IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC 36/2017

[2017] SCSC 1076

DORRINE ENA MONTHY

Petitioner

Versus

THE TOWN AND COUNTRY PLANNING AUTHORITY

Respondent

Heard:

Counsel: Mr Frank Ally for petitioner

Mr Chinnasamy respondent

Delivered: 13TH November 2017

JUDGMENT

L. Pillay, J

[1] This is an application for Judicial Review filed by the Petitioner on 30th May 2017.

[2] The facts are as follows. By a lease dated 8th November 2016 and registered 21st December 2016, the Petitioner leased the land comprised in title V. 9215 situated at Bel Eau for a term of 60 years for the purpose of Daycare and

Hairdressing Salon. By an application dated 28th March 2017 the Petitioner applied to the Respondent for a change of use of the building.

[3] By notice dated 25th April 2017 the Petitioner was informed that her application had not been approved on the basis that the Planning Authority was in possession of a document relating to cancellation of the lease of the parcel.

[4] The Petitioner's counsel argues that the said refusal was unjustified, illegal disproportionate, and/or unreasonable and was reached in a procedurally improper manner.

[5] The Respondents argues that the role of the Court in judicial review cases is to review the decision-making process of a decision making body or person, to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith ...without the Court substituting its opinion for that of the authority.

[6] The issues to be decided are as follows:

i) Was the decision by the Respondent unjustified, illegal, disproportionate, unreasonable and reached in a procedurally improper manner?

ii) What is the remedy available to the Petitioner?

iii) Is the Petitioner entitled to damages?

[7] When exercising its supervisory jurisdiction the Court examines the decision making process that was used. Essentially it will look at whether the decision making process was illegal, irrational, unreasonable, and procedurally improper.

[8] In the case of **Council of Civil Service Unions and others v Minister for the Civil Service (1984) 3 All ER 935** -the three grounds on which a decision may be subject to judicial review were classified as – illegality; irrationality and procedural impropriety. Procedural impropriety included not only the failure of the administrative body to follow the procedural rules laid down in the legislative instruments by which jurisdiction is conferred but it also includes the failure to

observe the rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

[9] Per Domah J in **Raihl v Ministry of National Development (2010) SLR 66** "the golden rule jealously guarded in administrative law by the courts is that no executive decision adversely affecting the rights of the citizen, more particularly, his property rights, may be taken behind his or her back, without affording him or her an opportunity to be heard."

[10] Dornah J went on to add that "no matter how valid and warranted the executive considered the facts and circumstances were, in its eyes, which justified the order of revocation, it could not do so without affording the citizen a right *to* be heard".

[11] It is trite that administrative law is about judges controlling the manner in which the executive chooses to exercise power which Parliament has vested in them. It is about exercise of executive power within the parameters of the law, which should be judicious; not arbitrary, capricious, abusive or in bad faith. The executive is under a duty to act fairly.

[12] The Court may issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto.

[13] With regards to the present case, it is clear in the First Schedule that the lease was for the specific purpose of a Daycare and Hairdressing salon, c.f. clause 7 (10) (b), that the Lessee (Petitioner) not use the premises other than for the purpose of use as described in the First Schedule. It is also clear that the leased premises is at present a residential property hence the Petitioner's application for change of use in order to comply with her obligations.

[14] The basis of the Respondent's refusal to grant the change of use was the letter of 25th February 2017. The letter was sent to the Petitioner only from a representative of the Lessor and not copied to anyone else, leaving open the question of how the Respondent carne to have a copy of the letter. The receipt of the said letter by the Respondent who was not a party to the lease and the Respondent's

consideration of the letter in refusing the application for change of use cannot be regarded as proper.

[15] Furthermore the Petitioner's views were not sought on the matter, seeing that she was the applicant for change of use and the other party to the purportedly cancelled lease.

[16] In such as the Town and Country Planning Act provides that the Planning authority may refuse permission it cannot do so without valid reasons. It is required in law to have regard to material considerations. I agree with Counsel for the Petitioner that the decision was not reached in a procedurally proper manner. The purported cancellation was irrelevant for the purposes of the consideration of the application. The Respondent erred in coming to a decision based on a purported cancellation of the lease without giving the Petitioner an opportunity to be heard.

[17] I note "en passant" that clause 8 provides for the Republic to resume possession of the property in the event of war or upon the declaration of a state of emergency, of which neither situation exists. Indeed as counsel says there is no provision in the lease for tem1ination as a result of the property being required for military purposes.

[18] In saying that, whether or not the Petitioner's lease had been cancelled was a matter between Republic of Seychelles, as the Lessor, and the Petitioner, as the Lessee. It had nothing to do with the Respondent. The Respondent’s role was simply to consider the application for change of use that had been submitted for consideration.

[19] On that basis it is necessary that a writ of certiorari be issued.

[20] As regards a writ of mandamus compelling the Respondent to change the use of the building located on the Leased Property from residential use to use for the purpose of a day care centre for children I am of the view that the application was not properly considered or considered at all in the first place by the Respondent. I note on the file there are various comments and letters from Department of Health, Land Transport and PUC amongst others. It is for the Respondent now to give proper consideration to the application along with the

documentation from the different agencies, taking into account the rules of natural justice and come to a decision, and not for the Court to order the change of use.

[21] On that basis I decline to issue a writ of madamus.

[22] As for damages I note section 18 (2) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules which reads as follows:

The Supreme Court may, where the petitioner has claimed damages in the petition, award him damages, if the Court is satisfied that if the claim is made in an action begun by the petitioner at the time of making the petition, he could have been awarded damages.

[23] With regards to the present case I note that clause 7 of the Agreement provides as follows:

"*The Lessee hereby covenants with the Republic that the Lessee shall:-*

(a) before the proposed development in respect of the permitted use stated in the First Schedule hereto is commenced, submit plans of the proposed development to the Town and Country Planning Authority ... and obtained their approval under the Town and Country Planning Act; and

(b) If approval for the proposed development is granted by the Authority, complete the development within a period of twenty four (24) months, ... "

[24] On the above, the argument of Mr. Ally cannot be maintained. The Petitioner cannot claim to have had a "legitimate expectation that since the Government has leased a premises for such use then the change should be effected." It is clear in the lease that before the project was commenced the Petitioner had to submit plans of the proposed development to the Town and Country Planning Authority.

[25] I also note the case of **Elke Talma v/s The Minister of Land Use and Housing MC 65/2014, [2015] 733 delivered 12th January 2016**. In that case exemplary damages was awarded, following the case of **Michel v Talma [2012] SLR 95,** on the basis that the actions of the servants of the government which are oppressive,

arbitrary and unconstitutional justifies an award of exemplary or punitive damages. In the present case I am of the view that the actions of the Respondent were illegal, unreasonable and disproportionate, however I am not satisfied that it is oppressive as in the **Talma** case above. On that basis the prayer for damages has to fail.

[26] On the basis of the above I make the following orders:

(1) I hereby issue a writ of certiorari quashing the Respondent's decision.

(2) The Respondent shall pay the costs of the suit.

Signed, dated and delivered at Ile du Port on 13th November 2017

L. Pillay
Judge of the Supreme Court