

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 104/2015

[2017] SCSC 851

VIVIANNE DAVID AND ORS

versus

THE PUBLIC UTILITIES CORPORATION
Respondent

Heard:

Counsel: Mr Derjacques for the Plaintiffs
Mr Rajasundaram for the Respondent

Delivered: 15 September 2017

JUDGMENT

R. Govinden, J

[1] The Plaintiffs are owners of land Parcel T281 found at Takamaka, Mahe. The Plaintiff's case is that the Defendant, also hereinafter referred to as "The PUC", is a statutory corporation which has one of its principal function, the provisions of water supply. According to the Plaintiff on the 30th June 2016 the "PUC" notified them of its intention to lay water pipes on their property at Takamaka, Mahe and in pursuant to that they were asked to sign an Easement Agreement. The second and third plaintiffs testified that they refused to sign this Agreement and notwithstanding that the Defendant did carry out the

water pipe laying work on their land. It is the Plaintiffs' case, that the act of laying of the pipe by the Defendant constitute a trespass and a violation of their constitutional rights to ownership and as such the Defendant ought to compensate them the sum of SR500,000, for loss and damages.

- [2] The Defendant does not deny the fact that they did lay the pipes on the property of the Plaintiffs. However, it claims that it lay the pipe on a very minimal portion of the Plaintiffs' property. This, after repeated refusal on the part of the Plaintiffs to allow them to exercise their statutory powers to lay down the pipes.
- [3] The Defendant avers that the laying of the pipes is in the national interest and part of the South Mahe Water Project and that this does not affect the use and enjoyment of the Plaintiffs' land. Moreover, it is the Defendant's case that all its actions are lawful and therefore cannot constitute any breach of any constitutional rights of the Plaintiff. As a result the Defendant avers that the Plaintiff is not entitled to any damages and that in any event the damages claimed is grossly exaggerated.
- [4] The Plaintiffs called two witnesses in support of their case. The first witness is Mivonne David, being the second Plaintiff. She testified that she, together with the other Plaintiffs, resides on Parcel T281 at Takamaka, Mahe. The draft agreement issued by the PUC to the Plaintiffs, in which the Plaintiffs were requested by the PUC to sign in order to allow them to lay the pipes, was produced by this witness as evidence. Following receipt of this draft order, the Plaintiff acknowledge that the attorney of the Defendant sent them a letter requesting them that they sign the Easement Agreement. This witness produced a number of documents depicting images of the agents of the Defendant excavating and laying the pipes on the Plaintiffs' land. Mivonne David says that the acts of the Defendant consist of stealing their properties. The agents of the Defendant were present on their property for about one month and she said that she is claiming the sum of SR500,000 for damages incurred as a result. She testified that she did not think that the water was supposed to be for Takamaka residents. And that the pipe laying would have prevented further development on her property. She testified that she's aware that the PUC had also laid pipes on other properties in the vicinity as part of the project. It is her testimony that there have been many verbal requests from agents of the Defendant to the pipe laying.

However, she was adamant that the PUC should not have built on their land given that there was no permission on their part.

- [5] The other witness was Natalie David. She produced an engineering detail plan setting out in detail the pipe laying project at Takamaka. She said that the Plaintiff objected to the pipe laying because they felt that the water was not in the public interest and it was being laid to provide water to a tourism development that was to take place at Grand Police, Mahe, something that they objected strongly as a matter of principle. She further testified that PUC could not guarantee to the Plaintiff that the water supply was not for the future Grand Police hotel development. She said that as a result she initiated this case. She claimed that the pipe laying and encroachment onto her land is not very far from her house and is nearly 20 meters.
- [6] The Defendant called one witness, Mr Livio George D'Offay, a civil engineer, employed by the Defendant as a project Coordinator. The witness testified that the South Mahe Water Project that exist on the Plaintiffs' property is in the national interest. It starts at Port Glaud and end up at Takamaka. It was designed to allow for the transportation of water in the drought period from Port Glaud to Takamaka. He says that it has served and serves many communities and would allow the PUC to provide water to those communities, especially during the drought season. And it would consist of also reducing the amount of desalinated water being used which is not very popular. The witness says that he is aware that there are issues relating to the encroachment of the Plaintiff's property by the pipes. And that the Defendant had, on numerous occasions, requested the Plaintiffs verbally and in written form, consent for the pipe to be laid onto their property. But that this was refused. He says that the distance between the pipes and the Plaintiffs' house is 35 meters and that they have minimised the construction on the property by building underground and sometimes putting pillars.
- [7] He says that, as to the Grand Police Project, that he informed Vivianne that he could not give an assurance that the water would not go up to the Grand Police Hotel development in the future but what he can say is that as, for the time being, the water was to stop at the Quatre Bonne Reservoir.

