

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2019] SCSC 347
CS 236/2010

In the matter between:

TONY TIRANT
(rep by A.G. Derjacques)

Plaintiff

and

THE PUBLIC UTILITIES CORPORATION
(rep by S Rajasundaram)

Defendant

Neutral Citation: *Tirant Tony v The Public Utilities Corporation* (CS 236/2010) [2019] SCSC 347

Before: Andre J

Summary: Prescription – Compensation for use of property by Public Utilities Corporation

Heard: 25th February 2019

Delivered: 23rd April 2019

ORDER

Plaint granted and compensation awarded.

JUDGMENT

ANDRE J

[1] This Judgement arises out of an Amended Plaintiff of the 23rd January 2013 as filed on the 7th February 2013, wherein Tony Tirant in his capacity as the Executor for the Estate of the late Mr. Oswald Tirant of Anse Louis, Anse Boileau, Mahe (*“Plaintiff”*), prays for

compensation in the sum of Seychelles Rupees Eight Hundred Thousand (S.R. 800,000/-); the vacating of the land of the Plaintiff namely parcel No. C2247 (*“the property”*); the Plaintiff retaining and assuming ownership of all Defendant’s structures, fixtures, moveables and immoveables on the Plaintiff’s property; and for costs and interests, as against the Public Utilities Corporation (*“Defendant”*).

- [2] The Defendant by way of amended statement of defence of the 25th March 2013 as filed on the same date, raised three objections on points of law namely, firstly, in that the Plaintiff failed to issue a notice in writing to the Defendant of the intended proceedings against the Defendant as contemplated under the provisions of section 18 (2) of the Public Utilities Corporation Act (Cap 196) (*“the PUC Act”*), and hence such failure being a bar from filing the plaint. Secondly, the failure of the Plaintiff to commence a legal action within nine (9) months from the alleged cause of action restrains prosecution by virtue of section 18 (1) of the *PUC Act*; and thirdly, that the plaint is prescribed in terms of Article 2271 of the Civil Code of Seychelles (*“The Code”*). On the merits, the Defendant denies the plaint and puts the Plaintiff to the strict proof thereof and further avers that the construction on Plaintiff’s property was consensual and waived as the purpose of the construction was for the interest and use of the general public and moves for dismissal of the plaint with costs.
- [3] For the purpose of this Judgement, the following are the salient factual and procedural background thereof.
- [4] The Plaintiff, late Oswald Tirant herein represented by Tony Tirant in his capacity as Executor, was the landowner of the property situated at Anse Louis Mahe. He was a pensioner and he passed away in 2012 at the age of 93 after he had instituted the current plaint.
- [5] Plaintiff’s claim is in essence, that on the 1st September 1976, the Defendant constructed, repaired, renovated and expanded a sedimentation tank, filter house, pipes, structures and water extraction units on his property which is close to a river from which water was

drawn. Plaintiff avers that he was not consulted, so he did not consent to the construction and that the Defendant still currently maintains these structures and continues to extract water from his property, for profits. Despite this, he has not received any rental, compensation or participatory profits. Instead, he has had to pay the Defendant monthly water utilities bills. It is claimed that the action of the Defendant is unlawful and unfairly deprived him of his property. He has suffered damages because of this deprivation and invasion of his lawful rights in the sum of Seychelles Rupees Eight Hundred Thousand (SR. 800,000/-) against the Defendant. He thus seeks an Order directing the Defendant to pay him the amount claimed, to vacate his property and pay the costs of this suit, and allowing him to assume ownership of all the structures that the Defendant had built on his property.

[6] In its defence, the Defendant raised two points in limine relying on two provisions of the *PUC Act* (supra). The first was that the plaintiff had failed to issue a written notice to the Defendant, as contemplated in section 18(2) of the *PUC Act* informing of his intended action. Secondly, the plaintiff was barred from instigating the action because section 18(1) of the *PUC Act* requires proceedings against the Defendant to be lodged nine (9) months from the date of the alleged cause of action. On the merits, the Defendant largely denied the Plaintiff's claims that its occupation on the land was unlawful and that it extracts water from his land. In particular, the Defendant alleges that the construction of the sedimentation tank and other structures happened with the Plaintiff's consent. He was not deprived of the use of the property. He waived his claims and interests, because the tank was constructed for the use of the general public. The allegation that the Defendant

continues to extract water from his property is false. After a few years of construction of the tank, the Defendant ceased its operation activities.

[7] Additionally, it is further averred that the Plaintiff had let the Defendant use the land for 34 years and only in 2010, did he challenge Defendant's actions. In its view, the Plaintiff's claim was seeking to get money from the Defendant because other claims had been made against it following allegations of water contamination in La Misere. The use of the Plaintiff's land was not continuous and no profits were derived from it. The Defendant is a public entity serving the public. It is not a for profit institution. That the Plaintiff is not entitled to the damages sought and that the action should accordingly be dismissed.

