

**Dewea & Or v Roucou Construction (Pty)  
(2003) SLR 219**

France BONTE for the Plaintiff  
Charles LUCAS for the Defendant

*Appeal by the Defendant was allowed on 5 December 2003 in CA 9 of 2003.*

**Judgment delivered on 27 March 2003 by:**

**PERERA J:** This is a delictual action in which the Plaintiffs claim damages for trespass and consequential loss caused to their property. The Plaintiffs are owners of a Parcel of land bearing no. C.3983 at Les Canelles. It is averred that the Defendant company, upon a contract with the Seychelles Housing Development Corporation (SHDC) excavated a road through its servants or agents, and in the course of such work caused damage to the Plaintiffs' land.

Upon a request for further and better particulars sought by the Defendant, the Plaintiff produced a Survey report from one B.J.K. Felix, a Land Surveyor, wherein the area of encroachment was computed at 17 square metres. He also reported that a beacon had been moved from its original position. The Plaintiffs also produced a report from Vladimir Prea, a Civil Engineer, regarding the damage. It was reported that an area of 8.5 metres in length, 2.5 metres in depth and 1.0 metres to 3.2 metres in height along the boundary of the Plaintiffs' land had been "cut and the soil removed." It was also reported that consequent to the excavation, the soil embankment had been disturbed, causing it to lose its effective stability and that hence a retaining wall should be constructed. These two reports were, at the hearing, marked as exhibits P3 and P4.

The Defendant Company avers that the excavation for the purpose of construction of a road was done specifically under the contract with SHDC along a pegged area and that no damage or trespass was caused to any neighbouring land. They further aver that they sub-contracted such work to a third party and that they did not instruct the sub-contractor to trespass on any privately owned land, and states that if the alleged acts were caused, it was done by persons unconnected to it, or its activities.

The case for the Plaintiffs' is that their land. Parcel C.3983 is bound by beacons TD 249, TS 866, TT 2783, TS 712 and TS 432 as shown in exhibit P3(a) attached to the report of Vladimir Prea. The excavation is shown in dotted lines between beacons TD 249 and TS 432 along the Eastern boundary.

The 1<sup>st</sup> Plaintiff testified that the JCB excavator engaged by the Defendant Company, through its servants or agents was parked on the adjoining Parcel C. 2851 which belonged to one Mrs Larue. One day in March 1997, when she returned home around 4.30 p.m after work, she found that the said portion of her land had been excavated. She however did not see anyone doing the excavation, but she obtained information

from the neighbours that it was done by the JCB excavator belonging to one George Vandange. The 1<sup>st</sup> Plaintiff testified that she had proposed to construct her access road in the area excavated and now she is compelled to build a retaining wall and backfill the earth to stabilise the area.

Cyril Roucou, the Director of the Defendant company testified that consequent to the contract with SHDC to construct the road, he hired the J.C.B. excavator of George Vandange to excavate an area indicated by pegs. He stated that he was not liable for any damages' that may have been caused outside his scope of work. He further stated that before Vandange was engaged as a sub-contractor, written consent was obtained from the SHDC as required by condition no.5 of the contract (exhibit P6).

Georges Vandange, himself a contractor testified that he contracted with the Defendant company to level the road for construction. Instructions regarding the area to be leveled were given by Mr Roucou. He stated that the lady occupying the neighbouring land wanted some soil "to reclaim or Gil up her property, and so to cut down on costs we gave her the soil." She however did not ask him to cut earth from part of any land. The road work was done by the excavator operator on the instructions given to him by the Defendant contractor, through him. Vandange further testified that he only supervised the work done to level the road and in doing so he visited the site about thrice a day. He maintained that what was done apart from excavating the demarcated area, was to dump the excess soil on the land of Mrs Lame.

Hansel Boniface, the J.C.B. excavator operator also testified that the area to be leveled was demarcated by Mr Roucou. He stated that there was no place to put excess soil that was excavated and hence it was heaped up in the middle of the road.

As regards the lady who wanted soil, he stated thus –

At the beginning of the road there was a lady who had lots of flowers. I pushed some of the soil near the flowers and I parked my JCK. there at night and as for the rest of the excess soil, we put them near the main road.

He further stated –

At first the soil was pushed on to her property, then when I was clearing out the property, she to led me just to push them inside, I did so.

He denied that he was asked to excavate or to terrace the land. Questioned by Court whether in the process of pushing the soil, he took the excavator into the yard and cut the soil on the embankment, he replied that he only dumped the excess soil and leveled it with the "*spade*" of the excavator. He stated that after the day's work was over, Vandange took away the ignition key of the excavator after it was parked on Mrs Lame's land.

