

SUPREMECOURT OF SEYCHELLES

Reportable
[2021] SCSC 38
MC 16/2020

In the matter between:

SOPHIA ESPARON
(*rep. by B Hoareau*)

Petitioner

and

MINISTER PAMELA CHARLETTE
(MINISTER OF LAND USE AND HABITAT)
(*rep. by G Thachett*)

Respondent

Neutral Citation: *Esparon vs Minister Pamela Charlette* MC16/2020 [2021] SCSC 38

Before: Govinden CJ

Summary: Judicial review; unlawful delegation of powers; right to be given a reason; acting on improper consideration; Petition upheld.

Heard: 22nd September 2020

Delivered: 4th March 2021

ORDER

The court issues a writ of certiorari and quashes the decision of the Respondent given on appeal by way of letter dated the 7th of November 2018. The case is remitted to the Minister in order to reconsider the appeal of the Petitioner in the light of this judgment. Cost is awarded in favour of the Petitioner.

JUDGMENT

R GOVINDEN, CJ

The background and submissions

- [1] The Petitioner invokes the supervisory jurisdiction of the Court under Article 125(1) (c) of the Constitution for judicial review of the First Respondent's decision taken on 7th November 2018 and for a writ certiorari quashing the same.
- [2] An application to dismiss the Petition on the ground that it was brought out of the statutory limit of three months was dismissed by this court on the ground that good reasons had been put forward by the Petitioner to show as to why she was out of time. This court proceeded to give to the Petitioner further time to file her Petition, which she had done. Subject to this leave to proceed with the instant suit was granted without the court delving into any great depth about the bona fides and standing of the Petitioner, having been generally satisfied ex facie of its sufficient interest and having expressed caution about the application so to permit the adjudication of the grave matters raised. .
- [3] The decision impugned concerned one made by the First Respondent on appeal from the Seychelles Town and Country Planning Authority in which she informed the Petitioner that she had upheld the decision of the Planning Authority to refuse the change of use from residential to self-catering in respect of the apartments of the Petitioner. Though the decision is apparently made by the Respondent, it was conveyed to the Petitioner by the Principal Secretary of land use and habitat.
- [4] The principal thrust of the case of the Petitioner is that the decision is illegal as the appeal was not heard and dealt with by the Respondent personally but by a committee known as the Appeals Advisory Committee.
- [5] The Petitioner also averred that the Respondent acted in breach of the rules of natural justice and with procedural impropriety in that no reason was provided for the decision to uphold the decision of the Planning Authority.
- [6] Lastly, the Petitioner avers that the decision was irrational and or unreasonable in view that there was no development plan prepared and approved under the Town and Country Planning Act which had demarcate the parcels upon which the apartment was found to be for be either for tourism or residential developments.

- [7] The Respondent countered this Petition, in her objection she avers that there is no legal necessity for her to personally hear and or determine the appeal and that this was carried out in accordance with statutory provisions. All in all, the Respondent avers that the Respondent's decision was rational, reasonable, legal and justified.
- [8] The Petitioner had previously applied to the Planning Authority under the provisions of the Town and Country Planning Act to change the use of the apartments in question from residential to self-catering and, by a notice dated the 2nd of August 2021, had been informed by the said authority that the application for change of use had been refused by the Planning Authority on the ground that-
- (a) the parcels of land are located within a Land Bank solely for residential purposes and what is being proposed is commercial ; and
 - (b) tourism use is not accepted in this estate which is classified as high density residential use which is not in conformity with tourism policy
- [9] In his submissions in favour of the first argument raised in the petition Learned counsel for the Petitioner submitted that both the hearing and the determination of the appeal should have been done by the Respondent and not by a third party, which in this case he said was the Appeal Advisory Committee. It is his submissions that this amounted to the Respondent delegating her statutory function to another person, something which is forbidden unless the power to delegate is given in law. Arguing on the second ground Learned counsel submitted that there was no reason given as to the decision to uphold the decision of the Town and Country Planning and Country. According to counsel, what is given is the way that the Respondent has come to her determination and not the grounds upon which the determination was reached. He submitted that it is imperative that a person making a quasi judicial decision gives reasons for decisions in order to allow the subject of the decision to judicially review it. Counsel lastly submitted that the Respondent cannot rely on a policy to curtail the exercise of a constitutional right, which is what happened in this case when the Respondent denied the Petitioner the right to change the use of her apartment based on a policy not enshrined in law.