[8] The Plaintiff passed away on 24th January 2013. Following this, his son the Executor to his Estate, Tony Tirant substituted him as Plaintiff. This was done by filing an amended plaint. The Defendant followed with an amended defence, adding an additional defence in limine. It stated that the action had been prescribed in terms of Article 2271 of the Code, which states that an action should be filed within five (5) years of the cause of action.

[9] At the hearing the Plaintiff called three witnesses. Tony Tirant the Executor testified and described how water was extracted from the mountain through the pipes, into the tank on his late father's land, and then distributed. He testified that the Government commenced the water operation on his father's property forcefully in 1976. His confirmed that his father did not protest defendant's action and in his opinion the reason being that there was no law at the time to help him enforce his rights. He testified that until 2013, the government was extracting water from his father's land. This water serviced many people. He denied that the reason why his father was motivated to claim from the

Defendant after such a long time, was because he learnt that others were claiming monies.

[10] In cross-examination, he testified that his father had told him that the government had forced him to build the structures on his land. His father had no choice in the matter. His father never wrote to the government to protest the use of his property. He intimated that his father filed the case in 2010 because the law had changed. Prior to this, there was no law to enforce the rights. It was only upon his father's awareness and knowledge that the law had changed that the claim was filed. He said that the structures have since been removed from the property.

[11] Defendant's witness Managing Director of PUC, Mr. Steven Mussard was called on his personal answers and he confirmed that the Plaintiff had not been paid for the use of the property. He also confirmed that the Defendant removed the structures and stopped using the property in 2015. They stopped doing so because a new project had been commenced at Mont Plaisir. They built bigger reservoir in that area, with pipes connecting to Anse Louis. It bypasses the reservoir near the plaintiff's property. This way, they could supply water to households that were already connected on that system. The storage was thus removed from the Plaintiff's property and placed on Mont Plaisir. He stated that the project services many customers, who were required to pay for the service. Between 1976 and 2013, they supplied water to the Anse Louis and part of Anse La Mouche districts from the Plaintiff's property. The source from which the water was then drawn is 'source' in a mountainous area above the Plaintiff's property. It is a substantial source that can provide at least two hundred households with water. It is not a steady source. This water was currently not being used by Defendant.

[12] The next witness called was Cecile Basthilde, a Quantity Surveyor. She testified that she was instructed to value the rental for the land and prepared a report which was entered as an exhibit. Her findings were that the rental on the property per month would have worked out to Seychelles Rupees Three Hundred (*SR 300/-*) per month. The total amount, for the duration of the period that the structures were on the land, worked out to Seychelles Rupees One Hundred and Forty Thousand Four Hundred (*SR 140,400/-*). She worked on a ninety nine year lease period basis to come to this amount.

[13] In cross examination, she stated that she took several factors into account when doing the valuation. This included safety and privacy. The safety aspect related to how close the tank was to the house, and the risks posed if it overflowed. The privacy of the owner was compromised because when maintenance or emergency works were due, strangers entered and exited the property. She testified that she looked at comparable land rentals at Providence and the rentals per annum, and what the rentals are in the area. This would then be divided to get the cost of the square meters per month. She used the comparable rental for commercial properties.

[14] The last witness, Gertha Tirant, Plaintiff's daughter who lives on the property. She testified that the house in which she lives is close to the tank. The tank is situated higher than the house. The tank sometimes flowed over into her backyard, causing her distress. It was not well maintained. The pump made a continuous noise. There were also two storages, which were not maintained and had pests. During drought, the tank was filled four times a day, using a dowsers. They could not use the property. Her son wanted to build on the land. She was unhappy about this. They never received payment. Their own water was

from a duct Defendant refused to provide them water, while around 5000 people received water from the resources on the plaintiff's property.

[15] In cross examination, she stated that the land was given to her by her father before he passed on. This was in 2010. Prior to this, she lived in the house with her father. When she built her house, the case was already filed by her father. She did not have any problems with flooding or noise during this time. When she did though, she raised it with Defendant's workers. But she did not file any complaint.

[16] The Defendant called one witness, Steven Mussard the Managing Director of Defendant. He testified that the tank had been built with the family's consent. The Defendant refused to remove it when requested, because it served some 100 households with water. Prior to 2010, there was no request from the family to remove the tank and other items on the land. They could not remove the tank when the case was lodged, because this would have implicated many people's access to water. They needed time, as they were arranging for the Mont Plaisir project which would replace the water supply. There was no hindrance to the Plaintiff in his use of the land, as it was vast (approximately 2096 square meters). The reason why the tank was in a state of derelict, was because the family had issues with their access on the land. Defendant is not liable to compensate the Plaintiff, because there must have been written consent to its construction.