On the basis of the evidence of Land Surveyors B.J.K. Felix and Vladimir Prea, it has

been established that soil from the area of approximately 17 square metres had been removed from the Plaintiffs' land which is on the same level as the area being excavated for the road, but about 3 metres above the land of Mrs Lame. At the visit to the locus in quo. it was observed that this loss of soil had not been due to any natural phenomena but due to an intentional or accidental cutting of soil on the embankment. Vladimir Prea, also, in his report describes the damage as a "cutting and removal of soil".

### **Liability**

Generally, to establish liability, there must be a "lien de subordination", between the "commettant" and the "proposé". However there are exceptions to that rule. In the case of *Paton v Uzice* (1967) SLR 8, the Plaintiff sued the Defendant for damages arising from trespass, alleging that the Defendant's labourers had crossed his land. The Defendant contended that he was working hours, and that even if there was evidence that he had instructed the labourers to cross the Plaintiffs land, when coming to work on his land, he was still not liable, as for him to be liable, there must have existed between him and the labourers a contractual relationship, and that did not exist after they finished their work on his property.

Soyave ACJ (as he then was) upheld the first contention. As regards the second submission, it was held that there was evidence that the Defendant had instructed the labourers to cross the Plaintiff's land. However what was material was whether the labourers were in such circumstances the proposes of the Defendant. The Learned Judge citing paragraphs 1030 to 1033 in Lalou *Traite Pratique de la Responsabilite Civile*, stated thus:

From the above, it appears to me that for a person to be the "proposé" of another, a contractual relationship between them is not essential and that he would be deemed to be the "proposé" of that other person in the course of doing something if he does it on the latter's instructions or request or order. It also does appear that if a person does something on the instructions and in the interest of another person, he is in the course of doing it the propose of that other person.

The Defendant was accordingly held liable in damages. The exception to the general rule of liability was clearly illustrated in the case of *Saisse v Serandat* 1863 MR 170. In that case the Plaintiff and the Defendant were labourers whose lands were separated by a public road. The Defendant hired a Sirdar (a contractor) to clean his land, trim the hedges and prune wild plants. The Sirdar in turn hired labourers. The labourers burnt the leaves and the trimmings, causing the burning embers to be carried by wind to the roof of the Plaintiffs house, which consequently caught fire. The issue was as to who the "commettant" and who the "proposé" were. It was held that the fire was caused by the negligence of the Sirdar and his labourers, on the basis that the Defendant's contract was directly with the Sirdar and his labourers. Hence the Court held 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.

In the present case, the Defendant company was performing a contract entered with the SHDC to construct a road as per the working plan (exhibit D1). Although the copy produced by the Plaintiffs was only signed by the Managing Director of SHDC as employer, Mr Roucou admitted that he signed it before commencing work. That, obviously would have been so, as the employer was a State Corporation. Incidentally that agreement (exhibit P6) was made on 29 April 1997, and pursuant to clause 6(i) work was to commence on 29 April 1997 and completed by 30 June 1997. The Plaintiffs have averred that the damage to their property was caused "on a date in March 1997."

However, Counsel for the Defendant in the examination in Chief of George Vandange questioned him whether the Defendant hired him to do the work in March 1997. and he replied in the affirmative. Clause 6 of the agreement stipulates that the contractor (Koucou Construction) shall not sub-contract the works or any part without the written consent of the SHDC. Although Mr Roucou in his testimony stated that he obtained such consent, no documentary proof was produced. In any event, the parties are ad idem that the construction of the road was done by the Defendant company as contractor of the SHDC and Georges Vandange as sub-contractor. In clause 8, the contractor was required to indemnify the SHDC and take out an insurance policy against, inter alia"

Any damage to property of persons other than the employer (SHDC) or the contractor (Koucou Construction) arising as a consequence of the negligence or breach of duty of the contractor or of circumstances within the contractor's control. For the purposes of sub-clause (i) (ii) and (iii), the expression "contractor" shall include any sub-contractor of his".

Hence even if the sub-contractor had breached his duty by exceeding his mandate by causing damage to the property of a third party, the SHDC would be indemnified, and the contractor would have been held directly liable in damages. Learned Counsel for the Defendant contended that the Plaintiffs who are third parties to that contract could not rely on that clause to establish liability. Although that submission is principally correct, yet, the Plaintiffs are not relying on that contract to establish a breach, as against them, but to produce evidence of the nature of the contract which the Defendant Company admitted they entered into with the SHDC, and the performance of which had caused damage to their property. The action is however based on delict and not in contract.

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 an independent contractor is one who does not take orders or instructions as to how he carries out his work. For example, doctors or surgeons are not the prepose's of their patients. In the present

case both Vandange and Boniface testified that they were excavating the road according to instructions given by Mr Roucou. On the basis of the nature of work involved, such instructions would not have been limited to merely showing the pegs demarcating the proposed road, but also giving of instructions regarding the gradient and such other vital matters that need to be given either directly by Mr Roucou or through his project engineer.