[10] In his counter argument, Learned counsel for the Respondent submitted that the law, namely section 10 (3) of the Town and Country Planning Act makes provisions for the minister to appoint one or more persons and to seek and rely upon their recommendations in any appeal that comes before her from a decision of the planning authority. According to him by relying upon the recommendation of the Advisory Committee on appeal, she could not have unlawfully delegated or forfeit the power for her to make a decision in the appeal. As regards the duty to give reasons, Learned counsel submitted that the Minister is not statutorily bound to give reasoning for the decision, especially given that the decision had only legal as compare to constitutional implications. On the last prayer of the Petitioner, Learned counsel was at pain to show the existence of a written, clear and published policy which prohibits tourism development in high density residential areas.

The law

[11] The provisions of the Town and Country Planning Act relevant to this case are as follows:

Section 10

- (1) The Minister may give directions to the planning authority requiring that any application made to the authority for permission to develop land, or all such applications of any class specified in the directions, be referred to him instead of being dealt with by the planning authority, and any such application shall be so referred accordingly.*
- (2) Where an application for permission to develop land is referred to the Minister under this section, the provisions of subsections (1) and (2) of section 9 shall apply, subject to any necessary modifications, in relation to the determination of the application by the Minister as they apply in relation to the determination of such an application by the planning authority.*
- (3) Before exercising any of the powers conferred by this section the Minister may, if he considers it expedient so to do, appoint one or more persons to inquire into and make recommendations on such matters as he may specify. Such person or persons shall keep or cause to be kept a record of any evidence taken and shall report their findings and make recommendations, to the Minister. The Minister shall consider the record, if any, the report and the recommendations, but he shall not be bound to follow such recommendations.*

- (4) *The decision of the Minister on any application referred under this section shall be final and shall not be questioned in any court.*

Section 11

- (1) *Where application is made under this part to the planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by the authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may, by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister.*
- (2) *Notwithstanding subsection (1), the Minister shall not be required to entertain an appeal under subsection (1) in respect of the determination of an application for permission to develop land if it appears to him that permission for that development could not have been granted by the planning authority, or could not have been so granted otherwise than subject to the conditions imposed by them, having regard to the provisions of section 9 and of the development order, and to any directions given under that order.*
- (3) *Where an appeal is brought under this section from a decision of the planning authority the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the planning authority, and subsections (2), (3) and (4) of section 10 shall apply, subject to any necessary modifications, in relation to the determination of an appeal by the Minister under this section as they apply in relation to the determination by the Minister of an application referred under subsection (1) of section 10.*

[12] The jurisdictional provisions upon which this suit has been brought in, on the other hand, found in Article 125 of the Constitution, which provides as follows:

Article 125 (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –

...

- (c) *supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders 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;*

