

MICHEL v TALMA

(2012) SLR 95

A Madeline for the Attorney-General for the appellants
A Derjacques for the respondents

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

This matter involves a protracted process culminating in the decision of the Constitutional Court on 28 September 2010. The respondents had brought a constitutional case arguing that their rights under article 26(1) (right to property) and article 27 (right to equal protection of the law) had been infringed by the first three appellants. The respondents, father and daughter, had invested time and money in a development plan for their land at Anse Lazio, Praslin with the approval of the first three appellants until an area of land which comprised the respondents' land was declared an area of outstanding beauty and a "no development zone" by the third appellant.

The respondents submitted that this unilateral decision had prevented them from peacefully enjoying and developing their property and was discriminatory as other development projects in the said area had been permitted, as had other projects on similar sites in Seychelles. They had argued that the appellants' decision was arbitrary, irrational and harmful to them and had rendered their property of nil value, nullifying past investments and costs they had incurred.

For their part the appellants had submitted before the Constitutional Court on a point of law that the matter was time barred and on the merits of the case, that the respondents' project's approval which had been subject to conditions had lapsed, that the prohibition of development was in the public interest, that the respondents' rights in being permitted to build a residential home as opposed to a hotel on the land was only a limitation to their property rights as was permitted under the law, and that they have not been treated any differently to other property owners in the area.

The Constitutional Court by a unanimous decision delivered by the Chief Justice found in favour of the second respondent; that there was no legal justification for the refusal to consider the project proposal of the applicant and that the refusal by the officers of Government to consider the petitioner's project, in accordance with the existing law, was unconstitutional. Hence declarations were made that the respondent's rights under article 26(1) of the Constitution had indeed been breached and an award of moral damages of R 50,000 was granted to the respondent against the Government of Seychelles and the Attorney-General. As the matter should have been preferred against

the Government of Seychelles and not the first two appellants, President James Michel and Minister Joseph Belmont in their personal capacities, no costs were awarded against them but costs were awarded against the fourth respondent. There was no finding of any discrimination contrary to article 27 of the Constitution.

It is against these declarations that the present appeal is now brought. The appeal is on four grounds, namely that:

- (i) The Constitutional Court erred in finding that the matter was not time barred;
- (ii) The award for moral damages was manifestly high and excessive;
- (iii) Costs should not have been awarded against the Attorney-General as he appeared *amicus curiae*; and
- (iv) The Constitutional Court erred in declaring that the action should have been brought against the Attorney-General and not the first two respondents.

At the outset we wish to make an observation. A finding was made by the Chief Justice in relation to the first appellant, Alwyn Talma, in relation to the fact that since he had transferred his interest in the land, Parcel PR2552, he had no *locus standi* to bring this action. We fully endorse this view and are surprised to see the appeal is brought again against him and his daughter. We are of the view that the first respondent equally has no *locus standi* in this case and will treat this appeal as properly brought only against the second respondent Elke Talma.

We now propose to deal with the grounds as they arise:

Was the action time barred?

It is submitted by the respondents that rule 4(1)(a) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules would preclude the respondent's action since it has been commenced outside the limitation period of three months. We note that a development of this kind does not go through a streamlined, seamless and efficient application process. Instead hopeful developers step into a Kafkaesque journey involving various ministries and departments which may be summarised (but not simplified) as follows: a project memorandum is sent to the Seychelles Investment Bureau (SIB), SIB circulates the memorandum to all departments including planning, environment and tourism. Comments are sent back to SIB. On this basis SIB confirms or denies permission for the project. Unfortunately it does not end there; if approval is granted the developer has to go through the planning process and meet the requirements of an environment impact assessment. Final approval results in the project finally getting off the ground.

