

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2020] SCCC ...
CP 12/2019

JAMES VALENTIN
(rep. by *Divino Sabino*)

Petitioner

and

PLANNING AUTHORITY
(rep. by *Stefan Knights and Aisha Morel*)

1st Respondent

PUBLIC UTILITIES CORPORATION
(rep. by *Rajasundaram*)

2nd Respondent

ATTORNEY GENERAL
(rep. by *Stefan Knights and Aisha Morel*)

3rd Respondent

Neutral Citation: *Valentin v Planning Authority & others* (CP 12/2019 SCCC ... (30 June 2020).

Before: Dodin J., Andre J., Carolus J.

Summary: Declaration that the Petitioner's constitutional rights under articles 16 and 26 of the Constitution has been or is likely to be contravened. Whether Petition out of time. Whether Constitutional Court is the proper forum. Whether alternative redress available to the Petitioner. (1) The Petition was filed nearly 3 years after the 2nd Respondent had communicated its reason for not relocating the electricity pole and lines. No reason was advanced by the Petitioner for the delay and no leave was sought to file the Petition out of time. (2) No prima facie case of breach of the Petitioner's constitutional rights under articles 16 or 26 of the constitution has been made out. The decision of the 2nd Respondent was purely administrative and at most subject to judicial review. The Petition is dismissed.

Heard: 11 February 2020

Delivered: 30 June 2020

RULING OF THE COURT

DODIN J. (Presiding), ANDRE J, CAROLUS J.

- [1] The Petitioner is the owner of a plot of land registered as Title V1564. The 1st Respondent is the authority in charge of deciding upon planning permission applications and related matters, such as the issuing of Stop Notices. The 2nd Respondent is a statutory body in charge of the provision of electricity and water supply to the public and related matters such as the setting up of the electricity infrastructure.
- [2] The Petitioner avers that in December 2009, he lodged an application for planning permission to build a second storey to his dwelling house, located on his property. The 1st Respondent initially refused to grant planning permission stating that the extension would encroach on an alleged right of way or passage utilized by the community. In December 2014, the 1st Respondent granted planning permission for the extension after the Petitioner had agreed to allow a way-leave to be constructed on his property in favour of a neighbour. The Petitioner applied to the 2nd Respondent to divert electricity cables as the extension would encroach upon the cables. The application was made on the 10th July 2008, and the 2nd Respondent approved to divert the lines on the 29th January 2015. The 2nd Respondent carried out the diversion works towards the end of 2015 but the Petitioner averred that the relocated electricity pole and wires still obstructed the planned extensions.
- [3] The Petitioner began construction work on the extension and applied and paid for a further diversion of electricity cables on 11th December 2015. Despite numerous correspondence and site visits, the 2nd Respondent failed to divert the electricity line. On the 31st July 2017, as the extension works were almost completed and neared the electricity line, the 1st Respondent issued a Stop Notice against the Petitioner. The Petitioner filed a complaint before the Anti-Victimisation Committee of the National Assembly towards the end of 2017. The Anti-Victimisation Committee convened a hearing on the 11st April 2019 wherein the 2nd Respondent stated that there were no alternative to diverting the electricity lines that could enable the Petitioner to complete his construction works. The 1st Respondent directed the Petitioner to demolish part of the construction works and complete it in such a manner so as not to intrude upon the electricity lines. Only then would the 1st Respondent remove the Stop Notice.

