IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 07/2013

[201] SCSC

PAULA STRAVENS
Plaintiff

versus

MINISTRY OF LAND USE AND HOUSING
Defendant

Heard:

Counsel: Mrs. A. Amesbury for plaintiff

Mr. B. Vipin for defendant

Delivered: 3 July 2014

RULING

Renaud J

1. After the Applicant in this matter had filed her Application for Judicial Review a third party sought leave of the Court to intervene.

2. **Locus Standi of Intervener**
The Intervener *inter alia* stated in his Affidavit in support of his Notice of Motion for leave to intervene that the reason for intervening is that – *"in view of the fact that the parties have not yet closed their case and I am the owner of Parcel V4140 on which the 1st Respondent's house stands I may suffer prejudice in that I will not be able to establish and protect my rights and interests in the suit and in Parcel V4140 if I am not made a party to the suit".* The Court was not required to consider the merit or otherwise of the *locus standi* of the Intended Intervener at that stage. It allowed the third party to intervene and its *locus standi* to

be determined when considering the matter.

3. Judicial Review emanates from Article 125(1)(c) of our Constitution which empowers this Court to have supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this regard, has 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 jurisdictions. For this purpose "adjudicating authority" includes a body or authority established by law which performs a judicial or quasi-judicial function.

4. By virtue of Article 136(2) of the Constitution the Chief Justice made Rules of Court, namely, the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules. That body of rules provide for the practice and procedure of the Supreme Court in respect of an application for the exercise of its supervisory jurisdiction otherwise termed, judicial review. In that set or rules there is no provision with regard to "Intervener".

5. It is an adopted practice of the Supreme Court where the above stated rules are silent, to adopt rules of procedure contained in the Seychelles Code of Civil Procedure (SCCP) Cap. 213. Section 117 of the SCCP states that every person interested in the event of a pending **suit** shall be entitled to be made a party thereto in order to maintain its rights, provided that his application to intervene is made before all parties to the suit have closed their cases. The SCCP states that "suit" means a civil proceeding commenced by **plaint.** The instant matter is not a suit and therefore that specific provision of the SCCP with regard to intervention is not applicable.

6. There is now considerable evolved jurisprudence of "*Locus Standi*" in matters of Judicial Review. The principle being adopted is that of "sufficient interest" shown by the Petitioner. This evolved standard is included in our Rules, in particular Rule 6 which provides that this 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. It goes on to provide that where the interest of the petitioner in the subject matter of the petition is not direct or personal but is 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.

7. In the instant case the Intervener is seeking to intervene because he claims that he has an interest in the matter. However, he is not before that Court as a Petitioner but as an Intervener in a matter that already been before by Court by way of Judicial Review of the decision of a Judicial Authority which affect the right of a citizen. In this matter the Court is simply required to exercise its supervisory authority to review a decision already taken by a Minister and to determine whether that decision is judicially correct. The provision of Rule 6 is not applicable to an Intervener as it applies specifically to a Petitioner.

8. I note that in his statement of demand, the Intervener simply states that he agrees and adopts the position, Objections and Reply of the 2nd Respondent and that his intervention is necessary in order for him to protect his right to his property, namely Title V4140. In his Objections and Reply, Learned Counsel for the Respondents have aptly responded in detail to all the averments of the Petitioner followed by comprehensive written submissions on the law and the merits. The legal right of the Intervener will obviously be taken into consideration by this Court and no ruling will be complete without consideration of the legal issues. No injustice will be caused to the Intervener.

9. In the final analysis I conclude that the "Intervener" in the instant matter has no locus standi and hence shall be excluded as a party in this matter. I rule accordingly.

10. **The Facts**

I have reviewed the facts stated by the Petitioner in her Affidavit in support of her Petition in relation to the facts outlined by the Respondent. There are slight differences and where these differences are material to the matter in issue, I have included them here.

