

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2023] SCCC
CP 04/2021

In the matter between:

WOODLANDS HOLDINGS LIMITED **1st Petitioner**

NABIL ELMASRY **2nd Petitioner**
(rep. by Frank Elizabeth)

and

**MINISTRY OF ENVIRONMENT,
ENERGY AND CLIMATE CHANGE** **1st Respondent**

MINISTRY OF HEALTH **2nd Respondent**

ATTORNEY GENERAL **3rd Respondent**
(rep. by Corrine Rose)

Neutral Citation: *Woodlands Holdings Ltd v Ministry of Environment & Ors* (CP04/2021)
[2023] SCCC (30th March 2023)

Before: Burhan J, Dodin J and Pillay J

Heard: 25th October 2022

Delivered: 30th March 2023

JUDGMENT

BURHAN J (DODIN J, PILLAY J CONCURRING)

[1] This is a matter arising from a referral made by Justice Vidot dated 29th October 2021 to the Constitutional Court which would be under Article 46(7) of the Constitution of the Republic of Seychelles (“the Constitution”).

Article 46(7) reads as follows:

“Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.” [Emphasis added]

[2] The background facts of the case are that the 1st and 2nd Petitioners are the 1st and 2nd Plaintiffs in Civil Suit 101/2019 being heard by Judge Vidot and the 1st, 2nd and 3rd Respondents are the 1st, 2nd and 3rd Defendants in the said case. The 1st Petitioner, Woodlands Holdings Limited is a juristic company that owns about 10 parcels of land situated at Fairview Estate La Misere. The 2nd Petitioner is a director of the 1st Petitioner company and also resident at Fairview Estate. The Respondents are cited as the Minister of Environment, Energy and Climate Change (hereafter “1st Respondent”), Minister of Health (hereafter “2nd Respondent”) sued as employees within the Government of Seychelles. The Attorney General, is included in the civil suit as “3rd Respondent” in his statutory capacity as legal representative of the Government of Seychelles.

[3] The Petitioners maintain that the State remains under a duty to fulfil the obligations to clean the pollution as provided for under Article 38 of the Constitution, and that the Respondents have committed a *faute* by their action/inaction or omission and consequently put the health, safety and environment of the Petitioners in danger, and which persists to date.

[4] The 1st Petitioner as a juristic person is entitled to rights enshrined in the Constitution. On the form of a referral, Rule 10 of the Constitutional Court Rules provides in part thus:

“(1) A reference made to the Constitutional Court by any court of law or tribunal for the determination of the Constitutional Court of any question with regard to the contravention or likely contravention of any provision of the Constitution shall be made in the form of a case stated setting out the facts, the question for

determination and the names and addresses of the parties to the proceedings before that court or tribunal, in respect of which the question arose....”

[5] To that end, Vidot J’s referral reads as follows:

“This matter is being referred to the Constitutional Court in pursuance of Article 14(7) of the Constitution.

During the course of the Plaintiff’s testimony it became clear that the allegation is that the Defendants are in breach of obligations under Article 38 of the Constitution, have failed to provide the Plaintiff with a clean, healthy and ecologically balanced environment. In fact, paragraph 19 of the Plaint, in averring such breach by the Defendants, has listed verbatim as appear in the Constitution, the obligations of the State to provide such safe environment.

The evidence of the Plaintiff also showed that the nuisance being complained of, which is polluting of the environment emanates from a farm of a private citizen. Despite that, the Plaintiff maintains that the State remains under obligations to fulfil the obligations provided under the Constitution. It is to be noted that the person causing the nuisance is not made party to this case.”

[6] Vidot J, went on to lay out the question for determination by this Court, being:

“Whether the obligation entrenched in Article 38 will extend to the State ensuring that private citizens do not pollute the environment and in the case they do for the State to take steps to clean up any pollution caused by such citizens and whether failure to do so may render the State liable to its citizens in damages.”[Emphasis added]

[7] Article 38 of the Constitution of Seychelles reads as follows:

“38. The State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment and with a view to ensuring the effective realisation of this right the State undertakes –

(a) to take measures to promote the protection, preservation and improvement of the environment;

(b) to ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles;
(c) to promote public awareness of the need to protect, preserve and improve the environment.” [Emphasis added]

