IN THE COURT OF APPEAL OF SEYCHELLES

PLATTE ISLAND RESORT AND VILLAS LTD

APPELLANT

vs

1. **MINISTER PETER SINON**
2. **ISLAND DEVELOPMENT CORPORATION**
3. **GOVERNMENT OF SEYCHELLES**

RESPONDENTS

SCA 1 of 2012

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Counsel: Mr F. Elizabeth for the Appellant
Mr G.Robert for the 1st and 3rdRespondents
Mr F. Chang-Sam for the 2ndRespondent

JUDGMENT

DOMAH, S.,

[1] The learned Chief Justice refused leave to the appellant who made an *ex parte* application before the Supreme Court to commence proceedings for judicial review against the three respondents. The appellant is appealing against that decision.

[2] The facts relevant to this appeal are as follows. The appellant, Platte Island Resort and Villas Ltd, is a sub-lessee of Platte Island of which the sub-lessor is respondent no. 2, the Island Development Corporation. Respondent no. 1 is the Minister holding office at the Ministry of Investment, Natural Resources and Industry, the Head lessor of Platte Island. On 5 September 2011, the Minister wrote to the appellant to inform him that, following an earlier letter sent to the appellant dated 29 August 2011 evoking a breach of contractual obligations, the government had taken the decision to “déclare votre project caduque.”

[3] In giving his decision, the learned Chief Justice, in the absence of any indication on the procedure adopted by the appellant, referred to the parent provision, Article 125(1) (c) and (7) of the Constitution which confers supervisory jurisdiction to the Supreme Court, in such cases; and also to the subordinate legislation that applied: i.e SI No. 40 of 1995, the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Bodies) Rules.

[4] The texts of the above are as follows:

> *"125 (1). There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –*
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> *(a) …*
>
> *(b) …*
>
> *(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have the power to issue injunctions, directions, orders, writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing and securing the enforcement of its supervisory jurisdictions and*
>
> *…*
>
> *(7) For the purposes of Clause (1) (c), "adjudicating authority includes a body or authority established by law which performs a judicial or quasi-judicial function".*

[5] He, concluded that the body whose decision was being challenged did not fall within the ambit of SI 40 of 1995 made under Article 125(1) (c) and (7) of the Constitution as the impugned decision was not a judicial or quasi-judicial decision in nature.

[6] He also took the view that the facts suggested that the matter pertained to the private domain and not the public domain. To him, the agreements are basically private law agreements for which the petitioner could seek an action in damages and/or a permanent injunction in the ordinary way.

[7] The learned Chief Justice relied on the case of **R v Superintendent of Excise and Anor ex parte Confait [1935-1955] SLR 154** which rightly decide that it is a matter of interpretation whether a discretion given to an administrative official or body is, on the

one hand, an executive or administrative discretion or, on the other hand, a judicial or quasi-judicial discretion.

[8] He also referred to the case of **Regina v East Berkshire Health Authority ex parte Paul Anthony Walsh [1984] EWCA Civ. 6** where Sir John Donaldson, M.R., has stated:

> *"the remedy of certiorari might well be available if the health authority is in breach of a "public law" obligation, but would not be if it is only in breach of a "private law" obligation."*

[9] The decision of the learned Chief Justice is challenged on the following grounds:

1. the learned trial judge erred in law when he refused to grant leave to the Appellant to file its application for judicial review;
2. the learned trial judge erred in law when he concluded that the matter was one of private law rather than public law;
3. the learned trial judge erred when he held that "Given the facts and matters complained of the Petitioner has put before this Court I am satisfied that there is no point granting leave to the Petitioner to proceed as those facts and the decision impugned is outside the purview of Article 125 of the Constitution."

[10] As is apparent, the first ground raised by the appellant relates to the procedure adopted by the learned Chief Justice for his decision, the second to the substantive question whether the matter brought before him related to public law or private law and the third the scope and limit of article 125 of the Constitution and its application to the present case.

[11] The respondent who resist this appeal has also raised a preliminary objection to the effect that as at 28th February 2014, the appellant had yet to file its Skeleton Heads of Arguments and for that reason he was in breach of the Seychelles Court of Appeal Rules 2005. We are in presence of his Skeleton Heads of Argument which is dated 27th February 2014 with a stamp of the Registry dated 28th February 2014.

[12] We make no comments on the lack of regard appellant has given to the rules of this court with respect to the timely filing of skeleton heads of argument. A Practice Direction has been issued recently stressing on the timely and proper compliance with

the Rules, failing which the consequences that will follow. For this case, we shall leave it at that.

GROUND 1

THE PROCEDURE FOR JUDICIAL REVIEW

[13] Mr Frank Elizabeth has questioned the procedure which the learned Chief Justice has adopted in the matter. However, neither his skeleton Heads of Argument nor his submission has been very helpful in showing what the procedure should have been. True it is that, as a rule, a Court should not proceed to great length in deciding the application at the leave stage. It is particularly onerous on a judge, if he were to treat every application for leave as though it was an application on the merits. However, this was not a case of inadequate consideration of the case of the appellant but one of over consideration on a matter of leave. What prejudice it caused to the appellant who was generously served is not quite intelligible to us. He has had the bonus of having been told by the court at an earlier stage than anyone could have done that his application, under public law, is an exercise in futility, and he should not spend more resources in this type of litigation.

