Talma v Michel

(2010) SLR 477

Antony DERJACQUES for the petitioners
CHINNASAMY for the respondents

Judgment delivered on 28 September 2010

Before Egonda-Ntende CJ, Karunakaran, Renaud JJ

EGONDA-NTENDE, CJ: Petitioner no 1 is a Seychellois businessman and investor of Anse Lazio, Praslin. Petitioner no 2 is a landowner, businesswoman and investor of Glacis, Mahe. They bring this constitutional petition against the respondents alleging infringement of their fundamental rights under articles 26(1) and 27 of the Constitution in relation to the development of their property PR 2552, a moiety of land, situated at or near Anse Lazio, Praslin and measuring 64.4 acres of land.

Respondent no1 is the President of the Republic of Seychelles and is being sued in his official capacity. Respondent no 2 was the Vice President of Seychelles at the time this petition was filed, and was sued in his official capacity as Minister responsible for Tourism. Respondent no 3 is the Government of Seychelles that establishes and administers policies and laws. Respondent no 4 is the Attorney-General and is added as a party in accordance with rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.

The petitioners contend that together with a foreign investor they established a joint project to develop a 5 Star hotel development complex, promoted by the petitioners' company, Leisure Investment Pty Ltd. They presented their project proposal to petitioners 1, 2 and 3 and it was approved on 7 September 2005, vide CO5/M24. The petitioners appear to have had problems that prevented them from proceeding with the project but they continued to be committed to the project.

The petitioners contend that on a date unknown in the year 2006 the respondents 1, 2 and 3 determined, unilaterally and without consultation, that the area of land at Anse Lazio including the petitioners' land was an area of outstanding beauty and was therefore declared as a No Development Zone. The respondents have pursued a zero development zone policy with regard to the petitioners' land. The petitioners made appeals to respondent no1 on 16 April 2007 and on 20 September 2007 to the first three respondents seeking that they relent from prohibiting the petitioners' development.

Respondent no 2, it is further contended for the petitioners, on behalf of the first 3 respondents, on 27 October 2009 answered the petitioners' appeal in the negative, stating in the National Assembly that hotel development for Anse Lazio was cancelled by the Government. The petitioners therefore contend that their constitutional right to protection of the right to property and equal protection of the law without discrimination have been contravened.

The particulars of violation are stated to be 8 in number and I shall set them out below.

i) The respondents' acts prevent the petitioners from peacefully enjoying their property.

(ii) The respondents' acts prevent the petitioners' right of motorable access.

(iii) The respondents' acts prevent the petitioners from developing the property and pursuing the said project.

(iv) The respondents' acts prevent any development whether proximate to Anse Lazio beach or not whatsoever.

(v) The respondents' acts and decisions are discriminating in that other owners and developers have been granted permission to construct two restaurants at Anse Lazio beach.

(vi) Other areas in Seychelles, unique in beauty, on beaches and mountains, have not been declared 'No Development Zones' including, Lemuria Resorts at Anse Kerlan, Praslin, a wetland and Turtles Nesting Site and Residence at Petit Zil, Anse Takamaka, at a Marine Park Boundary, whereas La Reserve at Anse Petite Cour, Raffles Resort, L'Archipel Hotel, Beach Comber Resorts at Anse Volbert, Paradise Resorts at Anse Volbert, Acajou Hotel, at Anse Volbert and Vacanze at Anse Volbert, all bordering the Curieuse Marine Park.

(vii) Numerous and innumerable sites on the outlying islands, of greater beauty have been developed by owners and investors, with the respondents' active management and backing.

(viii) The said decisions of the respondents have no basis in law, are arbitrary, irrational and harmful to the petitioners, rendering their property of nil value and nullifying all past investments, and costs incurred.

The petitioners seek declarations that:

1. The decision of the first three respondents that Parcel PR 2552 is in a No Development Zone contravenes articles 26(1) and 27of the Constitution in relation to the petitioners.

2. The decision of the first three respondents that the petitioners' project stands cancelled contravenes articles 26(1) and 27of the Constitution.

3. The aforesaid decisions of the first three respondents are void.

The petitioners further seek an order compelling the first three respondents to consider, consent and allow the petitioners to develop the said project or a similar tourism project or any tourism project; an award of damages of R 400,000 and costs of this action.

The petition of the petitioners is supported by the affidavits of petitioner no 1 and petitioner no 2.