- [8] Counsel for the Defendant in his submission relies on the statutory powers of the Defendant. He argues that under Section 3 of the Public Utilities Corporation Act, the Defendant has power to enter into the land of anyone in order to lay out pipes as part of its lawful duties and this includes laying over the pipes. He further argues that the failure on the part of the Plaintiffs to accede to the several verbal request for permission to lay the pipes and the statutory notification issued to them within reasonable time called for the Defendant to act in the public interest and carry out the work.
- [9] Counsel submits that the extent of the damage on the Plaintiffs' property is very minimal and the pipes were laid adjacent to the main road away from the Plaintiffs' house. Counsel further submit that the conditional acceptance on the part on the Plaintiff, which effectively shows that they were willing to give their consent subject that it does not serve and give water to the future Grand Police water project show that they were indeed ready to give their permission and that permission was being refused in bad faith. And that at any rate that this condition is *ultra petita* given that it is not averred in the plaint. The Defendant's counsel further submits that the Plaintiff has not submitted any proof in support of their claim of loss and damages as to their suffering and loss as a result of the pipe laying project. And that this has to be proved through evidence.
- [10] On the other hand, the Plaintiffs' counsel submitted that the Plaintiffs were entitled to sign an agreement and grant an easement to the PUC. However, the Plaintiffs refused based on the fact that there was no compensation offered or paid and that their land would not be transferred. He further submitted that the said water pipes were not to transport water for project at Takamaka but for a hotel development at Grand Police which the Plaintiff objected as against the environment. The Plaintiffs' counsel further submitted that the laws and regulation must be read in context of the Plaintiffs' constitutional right to ownership of land. It is his submission that the Plaintiffs cannot be deprived of their rights to ownership and that in order for land acquisition to take place compensation must be paid. Further, it is submitted by counsel that in all circumstances trespass without permission or authority was unlawful. Mr Derjacques further submitted that the development make the land unusable and was also tortious and unlawful.

[11] The law governing the facts of this case is found in the Public Utilities Corporation Act and Regulations and the (Civil Code of the Seychelles Act).

[12] Having scrutinised the pleadings before me, the evidence and arguments of both counsel, I find as follows:-

[13] The statutory authority of the PUC to provide water supply in Seychelles in the national interest is found in Section 5 of the Public Utilities Corporation Act.

Section 5 (1) provides the function of the Corporation shall be:

(a) To supply electricity

(b) To supply water

(c) The provision of sewage

(d) Such other function as maybe confirmed on the Corporation by any other act or by any regulation made under this act.

Section 5 (2) further provides that, regulations may provide for all matters in respect of the functions of the Corporation.

Section 6 (1) further provides that, subject to this Act, the Corporation shall have powers to do all that is necessary or consequential to be done for or in connection with or incidental to the exercise of their functions.

[14] Regulations have been made in pursuance to Section 5 (2) of the PUC Act. This is the Public Utilities Corporation (Miscellaneous) Regulations 1995.

[15] Regulation 3 of this regulation provides as follows:

3 (1) Any employee of the Corporation, with such assistance as it is necessary, may, at any reasonable time enter upon any land or premises for the purpose of exercising

the functions of the Corporation and may occupy such land to carry out thereon any prescribed Corporation.

3 (2) “Prescribed operations” in relation to the supply of water and provisions of sewage inter alia, means the following

- (i) The constructing, building, placing or laying, plant, machinery, pipe, sewers or mains.
- (ii) maintaining, removing, demolishing or replacing plant machinery, equipment, pipe, sewers.
- (iii) provisions of dams, treatment works, reservoir, pump station, sewer pipes and other apparatus as be necessary for the supply of treated and untreated water.

- [16] In relation of its prescribed operation of water and sewage, regulation 3 (2)(c) of this Regulations is relevant. Regulation 3 (2)(c) prescribed that it is legally allowable, for the Defendant to break open roads, bridges, sewers or drains or make cuttings or excavations and remove trees or vegetation or carry out as inspections, surveys or test.
- [17] Regulation 3(5), of the same Regulations further provides that before exercising any powers, the Corporation shall give the occupier or owner of any land under or over which any “prescribed operation” is intended to be carried out seven (7) days’ notice in writing, setting out the nature and extent of operation intended to be carried out. Unless such operation is carried out without the consent of the owner or occupier.
- [18] Regulation 3(6) further provides that a failure to give notice under sub-regulation 3 shall not affect the power conferred under Regulation 3 (5).
- [19] On the other hand, the Land Registration Act provides further, in Section 25, that unless the contrary is expressed in the Register, all registered land shall be subject to such of the following overriding interest as maybe for the time being subsist and affect the same without their being noted in the Register.