[17] In cross examination, he stated that there was no written proof of consent for the construction of the tank. But that the practice was that there would be such a form. There were only verbal complaints from the Plaintiff concerning removal of the tank, but no written complaint. However, there was a written complaint in February 2010. Prior to this, there was none. Subsequent to the complaint, they agreed that the tank would be

removed. It was eventually removed. He conceded that the storages were derelict, and that the tank at times overflowed, and the pump caused noise. He also conceded that there was unhappiness from the family about the tank. Further he conceded that about 3000 people were serviced. No payment was made to the Plaintiff for this use, and this was normal. The Defendant would normally buy the land or enter an easement agreement. There are examples, like at La Misere. The Plaintiff however was not paid, but this was because there was consent as it was for the benefit of the community. This justifies none payment.

[18] The Plaintiff through his Learned Counsel's written submissions submitted that the plea of prescription should be dismissed in view of the fact that the claim gives rise to a continuing cause of action. He relied on the matter **(Elke Talma v Michel & others (2010), 2 of 2010)**, wherein the Constitutional Court held 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'*. The Defendant's use of the land gave rise to a continuing cause of action as defined in **Talma case**. Thus, prescription as described in Article 2271 of the Code did not begin to run against him in 1976. The plaintiff was thus not time barred. Second, it was reasonable in the circumstances at the time not to take any action to contest the occupation and use. This was established in **(Antoine Derjaques v Public Utilities Corporation (2006), 201 of 2006)**. Third, regarding non-compliance with section 18(2) of the *PUC Act 25 of 1985*, the Court has a discretion to determine whether this was fatal, taking the particular facts and any undue prejudice caused into account. He relied on **(Gilbert Elisa v Public Utilities Corporation (2005), 244 of 2005)**, for this submission. It was submitted that this discretion had to be exercised to ensure justice and equity

especially in circumstances where the Defendant was made aware, by letter in February 2010 and April 2010 a few months before the action was instigated, that the Plaintiff was seeking compensation for the years of occupation. Further, the defendant had ample time to engage in settlement to avoid litigation. Thus, section 18(2) should not aid it. Lastly, since section 18(2) is merely a procedural requirement, it should not be interpreted rigidly to deny access to the Court especially when the dispute concerns a substantive constitutional right and he cited **(Chow v Attorney General & others (2207) SCCA)** in support.

[19] The Defendant submitted that the length of time is essential. The fact that thirty four (34) years lapsed before filing any objection shows that he had consented to the occupation and use. The Plaintiff failed to issue a notice as required in s 18(2) of the *PUC Act* and this failure bars the suit. It was submitted that the plaintiff's submission that there is 'continuous liability' should be disregarded. The Plaintiff cannot claim that the defendant's liability continues in perpetuity, or continues to do so until the plaintiff chooses to institute a claim. This would mean that there is no prescription, which is incorrect and this view is against what was said in different parts of the case of *Gilbert Elisa's case*, namely, that the legislation governing time limits cannot be replaced in a Judgment unless found inconsistent with the Constitution. The court should look at the facts, to determine whether a procedural objection should vitiate the substantive claim. The Plaintiff could not show why objections were not raised earlier. Further, the claim of Seychelles Rupees Eight Hundred Thousand (SR 800 000/-) is not substantiated. The expert evidence from the Quantity Surveyor regarding the valuation of the property was not satisfactory. In any event, the occupation and use was consensual.

[20] Having illustrated the salient evidence pertinent to this matter, I shall now move on to the applicable law and its analysis thereto.

[21] There are two main issues to be determined in this case as preliminary points of law. Is the claim barred by the prescription provisions in sections 18 and 25 of the 1985 *PUC Act* and Article 2271 of the Code? Should this be answered in the affirmative, then the second issue will become academic. The second issue is whether the Defendant unfairly deprived the Plaintiff of his property it occupied and used since 1976, and whether it is liable to pay him damages of Seychelles Rupees Eight Hundred Thousand (*S.R. 800,000/-*). I shall firstly consider the first issue.

[22] The Defendant claims that the Plaintiff's action has prescribed, because he brought it thirty four (34) years after the cause of action arose. The Defendant has cited section 18 and 25 of the 1985 *PUC Act* and Article 2271 of the Code. It is an established principle of Seychelles civil law, that unless the construction is expressly stated or arises by necessary implication, no law shall be construed to have retroactive effect unless such a construction is expressly stated in the text of the law or arises by necessary and distinct implication

(Reference to Article 2 of the Civil Procedure Code (Cap 213). Since the 1985 *PUC Act* came into effect on 1st January 1986, it does not have retroactive effect, and thus does not apply. The plea in limine of prescription based on the *PUC Act* is thus dismissed.

