

**PLATTE ISLAND v SINON**

**(2011) SLR 381**

F Elizabeth for the petitioner

**Ruling delivered on 2 December 2011 by**

**EGONDA-NTENDE CJ:**

The petitioner is seeking, *ex parte*, leave of this court to commence proceedings for judicial review against the three respondents. The petitioner is a sub-lessee of Platte Island. Respondent no 1 is a Minister in respondent no 3. The respondent no 2 is the sub-lessor of Platte Island to the petitioner. Respondent no 3 is the head lessor of Platte Island.

The decision complained against is stated to be a decision of the respondent no 1 conveyed to the petitioner in a letter dated 5 September 2011. The letter was written in French but it has been translated as under into English;

Reference is being made to our letter dated 29 August 2011 whereby we have informed you about your breach of contract and conditions. We have clearly indicated that as a result of the delay of the 7 days, the Government will be forced to take the necessary action in regard to your land and Tourism development. To this effect the Government of Seychelles therefore declares your project null and void.

The relief sought by the petitioner is stated to be,

1. Make an Order that this matter be heard *ex parte*.
2. Make an order granting leave to the petitioner to file its petition for judicial review against the respondents and;
3. Issue a writ of prohibition stopping and preventing the respondents from terminating the lease of the petitioner for Platte Island and cancelling the project of the Petitioner earmarked for Platte Island.

In addition to the petition filed in this matter there is an affidavit sworn by Mr Danielle Belle, on the instructions of the petitioner. Mr Belle states in part;

24.I aver that the decision of the 1st respondent is improper, in error, malicious, unreasonable, irrational, null and void and amounts to an abuse of power since the petitioner was not in breach of the said letter of undertaking dated 19 March 2011 or the letter of SIB dated 10 June 2011 as explained in the petitioner's letter of 2 September addressed to the 1st Respondent which the 1st respondent is yet to reply.

25. That the matter is urgent and the petitioner does not expect the court to complete this by 2012 by which time the petitioner would lose an estimated 5.1 million Euros already invested in the project.

26. That the petitioner has already invested 5.1 Euros in the venture and the respondents have done everything in their power to frustrate the petitioner in the completion of its project in order for them to get an excuse to cancel the petitioner's project on Platte Island and the lease agreement.

27. I am informed that in the event of the project being cancelled by the respondents, the petitioner would lose an estimated 35.1 Euros altogether.

28. I aver that the petitioner has been offered 66 million dollars from a financial institution to complete the implementation of the project and will suffer severe 3 financial penalties if the lease is terminated and the project is cancelled.

29. I aver that the petitioner has got a "prima facie" case and that the petition is not frivolous or vexatious and that leave ought to be granted to allow the petitioner to pursue his action for judicial review of the 1st respondent's decision mentioned in paragraph 21 here above.

At the hearing of this application counsel for the petitioner, Mr Frank Elizabeth moved as per petition. He further submitted on the court raising the issue whether this was not simple matter of breach of contract, that there were incentives available under the Tourism Incentives Act that the petitioner would lose. He stated that this petition has been brought because "the project is dealt with by the Government of Seychelles in terms of the approvals and other administrative issues for the project."

I have read the petition and supporting affidavit. Neither the petition nor counsel in his address to this court mentions under what law this petition has been brought. I shall assume that this application for leave is made under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, S I No 40 of 1995 and that the law applicable is article 125(1) (c) and (7) of the Constitution which confers supervisory jurisdiction on this court. I shall set the same out:

(1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have,

(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or 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.

It is clear from the foregoing provisions that an application for judicial review under the supervisory jurisdiction of this court must be directed only to certain respondents. These are subordinate courts, tribunals, and/or adjudicating authority that is a body with judicial or quasi-judicial authority. Reading through the petition and supporting affidavit it is not alleged that any of the respondents or respondent no 1 in particular had purported to exercise judicial or quasi-judicial function in taking the decision that

is impugned. I have read a translation of the impugned decision. I do not get the sense that it was conveying a judicial or quasi judicial decision.

Woodman, CJ expressed a similar view in *R v The Superintendent of Excise and Anor ex parte Confait*, (1935-1955) SLR 154 at 155;

When a legislative enactment such as an Act of Parliament or an Ordinance confers upon an administrative official or body a discretion to do or not to do something which affects the rights of the subject such as his liberty or his right to dispose of his property as he pleases, that discretion may be either what has been called an executive or administrative discretion, or it may what has been called a judicial or quasi-judicial discretion. In the former case it is not liable to be controlled by the courts by Certiorari, in the latter case it is liable, on certain grounds, to be so controlled. The question of whether the discretion conferred is administrative or judicial is in every case a matter interpretation of the legislative enactment which confers the discretion.

Given the facts and matters complained of that the petitioner has put before this court I am satisfied that there is no point in granting leave to the petitioner to proceed as those facts and the decision impugned is outside the purview of article 125 of the Constitution. Article 125 appears tailored to cover only adjudicatory agencies, including persons of course and the impugned decision must be a judicial or quasi-judicial decision in nature.

There is another hurdle too for this petition. On the facts presented to the court the subject-matter is a sub-lease and connected agreements between the petitioner and respondents no 2 and 3. The agreements are basically private law agreements for which the petitioner can seek an action for damages and or a permanent injunction in the ordinary way. The mere fact that the petitioner may have a prima facie case to succeed in ordinary action to recover damages or a permanent injunction, does not turn such case into one that can be pursued by judicial review.

The petition does not cite any public law that respondent no 1 has violated. Judicial review, in my view, is a remedy available only in matters involving public law rather than private law. The fact that respondents no 2 and 3 are a statutory corporation and government respectively does not transform any claim that may lay against them as a matter of public law. I am strengthened in my view by the words of Sir John Donaldson M R in *Regina v East Berkshire Health Authority ex parte Paul Anthony Walsh* [1984] EWCA Civ 6:

The remedy of judicial review is only available where an issue of "public law " is involved, but, as Lord Wilberforce pointed out in *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 276, the expressions "public law" and "private law" are recent immigrants and, whilst convenient for descriptive purposes, must be used with caution, since English law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circularity or levitation by traction applied to shoe-strings, since 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.

Leave to proceed by way of judicial review is refused.