IN THE SEYCHELLES COURT OF APPEAL

MURIELLE SIMEON **APPELLANT**

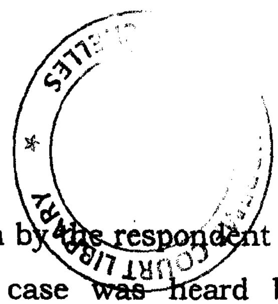
VERSUS

MARIE THERESE BAMBOCHE **RESPONDENT**

Civil Appeal No. 19 of 2002

[Before: *Ayoola P, Silungwe & Matadeen, JJA]*

Ms. D. Zatte for the Appellant
Mr. F. Bonte for the Respondent



JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The action in the Supreme Court concerned a claim by the respondent of a right of way over the appellant's property. The case was heard by Karunakaran, J. who entered judgment declaring the respondent entitled to have access over the appellant's property and determining the route of the access. The appellant dissatisfied with the judgment, has appealed to this Court.

The appellant was the defendant in the Supreme Court. The respondent who was the plaintiff in the Supreme Court claimed an order declaring a right of way on the appellant's land to be used by the respondent to gain access to and from the public road. The parties were at all material times owners of plots of land in the same neighbourhood at Machabee, Mahe. The respondent owned Title No. H4519 and the appellant Title No.H4999. The respondent's land was enclaved. There is a right of way on the appellant's property but it was created to serve properties other than the respondent's.

The respondent had been using a footpath which traversed the appellant's land and parcel H1951 owned by one Maxime Michel, not a party to this action, and situated between the parties' land, to reach her own land from the public road. The house of the respondent is on a higher terrain than that of the appellant. The appellant blocked the footpath over her land, compelling the respondent to divert her access along a path across the appellant's land. Hence, the respondent sought a demarcation and declaration for a proper right of way on the appellant's property.

The Supreme Court obtained expert opinion of a surveyor on possible suitable access routes to the respondent's property over the appellant's property. The expert came up with two proposals depicting two routes marked A and B respectively on a sketch map of the neighbourhood. The respondent showed preference for route A but the appellant accepted neither, insisting that an existing 3-metre right of way running over her property but terminating at a property parcel H1951 owned by one Maxime Michel provided the respondent an adequate and convenient access to her property.

After considering the expert's report and visiting the locus, the trial judge came to the conclusion as follows:

> "Having regard to the geographical condition and location of the properties in my judgment, the route A proposed by the surveyor in Exhibit P3 is the shortest more convenient, more practicable and less expensive to build than route B."

In the event, he found that the respondent's request for the approval and declaration of right of way over appellant's property along route A was *"just, reasonable and necessary."* He entered judgment accordingly and declared a two (2) metre right of way over H4999 to serve as access for the benefit of H4519.

In the ensuing appeal, counsel on behalf of the appellant took three points as follows:

(1) That the trial judge erred in the process of adjudication by confusing the right of way and the route along where the right of way is exercised.

(2) That the trial judge erred in allowing the respondent to exercise her right of way along a route which was different to that established on deed and alleged to exist on an averment in paragraph 5 of the plaint that it was dangerous and slippery during rainy season.

(3) That the finding of the trial judge that "in the circumstances the plaintiff is now using the defendant's property for access on her own, without having a proper right of way legally created either of agreement of the parties by law" contradicted the plaintiff's own case and should have led to a dismissal of the case on the pleadings.

The trial judge proceeded on the footing that the respondent's property was enclaved. Even though that fact was not pleaded it was evident from the surveyor's sketch that it was enclaved.

In **Azemia v Ciseaux 1965 SLR 199** it was held that the landowner whose property is enclaved and who has no access whatever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property. That was the right claimed by the respondent in this case and it was on that claim that the trial judge adjudicated.

Where a right of way is claimed by a landowner whose land is enclaved the court has power to fix the appropriate route in line with established principles. (See for instance, **Georges v Basset (1983) 177**.