[23] Turning to the second preliminary point, which was brought in by way amendment. Has the action ben prescribed because of the application of Article 2271 of the Code? Article 2271 provides that:

'1. All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code.

2. Provided that in the case of a judgment debt, the period of prescription shall be ten years.'

[24] Article 2262 of the Code provides for prescription on rights of ownership of land and other land interests. It provides that:

'All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.'

This provision caters specially for ownership of land and land interests, and provides a longer period for prescription than the period envisaged in Article 2271, which deals with actions other than those stated in inter alia, Article 2262. Article 2271 does not apply when land or a right in land is at issue. The Defendant's reliance on Article 2271 was misconstrued. This preliminary point accordingly fails.

[25] *Turning then to the merits and the Defendant's claim that the Plaintiff's claim should be dismissed, because he had consented to its occupation and use of his property in the interest of providing water to the community. Article 545 of the Code states that, 'no one may be forced to part with his property except for a public purpose and in return for fair compensation. The purposes of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted.'* This was the prevailing law at the time that the Plaintiff's property was occupied and used by the Defendant. Although not permanent, for the duration of the occupation and use, the Plaintiff was divested of his property. The relevant provision of the Code as cited required that he be

compensated for this occupation and use if this was done forcefully. This raises the question whether the use and occupation in this instance happened forcefully.

[26] The Plaintiff has claimed that he did not consent to the use of his property. The evidence led on his behalf, primarily by his son, was to the effect that he was forced to allow the erection and installation of these structures, and that there was no way that he could enforce his rights at the time, as no remedy existed. The Defendant's evidence was that although no written proof of consent existed, it was standard practice that such a form would be completed. But no such form existed in respect of the present dispute. This was the high watermark of the defendant's response to this crucial aspect. It was clearly insufficient, and did not challenge the Plaintiff's version at all. A practice to sign consent forms, without the proof of such forms, is hardly sufficient. In any event, the fact that such forms may have been completed does not mean that consent would have been given, for some persons may sign a form involuntarily. The Plaintiff's versions that he did not give any consent is accepted.

[27] The Defendant has submitted that the Plaintiff's failure to complain sooner than 2010 is proof that he consented to the occupation and use. Consent is determined at the time of the incident. If it was not voluntary at the time, then the later actions cannot be used to imbue consent at the time of the incident. It is possible for one to resign oneself to a particular fate after something had occurred. This does not mean that at the time it occurred, there was consent. This submission is rejected in all the circumstances of this case as illustrated and analyzed.

[28] It follows then, that the Plaintiff has proved that he was unlawfully deprived of his property from 1976 until 2013 when the structures were officially removed.

[29] Turning to the damages claimed, as mentioned, the Plaintiff has sought an amount of Seychelles Rupees Eight Hundred Thousand (*S.R.800, 000/-*). The Defendant had claimed that this was not proved. In its view, the valuations by the Plaintiff's surveyor, Ms. Cecile Bastille, were rough estimations, and thus unreliable. The surveyor clearly testified that she used comparable commercial markets to determine the rental per square meters. This placed her valuation on rental for 99 years at to (Seychelles Rupees One Hundred and Forty Thousand (*SR 140,400/-*)). She mentioned several factors which she took into account, like the privacy of the Plaintiff and his family and risks posed due to overflows. The Defendant's witness, Mr. Steven Mussard, conceded that the tank overflowed at times, and agreed with the Plaintiff's daughter that the pumps were noisy. He conceded further that ordinarily, where the Defendant required use of persons' land for water access, they would purchase the land by way of easement agreements. All these factors, coupled with the Plaintiff's daughter's (Gertha Tirant) uncontested evidence regarding their restricted use of the property because of the structures, the derelict and unmaintained state of the storages, and the impact that these structures had on her, lead to the conclusion that damages should be awarded in the plaintiff's favour. These factors must be balanced against the defendant's evidence that the structures were far from the Plaintiff's main home, and that the Defendant needed time to remove the structures after the complaint was made. Eventually, it removed them. All these factors tilt in favour of a reduction of the damages sought, to one that is fair and just.

[30] Hence, it follows that the action is granted and the defendant is ordered to pay damages in the sum of Seychelles Rupees Two Hundred Thousand (*S.R. 200,000/-*) with interest and costs. No order is made as to the vacating of the Plaintiff's property and or removal of

structures, fixtures, movables and immoveables for all have been removed as above illustrated in 2013.

Signed, dated and delivered at Ile du Port on 23rd April 2019.

ANDRE J