[20] One of those overriding interest is an easement to the benefit of the public or arising by law. Water supply is an easement to the benefit of the public and is created by law. Vide **Brian Moumou vs Dolly Joseph SC 140/2016**, where it was held that it is an easement established by law and they have their object the public for local benefit and that of an individual under Section 649 of the Civil Code of Seychelles.

[21] As to the fact of the case I find that the fact that the Defendant excavated the Plaintiff land and lay pipes on the Plaintiff property are not being disputed. What is being disputed in this case are the following:

- 1) To what extent can the Defendant carry out the work without a consent of the Plaintiff be it verbal or in writing?
- 2) The fact that the water supply was as a matter for public interest and public utility or was for an ulterior motive.

[22] In respect of the first issue, it is the Plaintiff case that given the fact that the Defendant should have signed and give consent, their refusal should have stopped the Defendant from carrying out the work. The Defendant should have not carried out the work without the Plaintiffs' consent, as a result that this is illegal and constitutional and therefore amount to a faute.

Both the first, the second and third Plaintiffs testified about the abuse of power on the part of the Defendant stealing their land without their consent. The Defendant however relies on the statutory power and testifies that the procedure has to seek consent was followed and the work proceeded on the failure on the part of the Plaintiff to give their consent, both verbal and in writing.

[23] On the second issue arising, it is the Plaintiffs' case that the pipe laying was not in the public interest but in the benefit of a developer at the Grand Police, Takamaka. The Defendant failure to give an undertaking that this water was not such supply and their refusal consist of an acknowledgement of this Act. Mr. D'Offay for the Defendant on the other hand contests this version. It is his testimony that the South Mahe Water Project was to feed water from Grand Anse to Takamaka and that the intent was to keep the constant water supply to the South Mahe especially in the drought period. He

acknowledged the fact that the Plaintiffs had put this as a condition for their consent, but that he could not reassure them in writing that the pipe would not feed water to the future Grand Anse Police Project, if any, in the future. He testified that, what he could say was for the time being the water was ending up at Quatre Bornes.

[24] Having heard the evidence and the submissions of the counsels I am on the view that the Defendant, in pursuant to the statutory mandate, did seek the approval of the Plaintiff before it started excavation and building on the Plaintiffs' property and laying the water pipes, however, as a result of the Plaintiffs failure to give their written or verbal approval, they exercised their statutory mandate as provided in the Public Utilities Corporation Act and the Public Utilities Corporation (Miscellaneous) Regulations and excavated and lay down the pipe as provided for in law. The laying of the pipe falling within the statutory powers, mandate and function I find further that the water pipe laying constitute a public utility easement in pursuant to Section 649 of the Civil Code of Seychelles, and that regard the land of the Plaintiffs is as a result subject to an overriding interest being an easement for the benefit of the public arising by law. I find further that the pipe laying was done by the Defendant in such a way as to minimise any damages caused to the Plaintiffs by laying it as close to the public road as possible. Therefore, the acts of the agents for the Defendant and the Defendant are legal and constitutional.

[25] It is to be further noted that the right to property and to peaceful enjoyment of property under Article 26 (1) of the Constitution is subject to Article 26 (2) in that it is limited by the law reasonably justifiable in a democratic society and in the public interest. The Public Utilities Act and its Regulations and the Civil Code read together consist of such a public interest limitations.

[26] As regards, ulterior motive, this has not been expressly pleaded for in the plaint. This as it may, it can be said that it is pleaded impliedly in the plea as to trespass and faute and violation of rights under paragraph 7 of the plaint, as the Defendant action, in law, must be in public interest and not for personal interest. I have considered the evidence as a whole, I find that the Plaintiff case that the water supply was time for the Grand Police Hotel Development to be unfounded and pure surmisation. All the witnesses testify that it was based on popular rumor and not on facts. There are no evidence in support. I

choose to believe the evidence of Emmanuel D'Offay in that regards. He testifies that the project was for the benefit of all the people living on water lanes starting from Grand Anse to Takamaka. Its objective was to provide constant supply of water to all western area of Mahe. Mr. D'Offay was candid enough to say that he could predict the future, he could not say to what extent would this supply benefit any future project at Grand Police.

[27] The Court, therefore, finds that there was no ulterior motive for the laying of the pipes on the Plaintiffs' property and it was for the benefit of the public at large. The Court takes judicial notice of the fact that at the end of the hearing of this case, it was announced that the future development of Grand Anse Police Hotel Development would be stopped. This has no bearing on the decision of the Court, though it rest to been made to be seen to what extent would that have affected the decision of the Plaintiff to institute this case or affect their testimonies before the Court.

[28] In the circumstances this Court finds that the Plaintiffs has failed to establish its case and the plaint is accordingly dismissed with cost in favour of the Defendant.

Signed, dated and delivered at Ile du Port on 15 September 2017

R Govinden , J
Judge of the Supreme Court