PUBLIC UTILITIES CORPORATION v ELISA

(2011) SLR 100

W Herminie for the appellant
A Derjaques for the respondent

Judgment delivered on 29 April 2011

Before MacGregor P, Hodoul, Domah JJ

In our decision dated 29 April 2011, we reproduced the facts of the case and dealt with the preliminary issue of section 18 of the Public Utilities Act where we stated that the protection afforded to the Corporation raised as a preliminary issue was not applicable in this case inasmuch as that objection was raised only on 22 February 2008 for a case which was served on the Corporation in mid-July 2005.

We are now moving to consider the merits of the case and the paragraphs shall be numbered following the numbering in our previous judgment on section 18.

Ground 3

Under ground 3, the appellant challenges the decision of the Judge on the ground that there was no finding of negligence in the discharge of the statutory obligation of the PUC to provide water to the public.

That is incorrect.There is a clear finding of failure to adhere to standards in the supply of water. The judgment runs this way:

After an exchange of particulars and pleadings, the appellant filed its defence. It raised the plea of act of God - that is the event which led to the substandard service was outside the control of the Corporation. In evidence it would advance that it was the effect of El Nino.

The case before the Supreme Court was to be heard on 25 May 2006 but suffered a number of false starts to take off only on 20 September 2007 when the plaintiff was heard and two of his witnesses. When the case came for continuation on 23 November 2007, it was put to 22 February 2008. It is on this latter hearing date that the appellant moved to amend the defence *in limine* to the effect that the action was time-barred in law and could not be maintained against the Corporation by virtue of section 18(2) and 18(3) of the Public Corporation Act (the Act).
As the case had already been part heard, the disposal of the plea *in limine litis* was dealt with in judgment on the merits. The Judge dismissed the plea *in limine* by an imaginative interpretation of section 18(2) and 18(3) of the Act on the basis that: (a) the provision of the law should be read contra proferente; (b) the wording was not mandatory for the giving of a notice if the circumstances showed as they did in this case that the Corporation was fully *"au fait"* with the tribulations of the respondent; (c) that the defence of statutory notice not having been given was being taken too late in the day; that is almost 3 years after the receipt of the plaint.

On appeal, we were specifically invited to state the law as to the interpretation that should be given to section 18 of the Act.

Section 18 of the Act is worded in absolute terms. The time limit for bringing an action against the Corporation is 9 months. It provides:

> No action shall be brought against the Corporation to recover damages or compensation in respect of any act or omission of the Corporation after the expiry of 9 months after the cause of action accrued.

That is not all. There should be some procedural compliance with the law before an action may be brought even within the 9 months time bar. The plaintiff should give notice in writing of the intended proceedings of not less than one month before the commencement of the proceedings. Section 18(2) of the Act provides:

> No proceedings shall commence against the corporation unless notice *in writing of the intended proceedings has been delivered at the office of the Corporation by the party intending to commence those proceedings or by the Attorney or Agent not less than one month before the commencement of the proceedings.*

The content of the notice which notably has to be in writing is also provided for in section 18(3):

> A notice under section (2) shall state the cause of action and the Court in which the proceedings are intended to be commenced, the name and the address of the party intending to commence proceedings and, if the notice was delivered by an Attorney or agent, the name and address of the Attorney.

In this case, the appellant had made oral complaints by going to the office of the Corporation. He had been received. Visits had been effected by the officers of the Corporation to the place as well of the respondent but the latter had given no notice in writing to the Corporation of the cause of action. The submission made on the preliminary objection taken on the plea *in limine* before the Judge was that section 18 was worded in mandatory terms and non-compliance with the notice in writing was fatal to the case. The Judge dismissed that argument and awarded the respondent damages. The nature of the obligations laid down in section 18 of the Act is the main issue in this appeal.