To complicate matters, each stage of the process described may see refusals and appeals and eventual permissions granted. It is not in dispute that the respondents had ventured down the rabbit hole and had "won some and lost some" and after a series of project reappraisals, re-designs and re-submissions (vide: project with EXIM approved

by President René, difficulties with Anse Lazio bridge, interest by Royal Resorts involving lease of Savoie land, approaches by Joe Albert and Southern Sun, United Resorts and finally, Dr Ramadoss) got the impression that the project would not go ahead. As late as April 2007, the first respondent was still writing to the first appellant appealing the decision.

It was obviously clear to the respondents that they still had a chance to see the decisions of the different authorities reversed. Further, that the appeal was still ongoing is clearly supported by the proceedings of the National Assembly of 27 October 2009 during question time with the Vice President:

Vice President Belmont: Mr Speaker mon mazinen si Msye Talma I oule fer kek developman touristic I bezwen pas atraver bann lenstitisyon ki konsernen avek sa... I kapab toultan *fer rapel* pou ki ban lotorite a *konsidere si i annan keksoz ki sanze, si I kapab fer en keksoz ki lo sa morso later* kot i ete laba... [my emphasis] [page 7 of Assembly proceedings in respondents' bundle of documents before the Court]

(my translation): Mr Speaker I think that if Mr Talma would like to carry put a tourism development he will have to go through the different institutions concerned with the project... he could always *appeal* so that the authorities *might consider if anything has changed or if he could do something with the land...* [my emphasis]

The respondents' petition to the Constitutional Court was dated 15 January 2010 and was received at the Registry on 22 January 2010. If the date of limitation started to run from the Vice President's statement in the National Assembly (27 October 2009) then the respondents were clearly not time barred. But as can be gleaned from the different stages described above, 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, in the words of the Chief Justice:

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.

We would in this respect, therefore, have no hesitation in also distinguishing the cases of *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 from the present appeal. As rightly pointed out by the Chief Justice they are not cases of continuing breaches. The historical basis for the limitation of actions is one based in equity, namely that "equity defeats delay." Limitation periods by their very nature curtail the right or ability of a plaintiff to pursue a claim. For this reason they require strong justification – fairness and certainty (closure of claims) being the strongest reasons. This Constitutional Court rule has already undergone a change from the original provision of "30 days" limitation to the 3 month one now in force. I would like to support and reiterate the Chief Justice's view that it may be time to

revisit this limitation period which may well run counter to article 45 of the Constitution, that is, that it may well amount to the suppression of a right.

This resonates with the Ugandan's Constitutional Court finding in *Uganda Association of Women Lawyers and Others v Attorney-General (Constitutional Petition No 2 of 2003)* [2004] UGCC 1 (10 March 2004):

It seems to us that a constitution is basic law for the present and the future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the thirty days [3 months for Seychelles] rule is enforced arbitrarily. In our view, rule 4 of Legal Notice No.4 of 1996 [the equivalent of the Seychelles Constitutional Court rules] poses difficulties, contradictions and anomalies to the enjoyment of the constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the learned Supreme Court Justices, (Mulenga, JSC and Oder, JSC) that this rule should be urgently revisited by the appropriate authorities... To recast the words of Oder, JSC (supra) "It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for a bodily injury in a run-down case has far more time to bring his action than the one who wants to seek a declaration or redress under... the Constitution.

We would finally point out that if everything else had failed, given the complicated process, the difficulty in ascertaining when a final decision had actually been communicated to the respondents, that this is one case when the discretion of the Constitutional Court would have been rightly exercised under rule 4(4) to allow the petition to be filed out of time. We therefore find no merit in Ground 1 of the appeal.

A related issue to this ground of appeal was brought tardily to this appeal but has a direct bearing to it. This is the authority of *Hall v Government of Seychelles*, a judgment by consent of the Supreme Court entered on 12 January 2012. Miss Madeleine for the appellants contends that this is a consent judgment and should be distinguished from an ordinary judgment. We respectfully disagree. A consent judgment entered by the court under section 131 of the Code of Civil Procedure is a judgment of that court and matters therein contained may be relied on in subsequent cases just as in other cases. We agree with counsel that there are other distinguishing factors, namely that the land in question was much smaller and the development sought was of a residential nature. However, we are of the view that the salient point applicable to all cases where rights to the peaceful enjoyment of property is concerned is the statement that a –

...recent decision taken on the Cabinet of Ministers reviewed the issues in this nature (sic) that areas which were formerly not permitted for development have been reconsidered to permit the development in the said areas, with very low impact on nature if it is buildable, construct able (sic) due to the rapid technological development in the construction field.