11. The Petitioner is the owner of her house which stands on Parcel V4140 by a virtue of a "droit de superficie" given in a judgment in the case ***Albest v Stravens (1976) SLR*** which judgment specifically states that – *"in selling the house to the defendant so that she could enjoy and dispose of it as owner thereof, the plaintiff granted to the defendant a right know to the law as 'droit de superficie'. The conferment of such right on the defendant does not now entitle the plaintiff in law to compel the defendant to remove the house from the land. However, I am not prepared to say that the right of the defendant is perpetual. I am of the opinion that it is temporary in the sense that it will come to an end when the defendant will want to re-build the house or will find herself obliged to re-build it."*

12. From the time that she obtained judgment, on every occasion that she had sought to repair her house, the owner(s) of the land had prevented her from doing so by sending her letters emanating from their legal representatives to the effect that legal action would be taken against her, if she proceeded with such works.

13. In or around March 2011 the Petitioner again intended to repair her house and to that effect she sent a letter to Mr. Collin Albest, the owner of Parcel V4140 of her intention to do so, through her legal representative.

14. In May 2011 she applied to the HFC for a Home Improvement Loan for the amount of SR50,000.00.

15. She then wrote to Planning Authority through its Chief Executive Officer, again informing him of her intention to repair her house.

16. The Respondent stated that the Petitioner, by a letter dated 31st August 2011 sought approval from the Planning Authority to proceed with re-roofing and other minor repairs on the house in question. The Respondent stated in that letter that she moved out of the house out of fear of the roof collapsing and safety.

17. In a letter dated 6th September 2011, she received a letter emanating from the Planning Authority granting her permission to re-roof her house and complete other minor repairs.

18. In a further letter dated 16th September 2011 the Planning Authority once again re-iterated that permission had been granted to her to carry out her repairs, provided that no structural works other that those aforementioned were to be carried out.

19. In October 2011, her loan from the HFC was approved, repayment of the said loan commenced and in or around January 2012, disbursement was made.

20. The repairs could not begin at that time as the carpenter was unavailable. It was only at the beginning of September 2012 that the carpenter was able to commence the work, which he did.

21. At around 09.15 a.m. on the morning of 20th September 2012, Mr. Collin Albest, together with his brother came to her house and informed the carpenter that he had no right to be carrying out any repairs to the house as this was adding value to her house.

22. The Petitioner then called her daughter who shortly thereafter came to the house. He then further informed her daughter that his permission should have been sought before she commenced her repairs, despite the fact that he was informed of her intention to do same since March 2011.

23. She believes that as the owner of her house through a 'droit de superficie' she does not have to seek permission of the owner of the land before carrying out repairs to her house.

24. On 20th September, 2012 her daughter Ms. Josette Stravens, acting on her behalf, wrote a letter to her legal representative asking her for advice in relation to the whole matter.

25. On 28th September 2012 she received a letter from Mr. Albest's lawyer, who, upon the instructions of her client noted that *"since her house has fallen into a state of disrepair and consequently she is obliged to renovate and re-build it"* she required the consent of the owner. The letter further states that "*she does not*

have permission to make any renovations or reparations to her house and that he therefore considers that her 'droit de superficie' *has come to an end."*

26. Petitioner believes that this is not the legal position as concerns a 'droit de superficie' as the judgment clearly states that her right being a temporary one would only come to an end when she *"will want to re-build the house or will find herself obliged to* ***re-build it."***

27. She had never had any intentions of re-building her house, but simply wants to repair it and on every occasion that she sought to do, the owners(s) of the land intimidate her into not doing so.

28. The Respondent stated that on 24th September 2012 Mr. Collin Jude Albest made a formal complaint to the Development Control Enforcement against the permission granted to the Petitioner indicating that permission was required from him for the Petitioner to do any **renovation.** On 28th September 2012 the Planning Authority received copy of a letter from the lawyer of Mr, Albest addressed to the Respondent to the effect that the Petitioner has no right to repair/rebuild her house without having first obtained his permission for any repairs.

29. On 15th October 2012 she wrote to Ms. Domingue in her capacity as the legal representative of Mr. Albest, through her attorney, contesting the contents of her letter.

30. The Respondent stated that on 19th October 2012 Ms Valentin a Development Control Officer made a site visit. Where she reported having "*found that there was* ***renovation work*** *undertaken on an old building whose structure was quite old and unsafe. The building is build (sic) with corrugated iron sheet for the first floor and the ground floor is constructed with limestone. And it is quite risky situation to occupy the same."*

31. Her daughter then sought advice from the Planning Authority and was advised to proceed with her repairs.

32. On the morning of 31st October, 2012 town planning officers, Mr. Franky Lespoir and Ms Meliza Valentin in the company of Mr. Albest, visited the house and were accordingly informed that permission had already been sought and granted in relation to the repairs.