- [4] The Petitioner averred that he obtained a structural report that stated that if he were to demolish the part recommended by the 1st Respondent, it could lead to the weakening of his entire house's structural integrity. A second report stressed that there are alternative positions to relocate the electricity lines.
- [5] The Petitioner now claims that his right to dignity under Article 16 of the Constitution has been infringed maintaining that he has followed all proper processes to build the extension to his dwelling house, and now through no fault of his, he is being directed to demolish part of his house, which risks the structural integrity of his entire house. He argues that this is heartless and cruel treatment on behalf of both Respondents.
- [6] The Petitioner further contends that his right to peacefully enjoy his property under Article 26 of the Constitution has or is likely to be contravened by the directive of the 1st Respondent to demolish part of his extension works. The directive being consequence of the 2nd Respondent's refusal to divert the electricity lines.
- [7] The Petitioner now prays for a declaration that the acts of the Respondents breached the Petitioner's rights under Articles 16 and 26 of Constitution and for this Court to:
- (i) order the 2nd Respondent to relocate, divert or otherwise reposition the electricity lines and poles in order that the Petitioner may complete his construction works;
 - (ii) order the 1st Respondent to lift, vacate or otherwise remove the Stop Notice;
 - (iii) award moral damages in the sum of SCR500,000 against the Respondents.
- [8] The 1st Respondent objected to the Petition raising two grounds, namely:
- (1) that the Petitioner's Petition should be struck out because it was filed out of time; and
 - (2) that the Petitioner has contravened the parallel remedies principle set out in the Article 46 (4) of the Constitution.
- [9] The Learned Counsel for the 1st Respondent submitted that the Planning Authority issued a Stop Notice pursuant to Section 14 of the Town and Country Planning Act against the Petitioner on 31 July 2017. The Petitioner acknowledged receipt of this Stop Notice in a

letter dated 11 August 2017. The Petitioner filed this Petition on the 19 June 2019 indicating that the issuance of the Stop Notice by the Planning Authority amounts to a likely contravention of the Petitioner's constitutional rights under Article 16 and 26 of the Constitution.

- [10] The Learned Counsel submitted that Rule 4(1)(b) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules imposes a time-limit of 3 months for the filing of a petition in the Registry of the Supreme Court where there is a likely contravention of a provision of the Constitutions caused by an act. The Learned Counsel referred the Court to the cases of Revici v Prentice Hall Inc [1969] 1 ALL ER 772, and Darrel Green v Seychelles Licensing Authority and the Seychelles Government [1998] SCCA 12 in support of his submission.
- [11] The Learned Counsel submitted that the failure to file a Petition within the stipulated time is a grave and serious non-compliance with the Rules but acknowledged that the Court could grant extension of time in exceptional circumstances and for good and substantial reasons under sub-rules 4(3) and 4(4) of the Constitutional Court Rules. However, the Learned Counsel argued that for the Court to consider whether the Petitioner has substantial reasons to justify filing the Petition out of time, the Petitioner must file a motion for leave to file this Petition out of time. Then the Court will apply the principle of lex non cogit ad impossibilia to determine whether the Petitioner has adduced sufficient reasons to purge the default; (Nora v Minister of Land Use and Habitat and Another [2002] SCCC). In considering whether to exercise its discretion to enlarge the time prescribed by the rule, the Honourable Constitutional Court may consider the length of delay, the reasons for delay, the chances of the Petition succeeding if the extension is granted and the degree of prejudice to the Respondents if the application is granted or merely consider the interest of justice.
- [12] The 1st and 3rd Respondents submitted that the Petitioner's grievance is against the Stop Notice and he is alleging that the act of issuing this Notice infringes his rights under Article 16 and 26 of the Constitution. The length of delay in bringing the Petition is almost 23 months before filing the Petition and the Petitioner did not provide any reason for the delay.

The Learned Counsel, nevertheless, acknowledged that there is little prejudice to the Respondent if the extension is granted but argued that if no excuse was offered no indulgence should be granted. It is the responsibility of the Petitioner to file a Petition within the time specified by the rules and if he fails to do so he must respectfully seek leave from the Court to extend the time to file the petition.