Analysis and determination

- [13] In this case there was no jurisdictional contention or contention as to whether or not the facts of the case call for it to be considered as one where the decision maker was acting as a quasi judicial authority which would make her amenable to a judicial review action. All the arguments were limited to whether she had acted illegally, with impropriety or unreasonably as both sides agreed that she was at all material times acting as a person in a quasi judicial authority.
- [14] The Petitioner's first argument is that the Respondent has delegated or forfeited her powers given to her by virtue of Section 11 (1) of the Town and Country Planning Act. It is her contention that the powers given by this section is that of the minister responsible under the provisions of this Act and no other. In that regard it is argued that the appeal lodged to the Respondent was not heard or determined by the Respondent personally but the appeal was heard and or determined by a committee known as the Appeal's Advisory Committee. On the other hand the Respondent says that Section 11(1) has to be read with Section 11(3) which allows the Minister to make applicable Sub sections 10(3) of the Town and Country Planning Act, which in turn allows her to, if she considers it expedient so to do, appoint one or more persons to inquire into and make recommendations on such matters as she may specify and following that she may consider the record, if any, the report and the recommendations, but he shall not be bound to follow such recommendations. According to the Respondent the Appeal Advisory Committee is precisely such a body set up by the Respondent to make recommendations to her under subsection 10 (3) and therefore reliance on the recommendation of the advisory committee in this appeal cannot be illegal.
- [15] There is a general rule in administrative law that where legislation confers power on a specified individual or authority, it is that individual or authority that must exercise the power, and the power must not be given away to another person or authority (so-called unlawful sub-delegation). This general rule applies to the delegation of all types of power – judicial, legislative and administrative.

[16] However, there are necessarily many exceptions to this rule, which are often set out expressly on the face of the legislation which confers power on the public authority. In other circumstances, the Court will be ready to infer from the wording and purpose of legislation that a particular power conferred on a public authority may be delegated to another person, provided that the authority maintains overall control. The Court will often infer such a power to delegate where not allowing the power to be delegated would lead to disproportionate administrative inconvenience.

[17] In the case of *Amalgamated Tobacco Company (Sey) Ltd v Minister of Employment and or 1996 SLR 15* the Competent Officer had made two decisions in favour of the employer in grievance proceedings under the Employment Act 1990. The employee appealed to the Minister. The Minister did not hear the appeals and had delegated the power to hear the appeals to the Industrial Relations Board in one case. He averred in an affidavit that he had consulted the board but that the decision was his own. On an application for judicial review this court held that the hearing on appeal was an exercise of judicial power which had been entrusted to the Minister, though a partial delegation could be proper. Such power cannot be delegated to hear and take evidence provided the Minister gave a decision after a hearing.

[18] In this particular case I find that Acting Chairperson of the Appeal Advisory Committee Mr Yves Choppy informed the Petitioner by a letter dated the 7th of November 2018 as follows –

*“ Your appeal was considered by the Minister under the powers vested in her by the Town and Country Planning Act. The Minister consulted on the issue with persons appointed by her to inquire in the matter.
However, I regret to inform you that the Minister has upheld the refusal of the application..”*

[19] To me it is clear that the Minister only consulted with the Appeal Advisory Committee. She did not substitute her powers to that of the Committee or vice versa and she did not forfeit her statutory appellate power to the said Committee. As a person who sits and hears appeals she is entitled to consult any person who she wishes in coming to her

determination. In this case, she has consulted the committee and has accepted the recommendation of the latter, which she is free to do.

[20] I also find that the Appeal Advisory Committee is not any third party but a body legally set up under Section 10 (3) of the Town and Country Planning Act to advise and make recommendations to the Minister on matters arising out of appeal from a decision of the Town and Country Planning Authority. The Minister in pursuant to Section 11(3) of the Act she may act on the recommendations but is not bound by the said recommendations.

[21] Accordingly, in this case there was no delegation of statutory powers. There was a consultation process that was expressly provided for by statute. The court will not go on to infer the powers to consult given the expressed provisions of the law. Accordingly, I find that the Respondent did not act illegally as she did hear and determine the appeal. She properly sought the recommendation of an advisory committee set up by law and properly exercised her discretion to rely upon the recommendation of the said committee.

[22] The second bone of contention in this case is the alleged breach of the rule of natural justice and the alleged procedural impropriety caused by the fact that no reason was provided for the decision to uphold the decision of the Planning Authority. Admittedly the letter of the 7th of November does not give the reasons for the determination of the Minister, it only refers to an act of consultation and that the appeal has been refused. No substantial reasons are put forward in order to justify the dismissal of the appeal.

[23] The Learned representative of the Petitioner says that this amounts to a procedural irregularity as it denies his client the possibility of contesting the said decision. On the other hand, the Learned counsel for the opposing party contends that there exist no obligations in law to give reasons in this instance.