Amos and Walton in *An Introduction to French Law* at 230 state:

Even if the servant has done something which he was expressly forbidden to do, the master is liable if the servant was acting in the assumed exercise of his duties.

Vandange testified that he dumped the excess soil on Mrs Lame's land to cut down on cost of transporting it out of the site. Hence that was an act which was connected with the main work entrusted to him by the Defendant Company, and was beneficial to both Vandange and the Defendant Company. Further the evidence of Boniface that the ignition keys of the excavator were taken away by Vandange every day after the excavating work was over, establishes that soil was dumped and leveled on Mrs Lame's land during the hours of employment, and rendered necessary due to the need to dispose of excess soil from the site. Whether any other work was done there at the request of Mrs Lame is immaterial, as it is clear that the Plaintiffs land had been excavated, intentionally or by accident.

Although there is no direct evidence as to who cut the soil and how, there is circumstantial evidence that the JCB excavator was engaged in excavating a road near the boundary of the Plaintiffs' land, that excess soil was "pushed" to the land below belonging to Mrs Lame, and that the excavator was parked overnight on Mrs Lame's land. There is no evidence that any other excavating machinery was involved in any work in that area during the time the Plaintiffs' land was damaged. Vandange and Boniface vehemently denied that Mrs Lame requested them to terrace her garden and to excavate the embankment to widen her yard. If so, the damage had been caused accidentally. The admitted activities on Mrs Lame's land makes it more probable that the damage caused to the Plaintiffs land, was caused by the J.C.B. excavator. Hence on a balance of probabilities it is most likely than not, that the damage was caused by the JCB excavator and by no other. That damage was caused by the sub-contractor in the discharge of his duties entrusted to him by the Defendant company.

On the basis of delictual principles therefore, the Defendant company, as the "commettant" would be liable for the damage caused by the operation of the J.C.B. excavator by Vandange and his driver, the proposes, as until the road construction work was completed, the Defendant company had the duty to ensure that the work contracted by him did not cause any damage or loss to any third party, either directly or through his preposes. In the present case, the Defendant's obligation to ensure that no harm or damage was caused to anyone was more, as he engaged heavy machinery to assist him in constructing a road from the main road, up a steep hill and that entailed a

certain amount of danger to the safety of persons and a risk to neighbouring properties. It would not be open to him to evade liability by treating Vandange as an independent contractor. If that be so, he ought to have moved the Court to add Vandange as a Defendant in the case, or raised a plea in limine that there was no cause of action against the Defendant company. As Amos and Walton further state:

The liability of the master for his servant's wrongs does not suppress the personal liability of the servant himself. "Both are liable solidarity and the master against whom damages are awarded has a right of recourse against his servant.

### **Damages**

The Plaintiffs claim R50,000 as trespass to land. On the basis of the finding of this Court, the prepose of the Defendant company is responsible for interfering with a portion of the Plaintiffs' land. There has therefore been trespass to land. On a consideration of the limited nature of the trespass, I award a sum of R10,000 under this head.

As regards the claim for the construction of a retaining wall to stabilise the area of land where the damage had occurred, Ms. Cecile Bastille, Quantity Surveyor has furnished a report (exhibit P5) wherein she has assessed the construction of a wall and back filling at R47,000. In her testimony, she stated that she based her estimate on the Engineering Report of Vladimir Prea. She further stated that the calculation was based on a "metre square rate" for a wall 8.5 metres in length, 2.5 m in depth and 1.0 metres to 3.2 metres in height. The estimate also included the cost of back filling. She also stated that that estimate was made in 1998, and that it would be costlier now. The report of Vladimir Prea remains unchallenged. Hence Ms. Bastille's report based on the measurements of the wall to be erected and calculated at the prevailing rate of construction cannot be faulted. Hence I award R47,000 under this head. The Plaintiffs also claim R500 paid to Ms Bastille for her report. In her testimony she stated that she could not remember how much was paid. There is also no documentary proof of any payment. Hence I make no order under that head. However in lieu of that payment I allow a sum of R2,875 paid to BJK Felix for the topographic survey, as per receipt dated 30 June 1999 which was produced in evidence as exhibit P4 a. As regards the payment made for the site visit report made, Vladimir Prea in his evidence stated that he received R750. Hence I accept his evidence and award a sum of R750 under that head.

The Plaintiffs also claim R30,000 as moral damages. They are presently unable to construct on their land as the portion of the land over which they proposed to build the access road has been disturbed and rendered unstable.

Undoubtedly, this has caused anxiety and distress to them. Accordingly I award a sum of R5,000 under this head.

Judgment is therefore entered in favour of the Plaintiffs in a sum of R60,625 together with interest and costs.

**Record: Civil Side No 17 of 1999**