IN THE SEYCHELLES COURT OF APPEAL

Gunter Fritz Awege	**1st APPELLANT**
Marija Zlatkovic	**2nd APPELLANT**
V	
Christine Lappe	**1st RESPONDENT**
Heiko Lappe	**2nd RESPONDENT**
Yves Choppy	**3rd RESPONDENT**
(Ministry of National Development and Planning)	

SCA NO 46 OF 2011

Counsel: Mr. B. Hoareau for Appellants

Ms. B. Confait for 3rd Respondent

JUDGMENT

<u>MACGREGOR, P</u>

1. The appellants, proprietors of land at Glacis, Mahé, applied for permission to the Planning Authority to build a walkway across the beach to the seaside. The walkway was necessary as the path leading to the seaside was rocky and dangerous.

2. Following the application a series of discussions and correspondences between two government ministries namely, the Ministry of Land Use and Habitat (which is responsible for the Planning Authority) hereinafter referred to as MLUH, and the Ministry of Environment and Natural Resources hereinafter referred to as MENR took place. MENHR issued the initial permission although the 3rd

Respondent was to later argue that this was a limited permission and had expired in due course.

3. During the trial several contradictory statements were made by the 3rd Respondent; for example, while he stated that there was no planning permission granted, he admitted that planning permission had expired.

4. To further complicate matters, the learned trial Judge makes a finding of 'faute' on the part of the 1st and 2nd Respondents, the neighbouring proprietors who removed the walkway construction. Damages were awarded against them for the appellants whilst a finding was made that there was no planning permission granted for the walkway.

5. The issue arises as to whether there was planning permission granted in this case. Although the word 'planning permission" is used several times no one has pleaded or otherwise stated its legal basis or derivation of legality or authority. Later observations in our decisions will establish its status.

6. For the general public or layman planning permission can be equated to a passport, visa, license or official certificate. It is no ordinary item or object, and has vital consequences giving authority for the use and development of land.

7. The appellants have appealed on the following grounds:

   (i) The learned trial judge erred in law and on the evidence in failing to hold
   that the approval and license granted to the 1st Appellant to build the walkway was granted by the planning Division by virtue of the letter exhibited as P11 and that there was no condition that the walkway was to be for a period of two years only.

(ii) The learned trial judge erred in law and on the evidence in holding that the 3rd respondent was justified in requesting that the walkway be dismantled and in sending the letter exhibited as P15 to Dr Jost. V. Shoenebeck, since P11 contained only two conditions.

8. The pertinent laws in this case are contained in The Town and Country Planning Act 1972, (hereinafter referred to as the Act). The provisions in the Act are not coherently laid out and require one to go back and forth between its different sections, schedules and other subsidiary legislation to obtain the necessary information. The Civil Code of Seychelles also contains salient applicable provisions. Since such laws touch much of the public and affects all land use, there is a need for better clarity to ensure compliance.

9. We have attempted to bring some clarity to this area by setting out what we consider to be the essential and material provisions:

   1. Sections 3 (1) and (2) of the Act establishes the Planning Authority.
   2. Clause 7, Schedule 1 incorporates the Planning Authority as a body corporate.
   3. Section 9(4) of the Act provides for Planning Permission.
   4. Sections 8,9, 11 and Schedule 2 of the Act provides for Applications for planning permission.
   5. The processing of the application is provided for in article 6 (5) of the Town and Country Planning General Development Order (S.I 133/1972) (hereinafter referred to as the Order) and Part 1 of Schedule 2 of the Act.
   6. Clause 11 of Schedule 1 of the Act provides for the Decisions of the Authority.
   7. Article 6 (8) of the Order provides for Reasons for decisions of the Planning Authority.
   8. Article 12 (1) of the Order provides for a Register of Applications.

10. We find it necessary to set out in extenso the following provisions of the applicable law section 9(4) (b) and (c) of the Act –

"(a) Provision may be made by a development order for regulating the manner in which applications for permission to develop land are to be made to, and dealt with by, the planning authority, and in particular …

(b) for requiring the planning authority, before granting or refusing permission for any development to consult with such authorities or persons as may be prescribed by the order or by directions given by the Minister thereunder;

(c) for requiring the planning authority to give to any applicant for permission, within such time as may be prescribed by the order, such notice as may be so prescribed as to the manner in which this application has been dealt with…"

11. Clause 11 of Schedule 1 of the Act in respect of the decisions of the Planning Authority provides:

"Decisions of the authority shall be authenticated under the hand of the Secretary to the Authority."

Clause 6(8) states that:

"Every such notice shall be in writing and where the Planning Authority decides to grant such permission or approval subject to conditions or to refuse it, they shall state their reasons for the decision in writing, and sent with the decision a notification in the terms (or substantially in the terms) set out in Part 1 of Schedule 2.

