

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES HELD AT VICTORIA

Civil Suit No. 176 of 2004 and Civil Suit No.110 of 2006

Phillip Rath=====Plaintiff

Versus

Berard Monthly=====Defendant

France Bonte for the Plaintiff

Frank Elizabeth for the Defendant

JUDGMENT

Egonda-Ntende, CJ

1 The plaintiff and defendant are neighbours. On 15th January 2004 a stone retaining wall constructed alongside the defendant's property collapsed. The plaintiff contends that it fell onto the plaintiffs property causing damage to the plaintiff's property. The plaintiff brought both the said actions against the defendant to recover the damage he contends he suffered.

2 In the first suit the plaintiff set out the following as particulars of damage,

‘block retaining wall and terrace collapsed;
debris landed on property between private house, office and
worker buildings;
electrical and telephone cables to the workers and office buildings;
water pipes damaged and blocked;
electrical board in the worker's building has been ripped out and
damaged cutting both power and telephone line to the buildings;
debris hit the house;

concrete steps blocked by debris and concrete paved compound damaged.’

- 3 In addition to that damage the plaintiff contends that he was unable to move his trucks, concrete mixers and compactors from his yard and had to hire out the same from outside in order to carry out his business incurring extra expenses in his business. He claimed the material damage and loss of R332,209.00 and moral damages R300,000.00, all totalling to R623,209.00 only. The plaintiff requested the defendant to make good the damage but the defendant refused.
- 4 The defendant accepted that the retaining wall collapsed onto the plaintiff’s property on 15th January 2004 but that the plaintiff had denied permission to enter his property to clear the debris and repair the said wall. The plaintiff has attempted to extort money from the defendant. The defendant further contended that the plaintiff had exaggerated his loss. The plaintiff did not hire equipment as claimed. The defendant denied that the plaintiff suffered any loss and damage and he put him to strict proof of all allegations in the plaint. He prayed that this suit should be dismissed.
- 5 The defendant added a counter claim to his suit which was denied by the plaintiff. At the trial the defendant never adduced any evidence. In the circumstances the counter claim remained unproven. It fails. I need not waste any time on the same.
- 6 In a bid to narrow matters in dispute the parties agreed on 28th October 2005 and the court ordered the following:
 - ‘(a) The defendant will enter in the plaintiff’s premises on Thursday the 3rd of November 2005, from 9.00 a.m. to 4.00 pm to carry out repair to the collapsed retaining wall.
 - (b) The work will take three days and the defendant would pay the sum of Rs1,000.00 to the plaintiff per day.
 - (c) If additional days are deemed necessary, the defendant will inform counsel/parties and seek permission from the plaintiff and will pay the additional Rs.1000.00 per day for any outstanding work.
 - (d) The defendant will provide a list about the workers who will be present on site to conduct the said work to the plaintiff prior to the date on which the work is to be commenced.’

7 The defendant did enter the plaintiff's land as agreed to carry out the agreed works but the plaintiff responded with more complaints eventually leading to the filing of Civil Suit No.110 of 2006, in which he contended, in paragraph 6 thereof as under,

'The plaintiff avers that the defendant is in breach of the court order in that

(a) he entered onto the plaintiff's property with Indian workers whose names were not listed in the letter dated 2nd November 2005

(b) the workers who came on the plaintiff's property to perform works, cut his bread fruit tree which is found alongside the office

(c) the workers have excavated earth and put concrete on his property

(d) the workers have failed to rebuild the wall on his property (e) failed to remove the encroachment on his property since 15th January 2005 and

(f) removing of earth and debris (property affected after every rainfall).

8 The plaintiff contended that the collapsed wall was very dangerous in that it threatens injury to himself and members of his family. The plaintiff claimed a total sum of R360,000.00 from the following itemised loss and damage,

- '(a) breach of contract =====175,000.00;
- (b) The encroachment=====25,000.00;
- (c) Trespass to property=====10,000.00;
- (d) Loss of Enjoyment of his retaining wall, space and privacy=====50,000.00;
- (e) Moral damage=====100,000.00.

