IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC102/2014

[2016] SCSC 865

Michel Ramgasamy

Plaintiff

versus

Chief Executive Officer of Planning Authority

Defendant

Heard: By written submissions dated 22nd August 2016 and 14th September 2016

Counsel: Mr. Bernard Georges for petitioner

Mr. Chinnasamy Jayaraj for respondent

Delivered: 10th November 2016

JUDGMENT

M. TWOMEY, CJ

[1] This is an application for judicial review of an administrative decision. The Petitioner is the owner of land, namely Parcel V11092, at Greenwich, Mont Buxton, Mahé and the Respondent is a statutory body charged with granting development permission in Seychelles.

[2] By a petition filed in October 2014, the Petitioner averred that he gave permission to one Regis Bethew to construct a dwelling house on his land. Planning permission for the development was subsequently granted to Mr. Bethew by the Respondent.

[3] On 30th April 2013, the Respondent issued a stop notice of the said development on the grounds that the development would sever an access path used by residents in the area. The Respondentfurther instructed the Petitioner to seek redress in court to declare the said access across his land illegal if he so wished.

[4] The Petitioner avers that the Respondent acted irrationally and unreasonably by placing the burden of proof upon him to prove the existence or non-existence of the right of way.

[5] The Petitioneraccepts that he was out of time in terms of filing his application for administrative review but sought leave of the court to proceed with the review nevertheless.

[6] He also seeks a writ certiorari quashing the decision of the Respondent as a remedy for the unreasonable and illegal act of the Respondent.

[7] In his response to the petition, the Respondent avers that the stop notice was justified given the fact that had the development proceeded, the pathway would have been severed. He adds that the notice was issued in good faith with a view to having the matter resolved by a judicial finding.

[8] Further, the Respondent avers that had the development been allowed to continue there would have been a likelihood of the PlanningAuthoritybeing sued by third parties in respect of the alleged right of way.

[9] The Respondent further prays that the mattershould not be entertained by the Court given the issue of prescription relating to the application notwithstanding the Petitioner's application for leave to hear the review out of time.

[10] Before reviewing the decision of the Respondent, the Court made an order that the administrative file in the matter be submitted to the Court for perusal and the same was complied with.

[11] A perusal of the file shows that a formal approval of the Petitioner's promisee'sapplication was made by theRespondent on 15th May 2012. On 20th August,the promisee, Mr. Bethew informed the Respondent that he was commencing the approved development.On 18th March 2013 the following letter was sent by the Respondent to Mr. Bethew:

I write in respect of the above subject matter and wish to inform you that on issues raised in respect of the approved development on parcel V11092, we have observed that you are with your project blocking an access crossing your property. The access we understand has been in existence for many years on your property and still being used by the public.

I note that this was not depicted by your Agent when he submitted plans for the above application to the Planning Authority and onto which we based our final decision to approve your proposal.

Nonetheless, I wish to inform you that at no time should you block the existing access on your property and also wish to draw your attention to conditions of your approval which specifically speaks about obstructing of accesses. I wish to refer you to the highlighted on the attached document.

In the event that you intend to discontinue with the existing access, you should further apply for approval with the Planning Authority or make provision for a new one on your property.

Meanwhile, I thank you for your cooperation in this matter and look forward for your full compliance to all Planning Authority and Department of Environment approved conditions.

[12] On 4th July 2013 after further communication, the Respondent again wrote to Mr. Bethew. The following is a relevant extract of the letter:

Having perused and studied the case extensively, based on facts and information presented to the Planning Authority, there is no evidence to suggest positive or not, that there is no access issue on the parcel under development by you, viz DC/300/12. You will agree that giving permission to build in a manner that will severe and or impact on an

access on the property could have resulted on an oversight on our part and it is logical for us to do what it takes to address same before it is too late.

Having met with the parties concerned, I can safely conclude that the current issue is not for the Planning Authority to determine but that of a Court of Law. In this respect and as explained to you this morning, I advise that you seek redress in Court and obtain a Court Order to declare the access on the property in question is illegal. Only then will the Planning Authority be in a possition to lift the stop notice to allow for the continuation of construction of the already approved development on the parcel.

It is my hope that this clarifies the matter and we are doing the necessary to regularise any wrong doing on parcel V11092.