The History of Statutory Protection for Public Officers

A limitation period with entrenched procedural provisions for actions against public officers, authorities or agents of public authorities may be traced in the history of law to 1898 in English law, the source of our law in this area. By an amendment effected to the then Interpretation and Common Form Ordinance, actions had to be instituted within three months. Subsequently, the time limit looking too short, the period was extended to six months.

This law was extended far and wide to what was then the British Empire, and today the Commonwealth, including Seychelles.

Protection of Public Officers in Seychelles

Section 43 of the Interpretation and Common Form Ordinance (ICFO) provided as follows:

> (1) Every civil or criminal action, suit or proceedings by any person other than the Crown, for any act or omission, against any public officer in the execution of his office, or against any person engaged or employed in the performance of any public duty, or against any person acting in aid or assistance of any such public officer or person, shall, under pain of nullity, be instituted within three calendar months from the date of the fact, act, or omission, which shall have given rise to such action, suit or other proceeding.
> (2) No such civil action, suit or proceeding shall be instituted, unless one month previously written notice thereof, and the subject-matter of the complaint shall have been given to the defendant. And if such notice is given no evidence shall be produced at the trial except of such cause of action as shall be contained in the notice. In default of proof at the trial that such notice has been given the defendant shall be entitled to judgment.

With time, government by public officers became in many cases such as the provision of public services, government by statutory corporations. The protection afforded to public officers had to be extended to the officers of the corporations. That is how section 18 of the Act came into being as no more than an extension of the protection given to the Public Utilities Corporation which by section 43 of ICFO was afforded to public officers.

The interpretation of the procedural as well as the substantive provisions followed English law and were strict. In *Mancienne v Azemia* (1962) SLR 278, the claim was for damages against a member of the Seychelles Police for alleged wrong committed by the latter in the exercise of his duty. The Attorney-General took an objection to the effect that the statutory requirement of section 43(2) of the Interpretation and Common Form Ordinance not having been complied with, the defendant was entitled to judgment.

Souyave J upheld the objection and entered judgment for the defendant with costs against the plaintiff. His reasoning was that the wrongful act took place on 3 December 1961. The action should have been entered within 3 calendar months from that date. The plaint was filed on 6 February 1962. The action was entered within the time period. However, the notice had only been given on 13 January 1961, which was one month and a few days too many. That was held to be non-compliance with section 43(2) and fatal to the case of the plaintiff.

Counsel for the plaintiff had argued that "one month previously written notice" meant “written notice at any time within one month", at least one month between the date of the notice and the date when the action was instituted. Souyaye J reiected that submission. His interpretation was that "although the action may be entered within three calendar months of the act complained of, one calendar month previously written notice must be given before the action is instituted." To so interpret the law,

he relied on the Mauritian decision of *Tronche v Legras* (1925) MR 100 where the text of the law was identical.

It is worth noting that while subsection (1) speaks of one calendar month, sub-section (2) speaks of one month so that to import the word calendar in section 43(2), in our view amounts to judicial legislation. It is unlikely that today such a reasoning would be followed. The trend today is that so long as there is substantial compliance with section 43(2), adherence precisely to the time element should not be fatal to the claim. But that was the era of judicial restraint in interpreting laws passed by Parliament too generously in favour of litigants.

In the case of *Berlouis v Attorney-General* (1963) SLR 57, the question arose as to the meaning of "public officer" in section 43 of the Act. Chief Justice Sir France Bonnetard decided that "the Crown (and for this purpose the Minister or his officers must be regarded as the Crown) is a public authority ..." He cited the case of *Western India Match Co Ltd v Lock & Ors* [1946] KB 606. Interpretation was in favour of protection of the public officer rather than the public.

The authority of the Mauritian case of *Toussaint v Regnard* 1940 MR 65 was also used for interpretation. The facts were that Berlouis had brought an action against the surveyor who had traced a public road and proclaimed another road over Berlouis' property. That had been done pursuant to a Proclamation published under the powers conferred on the Governor of the Colony by section 2 of the Road Ordinance to open up a road in Praslin Island by the name of Anse La Blague Road from the southern boundary of Cotes d'Or Estate to Au Cap, Anse Takamaka, Anse La Blague and Anse La Farine. The plaintiff had refused the offered compensation and decided to sue the surveyor. The Chief Justice decided that the protection applied to the surveyor who was the *préposé* of the Crown.