Petitioners’ Submissions

- [8] The Petitioners submit that as early as September 2018, they lodged complaints with the Respondents, wherein the Petitioners raised concerns about the effusions of waste material polluting a river proximate to the 1st Respondent’s property. That following lodgement of the complaint, tests were conducted by the 1st Respondent on the stream, with the results therefrom indicating an E. coli contamination.
- [9] The Petitioners argue that they indicated to the Respondents that they suspect the source of the E. coli contamination originates from a private farm at the top of the Fairview road, where large scale rearing of livestock is ongoing in a residential area. That despite providing a tip-off of the illegal dumping of animal waste occurring between 7pm - 10pm, no reasonable action was carried out. The 2nd Petitioner furnished the documentary proof of such correspondence with the Respondents.
- [10] The 1st Petitioner contends that the 1st Respondent has failed, refused or neglected to conduct any investigation on the farm to ascertain if it could be the source of the contamination, or to clean up the pollution as mandated by law.
- [11] Furthermore, the 2nd Petitioner challenges the decision of the Government of Seychelles in allowing a resident of Fairview to conduct extensive farming activities, in a residential area, to the detriment of the health of other residents. He avers that this in itself is a serious flaw in the machinery of the government which continues unabated. In effect, the Petitioners are of the view that the government has the duty and obligation towards the Petitioners as stipulated under Article 38 of the Constitution.
- [12] Accordingly, the Petitioners aver that they have suffered loss and damage for which the Respondents are jointly and severally liable to the Petitioners, and the Petitioners thus claim the following damages by way of a civil suit:

- a. Moral damage for inconvenience, anxiety and emotional distress – SCR 1, 000,000.
- b. Moral damage for risk to health, life and livelihood SCR 1, 000,000.
- c. Moral damage for exposure to health risk, annoying smell and unsafe environment SCR 1, 000,000.

Total = SCR 3, 000,000

[13] In addition to the damages claim, the Petitioners seek an order that the Respondents take active steps to identify and eliminate the source of the E. coli contamination forthwith.

[14] The Petitioners refer to Article 46(8) of the Constitution which provides:

“Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause (7), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.” [Emphasis added]

[15] They also invoke Article 46(9) which provides that:

“The court in which the question referred to in clause (7) arose shall dispose of the case in accordance with the decision of the Constitutional Court, or if that decision is the subject of an appeal to the Court of Appeal, in accordance with the decision of the Court of Appeal.”

[16] The Petitioners attached to their submissions a document titled *“Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”* A/HRC/37/59 dated 24 February 2018.

[17] Further, the Petitioners’ advance Article 48 of the Constitution which states that the charter on fundamental human rights and freedoms shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and that a court shall, when interpreting the provision of this Chapter, take judicial notice of, among other things: the international instrument

containing these obligations; or, the constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their constitutions.

[18] The Petitioners also cite the case of *Public Utilities Corporation v Elisa* (20 of 2009) [2011] SCCA 36 (02 September 2011) where the Court recognised the constitutional right of a citizen to a right to a safe environment, as set out in Article 38(a) of the Constitution.

[19] Lastly, the Petitioners refer to Article 46(5) of the Constitution on remedies provided to a person whose constitutional rights have been contravened. Article 46(5) of the Constitution provides that:

“46(5) Upon hearing of an application under clause (1) the Constitutional Court may-
(a) declare any act or omission which is the subject of the application to be a contravention of the Charter;
(b) declare any law or the provision of any law which contravenes the Charter void;
(c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application;
(d) award any damages for the purpose of compensating the person concerned for any damages suffered;
(e) make such additional order under this Constitution or as may be prescribed by law.” [Emphasis added]

Respondents’ Submissions

[20] In their submissions the Respondents refer to Article 38 of the Constitution, and also to sections 42(1), 42(3) and 42(4) of the Environment Protection Act, 2016 (hereafter “the EPA”). They centre on legal questions highlighted below:

First Legal Question: Whether the obligations entrenched in Article 38 of the Constitution will extend to the State ensuring that private citizens do not pollute the environment

[21] On the first question, the Respondents submit that:

- a. The Constitution does not lay down a prescriptive standard of the measures that the State must undertake to promote the protection, preservation and improvement of the environment.
- b. Therefore, that what is required is that the State take measures to help promote these aims, and that the legislative framework, is the way in which the State has sought to ensure that the undertaking has been met in law.
- c. That once a framework is in place, the State may make errors of law in enforcement, but the arena for determining such a challenge would not be a constitutional claim for redress.