The respondents, in their answer, raise two preliminary objections. Firstly they contend that petitioner no 1 has no cause of action against the respondents given that at the time of presentation of this petition he was not the registered proprietor of the property in question. The property in question is registered in the names of petitioner no 2. Secondly the respondents contend that this petition is time barred in terms of rule 4(1)(a) of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules.

The respondents contend on the merits that the approval granted for the project in September 2005 was subject to conditions precedent that never materialised and that approval lapsed. Anse Lazio is listed as an area of outstanding natural beauty by the Environment Protection(Impact Assessment) Regulations 1996. The prohibition of further development at Anse Lazio is in the public interest and is consistent with the Development Plan for Anse Lazio as approved in 1995, reviewed in 2005 and 2009. In accordance with that Development Plan the petitioners may develop a residential house on their land on its existing footprint, communicated to the petitioners in a letter dated 22 April 2009 (ref LAU/M/35/04).

The respondents further contend that the petitioners' right to property as protected by article 26(1) of the Constitution has not been contravened. The enjoyment thereof has been limited by Anse Lazio Development Plan which is permitted in so far as it was made under the Town and Country Planning Act, a law that is necessary in a democratic society in the public interest.

The respondents further contend that the petitioners' right to equal protection of the law from discrimination under article 27 of the Constitution has not been contravened as the petitioners have not been treated any differently from the owners of land at Anse Lazio in similar circumstances.

It is further contended for the respondents that other areas of natural beauty in Seychelles have not been declared 'No Development Zones' for relative considerations based on the public interest. The respondents' answer was supported by of affidavits of Sherin Renaud, Chief Executive Officer of Seychelles Investments Bureau (hereinafter called SIB); Flavien Joubert, Director General of Wildlife, Enforcement and Permit of Division of Department of Environment; Jones Belmont, Chairman of the Planning Authority; and Christian Lionnet, Principal Secretary for National Development in the Ministry of National Development.

The facts from which the issues for decision in this matter arise are not substantially in dispute in light of the affidavit evidence given by both sides. I shall set them out. Petitioner no 2 is the registered proprietor of the land PR 2552. A project proposal to

be partly implemented on the land in question of a 5 star hotel development consisting of 30 villas was approved in principle by SIBA by a letter dated 23 September 2005. The project was a joint venture proposal between Southern Sun Hotels, represented by Mr Joseph Albert and Leisure Investments Pty Ltd. The approval was subject to an Environment Impact Assessment Class 1 to determine the full scope of the project, submission of an outline planning application to the Planning Authority for consideration, and negotiation with the Ministry of Land Use and Habitat for additional land required for the implementation of the project.

On 26 March 2006 the Ministry of Land Use and Habitat informed petitioner no 1 and Mr Joseph Albert, in writing, that the Government was unable to offer them any land as requested for the proposed 5 star hotel development. The Environment Impact Assessment was not done and presented to the appropriate authority. The project did not receive Environment Impact Assessment Authorisation. The joint venture project ran into other problems and could not go ahead to implement the other conditions precedent outlined above.

Petitioner no1 submitted another project to SIB on 21 November 2006 under the name 'Le Privilege Hotel'. In December 2006 the Government decided to declare the Anse Lazio area, including the land known as PR 2552, now belonging to petitioner no 1, a No Development Zone.

On 13 March 2007, Le Privilege Hotel Development Co (Pty) Ltd with petitioner no 1 as lead shareholder presented yet another project proposal to SIB for a proposed luxury resort consisting of 62 freehold villas on the land in question. This project was not approved given the Government's No Development Zone at Anse Lazio.

The essential question that has to be answered is whether the Government's declaration of a No Development Zone at Anse Lazio in December 2006 was in accordance with the law in force at the time such decision was made. And if the answer is in the affirmative a secondary question may arise as to whether the law in question is constitutional or not.

Before those issues are tackled it will be necessary to deal with the preliminary objections raised by the respondents. Petitioner no 1 transferred the land, PR 2552, to petitioner no 2 and such transfer was effected on 10 November 2005. It is clear therefore that at the time this petition was filed in this court and up to now petitioner no1 was not the owner of PR 2552. He has no legal interest in PR 2552 having transferred for value this land to petitioner no 2.

Petitioner no 1 cannot therefore seek relief under article 46(1) of the Constitution on the ground that a provision of the charter is likely to be contravened or has been contravened 'in relation' to himself. In the result he has no *locus standi* to bring this action. The first preliminary objection has merit.