33. The Respondent added that the officers were denied access to the interior of the house and as observed from the outside, the house was not in a good condition and could be a subject of safety issue. Further on site, the officers sought for documents regarding the works carried out and also Planning approval for renovation, the same was not produced.

34. That afternoon she received a Stop Notice from the Planning Authority for the following reasons: *"No Planning Approval for renovation work on a house. Provide Proof for the works being undertaken."*

35. Her daughter on her behalf then wrote a further letter to the Respondent, again seeking to outline her position.

36. She had legitimate expectation that in light of all the information which had been provided to the Respondent, that he would uphold her approval and that she would be able to continue with her repairs.

37. The Respondent stated that a report dated 5th November 2012 was drawn based on the site visit recommending Engineer's views before any action is taken. Respondent recommended that the house be demolished and the occupier should vacate the building for their own safety.

38. In a letter dated 15th November 2012 emanating from the Planning Authority, she was informed that legal advice was being sought in the matter and that in the interim the Stop Notice was still effective.

39. In a further letter dated 30th November, 2012 in reply to her previous communication, the Respondent revoked the grant of approval which had been given to her, citing no reasons for the said revocation.

40. In a letter dated 4th February 2013, addressed to the Respondent, she had requested reasons for the said revocation and to date none have been forthcoming.

41. In light of the above she is now seeking this Court to exercise its supervisory jurisdiction and review the Respondent's decision to revoke the permission given to her.

42. She averred that the Respondent's decision was an abuse of power in that he exercised his power for an unauthorized purpose, disregarding relevant considerations and taking into account irrelevant considerations.

43. She further averred that the Respondent's decision was unreasonable as the decision was outrageous that no sensible person acting with due appreciation of his responsibilities would have decided to adopt.

44. She also averred that the Respondent's decision was in breach of the rules of natural justice (*audi alterem partem*) in that she was never told what was the nature of the "case" against her, nor was she given a reason for the revocation or informed of the rationale or grounds which were put forth to revoke her approval. Further, she claims that she was not given an opportunity to state her case or respond to the grounds which were used as the basis to revoke the said permission.

45. The Petitioner is the lawful owner of a house situated on the land Parcel V4140 belonging to one Mr. Colin Jude Albest. She has a 'droit de superficie' over that Parcel where her house is situated. She does not in law requires the permission of the owner of the subservient land for her to repair her house, including the changing of its roof if that needs changing. No one can conceive of a situation where a person is expected to live in a house which the roof is collapsing due to usage and passage of time. It is an obvious course of action of a reasonable person and owner of a house to have its roof attended to in order to enjoy the benefit of her house in all weather conditions. Likewise, no reasonable person, including the Petitioner, is expected to change the rotten C.I. sheets which cover her house and replace them with new C.I. sheets nailed on any rotten purlins and/or rafters. The obvious course of action of any reasonable person is to replace such rotten purlins and rafters where necessary before putting the new C.I. sheets on. This in my view amounts to reasonable repairs to the roof and cannot be deemed to be structural works. It is simply a matter of reasonableness and common sense. Ms Valentin a Development Control Officer in her report simply stated the obvious and that was the very reason why the Petitioner has to repair her house.

46. When the Officers made a site visit on 31st October 2012 they did not see the interior of the house yet opined that it could be a safety issue. What is ridiculous is that the Officers asked the Petitioners to produce documents regarding works to be carried out and Planning approval for renovation, (which their Authority had itself given) and that was not produced. I say that is ridiculous of the Officers because one would expect those Officers to have the files, records and all documents relating to that matter with them.

47. The Respondent's Report dated 5th November 2012 was not in evidence and the rationale of it as well as the basis of its conclusion avoided the present review. It is evident that the recommendation to seek Engineer's views before any action is taken, was not followed through as no such conclusive report is made available for this review. In any event that was a unilateral subjective view. Respondent's recommendation that the house be demolished and that the occupier should vacate the building for their own safety cannot stand unless the Petitioner was given the opportunity to counter this recommendation.