In the case of *Berlouis v Attorney-General* (supra), it is worth noting that the learned Chief Justice quoted Lord Chief Justice Goddard in *Western India Match Co Ltd v Lock & Ors* (supra) who had qualified the scope of the protection in the following words:

> Whether a public authority is protected by the section depends on whether the act complained of arose out of the discharge of a public duty or the exercise of a public authority...

In the case of *Union Lighterage Co Ltd v Attorney-General* (1967) SLR 43, a worker sued the company for prejudice suffered by him when he was injured when, while removing a bag of copra, a bag of flour slipped and fell upon him in the government customs go-down. The responsibility for showing where the bags should be stacked lay with the government employees. After the worker obtained judgment against the company, the latter sued the government to recover the damages and costs it had paid to the worker. The Attorney-General raised the objection that section 43 of ICFO had not been complied with. The company argued that the cause of action arose from the moment of the judgment so that it was in compliance with the rules. Sir Campbell Wylie CJ held that what gave rise to the action was the acts and omissions which occurred on the day of the accident and not the day of judgment. Interestingly, he made an assessment of the damages nonetheless, just in case the

judgment on appeal was to be allowed on the plea *in limine*. Such were his concerns in which direction the law should turn.

The next case we examine is *D'Offay & Anor v Electricity Department* (1968) MR 143. The plaintiff had sued the Electricity Department for having felled a number of trees on his land, inter alia, coconut trees, takamaka trees and a calice du pape tree. The clearing had lasted a period of time. When objection was taken on section 43 of ICFO, Sir Campbell Wylie CJ decided to look clinically at the dates on which the trees were felled so that he could uphold the objection for some and allow for others. Courts have adopted imaginative ways of doing justice in such cases.

On this matter one may also refer to *Lablache v Government of Seychelles* (1977) SLR 22 where a plaintiff sued five defendants for arresting him on a mistaken belief that he was the escaped prisoner they were looking for. The error was discovered by one of them, a fifth defendant, when the plaintiff was being taken to prison. At the time of his arrest, they had not informed him of the reason for his arrest. However, the reason for which he was arrested was that on seeing the officers, the plaintiff took to his heels and went to hide underneath the bed of a private house. Sauzier J held on the facts that the defendants who had arrested the plaintiff should have informed him of the reasons for his arrest and for that reason they were liable to the plaintiff. Courts have done what courts need to do - to do justice to the case by a proactive interpretation of the law of the land passed by Parliament.

On the other hand, in the case of *Archilles Telemaque v Michel Volcere* (1982) SLR 266, the defendant who was a driver was held to be on a frolic of his own when he caused an accident to the plaintiff. F Wood J held that he was not within the scope of his duty when he caused the accident to the plaintiff so that section 4 of the Public Officers (Protection) Act, the successor to the ICFO, did not apply.

The above shows that the constraints imposed by the law for actions by citizens against public officers or public bodies have been systematically challenged before the courts ever since the nineteenth century. And the courts have been imaginative in striking the balance between the two protections - that to the citizens against the arrogance and abuse of power and that to the public officers useful exercise of power.

The Rationale of the Protection

Limitation periods are not unknown in the history of law. Laws give rights. If those rights are not exercised within a set time or a reasonable time, that right lapses against the person claiming that right in favour of the person against whom it is claimed. Most rights do not have an eternal life. Some have longer lives than others. The law of prescription sets the span of life of the rights. Some rights have to be exercised within days (Mise-en-Demeure); some within weeks (appeals); some within months (employment); some within years ranging from one to as long as thirty (extinctive and acquisitive prescription). The Civil Code has a special chapter on prescriptions based on certain rationalization.

