CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2020] SCCC 975

CP 06/2019

In the matter between

ASSEMBLIES OF GOD **Petitioner**

(rep. by Mr. Anthony Derjacques)

And

THE ATTORNEY GENERAL

(representing the Government of the Republic Seychelles) **1st Respondent**

(rep. by Mr. George Thachett)

THE ATTORNEY GENERAL **2nd Respondent**

(rep. by Mr. George Thachett)

Neutral Citation: *Assemblies of God v Attorney General* (CP06/2019) [2020] SCCC 975 22 December 2020

Before: Govinden CJ, Burhan and Dodin J J

Summary: Constitutional law: claim of infringement of right to freedom of conscience and religion, and right to property: whether or not the refusal to approve building plans constitutes an infringement of these rights: four preliminary objection raised by Attorney General: first and second objections dismissed; the petition not a nullity but an irregularity which has been remedied; the petition not filed out of time because

potential breach of rights of a continuous nature: third objection upheld; Petitioner has not availed alternative remedy; Petitioner has right to compel Respondents by way of writ mandamus to finalise appeal; Case transferred to the Supreme court to exercise its supervisory jurisdiction under article 125 (1) (c) of the Constitution.

Heard: 15 September 2020

Delivered: 22 December 2020

ORDER

Having come to the finding that an alternative and adequate redress in law is available to the Petitioner to compel the Respondents by way of a writ of mandamus to finalise the appeal procedure, we transfer this matter to the Supreme Court of Seychelles to exercise its supervisory jurisdiction under Article 125 (1) (c) of the Constitution.

JUDGMENT OF THE COURT

BURHAN J (Govinden CJ and Dodin J concurring)

[1] This is an application under article 46 (1) of the Constitution of the Republic of Seychelles (the Constitution) where the Petitioner avers that its right to property as protected by Article 26(1) of the Constitution and its right to the freedom of conscience as protected by Article 21(1) of the Constitution have been contravened by the first Respondent.

[2] The Petitioner, the Assemblies of God is an association registered in terms of the Registration of Associations Act, 1959. The first Respondent is the Government of the

Republic of Seychelles, in particular, the Town and Country Planning Authority and the Ministry of Habitat, Infrastructure and Land Transport. The first Respondent is represented by the Attorney General, who is cited as the second Respondent. The events leading to the petition have been outlined in the petition.

[3] The Petitioner owns a land parcel, LD 511 on La Digue, which it purchased on 13 April 2011 for the sum of SCR 750 000. On 23 May 2014, the Petitioner applied to the Town and Country Planning Authority to build a church on the said parcel of land. The Planning Authority rejected the plans on 16 July 2014 citing the following reasons: (a) the proposed development is situated in a sensitive area for the paradise Flycatcher habitat; (b) the Land Usage Planning exercise classifies this area as a "no development zone".

[4] The Petitioner appealed to the Minister of Land Use and Housing on 19 August 2014. The Petitioner raised the following grounds: (a) that the property has been divided for some time with the purpose of constructing residential properties; (b) in close proximity of the parcel are other residential buildings, a playing field, and a large hotel which is similar nature to a church; (c) the area itself is demarcated for Flycatcher habitat is very small and it is not of huge importance in terms of habitable area; (d) there is a main road and a secondary road which provide access to the property which in one way or another brings human presence in that particular area; (e) the church meets only three times a week and it generates low noise level; and (f) there is no physical evidence that the Flycatchers are still living in that vicinity.

[5] The Petitioner's appeal also stated that if the proposal was approved, they would make sure that minimum trees were removed from the site; that the building is constructed in a way

that will generate less noise; and to paint it a colour that will blend with the surrounding environment. As an alternative solution, they recommended that the Respondents agree to an exchange of the land parcel with one similar in size and typography to theirs.

[6] On 25 August 2014, the Ministry of Land Use and Housing wrote to the Petitioner informing it that the appeal had been considered and forwarded to the Appeal's Advisory Committee for further processing. To date, the Petitioner has not received the outcome of that appeal.

[7] The Petitioner, through their representative the International Associate Consultancy (Pty) Ltd, wrote to the Planning Authority on 2 December 2014 requesting that it reclassify the land parcel as a residential or tourism zone. Planning Authority responded on 16 December 2014, stating that the request for reclassification had not been approved and advising the Petitioner to communicate with the Department of Environment for further clarification.

[8] In line with this advice, the Petitioner wrote to the Principal Secretary of the Department of Environment & Energy on 6 January 2015. They motivated why the land parcel should be reclassified as a residential and tourism zone and not remain as a buffer zone, and their reasons included the following:

(a) Other land parcels, namely LD 1608, LD 920, LD 922 and LD 510 which are close to the Petitioner's land parcel are classified as tourism and residential zones;

(b) A hotel, namely Caban Des Anges has been constructed on land parcel LD 920; and

(c) A footprint of 150 square meter on a 1294 square meter land parcel will not severely interfere with the vegetation situated thereon.