In this case the trial judge having found that the respondent was entitled to a right of way exercised a proper jurisdiction in fixing the appropriate route of such a right of way. The question is whether he had been properly guided by the law and the evidence in the exercise of that jurisdiction. Article 683 of the Civil Code provides such guidance as follows:

> "A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible."

The respondent acknowledged by paragraph 5 of her plaint that there was a "present right of way". However, according to her averment that right of way in dangerous "as they have to go over boulders to gain access to and from her property and during rainy season the access is slippery." The appellant denied that averment. The surveyor by his report was of the opinion that the existing 3 metre right of way was a possible alternative route if the route marked B on his sketch was accepted.

The trial judge showed preference for route A for reasons which have been noted, namely: that it was the "shortest more practicable and less expensive to build." However, in our judgment these are not good enough reasons to abandon the existing 3 metre right of way which the surveyor had incorporated into the option of route B and request the appellant to open up a fresh route, yet along another border of her property, thus leaving her land encumbered with rights of way on three out of four sides, if option of route A is adopted.

The learned judge seemed to have ignored that part of the respondent's evidence as follows:-

> "Q: Lets look at the survey plan. If you look at proposal B made by the surveyor. Along the boundary between H4999 and H1951 on either side of the boundary, is there an adequate space to carve out a 3m wide right of way on both side of the boundary?
>
> A: I think so.
>
> Q: I think so?
>
> Q: You know that property?
>
> A: Yes.

Q: Is there adequate and convenient space on both side of the boundary to carve out a 3 m right of way?

A: Yes.

Q: Would you have any objections if instead of the 3m wide strip is carved out on your father's side of the boundary rather than on the defendant's side?

A: I will be happy.

Q: So if the 3m right of way is carved out on your father's side of the property and goes on to the 3 m right of way and to the main road you will be happy with that?

A: Yes.

Q: Your father is willing to give you that 3m.

A: Yes I have asked him and he say no problem with me because we want to go to our home where do we pass?

Q: So you are happy with that?

A: Yes.

If he had adverted to the above evidence he would have found that the respondent did not have any real objection to the option of route B.

It is expedient to note that the option was between route A and route B. There was no question of an option of a third route which would have passed on the respondent's father's side of the common boundary between the appellant's property and the respondent's father's property to link with the existing 3 metre right of way, the respondent's father not being a party to the action.

The following facts, in our opinion, should have made route B an option that better suited the justice of the case:-

1. The respondent from the evidence quoted did not have a serious objection to route B.
2. Route A would encumber the appellant's land with rights of way on three sides whereas route B would have limited the burden on her land to two sides.
3. Preference for route A did not show that attention was paid to the need to reduce any damage to the appellant's land as far as possible as required by Article 683 of the Civil Code.

Apart from stating in his report an opinion that "Route A would be easier and more economical to build" the surveyor, who was not called to give evidence, did not state the facts on which he based the opinion. The opinion, therefore, should have carried little or no weight. The learned trial judge who visited the locus did not state, either by a report of visit to locus in quo or in his judgment, what he found in the locus to justify his conclusion that route A was "more convenient, more practicable and less expensive to build."

For these reasons the appeal succeeds in part only. The judgement of the Supreme Court is varied to the extent only that the (respondent) plaintiff is entitled to have access over the (appellant's) defendant's land along the route B as proposed by the surveyor in his report dated 26th June of 2001 and

diagramed in the plan thereto attached. Apart from the existing 3 metre right of way, the rest of the right of way shall be exercised along route B on the defendant's (appellant's) property and shall be 2 metres wide. Apart from this variation and variation of the learned judge's order consequential thereto, the rest of the learned judge's order remains.

Each party shall bear her own costs of the appeal.

Delivered at Victoria, Mahe, this day of **December** 2003

Read in open Court on 29th January 2004 at 9.30 a.m.
Juddoo J.