[22] Ms. Corrine Rose, learned State Counsel for the Respondents in summary submits that in view of the recognition that several pieces of legislation have been enacted with the aim of protecting and preserving the environment, this demonstrates that the State has taken measures to protect, preserve and improve the environment. Accordingly, that there is no merit in the attempt by the Petitioners arguing that there has been a breach of Article 38 that needs to be addressed in this Court.

[23] Respondents' Counsel concludes that the 1st Respondent has taken active steps to try and identify the source of the E. coli contamination by taking various water samples, conducting site visits, and liaising with other relevant Government Departments in an effort to try and control and abate the said pollution. Further, that investigations are still ongoing.

Second legal question – Whether the State must take steps to clean up any pollution caused by its citizens

[24] On the second legal question, learned Counsel for the Respondent states that it is the responsibility of the person causing the pollution to take steps to it clean up and restore the environment to its prior condition before the pollution occurred, and at their own expense.

[25] Although Counsel recognises that the Ministry is liable to take remedial action where a person fails to do so, she states that the onus is on the person responsible for the pollution in the first instance. Counsel for the Respondents continues to state that, to the extent that

the Ministry has failed to step in upon a failure by a polluter to meet their responsibility under section 42(5) of the EPA 2016, a Petitioner would need to seek redress in the courts in the usual way. Such a claim, she opines, would not be one for the Constitutional Court to address.

Analysis

[26] It is to be noted that this is a referral from the Supreme Court where the Petitioners have sought redress by way of a claim for damages based on *faute*. Therefore the cause of action is a civil suit being litigated in a civil court. This is not a direct application under the Article 46(1) seeking a ruling from the Constitutional Court that their fundamental rights have been breached by the acts or omission of the Respondents. That being so, this Court will look into whether the obligations entrenched in Article 38 extend to the State. If the answer to this question is in the affirmative, the Court will, in line with Article 46(5) render the appropriate declaratory order. In a South African case of ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 106, 208*** the Constitutional Court emphasised the importance of declaratory orders of this kind as follows:

“A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. ... [D]eclaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.”

[27] This case, too, calls for an appropriate declaration of rights and obligations. The 1st and 2nd Respondents repeatedly and emphatically deny any breach of Article 38 of the Constitution and any corresponding duty of the State to require private citizens to not pollute the environment or to clean up in the event there is contamination resulting from pollution. Upon disposing of the constitutional issues in question, the Court will then refer the matter back to the court *a quo* as the court of original jurisdiction.

[28] The Respondents' argument that Government has taken the necessary measures to protect and preserve the environment, thus having fulfilled its obligation in enacting the EPA, which governs environmental protections, and thereafter the State being devoid of any further responsibilities, is untenable. Undoubtedly, in Seychelles, to give effect to Article 38 of the Constitution, the legislature enacted the EPA. The legislature's enacting of the EPA was the primary method in which the actual standards of environmental protection that are represented in the country's constitution are given clarity and substance. While Article 38 provides a broad view of the country's aspirations pertaining to environmental laws and protections, the EPA gives expressions to those imperatives. The environmental provisions are given clarity as the EPA determines precisely what aspects of the environment are protected and the extent to which that protection is provided. They are also given substance through legal mechanisms that can be used in the event of non-compliance. Thus the EPA being as such an extension of Article 38, there needs to be compliance with the EPA to effectively give effect to Article 38.

[29] For instance, section 3 of the EPA states that "*The Ministry for the purposes of this Act shall be the Ministry or Department of the Government under the Minister responsible for environment.*" In this case the Ministry is cited as the Ministry of Environment, Energy and Climate Change (the correct name should be the Ministry of Agriculture, Climate Change & Environment). The functions of the Ministry are provided for by section 4 of the EPA, and these are, amongst others, to —

"(a) administer, implement and enforce the provisions of this Act;
(b) develop and implement policies, programmes and guidelines in pursuance of the national objectives on environment protection;
(c) co-ordinate the activities of other agencies concerned with the protection of the environment (i) under this Act; or (ii) under any other written law for the time being in force which relates to the objects of this Act;..."

[30] The above provision sheds light on who bears responsibility for the administration of environmental matters within the country, and justifies the Respondents' solicitation to the 1st and 2nd Respondents when the environmental predicaments ensued.

[31] Section 14 states that the Minister may prescribe standards for, *inter alia*: (a) quality of air, water or soil for various areas and purposes; (b) effluent limitations for existing and

new point sources; (c) emissions of air pollutants from mobile and stationary sources. Advisedly, section 64 enjoins the Minister to establish laboratories for conducting tests of samples to determine whether there has been pollution or not. The above justifies the Petitioners' legitimate expectation that the Respondents should provide answers to questions of pollution and act decisively, as they have both the authority and apparatus to detect and correct in the event of breach of the EPA.