9 The defendant denied this further claim against him and asserted that he had fully complied with the court order. He put the plaintiff to strict proof and prayed that this suit be dismissed. The defendant contended that this claim was frivolous and vexatious and ought to be dismissed. The defendant further contended that this suit was res judicata in light of Civil Side No. 174 of 2004. The defendant further contended that the collapse of the wall on the plaintiff's property was an act of God, 'Force Majeure' due to bad weather and constant rain fall. At the same time the defendant contended that the collapsed wall was due to the fault and negligence of the plaintiff. The defendant contends that the plaintiff did not obtain planning permission to build his wall and the same was built without proper plans and expertise and

without adequate supervision and with substandard materials which rendered the wall weak and susceptible to collapse whenever there was heavy rainfall in the area.

- 10 The defendant further counter claimed for persecution, harassment and inconvenience by the plaintiff a sum of R225,000.00. As the defendant never called any evidence in this case I need not trouble myself with this counter claim. It remained unproven just like the previous one in the earlier suit and stands dismissed.
- 11 Both these suits were by my order consolidated and tried jointly.
- 12 At the trial the plaintiff testified and closed his case without calling any other witness. The defendant elected to make a submission of no case to answer and thereby forfeited his right to call evidence in the matter.
- 13 The testimony of the plaintiff was fairly short and I can set it out or the relevant parts thereof verbatim. He started his testimony in the absence of his attorney, Mr Bonte who turned up in the course of his testimony and took over the examination in chief.

‘(Mr. Philip Rath – Sworn)

Mr. Rath: Your Lordship before I move forward with my case I would like to firstly have three concern or three points to put forward. One is that it had took the Court almost about 8years for the Court to hear this matter and secondly that this same two cases were heard before the Chief Justice Perera and thirdly there were locus which were carried out by the Chief Justice himself. Fourthly I would be grateful if these findings could be brought before his Lordship for him to clarify certain facts which were brought before this very Court.

Court: The hearing is going to be afresh. I cannot rely on the testimony that was given before the previous judge. I must restart the hearing.

Mr. Rath: On the 15th January 2004 while I was sitting in the kitchen few minutes before lunch it comes a heavy rain and there there was a huge amount of water which was flowing in front of my kitchen and my office and suddenly I saw a crash it was just there before my eyes and it was a shock. It was a shock firstly that it had took me years for me to establish a sound environment for me to enjoy with me and my family and the serenity and the peaceful area suddenly comes into a turmoil or a mess. From then after a while I took my phone and I called the insurance company.

The same very day they didn't turn up but two days later they turned up, they came on the other property and I was called by a lady and she told me that they're coming to visit my site afterwards and what is the best way for her to get to my place.'

14 Mr Rath further testified,

'Your Lordship it was on the 6th day after the incident happened that I had a call from a lady and she stated that her name is Sylvette and I said what Sylvette and she said the lady living next to you and she said that Mr. Monthy wants to talk to me and I said okay. And Mr. Monthy just told me that he has an intention to come to my property for him to take his goods which have fallen down on my property, his collapsed retaining wall. I said fine you would have to make sure you have an application and with regards of this application I will grant you permission to enter my property. This was not done so; I had to write the insurance, I didn't write any letter directly to Mr. Monthy. I wrote the letter to the insurance and through Mr. Derjacques.'

15 Mr Rath continued with his testimony with Mr Bonte leading him. He stated,

'EXAMINATION IN CHIEF BY MR. BONTE

Q Mr. Rath after the incident of the wall have you received any compensation from the gentleman?

A Not at all.

Q He has not paid you a cent?

A Not at all.

Q Did you come to expend any money to repair your place and do whatever necessary for clearing and so on?

A Yes.

Q What did you spend?

A I spend money on hiring excavator.

Q How much did it cost you?

A In fact it cost me Rs16,830 and I had to pay-

Q And that is for the excavator?