[24] To my mind, there are many valid reasons to justify the giving of reasons in such cases. In order to be acting lawfully, the decision maker must have reasons for the decision. To have to give them is likely to be some assurance that the reasons will be likely to be properly thought out and possibly good in law, for, having made the reasons known, the decision can be properly open to scrutiny. The decision maker is likely to focus more

carefully on the decision and minimise whim and caprice. Giving reasons is also “a self-disciplining exercise”, Sir Louis Blom-Cooper, QC. In **R v. Islington LBC, exp. Hinds (1995) 27 HLR 65** at 75 and in **Tramountana Annadora SA v Atlantic Shipping Co. (1978) 2 All E.R. 870** at 872 Donaldson J stated that “(h)aving to give reasons concentrates the mind wonderfully”.

[25] In addition, to give reasons is to invite accountability and transparency and to expose oneself to criticism; this helps to ensure that power is not abused or arbitrarily exercised. This will in turn promote public confidence in the system.

[26] A further advantage of giving reasons is that the process will facilitate appeals and assist the Courts in performing their supervisory functions to know whether the decision maker or body took into account relevant considerations or acted properly. This might well reduce the number of unsustainable appeals. Reasons also provide guidance for future conduct and so deter applications which would be unsuccessful. In short, it is essential for the efficient functioning of the machinery of good government.

[27] In the case of **Flannery v. Halifax Estate Agencies Ltd (2000) 1 W.L.R. 337** at 381, Henry LJ stated that “(t)he duty is a function of due process, and therefore justice.” According to Lord Donaldson MR in **R v. Civil Service Appeal Board, exp. Cunningham [1991] 4 All E.R. 310** “There is a principle of natural justice that a public law authority should always or even usually give reasons for its decision.” Pill J. similarly said in **R v. Crown Court at Harrow, exp. Dave, [1994] 1 All E.R.315** that a refusal to give reasons might amount to a denial of natural justice. Neill LJ. in **Reg. V. City of London Corporation, Exp. Matson [1997] 1 W.L.R. 765 at 776 G-H** was also persuaded that natural justice required that a decision not to confirm the appointment of an alderman should not be allowed to go unexplained and that reasons must be given.

[28] In Seychelles, there is no express general statutory duty to give reasons. However, it is apparent that the Administrative law has developed to a stage that in almost every case where a right is affected or an exercise of discretion is involved, there is a duty on the decision maker to give reasons. This duty has evolved out of the general principle of fairness and fairness runs across our Constitution .Constitutional justice imposes a

requirement of procedural fairness and consequentially this necessitates a duty to give reasons. To not give reasons is the very essence of arbitrariness as one's status could be redefined without adequate explanation as to why this was done. Secrecy creates suspicion, justly or unjustly. This secrecy may also be described as the hallmark of inefficient and corrupt administration. Reasons must therefore be disclosed. Besides, the giving of good reasons would inevitably earn respect for the decision maker. Article 19 (7) of our constitution obliges any authority empowered by law to determine any civil right or obligation the constitutional obligation to act independently, impartially and to give a fair hearing. I read within that the constitutional duty of a person acting within a quasi judicial capacity to give reasons for his or her decision, as without that reason the decision becomes unfair.

- [29] Within natural justice is the right to a hearing that is fair, and free from bias. The natural justice principle is bound up with reasons. If reasons are not given, the hearing would be incomplete and therefore unfair. It is for this reason that I find that the decision of the Respondent given in the letter dated the 7th of November 2018 to be procedurally improper and contrary to the duty to act fairly.
- [30] The third ground of contention in this case relates to the fact that the Petitioner claims that the Respondent could not have upheld the decision of the Planning Authority in view that there is no developments plans prepared and approved under the Town and Country Planning Act, as found by the Authority, which had allocated the area within which parcels C2344 and C8144 are located only for residential or for non tourism purpose. The Respondent does not deny and aver that there exists a plan. She only denies and put the Petitioner to the strict proof that there was not such a development plan. Whilst Learned counsel for the Respondent in his submission accepts that there is no published development plan and focus answer on the second limb of the decision of the Authority to the effect that the area was also found in a land bank with a high density area.
- [31] The necessity for there to be a clear, unambiguous and published Development Plan before it is used as a basis to restrict or stop a development by the Town and Country Planning Authority or the Minister on appeal under the provisions of the TCPA is well