48. Minute (5) on file shows thatMr. Gerard Esparon an employee of the Respondent met the owner of the property on 7th November, 2012 and reported as facts what the owner has told him regarding the house of the Petitioner and he drew his conclusions on that basis and recommended that "the stop notice should not be lifted until the Court ruling is over. That is a most inappropriate approach by this officer. This Court does not endorse such course of action as it gives the impression that Mr. Esparon was operating under the instructions of the owner of the land. There is no case filed in Court by the owner of the land as stated.

49. On 23rd November, 2012 the Chief Executive Officer of the Planning Authority drew up with a strong element of candidness a "Brief" stating the facts of the case as it has developed until the stage it has reached. That "Brief" is reproduced hereunder.

Contents of complaint letter dated 12th October 2012, lodged in respect of the above case now clearly suggest that it is one of a family related issue and if we are not careful, the Planning Authority will be dragged into this affair.

The Planning Authority got involved in this when a Mr. Colin Albest called on Ms Meliza Valentin, the Planning Authority Control Officer responsible for St Louis district, on 24th September 2012 to lodge an official complain claiming that a Ms Josette Stravens and Ors had been issued Planning Authority permission to renovate an old house located on parcel V4140, the latter belonging to him at St Louis. Mr. Albest further informed the Authority that he had been advised by his lawyer, Ms Karen Domingue that no renovation should be effected without his permission. He produced a registered document to prove that he was the owner of the land in question. There are reasons to believe though that an old house located on the parcel belongs to a Ms Paula Stravens, who now Ms Josette Stravens to be acting on her behalf. At the time of lodging the complaint, the Development Control Officer had no knowledge of approval to renovate the old house.

The Planning Authority received a letter dated 28th September 2012 from Karen Domingue addressed to Ms Paula Stravens c/o Josette Stravens basically infoming her that her 'droit de superficie' she held on the land had expired and that she cannot renovate the old house without the landowner's permission.

Based on the facts presented to Planning Authority at the time, the Development Officer visited the site on 19th October 2012 and reported on the matter. Report at folio 9 is pertinent. Basically it was found that there was some renovation works being carried out on the old house which was effectively found to be in a state of disrepair. Given the status of the old house, a recommendation was made by the Development Control Officer for the case be passed on to our in-house Engineer for a proper assessment. This was effected on 31st October 2012 where the Engineer, Mr. Franky Laporte reported that they were denied access to the interior of the house and that from the outside they could observed the house to be not in good condition and could be the subject of a safety issue. On site, it was reported that the occupier could not provide for evidence if permission to renovate the old house was granted and the Engineer proposed for the Planning Authority to issue a Stop Notice to the renovation in fear of possible safety issues resulting from renovation works. I was consulted and from facts presented to me, I sensibly concurred with recommendation for a Stop Notice. This was immediately effected on 31st October 2012, the same day the Engineer visited the site.

The information I have is that upon issuance of the Notice, Josette Stravens called the Development Control Officer to inform her that she had Planning permission to renovate the old house and faxed a copy of a letter written by Mr Gerard Esparon dated 16th September, 2012. The letter basically informed Mrs Paula Stravens that she was being given permission to carry out re-roofing and minor repairs to the house. No structural works was to be carried out to the existing house. This is a standard letter issued to clients to allow for only minor repairs to be carried out on a structure that do not strictly needs the submission of a full Planning application under the TCPA CAP 237.

It is reported on file that Gerard Esparon met with the owner of this property on 7th November 2012 and he informed Gerard that the existing structure is indeed in a dilapidated state, that the occupier was no longer residing there and that he intended to demolish this structure and that he was taking the matter to Court to resolve the issue of 'droit de superficie'. It was further recommended that the Stop Notice be maintained until the Court rules on the case. This is precisely what we did.

I believe Ms Stravens was aggrieved by the Stop Notice and wrote to the Minister to complain about the Planning Authority's action.

Referring to contents of the letter from Josette Stravens, I am of the view that the DCO effectively did her job and followed the laid down procedures. It is well-known to us all that once we aremade aware of a Court case, PA would do what it takes to ensure that it does not get dragged into such matter.