[13] Counsel for both the Petitioner and Mr. Bethew, Mr. Georges, wrote to the Respondent on 31st August 2013. The relevant part of the letter is as follows:

We are instructed to bring to your attention that you are placing the burden on the wrong person. Rather, it is to those claiming that they have a right of way to prove the same to your satisfaction. The law in that respect is clear and is to be found in the following places:

(a) Article 682 of the Civil Code grants to an enclaved owner of land a right to claim a right of way from his neighbours.

(b) Article 688 states that a right of way is a discontinuous easement.

(c) Article 691 provides that discontinuous easements can only be created by written agreement and not a long user. The case of Houareau v Ah-Tive (1979) SLR 38 is authority for the proposition that a right of way can also be granted by court order.

(d) Article 701 allows a landowner to propose an alternative easement to someone who has one and that cannot be refused.

We are instructed that there is neither an agreement nor a court order in favour of those who use the access over parcel V11092. Despite that, we are instructed that the owner of

parcel V11092 has offered an alternative access of equal convenience to those who were using the path where our client is preparing to build.

On the basis of the foregoing, we are to request you to reconsider your stop notice and to request – as the law provides – those who have objected and who use the alleged right of way to accept the alternative provided to them or, if they feel that that is not convenient, to apply to the court for a right of way. Until they do, they only have a theoretical right under article 682. This gives them no actual rights whatsoever. If they apply to the court, they may seek an interim injunction restraining the construction by our client. This will then bind you. In the absence of any court order, we are to advise you that your action is contrary to the law and reverses the legal obligations of the parties.…

[14] In reply, the Respondent informed Counsel that the matter was being referred to the Planning Authority's legal advisor but notwithstanding took the view as expressed in the following extract of the letter of 6th September 2013:

…*we remain convinced that the Planning Authority should not and will not allow for the undertaking of any development that anticipated to block and/or obstruct (legal or not) on any parcel of land* (sic).

[15] No other correspondence is present on the file to indicate that the Planning Authority's decisionwas ever reversed. Mr. Bethew's development was therefore not proceeded with. Instead a scaled down development not encroaching on the alleged right of way was eventually granted planning permission and proceeded with.

[16] ***Leave for review***

[17] The Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authority) Rules 1995 (The Rules) made pursuant to Article 136(2) of the Constitution provides for the limitation period for applications for the review of administrative decisions. These rules provide in relevant part:

…

1. (2) These Rules provide for the practice and procedure of the Supreme Court in respect of an application for the exercise of the supervisory jurisdiction of the Court over subordinate courts, tribunals and adjudicating authorities.

2.(1) An application to the Supreme Court for the purposes of Rule 1(2), shall be made by petition accompanied by an affidavit in support of the averments set out in the petition.

…

4. A petition under rule 2 shall be made promptly and in any event within 3 months from the date of the order or decision sought to be canvassed in the petition unless the Supreme Court considers that there is good reason for extending the period within which the petition shall be made.

[18] Since the stop notice was issued on 30th April 2013, strictly speaking, the petition should have been promptly brought but in any case not later than 30th July 2013. It was however brought eighteen months later. The Petitioner, who prays the court to exercise its discretion and to nevertheless hear the petition, acknowledges this fact. The Respondent in his pleadings has taken the position that on this ground alone the petition should not be entertained.

[19] However, the Court was never addressed on this issue and the written submissions from Counsel make no mention of this fact. Further, Counsel for the Respondent does not make any objection to the substantive issues being adjudicated by the Court in his written submission. In any case, given the fact that negotiations on the stop notice seem to have been on-going between the parties, it is reasonable to infer that a final decision had not been reached on this issue by the Respondent. It is difficult in such circumstances to ascertain when the clock started to tick in terms of the limitation period.It would therefore be proper in this case for the court to exercise its discretion and to hear the matter.

[20] ***Locus standi and powers of the court to review administrative decisions***

[21] The Petitioner submits that the petition for judicial review is brought pursuant to The Rules. As stated above, The Rules allow the court power to supervise decisions of public

authorities (adjudicating authorities). They are made in accordance with Article 125(1) (c) of the Constitution which provides that the Supreme Court shall have:

supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction.