[9] The Ministry of Environment, Energy and Climate Change responded to the Petitioner's letter on 14 April 2015 saying that the Ministry had re-assessed the Petitioner's request and forwarded its recommendations to the Planning Authority. A follow-up letter from the Ministry on 30 April 2015 informed the Petitioner that the Ministry maintained their previous stance in so far as the zoning of the parcel was concerned, and so it would not recommend a reclassification of land parcel. It would remain a buffer zone.

[10] Unhappy with this outcome, the Petitioner turned to the President. They wrote to the President on 1 February 2016, complaining that the agreement that had been reached with the Planning Authority and the relevant Ministry to facilitate an exchange of land parcel LD 511 with another one selected by the Petitioner had not been honoured by these government agencies. Instead, a land parcel had been preselected without the Petitioner's knowledge or involvement, which the Petitioner felt was unacceptable since they did not know whether the proposed land parcel was suitable for a church.

[11] It seems the Petitioner was not successful in getting the President's intervention in resolving the matter. Hence they turned to this court.

[12] The Petitioner thereafter lodged this petition before the Constitutional Court on 10 April 2019, setting out the above events. In the petition, they claimed that they have not been able to construct a church and to propagate, manifest, practice and worship their religion on La Digue due to the actions of the Planning Authority and the mentioned ministries.

The Petitioner alleged that their right to property under Article 26(1) and their right to freedom of conscience under Article 21(1) of the Constitution have been contravened.

[13] In their view, the acts of the Planning Authority and the mentioned ministries prevented them: from peacefully enjoying their property in an appropriate, dedicated and official church on church premises; from developing their property and pursuing the project; and from providing their congregation with a properly built area for peaceful worship and further contravenes their right to manifest, propagate, worship, teach, practice and observe their religion.

[14] In addition, the Petitioner averred that the policy in terms of which the Respondents acted, the "no development zone" one, is not law. They also alleged that the acts and denial was arbitrary and unreasonable in view of the fact that a large hotel was built on land parcel LD 920, which land parcel was close to theirs. The decision, they aver, was also irrational and harmful to the Petitioner, had no basis in law, and deprived their congregation a place for peaceful and spiritual worshipping.

[15] Their prayers include the following reliefs:

(a) A declaration that the decision of the first and second Respondents that the Petitioner's project stands cancelled contravenes Article 26(1) of the Constitution with respect to the Petitioner.

(b) A declaration that the decision of the first and second Respondents, as stated on 16 July 2014, with respect to the cancelling the said project and withholding permission contravenes Article 26(1) and 21(1) of the Constitution with respect to the Petitioner.

(c) An order compelling the first and second Respondents to consider and consent and allow the Petitioner to develop the project and construct its church;

(d) Any order that may meet justice of this case;

(e) An order of special damages in the sum of SR500 000 and costs to the Petitioner.

[16] It bears mention, at this point, that the petition was filed without a supporting affidavit. Which is one of the matters that the Respondents have taken issue with in their preliminary objections. But the Petitioner remedied this misstep on 15 May 2019, and sought the court's permission to file the supporting affidavit. In proceedings on 25 June 2019, the Respondents' position was that the failure to support the petition with an affidavit rendered the petition a nullity. It was agreed in those proceedings that the issue of failure to tender the affidavit with the petition would be determined together with the rest of the Respondents' preliminary objections.

The preliminary objections

[17] The Respondents' preliminary objections were filed on 14 May 2019, and are: (a) the petition is defective as it contravenes Rule 3(1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules; (Constitutional Court Rules); (b) the petition is barred by prescription as set out in Rule 4 of the Constitutional Court Rules and the Petitioner had not sought leave of the court for filing the petition out of time or for extending the statutory limits; (c) the Petitioner had not availed the adequate means of redress available under law; (d) there is no violation or likely

violation of any of the Petitioner's constitutional rights and there is no prima facie case of any alleged violation of their rights.

Analysis

[18] In regards to the first objection, it is common cause that the Petitioner filed their petition without a supporting affidavit. In terms of Rule 3(1) of the Constitutional Court Rules, an application to this court in respect of matters relating to contravention of the Constitution has to be made by petition accompanied by an affidavit of the facts in support thereof. The Petitioner cured their misstep on 15 May 2019, seeking the court's permission to file the supporting affidavit which it had inadvertently failed to attach when the petition was filed on 19 April 2019. The Respondents submit that the failure to attach the affidavit renders the petition a nullity.

[19] In our view, the Respondents' submission is incorrect. In terms of Rule 6 of the Constitutional Court Rules court may make an order where there has been none compliance with the Rules. The Rule reads:

"6. (1) Where a petition which has been presented fails to comply to with the Rules, the Registrar of the Supreme Court shall submit the petition for an order of the Constitutional Court.