12. Counsel for the Appellants have also drawn our attention to the provisions of the Civil Code of Seychelles in relation to the interpretation of contracts (Articles 1156 – 1164) and the case of Michel and ors v Dhanjee (SCA 5 & 6 2012) which

is authority that such provisions may be used for interpretation of other transactions.

13. We also find Wade & Forysth on Administrative Law, 10th Edition, of persuasive value especially insofar as the following matters for administrative bodies are concerned : Over rigid policies (page 270), estoppels and misleading advice (pages 281- 285), justification for review on substantive grounds(page 287), confusing terminology (page 292), the rule of reason (page 293) , categories of unreasonableness (page 328), mixed motives (page 349), good faith (page 352) and statutory reasonableness (page 363). We find all these principles applicable in the following case.

14. Wade and Forsyth is particularly instructive insofar as estoppels and misleading advice is concerned, especially insofar as it illustrates the conduct of a planning or public authority and use of its discretion, particularly where it had no authority or mislead the public and applicants for planning permissions.

15. We bore in mind the law outlined and the principles outlined in Wade and Forsysth in relation to the decision making of an administrative authority when examining the evidence adduced in this case. We find that the material evidence in this case to be contained in Exhibits P8 and P11. Exhibit P8 is a letter from the MENR and states that:

> "Reference is made to your letter dated 29th April 2004 regarding the above.
>
> Further to your request a site inspection was carried out on your premises on Sunday 16th May 2004 by officers from the Ministry of Environment and Natural Resources to access possible impacts that the proposal will have on the natural environment.

> Please note that we have no objection to grant approval for the construction of the access. We do not foresee any negative impacts that the proposal will impart on the coastal area. However, since the access is meant to be temporary we would request that it be removed in two years from the date of this note of authority.
>
> We request that you liaise with the Director for Development Control in the Ministry of Land Use and Habitat for final approval for the construction."

16. P11 is a letter from the Planning Division of MLUH and states:

> "I acknowledge and thank you for your response to our letter dated July 28 2004 with regards to the above matter, content of which has been noted.
>
> Kindly be informed that there are no objections conditional to the last paragraph of your letter and that there should also be no removal of rocks by any means on the property.
>
> In the meantime, please do not hesitate to contact the office of the undersigned for any further clarification that you might require on this issue."

17. It must also be noted that an the application for beach access through State land was made by the appellants on 5th May 20004 to the director of Development Control of MLUH, Mr. Meriton.

18. Mr. Rath acting for MENR wrote to the appellants on 17th May 2004 and the following extract is pertinent:

> "Since the access is meant to be temporary we would request it be removed in two years from the date of this authority… We request you <u>liaise</u> with the Director for Development Control in the MLUH for <u>final</u> approval."

19. As is evident from what we have laid out, information and conditions for the building of the walkway was issued by an authority with delegated powers from the planning authority. There is a clear implication that the appellants had to liaise with the MLUH for “final “permission and that therefore what had preceded was a provisional permission.

20. The mischief caused by the blurring of the powers of these two ministries was raised at the appeal. While Mr. Rath from the MEHR ought to have restricted himself to commenting on environmental issues or made a climate impact assessment, he went on and to grant permission albeit provisional. This fact was conceded by Counsel for the 3rd Respondent.

21. The letter of the Director of Development Control of MLUH on 28th July 2004 implies some provisional permission as it draws the appellants’ attention to the fact that since the access will partially affect adjoining private property they need to obtain the landowner’s undertaking that they have no objection to the walkway.

22. The appellants replied to this request from MLUH pointing out that the landowner had left Seychelles more than twenty years ago and requesting permission to proceed with the project notwithstanding. The appellants further undertook to come to some compromise in the event that the adjoining landowner was ever to return and object to the walkway.

23. On 3th August 2004, Mr. Biscornet, then Secretary of the Planning Authority replied to the appellants stating:

> “Kindly be informed there are no objections conditional to the last paragraph of your letter.”

The last paragraph of the letter referred to is in relation to the return of the landowner. On 13th January 2005 Mr. Rath, the Director of Environmental

Impact Assessment of the MEHR wrote to the appellants also referring to the approval granted for the project.

24. Given the evidence set out above it is difficult to understand the position taken by the 3rd Respondent that the walkway was constructed without planning permission. His reliance on the position of his officer, Mr. Biscornet that no planning permission was given is also flawed. On a plain reading of the letter (P11) from Mr. Biscornet we are of the view that planning permission was indeed granted to the appellants for the construction of the walkway. We uphold the decision of the trial judge only insofar as the finding of "faute" and award of damages against the two respondents are concerned.

25. Accordingly we allow this appeal with costs.

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F. MacGregor	Anthony Fernando	January Msoffe
President	Justice of Appeal	Justice of Appeal

Dated this 11th day of April 2014 at Ile du Port,