With regard to whether this action is time barred it is convenient to start by setting out the relevant provisions of the law. Rule 4(1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules states,

(1) Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court:

(a) in a case of an alleged contravention, within 3 months of the contravention;

(b) in case where the likely contravention is the result of an act or omission, within 3 months of the act or omission; …

It is clear that the matters complained of initially occurred in December 2006 or somewhat soon after the rejection of the Le Privilege Hotel Development Co (Pty) Ltd proposal of 13 March 2007. This petition was filed early this year, approximately 3 years later, which exceeds the 3 month time limit provided by the rules.

Nevertheless the nature of contravention in this matter, being in relation to land continues to inhibit petitioner no 1's right to enjoy her land, and in that sense can be viewed as a continuing cause of action. For as long as the policy in question is in place and the policy continuously inhibits a person from enjoyment of her property the contravention would continue to arise and in that sense give rise to a continuing cause of action. In such a case it is possible to found a cause of action in the last three months from the filing of the petition.

This is different from a contravention that is a completed transaction, for instance, holding a person in custody beyond the permitted period of 24 hours without being produced before a court of law. If he is held for 3 days and then released, the contravention is complete and is not continuing. He would have regained his liberty. On the other hand in the instant case if the contravention continues to inhibit the person entitled to enjoy a right in relation to land, for as long as it inhibits that person from the enjoyment of one's land as one would wish to do, the contravention is continuing.

Talbot Fishing Co Ltd v Ministry of Fisheries & Cooperatives(2002) SCJ 131 (unreported) and *De Boucherville Roger France Pardayan v Director of Public Prosecutions*(2002) MR 139, decisions of the Supreme Court of Mauritius, cited to us by the respondents are distinguishable from the case before us and are not helpful on this point. Both were concerned with causes of action that were not continuing causes of action.

Secondly it is troubling that in an ordinary cause of action based on contract or other right of action not specifically provided for, limitation is 5 years but in a matter of such public law significance a limitation of 3 months was imposed by rules of procedure to subscribe enforcement of a constitutional right. Maybe the time is ripe for reconsideration of what would be the appropriate time limitation in initiating actions of this kind in relation to the application, enforcement and or interpretation of the Constitution.

I can understand the need to commence constitutional actions as soon as possible given that the Constitution is the foundation of the State of Seychelles from whence everything else springs. Hence the need for a speedy resolution of all issues related

to its application, enforcement and or interpretation.

I am far from sure whether in the application of rule 4(2) of the Constitutional (Application, Contravention, Enforcement, or Interpretation of the Constitution) Rules, in some circumstances as in this case, may not run contrary article 45 of the Constitution as it may allow a person or group of persons to continue with contravention of the rights and freedoms protected by the Seychellois charter of fundamental rights and freedoms on the ground that an action challenging such contravention was not instituted within 3 months of commencement of such contravention.

Article 45 states,

> This Chapter shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in this chapter.

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 Chairman of the Planning Authority in his affidavit states in part,

> ...that the Anse Lazio (Baie Chevalier) development plan was approved in 1995, reviewed in 2005 and edited and revisited in 2009. That I state that the Anse Lazio (Baie Chevalier)
> Development Plan as approved in 1995 maintained the moratorium on all tourism development, particularly accommodative tourism development, with the exception of the two approved restaurants, at Anse Lazio, Praslin. The Anse Lazio (Baie Chevalier) Development

> Plan as reviewed in 2005 reaffirmed the moratorium on further facilities at Anse Lazio, Praslin. The Anse Lazio (Baie Chevalier) Development Plan which was edited and re-visited in 2009 also re-affirmed the moratorium on tourism accommodative development as well as further developments. However, Anse Lazio property owners are allowed to build a residential house on their land on its existing footprint, which ground plus one story (G + 1), ground only or ground plus attic depending on the location of the existing footprint.

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.

I have searched the statutory instruments issued under the Town and Country Planning Act from 1971 to date and have not seen any that relate to the Anse Lazio (Baie Chevalier) Development Plan.

If it is true that a moratorium on tourist accommodative development was in place from the 1995 Plan, it is puzzling that the petitioners received provisional approval of their 5 star hotel development project that was partly to take place on PR 2552. If the moratorium was in place in 2005 it is inconceivable that SIB would have granted approval to the 5 star hotel development project.

A letter dated 17 March 2009 addressed to the Ombudsman by Mrs Sherin Renaud giving a history of the matters related to PR 2552 and now attached to petitioner no 2's affidavit states in part,

> In December 2006, a decision was taken by the Government to declare the Anse Lazio area, an area of outstanding beauty andtherefore decreed as a No Development Zone. This area encompasses parcel PR 2252 belonging to Mr. Talma.