This change of policy in our view confirms the inconclusiveness of actions of this nature. The right to peaceful enjoyment of property is without doubt subject to limitations as prescribed by law as is necessary in a democratic society but since laws and policies as

permitted by these laws are also not immutable, it is questionable whether breaches to such rights are ever time barred. Each case will of course have to be decided on its merits.

Award of moral damages

We now turn to the next issue raised: that the award for moral damages was manifestly high and excessive. It is correct that no direct evidence was brought at the trial on this issue, nor was “moral damages” ever claimed for that matter. The respondents had claimed that as a result of the appellant’s actions their property was of nil value that their past investments and costs incurred thus far were nullified and that damages of R 400,000 should be awarded. In awarding R 50,000 the Chief Justice in his judgment terms it an award for “moral damages.”

Article 46(5)(d) of the Constitution makes provision for the award of “any damages for the purpose of compensation of the person concerned for any damages suffered.” The wording is in our view very broad and would permit compensation under any head – pecuniary damage or moral damage and hence the Chief Justice was perfectly entitled to make such an award.

Both liability for moral damage and its assessment have always concerned courts. In tortious actions, the Seychelles Civil Code in article 1382(1) states “Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it” and article 1383(1) “Every person is liable for the damage it has caused not merely by his act but also by his negligence or imprudence”. The provisions make no distinction between pecuniary damage and moral damage. The French from whom we received the provisions in our Civil Code initially also had great difficulty accepting the basis for moral damages as in the words of Professor Ripert “Il peut être choquant d’aller monnayer ses larmes devant les tribunaux “(G Ripert, “Le prix de la douleur,” 1948). In Seychelles, we also overcame our revulsion of valuing the invaluable – the monetary value of suffering - and have for many years in our jurisdiction accepted the indemnification of non-pecuniary loss. Although, the provisions outlined apply to delicts I have no doubt that in the absence of a specific scheme or proviso in the Constitution dealing with awards for damages caused by the infringement of constitutional rights, general principles for awards of damages do not vary significantly.

It is also the law that the burden of establishing the existence of the loss which in principle lies with the plaintiff/petitioner should not be an obstacle to the success of his or her claim. The existence of the harm is inferred from the infringement itself. It is obvious that as the Constitutional Court found no basis for the refusal by the appellants to consider the respondent’s project, such a refusal or even the withholding of such permission in the circumstances resulted in an infringement of her constitutional right to enjoy her property. The fact that the respondent had spent both considerable time and money in trying to secure permission to develop her property as was her right was never contested and hence compensation for that loss must naturally flow from a finding of wrongdoing.

However, the question does remain of how the sum of R 50,000 was arrived at. The Court of Appeal in *Cable and Wireless v Michel* (1966) SLR 1966 253 referring to Planiol and Ripert make the case that where a right has been violated, compensation can be awarded for moral damages even in the absence of a claim for material damages. These rights can be patrimonial or extra patrimonial as in this case. We agree that it is difficult to assess moral damages but the exercise must still be carried out and the plaintiff is entitled to them. There has however never been a method established in Seychelles to assess moral damages. No method of assessment is set out either in the Constitution or in the Civil Procedure Code.