When the limitation period for bringing an action against the State was enacted in 1898 in English law by requiring that actions against public officers should of necessity be instituted within three months, the rationale lay in the protection that should be afforded to public officers in the performance of what was regarded as a public duty. As may be read from the Hansard, the then Procureur-Général's argument was that "with regard to public servants it is admitted in law that they are entitled to a certain protection." As employees of the Crown, they were regarded as public servants discharging a public duty.

The rationale for such a provision was that: (a) public officers needed a special protection by virtue of their commitment to their public office as servants of the State: and (b) diligence in bringing actions will ensure that official records are kept and evidence preserved.

The State as we know it today had slow beginnings. To properly govern over the citizens, to protect and to provide, it had to be empowered and its servants protected. Government was moving from the provision of an army to protect the citizens from the enemy to the more cultured business of providing police for keeping law and order, building roads for facilitating access and post offices for communication etc. It needed empowerment and its servants needed protection.

The Paradigm Shift

In this day and age, the State is regarded as having become too powerful. It is an era when the citizens need protection from the State. The State is engaged both in functions of government for which the citizens are paying through taxes but also in the delivery of services for which the citizens are paying for as services rendered otherwise than through taxes but through a meter. In this new paradigm, it is not the State that needs the protection to deliver but citizen that needs protection so that the State delivers. That is what the Constitution is all about - the pledge of Government to deliver to the people what it undertook to deliver by the Charter of the people. While the need for protection may continue to exist, it would not serve to overprotect at the expense of protections due to citizens by the State, especially where they are paying for the services which are provided by statutory corporations and not by Government as such. All those laws which succeeded ICFO such as the Public Officers Protection Act 1976 (POPA) and section 18 of the Public Utilities Act should be looked at from that angle.

Mitigation of the Rigours of POPA

Accordingly, the vestige of old law with little relevance to the present day has been subject to justified scrutiny and restrictive interpretation against the State. The Judge did not err when he decided that the time limit in section 18 did not apply in the particular circumstances of the case. Section 18 of the Public Utilities Act by its very existence in our statute book should be applied not as a guillotine as before, but restrictively and with imagination.

Attitude of Other Countries to Such Protection

The injustices caused by the short prescriptive periods were variously talked about in the legislature as well as in the judicature of other comparable jurisdictions. In the United Kingdom where it emanated, the rigours were gradually mitigated - the period was first extended from 3 months to 6 months, then from 6 months to a year (1939). Finally, in 1954, on the recommendations of the Tucker Committee, English law removed once and for all that limitation period from the statute book so that today actions against public officers are subject to the same conditions as any other civil actions.

Other States have followed that trend in the Commonwealth.

Australia and New Zealand

Australian states began to follow suit on the recommendations of the Tucker Committee; Tasmania in 1954, Queensland in 1956, Victoria in 1966 and New South Wales in phases until it terminated the limitation finally in 1977. Canada followed - Alberta, British Columbia and Manitoba- see for example, Limitation Act 1979 (BC) 1979 s 15. Abolition has been recommended in Ontario, Newfoundland and Saskatchewan by Law Reform Commissions reports. New Zealand laid the law to rest in 1962.

Other Commonwealth Countries

India has recommended its abolition. So has South Africa. So has Mauritius.

Judicial Attitude in an Age of Universal Access to Justice

The sensitivity of such a limitation period in an age when society is clamouring for universal access to justice, especially 9 months after the cause of action accrued, certainly looks unjustified, unreasonable and discriminatory in that it would deny equal access of citizens to the courts.

With regard to the lack of justification and unreasonability, one may cite the following comment from the Mauritius case of *Jeekahrajee v Registrar of Co-operatives & Anor* (1978) MR 215 where Glover J, as he then was, commented that the law was:

> Unreasonable and may have unjust consequences, as there would be a number of situations where a person would be absolutely unable to present his action before the expiry of the time limit.