- [13] On the second issue, the contravention of the parallel remedies principle, the 1st and 3rd Respondents submitted that where there is a parallel remedy, a person should not seek constitution relief unless circumstances of which the complaint was made include some feature that justifies resort to a claim for breach of a fundamental right referring to Article 46(4) the Constitution. The Learned Counsel for the 1st Respondent referred the Court to the cases of *Kermrajh Harrikissoon v Attorney-General of Trinidad and Tobago* [1979] 3 WLR 62, PC, and *Darrel Green v Seychelles Licensing Authority and the Seychelles Government* [1998] SCCA 12(supra). The Learned Counsel maintained that the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the Petitioner to invoke the jurisdiction of this Court, particularly if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.
- [14] The 1st Respondent submitted that the Petitioner has other causes of action available to secure the redress to which he may be entitled. The Learned Counsel argued that the real objection of this Petition is to secure judicial review of the action of the Planning Authority and as such, the Court should decline constitutional redress given that a parallel remedy exists.
- [15] The Learned Counsel submitted that the Constitutional Court should not hear this matter because the important and valuable safeguard that is provided in Article 46(6) of the Constitution will be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. Alternatively, the

Constitutional Court should transfer the Petition to the appropriate Court for grant of redress in accordance with Article 46(4) of the Constitution.

[16] The Learned Counsel for the Petitioner submitted further in reply that this Petition is not based on the stop notice but against the non-relocation of the electricity lines, which prevent the Petitioner from completing his construction and hence infringing his right to enjoy his property.

[17] Article 16 of the Constitution in regard to the right to dignity states:

“16. Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

Article 26 of the Constitution in regard to the right to property states:

“26. (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

(2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-

(a) in the public interest;

(b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;

(c) in satisfaction of any penalty, tax, rate, duty or due;

(d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;

(e) in respect of animals found trespassing or straying;

(f) in consequence of a law with respect to limitation of actions or acquisitive prescription;

(g) with respect to property of citizens of a country at war with Seychelles;

(h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or

(i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

(3) A law shall not provide for the compulsory acquisition or taking of possession of any property by the State unless-

(a) reasonable notice of the intention to compulsorily acquire or take possession of the property and of the purpose of the intended acquisition or taking of possession are given to persons having an interest or right over the property;

(b) the compulsory acquisition or taking of possession is necessary in the public interest for the development or utilisation of the property to promote public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning;

(c) there is reasonable justification for causing any hardship that may result to any person who has an interest in or over the property;

(d) the State pays prompt and full compensation for the property;

(e) any person who has an interest or right over the property has a right of access to the Supreme Court whether direct or on appeal from any other authority for the determination of the interest or right, the legality of the acquisition or taking of possession of the property, the amount of compensation payable to the person and for the purpose of obtaining prompt payment of compensation.

(4) Where the property acquired by the State under this article is not used, within a reasonable time, for the purpose for which it was acquired, the State shall give, to the person who owned it immediately before the acquisition of the property, an option to buy the property.

(5) A law imposing any restriction on the acquisition or disposal of property by a person who is not a citizen of Seychelles shall not be held to be inconsistent with clause (1)."

[18] Article 46(1) to 46(5) states:

"46. (1) A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.

(2) An application under clause (1) may, where the Constitutional Court is satisfied that the person whose right or freedom has been or is likely to be contravened is unable to do so, be made by another person acting on behalf of that person, with or without that person's authority.

(3) The Constitutional Court may decline to entertain an application under clause (1) where the Court is satisfied that the applicant has obtained redress for the contravention under any law and where the applicant has obtained redress in the

Constitutional Court for any matter for which an application may be made under clause (1), a court shall not entertain any application for redress for such matter except on appeal from a decision of such court.

(4) Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other court under any other law, the Court may hear the application or transfer the application to the appropriate court for grant of redress in accordance with law.

(5) Upon hearing of an application under clause (1) the Constitutional Court may-

(a) declare any act or omission which is the subject of the application to be a contravention of the Charter;

(b) declare any law or the provision of any law which contravenes the Charter void;

(c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application;

(d) award any damages for the purpose of compensating the person concerned for any damages suffered;

(e) make such additional order under this Constitution or as may be prescribed by law.”

[19] The first issue raised in the objection is that the Petitioner has filed this Petition out of time and against the provisions of Rule 4 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules. Rule 4 states:

“4. (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 a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;

(c) in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law.

(2) Where a petition under rule 3 relates to the application enforcement or interpretation of any provisions of the Constitution, the petition shall be filed in the Registry of the Supreme Court within 3 months of the occurrence of the event that requires such application, enforcement or interpretation.