[20] This court has before determined whether it would exercise its discretion to excuse none compliance with Rule 3. For example, in **Naddy Dubois & ors v The President of the Republic & ors CP02/2014 [2016] SCCC 23**, the court refused to accept the affidavit filed and one of the reasons was that the affidavit did not disclose evidence in support of

the petition in accordance with Rule 3 (1). So it is incorrect to say failure to comply with Rule 3(1) renders the petition a nullity. It amounts to an irregularity which could be cured at the discretion of Court.

[21] In the current matter, the Petitioner has sought the court's approval to remedy none compliance with Rule 3(1). They stipulated that the failure to attach the affidavit was an administrative error on the part of the legal practitioner. It is in this court's discretion to allow the Petitioner's request, and there is no reason why we would refuse to do so in this instance. The explanation provided by the legal practitioner, namely that it was an administrative error which led to the affidavit not being attached, is sound. Further, the affidavit was filed soon after the petition, and it properly set out the factual and legal basis for the claims made in the petition. On this basis, the court exercises its discretion in favour of the Petitioner and accepts the affidavit. The first objection fails.

[22] Turning to the second preliminary objection. The Respondents submit that Rule 4(1) (a) of the Constitutional Court Rules would preclude the Respondents' action since it has been commenced outside the limitation period of three months. In response, the Petitioner submitted that where an offence or unlawful act continues to inhibit a 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, that contravention is continuing. For this, they rely on **Elke Talma v Michel & Ors Constitutional Court Case No 2 of 2010**. They state that the first Respondent unlawfully rejected their application on 16 July 2014, but the breach of their rights has been continual. Due to the continual nature of the breach, prescription did not begin to run on 16 July 2014 and therefore their claim is thus still actionable.

[23] It will be recalled that in **Talma**, this court stated that *"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."* The reason why the court found as it did in **Talma**, was because it was not clear whether a definite and final refusal had been recorded in respect of the land.

[24] On appeal in **Michel v Talma (2012) SLR 95** the court agreed that the petition was not time barred because the contravention was of a continuing nature. The court stated: *"it is not clear when a definite and final refusal was recorded, if ever. In that case it may well be that the appellant's actions even today continue to be a breach of the Respondents' rights and as such."*

[25] In the current matter, the last correspondence regarding the appeal was sent to the Petitioner on 25 August 2014. The Ministry of Land Use and Housing wrote to the Petitioner informing them that the appeal had been considered and forwarded to the Appeal's Advisory Committee for further processing. It is common cause that to date, the Petitioner has not received the outcome of that appeal. The appeal process has therefore not been finalised yet, since there is no decision.

[26] Accordingly, the Petitioner was correct to rely on the reasoning in **Talma**. Since the decision in the appeal proceedings has not yet been given, the potential breach of their rights is still continuing. Thus, following **Talma**, the second objection is dismissed. The petition is not time barred.

[27] The third objection relates to the question whether the Petitioner s have availed an alternative remedy under law. With regards to this objection, the Petitioner has submitted

that it had followed all the necessary procedures to obtain permission to build the church. Following the refusal by Planning Authority, they appealed to the Minister of Land Use and Housing on 19 August 2014. To date, they have not received the outcome of this appeal. Thus, all adequate means of redress under the Seychelles Planning Authority and the Ministry of Land Use and Housing have not been exhausted.

[28] We observe that in the meantime, however, the Petitioner has been waiting in excess of six years for the appeal to be finalised. This is an astounding period of time to be required to wait for an appeal. The Petitioner has been unable to exhaust his remedies available to him but due to no fault of his. The appeal dated 19th August 2014 to the Minister of Land Use and Housing by the Petitioner is still a live issue to be determined. In our view an alternative remedy in law is available to the Petitioner to compel the Respondents by way of a writ of mandamus to finalise the appeal procedure. As the means of adequate redress are available to the Petitioner under other law, this court cannot permit a collateral petition for redress under the Constitution to a court of co-ordinate jurisdiction as stated in ***Germaine Amesbury v Chief Justice Constitutional case No 6 of 2006***.

[29] It would be pertinent at this stage to consider the provisions of article 46 (4) of the Constitution which reads as follows:

"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."

[30] Having come to the finding that an alternative and adequate redress in law is available to the Petitioner to compel the Respondents by way of a writ of mandamus to finalise the appeal procedure referred to in paragraph 27 herein, we transfer this matter to the Supreme Court of Seychelles to exercise its supervisory jurisdiction under article 125 (1) (c) of the Constitution. We observe that the Constitutional Court Rules provide guidance and guidelines in referrals to the Constitutional Court but the Constitution, the Rules and the Seychelles Civil Procedure Code are silent on transfers under Article 46(4) of the Constitution. The Supreme Court in hearing this judicial review matter should give due consideration to the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules.

[31] The Registrar Supreme Court is ordered to transfer the said case to the Supreme Court to be heard by a Judge appointed by the Chief Justice.

Signed date and delivered on this at Ile du Port on 22 December 2020

Govinden CJ Burhan J Dodin J