[22] In*SIBA v Jouanneau and anor*SCA 40 and 41 of 2011, the Court of Appeal held that in exercising its supervisory powers, the Court may be guided by English administrative law precedents that have application in Seychelles bearing in mind that the reform brought about by Rule 54.19 (Civil Procedure Rules) UK (White Book) and section 31 of Senior Courts Act 1981 do not apply to Seychelles. Nevertheless, as was also pointed out in *SIBA,* decisions given by the courts of England after 1976 continue to have strong precedential value as long as they do not concern English statutory amendments to the procedural rules after that date. The use of such precedents is especially important given the nascent stage of Seychellois administrative review law.I will therefore be guided in the examination of the decision making process in this suit by both Seychellois and English jurisprudence.

[23] Although, the Respondent has not taken a position with regard to the issue of the *locus standi*of the Petitioner, Mr. Georges for the Petitioner has submitted that the Petitioner has sufficient interest in bringing the application for judicial review. He does so given the provisions of The Rules which state in relevant part:

6. (1) The Supreme Court shall not grant the petitioner leave to proceed unless the Court is satisfied that the petitioner has a sufficient interest in the subject matter of the petition and that the petition is being made in good faith.

(2) Where the interest of the petitioner in the subject matter of the petition is not direct or personal but is of a general or public interest, the Supreme Court in determining whether the petitioner has a sufficient interest in the subject matter may consider whether the petitioner has the requisite standing to make the petition.

[24] Hence, every petitioner must satisfy the court that he has sufficient interest in bringing an application for judicial review notwithstanding the position of the Respondent on the matter.

[25] Mr. Georges submitsthat given that the stop notice was issued to the permisee of the Petitioner, the latter is best placed to bring this matter. I agree. It is clear that as the owner of the land and the permissor of the building development from which this suit arises, the Petitioner is indeed best placed to issue proceedings against the Respondent. Little more need be said about this issue.

[26] ***Review of the Respondent's decision.***

[27] The substantive ground for review of the Respondent's decisionis that the decision of the Respondent was irrational and unreasonable. In his written submission, Mr. Georges for the Petitioner relies on the authority of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the *GCHQ* case) in which Lord Diplock, summarised the law of judicial review, enumerating three principles as the benchmarks of good administrative decision-making: legality, rationality and procedural propriety.These have developed into the three main grounds for judicial review: illegality, irrationality and procedural impropriety. Mr. Georges submits that the Petitioner's application is based on the second of these grounds, that is, irrationality.

[28] He further submits that the principle of irrationality can be likened to *Wednesbury*unreasonableness (See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1947 2 All ER 680).

[29] In *GCHQ* (supra), Lord Diplockhaving created the ground of unreasonableness preferred to use the term *irrationality* to express what it meant in the decision-making process as follows:

By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury's unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[30] It is clear from administrative jurisprudential development that the two grounds have overlapped and merged. In *Boddington v British Transport Police* [1998]2 AC 143, 152E-F (where Mr. Boddington was caught smoking in a railway carriage where smoking was prohibited and convicted and fined by a magistrate under a by-law made under the Road Transport Act 1962) Lord Irvine of Lairg LC stated that:

The various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result.

[31] Similarly, in *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254 (CA), 280 (which involved a judicial review of the lawfulness of an orderrequisitioning a factory) Lord Donaldson MR stated:

It would be a mistake to approach the judicial review jurisdiction as if it consisted of a series of separate boxes into which judges dipped as the occasion demanded. It is rather a rich tapestry of many strands, which cross, re-cross and blend to produce justice.

[32] Hence, while Mr. Georges has based his submissions solely on *Wednesburyreasonableness* and irrationality, it has become imperative for the court to take into account all the different waysthe decision-making might have been flawed in the present case.The umbrella principle of unreasonableness includes adecision-making process that may have been illegal, unreasonable, unfair or, ultra vires and alone or together articulate the unease with which a reasonable person might view a decision taken. Sometimes, the disquiet brought about by a decision may not fit into any of the above labels but nevertheless amount to a defect which fails the scrutiny of any reasonable person when reviewing the decision.