The letter continues later on to state,

> The No Development Zone policy has recently been finalised by the Ministry of National Development providing clear guidelines on the extent of no development and demarcating the boundaries. The Cabinet has also approved the updated policy and the Ministry of National Development has agreed to meet all promoters who submitted projects in that area to explain the extent of the policy. These meeting are yet to be scheduled and SIB is in the process of informing the promoters of same. On the same token, SIB has kept pending project proposals for that area submitted by all promoters until after the above meetings.

Who are we to believe? Is it the Chairman of the Planning Authority who asserts on oath that there was a moratorium on tourist accommodative development from 1995 to date? Or is it the Chief Executive Officer of SIB? On the one hand she claims that the No Development Zone policy started in December 2006 but then continues to claim that the policy has only recently been finalised and is yet to be presented to the affected people.

Petitioner no 2 established that she is the owner of PR 2552 and she planned by the last project proposal they submitted to develop a luxury resort with 62 villas. This is the way she wishes to enjoy her property. She has established that she was denied approval to develop her property on the grounds that the land was in a No Development Zone.

Of course development of such property is rightly and according to law subject to restrictions in the public interest. This is contemplated and permitted by the Constitution. The obligation on the officers of the Government is to manage the development process or enjoyment by the people of their rights in accordance with the different laws in place for such a purpose. In this case the TCPA and regulations issued thereunder provide a route for management of development of land.

It appears to me that the officers of the Government have failed to proceed in accordance with the law with regard to the Anse Lazio (Baie Chevalier) Development Plan. The No Development Zone policy for Anse Lazio whether it was formulated in 1995, 2000, 2005, as a moratorium on tourist accommodative development, or December 2006 or recently in 2009, has not been shown to have been formulated in accordance with the relevant laws. That plan cannot therefore provide the basis for a refusal to consider the development plans for parcel PR 2552.

Reference was made to the Environment Protection (Impact Assessment) Rules 1996 as laying the basis for the declaration of Anse Lazio as an area of outstanding natural beauty. It is true that it is named in Schedule 2, A.4 as a site of outstanding natural and physical beauty. However those regulations do not bar development much less impose a No Development Zone. Those regulations are dealing with Environment Authorisation of development in certain areas or for certain projects.

All in all it is clear that there is no legal justification for the refusal to consider the project proposal of the applicant. The refusal by the officers of Government to consider the petitioner's project, in accordance with the existing law, is unconstitutional. The officers of Government have made decisions that would have been constitutionally permissible had they complied with the law in the first place. Not having acted within the relevant law those decisions have no force of law. Those decisions are, so to speak, unlawful and unconstitutional.

I would therefore grant the declaration that the decisions of respondent no 3 in refusing to consider the petitioners' application for development of her property contravene article 26(1) of the Constitution. The No Development Zone policy has no basis in law and presently cannot be the basis for a refusal to consider petitioner no 2's project proposal by the relevant authorities. An award of moral damages in the sum of R 50,000 is made in favour of petitioner no 2 against respondentsnos3

and 4.

I do not find that the applicant has suffered any discrimination contrary to article 27 of the Constitution on the facts before this court. No declaration would issue with regard to article 27 of the Constitution.

With regard to the order for costs I note that this action was commenced against 4 respondents. Under section 29(2) of the Seychelles Code of Civil Procedure, hereinafter referred to as SCCP, all actions against the Government of Seychelles may be preferred against the Attorney-General as defendant. This petition is basically against the Government of Seychelles, and not respondents 1 and 2 in their individual capacities. It was entirely unnecessary to name respondents no 1 and 2 as parties to the proceedings. Doing so just led to unnecessary multiplication of cost and time spent on this matter. I would allow petitioner no 2 as the only proper defendant in the matter.I would dismiss the petition by petitioner no 1 with costs.

As Karunakaran and Renaud JJ agree, the petition by petitioner no1 is dismissed with costs and the petition by petitioner no 2 succeeds in part as set out above against respondent no4.

KARUNAKARAN J: I have had the benefit of reading in draft the judgment of the Chief Justice. I agree with the reasons, the findings and the conclusion reached by the Chief Justice. I concur.

RENAUD J: I had the benefit of reading the draft of the judgment drawn up by his Lordship the Chief Justice. I concur with the judgment.

Record: Constitutional Case No 2 of 2010