The anomaly of shutting the door of a court in a democratic society by reference to the status of the person to be sued is an ignominious vestige of a past State arrogance continuing in the present and to which there should be a legitimate stop. If any limitation is to be put for any reason whatsoever in law — and there are many such limitations existing which are rational - it cannot be by reference to the status of the defendant but to the nature of the action. As the 1969 Ontario Law Commission comments:

> Whether a personal injury occurs on the operating table, on the highway, or on the faulty stairs in a private residence, the same factors are relevant. The

> injured person must have a reasonable time to discover the extent of his injuries, to find out his legal position and to attempt to reach a settlement without bringing an action. Furthermore, an injured person should be entitled to some recovery from his injuries. He should not, in an ordinary case of hospitalization, have to be worried about issuing a writ from his hospital bed.

As regards the discrimination element inherent in the law, we may with benefit refer to the comments of the New South Wales Law Reform Commission. It concludes, endorsing the comment of a leading article in the Australian Law Journal and reproduced in the Law Reform Commission of Mauritius on "Access to Justice and Limitation of Actions against Public Officers and the State" [May 2008];

> The most obscure country shire is to receive notice of claim before any action may be taken against it or its servants. The largest private retail store in which thousands of people pass daily is not to receive such notice. There is discrimination in favour of public bodies as against private persons.

On the constitutional questions raised as regards discriminatory treatment, one may look at the South African constitutional law cases of *Mohlomi v Minister of Defence* [1996] ZACC 20 and *Moise v Transitional Local Council of Greater Germiston* [2001] ZACC 21.

Courts of law in all jurisdictions have been vigilant in ensuring that the rigours of the limitation periods are mitigated today where they are found to be inequitable vestiges of a previous age.

The tendency is for the abolition of what on the face of it has been variously commented upon as undue, unjust and discriminatory in a number of given situations. That is why courts have interpreted its application with circumspection to minimize its adverse consequences to citizens. In many cases in Mauritius, for example, the issue is raised but at the time of argument it is waived as a goodwill gesture. In other cases, courts look at the pleadings and the time it is raised. If it has not been raised at the first opportune time, it is deemed to have been waived by *laches.* In some cases, courts look at the substance of the claim and, if it there is substance in the claim and the objection raised is regarded as a procedural objection to defeat an otherwise substantive action, the court proceeds to hear the substantive claim.

This salutary attitude of the part of the court to restrict the application of such limitation periods which in their effect shut citizens with an otherwise legitimate claim out of court may still be traced to the English courts which restrictively applied the text of the law. Thus, English courts decided that the limitation period of the Public Authorities Protection Act 1893 (PAPA) did not apply to, for example, actions in contract: see *Sharpington v Fulham Guardians* [1904] 2 Ch 449.

Lyles v Southern Corporation [1905] 2 KB 1 confirmed that interpretation. Further narrowing of the scope of such protection when it had to do with statutory public bodies rather than public officers as such, followed. *Fry v Cheltenham Corporation* (1911) 81 LJKB 4 is authority for the fact that PAPA did not apply to cases under the Workmen's Compensation Act 1897. It does not apply to the legislation which repealed and replaced that legislation. Nor did the limitation period apply to the Fatal

Accidents Act 1846 and the later enactment which repealed and replaced that Act: see *British Electric Company Ltd v Gentile* [1914] AC 1034 (PC) and *Venn Tedesco* [1926] 2 KB 227.

The fact of the matter is, however, there are limits up to which, under the separation of powers, the courts could go. It cannot with the stroke of a judicial pen repeal and replace an Act of Parliament, unless it is inconsistent with a particular provision of the Constitution. Laws passed by Parliament may be restrictively or generously interpreted to meet the justice of the case but they cannot be repealed and replaced by the Judiciary. That task lies upon the Legislature. It should be noted that all the jurisdictions where the law was extended did so not by judicial legislation but by parliamentary legislation within the strict parameters of the doctrine of separation of powers. Even then, the parliamentary powers were not exercised with undue haste and arbitrarily but judiciously after reports from law reform commissions. In some cases, the abrogation was incrementally achieved.