The damages that occurred seem to me to relate to the fact that for well over twenty years the respondent and her father were involved in an emotional rollercoaster believing they were going to be permitted to develop their property and then having those same hopes dashed and the realisation that in commercial terms their property was of nil value; that their past investments and costs incurred thus far were nullified. Such emotional distress and stress is to my mind extremely punishing and can wear out even the most hard-nosed businessmen. In *David v Government of Seychelles* (2008) SLR 46 it was held that in such cases “The Court should make a subjective assessment of damages”. Further, in *Mousbé v Elisabeth* (SCA 14/1993 unreported) it was held that in determining damages, the court should not substitute its own judgment of appropriate damages for that of the trial court. Rather, it should decide if the trial court’s award of damages was manifestly high and excessive.

We have listened to both parties in this case and have studied the record meticulously and we bear in mind the authorities above and those cited by Miss Madeleine for the appellants. We are of the view that the award was far from being manifestly high and excessive. Indeed had the respondent cross-appealed on this ground we would have had no hesitation in raising the award made and would have considered other damages suffered by the parties. The infringement of a constitutional right is a serious matter and should be viewed as such by all concerned. In the defamation case of *Regar Publications Ltd v Lousteau-Lalanne* (SCA25/2006 unreported) the Court of Appeal made the following remark:

Apart from the fact that exemplary damages should be specifically pleaded, it should be awarded only in cases falling within the following categories:

- (a) oppressive, arbitrary or unconstitutional action by servants or the Government...

It is our view that had a claim been made for such damages in this case they may well have been awarded given the magnitude of the oppressiveness, arbitrariness and unconstitutionality of the acts of the servants of the Government. The award of damages in this case is by no means punitive or exemplary but rather reflects the compensatory quality of the damage caused to the respondent. This ground of appeal therefore has no merit and we dismiss it.

The costs of the case

We would now like to consider the third and fourth grounds of appeal together as they are clearly linked, namely that costs should not have been awarded against the Attorney-General as he appeared *amicus curiae* in this matter and that the Constitutional Court was wrong in declaring that the action should have been brought against the Attorney-General and not the first two respondents. At the outset we must point out that the Constitutional Court made no such declaration. The award of costs was made in the penultimate paragraph of the Chief Justice's judgment in which he stated:

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 respondent no 1 and 2 in their individual capacities. It was entirely unnecessary to name respondent no 1 and 2 as parties to the proceedings. Doing so just led to unnecessary multiplication of costs and time spent on this matter. I would allow petitioner no 2 only $\frac{1}{4}$ of the costs she has incurred against the Attorney-General who was the only proper defendant in the matter.

What we understand the Chief Justice to be stating is that the matter should not have been brought against the first two appellants (President James Michel and Minister Joseph Belmont) in their personal capacities. It did not state that the matter should not have been brought against the Government of Seychelles or any particular Ministry or its employees involved in the breach of the appellants fundamental rights. The respondent was entitled to bring a case against those who had occasioned the breach to her rights and against whom relief was sought, *vide* the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules rule 3(2) – "All persons against whom any relief is sought in a petition under sub-rule (1) shall be made a respondent hereto".

The action therefore should have been brought against the Government and the Attorney-General in terms of the Constitutional Court Rule 3(3) which stipulates that the Attorney-General also has to be made a respondent in all Constitutional Court cases in cases which he is not himself bringing. In such cases his appearance is indeed *amicus curiae* as he is not representing any party but is there to advise the court independently. The difficulty arises in this case as his role was blurred. Was he appearing for the Government as well as *amicus curiae*? In the pleadings and during the case he clearly conducted himself as the representative of all the appellants. Hence in apportioning costs, he is under the misconception of being burdened with those costs awarded against the Government of Seychelles. Article 76(4) of the Constitution clearly states that he is "the principal legal adviser to the Government" while article 76(10) emphasises his impartiality in the exercise of his powers namely "not to be subject to the direction or control of any other person or authority." When the Attorney-General appears in constitutional cases representing the Government the presumption is that his views are not in variance with the Government. Hence he is there representing the

Government. Costs awarded against him in such cases are costs awarded against the Government and not against him in his capacity as *amicus curiae*. To make it clear the costs are against the Government of Seychelles.

In the circumstances this appeal is dismissed in its entirety with costs.