settled in law. In the case of *Talma & Anor v Michel & Ors (2 of 2010) [2010] SCCC 6 (28 September 2010)* a similar issue arose before the Constitutional Court where the Petitioner's development had been stopped on the basis that the Anse Lazio area falls within a No-development zone as set out in a Development Plan and the Respondent was at pains to show the existence of such a plan. The court unanimously held -

I now turn to the main question before us: Whether the Government decision or policy of a No Development Zone at Anse Lazio is constitutional or not. The respondents put forth two contentions in support of the Government's position of a No Development Zone. Firstly it refers to the Town and Country Planning Act and submits that this Act empowers the Planning Authority to prepare development plans for the whole of Seychelles and review the same every 5 years. The Anse Lazio Development Plan decreed that that it would be a No Development Zone. Secondly that it was an area of outstanding natural beauty specifically mentioned in the Environment Protection (Impact Assessment) Regulations 1996.

The Town and Country Planning Act (hereinafter referred to as the TCPA), established vide section 3 a Planning Authority with extensive powers to plan for the development of all land in Seychelles that would be published in a development plan. Development plans would be revisable every 5 years or possibly at other intervals.

Section 6(2) of the TCPA obliges the Planning Authority to publish notice of drafts of such plan or proposals for amendment of such plan, including the place or places that the public may be able to inspect such draft plans and or proposals. Provision is made for objections to be made. The plan or proposals for amendment so submitted to the Minister may be approved by him and that approval shall be published in the Gazette and at least one newspaper. Under section 6(6) of the TCPA the development plan or such amended development plan becomes effective on the date it is published in the Gazette or such later date as the Minister shall determine.....

The respondents have not put in evidence the Anse Lazio (Baie Chevalier) Development Plan as amended or reviewed. The respondents have not provided any evidence that in the making of this plan the Planning Authority complied with the TCPA. The respondents have not shown that notice of the draft plan, or the amended or revised plans were ever published in the Gazette and one newspaper. The respondents have not shown that the Minister approved that plan, and its

various amendments or revisions. The respondents have not shown that the notice of the approval by the Minister of the plan, amended plan and or revised plan, were ever published in the Gazette, a necessary prerequisite for such plans to take effect.

[32] The No Development Zone policy having thus no basis in law, the Constitutional Court found that it could not have been the basis for a refusal to consider petitioner no 2's project proposal by the relevant authorities under the TCPA.

[33] Similarly, in this case I find that the Respondent have been unable to prove the existence of a valid development plan which had formed the basis of the Town and Country Planning Authority and the Minister to refused to accept the change of use application of the Petitioner. Therefore, I agree with counsel for the Petitioner that there being no such plan the decision of the Respondent is both unreasonable and irrational.

[34] As regards the non-approval based on the high density development in a Land Bank area, that decision was within the purview of the Authority and hence that of the Minister as it is based on assessment that the decision makers could have properly taken given the existing physical development in the area as compared to its size.

Final determination

[35] In my final determination I find that the Respondent acted contrary to the Petitioner's right to fair hearing in not giving a reason for her determination and that she has acted improperly and irrationally by taking into account a consideration that should not otherwise been taken, namely a non- existent Development Plan.

[36] For these reasons, I would issue a writ of certiorari and quash the decision of the Respondent given on appeal by way of her letter dated the 7th of November 2018. The case is remitted to the Minister for consideration of the appeal of the Petitioner under the provisions of Town and Country Planning Act in the light of this judgment. Cost is awarded in favour of the Petitioner.

Signed, dated and delivered at Ile du Port, Victoria on 4th of March 2021

R. Gonvinden

Chief Justice