Given the possible legal implication of such a case, I recently consulted the Attorney-General for his views and advise. He has informed us after going through the Court Judgment dated as far back as 1976 (for the same case) that the Court ruled that the 'droit de superficie' would come to an end when the Stravens decides to renovate the house and this is exactly what Mrs. Paula Stravens did. You will note that in the absence of this information (Court judgment), the Planning Authority as stated before, gave approval for the renovation. ***So in brief Paula Stravens does not have the legal right to renovate the old house located on parcel V4140 belonging to Mr Albest. She will need to be informed of this the soonest.*** *(emphasis added by me)*

50. The meaning of the words "repair" and "rebuild" and its application need to be clarified in order to correctly understand the judgment of the Court in the case of ***Albest v Stravens (1976) SLR*** 78 which is the subject of much controversy in this matter.

51. Learned Counsel for the Petitioner has cited … cases in order to demystify and further clarified the meaning of "rebuild" as oppose to "repair".

52. As to **'droit de superficie'** I will hereunder cite the principles of jurisprudence as applied in a few cases in order to highlight its purport.

53. In the case of ***Youpa v Marie Civil Side 47 of 1991***, which judgment was delivered on 4th March, 1992, the Court held that –

> "*Where a person has* a droit de superficie *over property and a purchaser purchases the land with the knowledge of the structures on it, the property passes with the* droit de superficie *remaining on it".*

54. In the case of ***Juliette v Chang-Leng 1992*** the Court inter alia held that –

> *(1) "where a party has acquired a* droit de superficie *over another's land , the landowner cannot require a party to remove any extension build or to vacate the property.*

55. In the case of ***Tulsi v Tulsi (1981) MR493*** the Court held as follows:

> *(1)* "…
>
> *(2) If an owner has consented to a stranger building on his land, he cannot compel the stranger to remove the building; but the stranger's right is extinguished if the building is* ***destroyed****"*
> (emphasis by me)

56. In the case of ***Dursun v Dursun (1982) MR289*** the Court held that a person who builds on a land belonging to a third party with the latter's consent acquired a –

> "*droit de superficie"* viz: "*une sorte de concession de droit de superficie temporaire, de servitude qui greve le fond et don't il sera affranchi quand le constructeur voudra* ***rebatir*** *ou se trouvera dans la necessite de le faire."* (emphasis mine)

57. Learned Counsel for the Respondent submitted that the Oxford Dictionary meaning of "**Rebuild**" – means rebuild something after it has been damaged or destroyed and as for **"Repair"** it means restore something damaged, faulty or worn, to a good condition. He also submitted the Cambridge Dictionary meaning of "**rebuild"** as meaning "to build something again that has been damaged or destroyed" and the meaning of

"**repair"** is "to put something that is damaged, broken, or not working correctly, back into good condition or make it work again".

58. From the above citation and the meaning given to **"repair"** and "**rebuild"** it is clear that the Petitioner in this case has a right to repair her house and to do so she does not require the permission of the land owner. The Petitioner will not have the right to demolish and destroy her house and rebuild it. In the instant case the Petitioner intended to repair the roof and did some other repairs which I find and conclude that she is entitled to do without any let or hindrance from the owner of the land whose permission is not necessary.

59. In view of my finding and conclusion, I further find that the Respondent having itself given prior permission to the Petitioner to repair her house, then issued Stop Notice on the Petitioner because of the complaint and objection of the land owner, is not tenable in law. The land owner had and has no right to lay any objection to the Petitioner carrying out repairs to her house. The Respondent was wrong to change its decision to permit the Respondent carry out repairs to her house.

60. In view of my conclusion and finding, I accordingly set aside the decision of the Respondent and hereby issue a **Writ of Certiorari** quashing the decision of the Respondent to issue a Stop Notice on the Petitioner.

61. I hereby further issue a **Writ of Mandamus** compelling the Respondent to withdraw the Stop Notice and re-issue the grant of approval for the Petitioner to proceed with the repairs of her house.

Signed, dated and delivered at Ile du Port on 3 July 2014

B Renaud
Judge of the Supreme Court