- [32] Section 55 proscribes any project or activity, where in the Administrator's opinion, such project or activity involves an imminent risk of serious pollution of the environment. In such instances, the Administrator may cause to be served on the person owning, or managing, or in charge of, or in control of the project or activity a prohibition notice, whether or not (i) the activity is in contravention of the EPA or (ii) there is in force in relation to that project or activity, a licence, permit or approval issued under the EPA or under any other Act. Respondents' Counsel, Ms. Rose confirmed that the alleged polluter is a licensed farmer. Being so licensed to farm, upon discovery that the farming project or activity might involve an imminent risk of serious pollution, should have triggered this section (and others discussed below) to ensure that the pollution is put to a stop.
- [33] Correspondence submitted by the Appellants provides evidence of the Respondents being notified of the pollution, as far back as September 2018. The inordinate delay of more than four years in investigating and reaching finality in this case could be interpreted to mean that the Respondents have failed in effecting the provisions of the EPA, and by extension, Article 38.
- [34] In a case heard at the Inter-American Court of Human Rights of ***Indigenous Community Members of the Lhaka Honhat (Our Land) Association vs. Argentina (IACtHR), 2020***¹ where indigenous community members from Lhaka Honhat sued the Argentinian State for, among others, failure to protect their rights to a healthy environment. The court analysed the rights to a healthy environment under Article 26 of the Convention, and found that activities like illegal logging carried out by the Creole settlers detrimentally

¹ *Indigenous Community Members of the Lhaka Honhat (Our Land) Association vs. Argentina*, Accessed online at <https://www.escr-net.org/caselaw/2020/indigenous-community-members-lhaka-honhat-our-land-association-vs-argentina> on 24 March 2023.

affected the Indigenous communities' way of life and access to water, food, and a healthy environment. The State was aware of these harmful activities and their impact on the Indigenous communities' way of life and did not effectively stop them. The court further held that because the detrimental activities were not consensual, Argentina failed to guarantee the Indigenous communities the right to determine activities done on their property and violated Article 26 and 1.1 in connection with the rights to a healthy environment, adequate food, and cultural identity.

[35] Although in this example, a convention and not a provision of a constitution was violated, however, it should serve as a pattern which a court may follow where person/s suffers environmental harm caused by the unlawful conduct of a third party, and the State, which through its duly constituted and authorised government agents fails to stop this illegal conduct or to correct it.

[36] In the present matter, the Respondents have not responded with the agility and urgency necessary in cases where the environment is under threat. In the case of ***R v Allen SSC 11/2003, 6 April 2004***, the Court stated that the precautionary principle is an essential feature of sustainable development. This principle means that the State and other statutory authorities must anticipate, prevent, and address the causes of environmental degradation. In the present circumstances, the degradation resulting from possibly human conduct.

[37] While the identity of the polluter is unknown, evidence that the area in question is polluted is not controversial and is not in dispute. In addition, the pollution was identified as contamination from E. coli. With the fact of the pollution being in unanimity, the State becomes answerable to its citizens by virtue of Article 38, and upon dereliction of its responsibility, it becomes liable to the same citizenry.

[38] While it is true that Article 40(e) of the Constitution accords responsibility to all persons within Seychelles, in so far as it states "*It shall be the duty of every citizen of Seychelles... (e) to protect, preserve and improve the environment,*" the Respondents' view that the onus is on the person responsible for the pollution to pay and not on the State is incorrect in that it appears to exempt the State from its obligations in terms of the EPA, these

being; to investigate the pollution, to issue directions, to take action or measures aimed at abatement of pollution, and to take further action in the event of failure to take remedial action.

[39] Apart from testing the water, the State has not provided any outcome of further investigations despite their assertions that investigations are ongoing. Therefore, it cannot be said that the State has effectively given effect to the Article 38 right to a safe environment, since the pollution still persists. When presenting her submissions in court, Counsel for Respondents was asked by the Court whether the contamination emanated from the farm, to which Ms. Rose informed the Court that tests were conducted on the farm but that *“they did not find anything like any leakage or anything that could have come from the farm itself that could have gone into the river.”* Yet earlier Ms. Rose had informed the Court of the State’s limited resources to make a precise determination as to the source of the contamination. These assertions are conflicting. Ms. Rose even went to the extent to invite the Court to do an inspection *in loco*, to which the Court responded that such would not be helpful as investigations of this nature require specialised skills and apparatus.