On this matter, we may refer to the case of *Gervais Aimee v Phlippe Simeon* SCA 7 of 2000 where the question was raised as to the constitutionality of section 3 of the Public Officers (Protection) Act. The Court of Appeal held, inter alia, that equal protection of the law means the right to equal treatment in similar circumstances and the State retains the power to classify people for a legitimate purpose and that classification of public officers and non-public officers has a purpose and was based on intelligent differentia with a rational purpose behind.

It is our view that we should not in our fledgling democracy proceed with haste in the matter but with circumspection having regard to the separation of powers. That also means that the courts should not abdicate responsibility to do justice to the citizens on a case to case basis which our legal system allows courts to do. *Gervais Aimee v Phlippe Simeon* should be applied on its own facts.

It is also our view that in interpreting section 18 of the Act, a jurisprudence that acts indiscriminately like a guillotine to deny access to a plaintiff with a deserving case should now be laid to rest. A court before which such limitation period is raised should proceed on a case by case basis and examine the facts and circumstances to decide whether justice would be better served by upholding the procedural objection or overruling it. In such an examination and decision, some evidence should be adduced on either side to decide that preliminary issue. The guiding principle should be that the section should be restrictively interpreted and a mere procedural objection should not be raised to defeat a substantive action. If that threshold test is passed, then the court will proceed to the hearing on the merits. One other factor which should weigh one way or the other is whether the objection was taken in a timely manner. If it was taken too late, it should be deemed to have been waived. Another factor should be whether the act or omission complained of was with regard to the performance or non-performance of a function of the officer or the misperformance. If the claim arose with regard to the delivery of services rather than the discharge of a function, the protection is less likely to apply to do justice to the case.

THE DECISION OF THE JUDGE ON THE PLEA IN LIMINE

Grounds 1 and 2

The above preliminary issue was the subject-matter of grounds 1 and 2 whereas grounds 3 and 4 had to do with the merits and may be taken together. It was the contention of the appellant that the Judge erred when he decided that section 18(2) of the Public Utilities Act was not mandatory and non-compliance with its provision was not fatal. It is also argued that section 18(2) makes a distinction between notice and proceedings.

In light of whatever we have stated, we hold that the decision of the Judge was correct when he ruled that in the circumstances of the case, the appellant could not rely on the protection afforded by section 18 of the Public Utilities Corporation Act. We endorse his reasoning insofar as it purports to state that:

(a) The appellant having been fully aware of the act and omission complained of by the respondent at the office of the appellant was deemed to have taken notice of the cause of the action and, accordingly, the conduct of the two parties did not warrant the service of a formal notice;
(b) The appellant having invoked a statutory protection long after filing its defence is deemed to have waived the protection which law affords to it.

We are inclined to believe that the legislator did not mean to cover cases where the Corporation was delivering services to the public but only to those acts and omissions which the Corporation did or did not do in its functional corporate capacity. However, where the Corporation undertook to deliver a service as it did in this case against the payment of rates, the acts and omissions were not one of the Corporation as such, but one of the delivery of a contractual service to the public at large. For these reasons, the protection of section 18 would not apply.

In this case, the grievances against the Corporation do not relate to performance or non-performance of a statutory obligation to do but for misperformance of its statutory obligation to do and to deliver a service. Section 18 did not, in our view, contemplate such a situation, otherwise the legislator in his wisdom would have readily inserted that requirement such as "any act or omission of, or services rendered by, the Corporation." This the legislator did not do.

For those reasons, we uphold the decision of the Judge on grounds 1 and 2 when he decided to proceed to hear the case for the reasons he enumerated.

We may now proceed to consider the merits of the case. Case to be referred to the Registry to fix a date for hearing parties on grounds 3 and 4