[14] We cannot do better than reproduce the relevant extract of the manner in which an application for judicial review should be determined at the leave stage. Even if the extract relates to English law, Seychelles law has followed the English rules as of old in the matter: i.e. Order 53: see **Ex P. Shilly Civ. A73/1992; Finesse v Banane [1981] SLR 103; Florentin v Florentin (unreported) Civil. A 1980; Re Passport Officer, ex parte Pillay (unreported) Civil A 9/1990; Bird v Attorney 1914 MR 94; Koo Foo Seng v Koo Foo Seng 1957 MR 104; Michel v Colonial Government 1896 MR 54.**

[15] In the White Book, we read (numbering inserted):

> "1. The application for leave to move for judicial review must be made ex parte to a single Judge, whether in term time or vacation (see r. 3(2)).

2. The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which are frivolous, vexatious or hopeless, and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.
3. The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" **(R v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed And Small Business Ltd [1982] A.C. 617, p. 642; [1981] 2 All E.R. 93, p. 105** per Lord Diplock.
4. Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant (ibid. at p. 644/106).
5. In **R v Secretary of State for Home Department, ex p. Rukshana Begum [1990] C.O.D. 109,** the Court of Appeal held that the test to be applied in deciding whether to grant leave to move to judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full *inter partes* hearing of a substantive application for judicial review.
6. If, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted."

Further down we read:

7. The applicant for leave must show *uberrimae fides*, and if leave is obtained on false statements or suppression of materials facts in the affidavit, the court may refuse an order on this ground alone **(R v.**

Kensington Commissioners, ex p. Polignac [1917] 1 K.B. 486, C.A. R v Barnes, ex p. Vernon (1910) 102 L.T. 860.

8. In **R v The Jockey Club Licensing Committee, ex p. Wright [1991] C.O.D. 306, Q.B.D.** the grant of leave to move for judicial review was set aside on the grounds of material non disclosure on the part of the applicant."

[16] We have dwelled on the procedure above for the purpose of showing that if there is any error which the learned Chief Justice did, it was to go in depth in his examination of the affidavit of applicant and deliver an elaborate judgment on it. This was strictly unnecessary. We do not think, therefore, that there is any merit in Ground 1 of the appeal.

GROUND 2

[17] Ground 2 challenges the fact that the matter relates to private law. It has been the argument of learned counsel for the applicant that it is properly a public law issue inasmuch as the decision was the decision of the Minister as the documents showed.

[18] To do justice to the submission of learned counsel for the applicant, we have to go to the primary facts rather than the collateral matters. Who are the parties? They are a sub-lessee, a sub-lessor and a head-lessor. Their dispute arises out of what? Their dispute arises out of a public contract of project management. What is the essentially the grievance of the appellant? It is that the head lessor has wrongly decided that his project is no longer viable. What is the remedy which he is seeking? He is seeking contract performance from the head lessor.

[19] From the nature of the obvious answers to the questions which this dispute raises, we are unable to say that the matter is governed by public law. That the head lessor is a Minister and that the property involved is state land is a collateral matter. The learned Chief Justice was correct in his conclusion on the facts, therefore, that the dispute was a dispute in private law and not public law. This is not a dispute where a citizen is claiming that the procedure which has been adopted by a public body to

adjudicate on his right has been wrongful so that the decision should be rendered null and void. This is a dispute about the application of the civil law provisions related to contractual obligations. In this regard, we note that parties have already lodged a case in the civil courts. There is, therefore, a civil remedy he is seeking which is wider than the public law remedy available to him. We find no merits in Ground 2.

GROUND 3

[20] Ground 3 relates to the scope and limit of article 125 of the Constitution and its application to the present case. The learned Chief Justice was correct in his view that the facts did not support the contention of the petitioner, now Appellant, that the head lessor was involved in any adjudicatory function so that the Supreme Court should supervise the exercise of that quasi-judicial jurisdiction. What the Minister was involved in is essentially an executive function of project management or project failure given under the Tourism Incentives Act by the Government of Seychelles in terms of approvals and other administrative issues (underlining ours).

[21] The Minister was not discharging the function of an adjudicator in the matter. He was simply executing a policy of government with regard to management issues in a public contract of major importance to the State under a legislation dedicated for the purpose. In taking his decision, he was applying project management principles and principles of the law of contract as he saw them. It cannot be said, in the circumstances, that the facts and circumstances fell under the purview of article 125 of the Constitution.

[22] All the grounds having failed, this appeal is dismissed with costs.

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S. B. DOMAH	**A. FERNANDO**	**M. TWOMEY**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Seychelles.