[40] Be that as it may, the EPA makes provision for steps to be taken in the event of/or suspected pollution. Section 42 provides that where there is an occurrence of pollution, the Ministry may take such action or measures as is necessary to control or abate such pollution. *In casu*, apart from testing the water source, the Respondents have not provided proof to show that they took measures to control or abate the pollution.

[41] With the offender yet unknown, section 42(2) cannot be put into effect as well, through directions by either the Minister or other designated staff, to such polluter to take the necessary actions or measures to control or abate the pollution.

[42] So too are subsections (3) and (4) which state as follows: -

“(3) The person responsible for causing pollution or the likelihood of pollution for which any action measures are taken under subsection (1) or (2) for the prevention, control or abatement of such pollution, shall bear the cost of taking of such action or measures.”

(4) Where any pollution has occurred, the person responsible for causing the pollution shall – (a) be liable for payment of compensation for any loss or damage to the environment as a result of such pollution; and (b) at that person’s own cost, restore the environment to close approximation of its condition prior to disturbance.”

[43] Notwithstanding the above provisions, with the polluter still unidentified, sections 42(5) provides that:

“Where a person fails to comply with subsection (4)(a), the Ministry may carry out such works as are necessary for such restoration and recover the cost from that person.” [Emphasis added]

[44] Accordingly, where a polluter fails to clean up the contamination, or, as in the present circumstances, not yet ascertained, the Ministry may do whatever is necessary to restore the environment, and recover from the polluter (once discovered). Once again, there is no proof that the Ministry took any action to clean up or restore the polluted river, and neither is there proof of cleaning costs expended to that end.

[45] Clearly the Constitution and the authorities cited above provide clear guidelines for the protection of every person’s right to enjoy a clean, healthy and ecologically balanced environment, and the State’s obligations ensuing therefrom. Considering the various avenues available to the 1st Respondent in terms of the law, it is unconscionable for the Respondents to argue that the State has taken all reasonable and necessary measures to protect and preserve the environment, or at least to bring the matter to a conclusion, or at least to adduce evidence in support of those assertions.

[46] Furthermore, the State has a responsibility under section 43(1)(b)(i) of the EPA to separate farmland from residential areas. Additionally, they are to equip themselves with the tools to properly determine sources of pollution in the environment.

[47] Accordingly, seeing as legislation exists that seeks to give effect to Article 38 of the Constitution, the relevant government departments are obligated and it is their duty to conduct the necessary investigation and to take the measures necessary to clean up the pollution in the river and surrounding environment. The South African Constitutional Court in the case of *Mwelase and Others v Director-General, Department of Rural*

Development and Land Reform And Another 2019 (6) SA 597 (CC) at para 51 declared that “*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility,*” particularly in cases of executive foot-dragging and inordinate delay is illuminating.

[48] The sitting judge in our view is therefore empowered to consider the evidence before him and come to a finding as to whether the State has taken all the necessary measures to promote the protection, preservation and improvement of the environment, and take remedial action against the polluter as empowered by the EPA.

[49] Accordingly, the declaratory pronouncements of this Court follow:

- a. It is declared that the poor water quality in the Fairview Estate La Misere Area is in breach of residents’ Article 38 constitutional right to an environment that is not harmful to their health and well-being.
- b. It is declared that the State has a legal duty to clean the contamination under section 42(5) of the Environment Protection Act, 2016 to implement and enforce the provisions of Article 38 of the Constitution.
- c. It is declared that the Respondents have unreasonably delayed in conducting the investigation in terms of section 61 of the EPA and to resolve this matter.

The Constitutional Questions

[50] As per the referral, the questions to be determined by the Constitutional Court are:

- (i) whether the obligation entrenched in Article 38 extends to the State, to ensure that private citizens do not pollute the environment;

Answer --Yes
and in the case they do

- (ii) whether there is an obligation on the State to take steps to clean up any pollution caused by such citizens;

Answer--Yes

(iii) whether failure to do so may render the State liable to its citizens for damages.

Answer – Yes

[51] We refer the case back to Vidot J to determine the Petitioners' claim in accordance with the considerations and findings of the Constitutional Court.

Signed, dated and delivered at Ile du Port on 30th March 2023

M Burhan J.

G Dodin J

L.Pillay J