noise on some days as the contractors were working behind schedule. The work was due to be completed on 15 April 1997, but the first phase was opened only on 3 May 1997. It was the first phase that involved concrete work and hence, according to him, woodwork done at night may have cause undue noise.

B K Pater (DW2), a director of the defendant company, testified that work had to be expedited to be completed before the scheduled date and hence work progressed up to 9 pm or even midnight on some days. He denied that noisy types of jobs were performed at night for about five months. He however admitted that for about one week in the final stages, there would have been noise. He corroborated Mr Norah that all

complaints were to be directed to Masons Travels through Mr Norah. He further stated that there was no intention to annoy the plaintiff and that the noise, if any, was common to all building construction work. He further stated that his company had completed about six other projects in Praslin without any complaint.

The law applicable in the instant matter was tersely summarised from the dicta of Sauzier J in the case of *Desaubin v United Concrete Products (Seychelles) Limited* (1977) SLR 164, 166-167 as follows:

Under the Civil Code, the jurisprudence was settled in France, Mauritius and Seychelles. The principle evolved in cases where the plaintiff complains of noise, smoke, smell or dust is that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighborhood.... It is not necessary that the author of the nuisance should have been negligent or imprudent in not taking the necessary precautions to prevent it. Liability arises even in cases where it is proved that the author of the nuisance has taken every permissible precaution and all the means not to harm or inconvenience his neighbours and that his failure is due to the fact that the damage is the inevitable consequence of the exercise of the industry.

In English law, which is very similar, it was held in the case of *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, 151 that:

The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area everyone must put up with a certain amount of discomfort any annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment.

It is an undisputed fact that tourists come to the country to enjoy the sun and sand and also the peace and tranquility of the islands. This is more so in the case of the islands of Praslin and La Digue. In this respect, both the plaintiff's guest house and the Indian Ocean Lodge which adjoins it have the right to undisturbed enjoyment of their premises especially from the point of view of their guests. But the expansion of the tourism industry and the consequent need for hotels and guest houses to expend to cater to increased tourism needs necessarily entails renovation of existing buildings, refurbishments and even reconstructions. Noise is a concomitant factor in all such works. There has to be a certain amount of reciprocity, especially when two businesses of a like kind are sited close-by. The liability of an author of an alleged nuisance such as smell, smoke or dust may be strict, as such deleterious substances could be arrested or channeled. So also from noises as from music sets etc which can be controlled. But how could a carpenter muffle his hammering and sawing if such work was needed to be

done at night due to an exigency? Hence in such cases, the “measure of ordinary obligation” must be considered in the proper perspective. In the present case there is an admission that noise beyond the measure or ordinary obligation was caused for a short time. Hence the defendant company is liable in damages to the extent of their fault.

Counsel for the Plaintiff abandoned the claim in paragraph 3 of the amended plaint. Hence the claim for damages is limited to the following –

1.	Loss of business	R 75,000
2.	Nuisance, annoyance, disturbance and agitation	R 50,000
3.	Moral damages for anxiety, distress and discomfort	R 25,000
4.	Loss of reputation and good name of business	R 50,000
5.	Rapid deterioration of health	<u>R 10,000</u>
		<u>R210,000</u>

As regards item (1), the diminution in the gross income in 1997 was R54,144 for a period of 12 months. Hence the monthly loss was R4512, and for the period of five months complained of it would be R33,560. The loss should necessarily involve commissions, operating costs, increased prices of food and drinks etc. It must also involve the vagaries of the tourist arrivals and the actual bookings at the plaintiff's guest house. The plaintiff has failed to produce any details on those matters. The plaintiff testified that normally he had about 60% occupancy of his 9 rooms, that is about 6 rooms, but due to the nuisance he lost about 10% occupancy. Hence he had occupancy of about 5 rooms. He further stated that it was only the guests who booked individually who checked out after a few days. Mr Norah testified that to his knowledge only one guest complained. In the absence of statistics, I would consider that one guest checked out every week, so that the 6 room was left vacant off and on. At the rate of R375 per day for a double room, the plaintiff would have lost R11,250 for 30 days. This gross amount must be further discounted by about 25% to permit allowable expenses. Hence less R2812.50 would be R8437.50. In the absence of particulars of the actual loss, and on the basis of Mr. Norah's evidence that there could have been noise only on certain days, and also on the admission of Mr Patel that towards the end of the first phase work progressed towards midnight, I would consider the sum of R8437.50 to be adequate compensation for any loss of business.

As item (2) has been considered under item (1) no award is made.

As regards item (3), the plaintiff, who is 73 years old and suffering from high blood pressure, undoubtedly would have been affected by the noise at night. Consequently on the basis that he suffered distress, anxiety and discomfort, I award a sum of R5000.

As regards item (4), there is no proof that there was loss of reputation and good name of the business. The plaintiff testified that the guests who booked through tour operators continued to arrive and that he had 50% of the usual 60% occupancy throughout. Hence no award is made under this head.

Item (5) was also unsubstantiated by medical evidence to any appreciable degree to warrant damages. The blood pressure may have been affected by insomnia as Dr Chetty had certified. Compensation for that aspect was considered in making the award under moral damages.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R13,437.50 together with interest and costs taxed on the Magistrates' Court scale of fees and costs.

Record: Civil Side No 100 of 1997