A Yes.

Q What else did you spend?

A I spend money to pay quantity surveyors.

Q How much?

A It is Rs7059 and it was Cecile Basthilde.

Q What else did you pay?

A I spend money on making sure to cart off the rear on my property and I've spend money on getting someone to drill the rocks which was still on my property after the locus was done and I spend money at every point of time that rain falls and come –

Q And his wall falls down.

A Yes.

Q Now you are asking the Court the sum of Rs22,000 for reinstatement of the terrace?

A Yes indeed.

Q And to rectify your office and the workers building were your workers lives, workers quarters Rs14,000, repel of pipe and pavement of the compound you are asking for Rs6000.

A Yes.

Q Removal of debris Rs22,750.

A Yes.

Q Hiring of plants and for all kinds of works that needed to be done you are asking the sum of Rs260,400.

A Yes indeed.

Q Valuers report Rs759 and moral damages in the sum of Rs300,000.

A Yes indeed.

Q And you are asking the Court for damages in total of Rs651,409?

A Yes indeed.

Q And you are asking the Court to give judgement in your favour?

A Yes indeed.

Mr. Bonte: No further question.

CROSS EXAMINATION BY MR. ELIZABETH

Q You told the Court in examination in chief that when the incident happened you telephoned your insurance company. Is that correct?

A Yes.'

16 It is the duty of the plaintiff or any one who asserts a fact to be true to prove that fact or set of facts on a balance of probability if he is to succeed on his claim. In this case the plaintiff had asserted that he suffered damage to his property as a result of the

fault of the defendant. In his testimony, as Mr Frank Elizabeth submitted, the plaintiff had failed to establish that the defendant was the cause of the damage that he had suffered. The only evidence about the incident is found in the following words of the plaintiff,

‘On the 15th January 2004 while I was sitting in the kitchen few minutes before lunch it comes a heavy rain and there there was a huge amount of water which was flowing in front of my kitchen and my office and suddenly I saw a crash it was just there before my eyes and it was a shock. It was a shock firstly that it had took me years for me to establish a sound environment for me to enjoy with me and my family and the serenity and the peaceful area suddenly comes into a turmoil or a mess. From then after a while I took my phone and I called the insurance company.’

- 17 There is no imputation of fault or cause of this incident upon the defendant. The plaintiff has failed to connect the defendant with the cause of the damage that he allegedly suffered. On this ground alone I would dismiss the plaintiff’s suits against the defendant.
- 18 I would think it unnecessary to discuss the question of damages given that liability has not been established. Nevertheless given the possibility of an appeal and in case I am found wrong on the issue of liability I will deal with the question of damages.
- 19 **Has the plaintiff established the injury, loss and damage that he claimed in his plaint?** His attorney asked him if he had received compensation from the gentlemen and he replied in the negative. He then testified that he had spent R16,830.00 on hiring an excavator. What the excavator did he did not say. He stated that he paid R7059 to Cecile Bastilde. What the quantity surveyor did to receive this money we are not told. He stated that he wanted R22,000.00 to reinstate the terrace. How this sum would achieve this we are not told. Is it for labour or materials or both? Nor do we know what damage the terrace suffered from and who caused such damage.
- 20 The foregoing comments equally apply to all other heads of claim and sums of money claimed as set out in the testimony of the plaintiff. This includes the claim for removal of debris of R22,750.00; hiring of plants and all kind of works for R260,400.00. In my

view, with regard to material damage, the plaintiff totally failed to prove not only the injury, loss and damage he claimed to have suffered but also the money to compensate the same.

21 Had the plaintiff succeeded on the question of liability I would have probably awarded him R30,000.00 for moral damages. But as he did not establish liability of defendant as well as his own entitlement to any moral damages no award is made for moral damages.

22 Both these two suits are dismissed with costs.

Signed, dated and delivered at Victoria this 31st day of October 2012

FMS Egonda-Ntende
Chief Justice