(3) Notwithstanding subrules (1) and (2), a petition under rule 3 may, with the leave of the Constitutional Court, be filed out of time.

(4) The Constitutional Court may, for sufficient reason, extend the time for filing a petition under rule 3.”

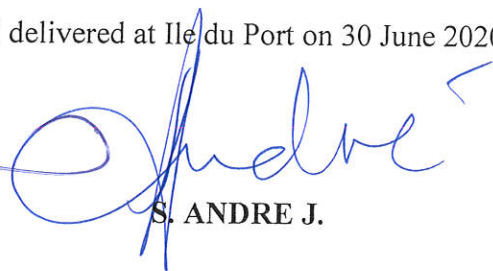

- [20] As submitted by the 1st and 3rd Respondents, the last communication from the 2nd Respondent was dated 11 August 2016 and informed the Petitioner that the electricity cables could not be relocated onto another neighbor’s land without that neighbor’s permission. The decision by the 2nd Respondent does not appear to be final. It places the onus on the Petitioner to seek some arrangement with his neighbor with regards to the relocation of the electricity pole and cables. Nevertheless, it raises two issues: whether it was an administrative decision, in which case the proper challenge should be by way of judicial review, or an act or omission under Article 46(1) of the Constitution.
- [21] The Petitioner claims that he is petitioning the Court pursuant to Article 46(1) of the Constitution. Should that be the case, the Petition should be in compliance with the Constitutional Court Rules particularly rule 4(1)(a) or 4(1)(b). The Petitioner chose to complain to the Anti-Victimization Committee of the National Assembly at the end of 2017 and to the Ombudsman in 2018. The Petitioner gave no other reason why the Petition was not filed in compliance with rule 4(1). Furthermore, the Petitioner never sought leave to file the Petition out of time pursuant to rule 4(3).
- [22] The Learned Counsel for the Petitioner argued that leave was not necessary since the refusal to relocate the electricity pole and cables by the 2nd Respondent is an ongoing violation and no final decision has been taken despite the Petitioner having paid for the

relocation. If we were to subscribe to that view, this Court would have to be also of the opinion that the 2nd Respondent has an obligation to relocate electricity poles and cables whenever requested regardless of circumstances. We disagree with the Petitioner on this as we consider that any such request must be reasonable and the decision arrived at by the 2nd Respondent must also be reasonable in the circumstances. Such decision where the reasonableness of the public authority is called into question should be challenged by way of judicial review unless a clear case of violation of a constitutional right has been established.

- [23] In this case the stop notice which has caused the Petitioner to cease construction of the extension was issued under section 14 of the Town and Country Planning Act and is not being challenged before this Court. The Petitioner maintains that the issue is the relocation of electricity cables, which, if resolved to the satisfaction of the Planning Authority, would result in the stop notice being removed and allow the Petitioner to conclude the extension of his house. The question, therefore, is whether the decision by the 2nd Respondent (PUC) not to relocate further the electricity cables for the reasons given in its letters of 18 March 2016, 15 June 2016 and 11 August 2016 amount to a violation of the Petitioner's constitutional rights under articles 16 and 26 of the Constitution.
- [24] We find that the Petition in this case was filed nearly 3 years after the 2nd Respondent had communicated its reason for not relocating the electricity pole and lines. No reason was advanced by the Petitioner for the delay and no leave was sought to file the Petition out of time. These procedural improprieties are in themselves sufficient to dismiss the petition.
- [25] Even if we were to condone the lack adherence to the rules for filing constitutional petitions, after perusing the Petition and the affidavit of the Petitioner, we find that no prima facie case of breach of the Petitioner's Constitutional rights under articles 16 or 26 has been made out. We find the decision of the 2nd Respondent to be purely administrative. At most, the Petitioner could have sought judicial review of that decision.
- [26] Consequently for the reasons given above we sustain the objections raised by the 1st and 3rd Respondents and we dismiss the Petition.

[27] We do not make any order for cost.

Signed, dated and delivered at Ile du Port on 30 June 2020



C. G. DODIN J.

S. ANDRE J.



E. CAROLUS

(Presiding)