[33] In thepresentcase, the decision of the Respondent was that the Petitioner should not proceed with an approved development for fear thatthird parties might object since the development might sever a right of way (emphasis intended). The Respondent at the time of making his decision was aware that no such right of way existed at law. This had been brought to his attention.Notwithstanding, hewas presumed to know the law in any case.

[34] ***The law relating to rights of way***

[35] The law relating to rights of wayis clearly stated in the Civil Code and in jurisprudence. First, Article 639 states:

An easement arises either from the natural position of land or from obligations imposed by law or from agreements amongst owners.

[36] In addition, Article 682 provides in relevant part:

1. The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause (emphasis mine).

[37] Article 691 also provides in relevant part that:

Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title.

[38] In addition, section 52 of the Land Registration Act (LRA) provides in relevant part:

(1) The proprietor of land or a lease may, by an instrument in the prescribed form grant an easement to the proprietor or lessee of other land for the benefit of that other land.

(2) The instrument creating the easement shall specify clearly:

(a) the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and

(b) the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and

(c) the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.

…

(3) The grant of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the register of the land which benefits, and filing the instrument (emphasis mine)

[39] The principles that we can distil from all the above provisions read together are that an agreement among owners can create a right of way but that the agreement shall only have effect if created by a document of title, which is registered. In addition, based on Articles 639 and 682 (supra), where land is enclaved the owner of the dominant tenement may apply to the court to have a right of way across a servient tenement. Court orders in this respect are also registered.

[40] There is also *jurisprudence constante* that a right of way requires a document of title or an order of the court (see *Hoareau v Ah-Tive* (1979) SLR 38, *Payet v Labrosse and another* (1978) SLR 222 and *Delorie v Alcindor and another*(1978-1982) SCAR 28, *Sinon v Dine* (2001) SLR 88, *Laurette v Sullivan* (2004) SLR 65, *Umbricht v Lesperance* (2007) SLR 221).

[41] The law is also clear on the fact that it is incumbent on the person who seeks the right of way to prove it by registered title deed or to claim it in court. The owner of the servient tenement need not prove anything and the dominant tenement is only burdened by registered easements arising from title or court orders (see article 682 above).

[42] The stop notice was issued under Section 14 of the Town and Country Planning Act which provides in relevant part that:

(1) If it appears to the planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this part, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then the authority may at any time, if they consider it expedient so to do having regard to the provisions of the development plan in force and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

[43] The exercise of the discretion of the Planning Authority to stop a development is only triggered if a developer proceeds without planning permission or fails to meet the

conditions of the planning permission granted.In such cases the provisions of the development plan and material considerations are taken into consideration. Neither of these two eventualities was present. What is even more disturbing in the present suit, is that the Respondent was informed of the legal provisions applicable in claims for rights of way by both the Petitioner's attorney and his own legal advisor but refused to act on their advice.

[44] In flouting these legal considerations the Respondent acted unlawfully and ultra vires his powers. He has infringed provisions both the Town and Country Planning Act and the Civil Code.

[45] As Lord Bridge stated in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597 D-E:

If the court concludes …that a minister's exercise of a statutory discretion has been such to frustrate the policy of statute, that conclusion rests upon the view taken by the court of the true construction of the statute which the exercise of the discretion in question is then held to have contravened. The administrative action…is then condemned on the ground of illegality. Similarly, if there are matters which, on the true construction of the statute conferring discretion, the person exercising the discretion must take into account and others which he may not take into account, disregard of those legally relevant maters or regard of those legally irrelevant matters will lay the decision open to review on the ground of illegality.

[46] While Mr. Georges has submitted that the Respondent has acted irrationally, it is the court's finding that the review of decision he took should also succeed on grounds of illegality. The court in the instant case does make the conclusion that the decision of the Respondent was open to review. This conclusion is based on the fact that the Respondent acted in disregard of the correct legal provisions relating to easements and without authorisation under the relevant law relating to stop orders. The Respondent chose instead to be misguided by irrelevant matters. His decision to issue the stop notice was therefore, illegal, irrational and unreasonable.

[47] In the circumstances I quash the decision of the Respondent dated 30th April 2013. No application was made for costs and I therefore make no order in this respect.

Signed, dated and delivered at Ile du Port on 10th November 2016

M. TWOMEY
Chief Justice