TACOURI PREETAM & Ors v MOHAMUD FEROZE

2010 SCJ 132

0SN1470/08

IN THE SUPREME COURT OF MAURITIUS

CHAMBERS

In the matter of:-

Mr Preetam Tacouri and 9 Others

Applicant
V

1. Mr Feroze Mohamud

2. The District Council of Pamplemousses/Riv. Du Rempart

3. The Ministry of Public Infrastructure

4. The Ministry of Environment

5. The Commissioner of Police

6. The Mauritius Revenue Authority

7. The Tourism Authority

Respondents

Applicants (the residents) are the residential neighbours of Respondent no. 1 (the developer) who is running a commercial business in Morcellement Jubboo which the residents aver is a residential morcellement where the owners and their heirs and successors are bound by a number of conditions including the prohibition *"de planter aucun arbre ou haie ni contruire aucun mûr ou bâtiment sur des bandes de terres réservées d'un mètre et vingt centimètres de large longeant les limites du terrain vendu, ces*

bandes de terres devant servir éventuellement au passage de tout drain, tuyautage, ligne électrique ou autres services essentielles."

They aver that the developer has not only acted in breach of those covenants which bind the lotissements in the morcellement one to the other but also committed a number of breaches of the law, many of which have remained unattended by the authorities concerned: namely, respondents 2 to 7.

They are, accordingly, moving before me in Chambers for an injunction:-

(a) prohibiting and restraining the developer from operating his commercial building at Drive Road, Morcellement Jhubboo, Tou aux Biches and from adding a further construction thereto;

(b) ordering Respondent No. 6 (The Tourism Authority) not to issue any trade licence to operate in the building inasmuch as it is an illegal construction;

(c) ordering the Respondents No. 2 to 5 to take remedial steps for the pulling down of the illegal construction within such time as may be fixed by me;

(d) ordering the Tourism Authority to withdraw all licences issued to any person, parties, companies, societies trading in the illegal premises; and

(e) making such other orders as I may deem just and reasonable.

From what emerges from the affidavit evidence filed in this application, the case of the developer is that he is not operating illegally, having obtained all the required permits and licences from the relevant authorities. It is the case of respondent no. 2, the District Council (council) that it did issue to the developer a licence for developing the land *in lite* but on a number of conditions attached. It later emerged that the developer had breached a number of the conditions. The council did prosecute him before the District Court for illegal construction and even moved for a pulling down order. The District Court fined the developer in the sum of Rs20,000 but declined to make a pulling down order.

Respondents Nos. 3 and 4 opted to abide by my decision. Respondent no. 3 has not put in an affidavit but Respondent no. 4 has. In its affidavit, its stand is that – as regards the building - it is not the authority which issues permits for the construction of buildings and – as regards its own competence – an EIA licence is only needed for a hotel with first boundary falling within 1 kilometre of high

water mark in Part B of the Environment Protection Act so that the case of the applicants did not fall within their purview.

The case of respondent no. 5 is that the Police did receive applications for police clearance from Respondent no. 7 for the following licences: (a) restaurant plus liquor and entertainment on the First Floor in the name of IAS Entertainment; (b) restaurant in the name of

Dive Dream Centre; and (c) Hotel in the name of Dive Dream Centre. After taking into account the objections raised by the neighbours, the Police were unable to grant clearance.

The case of the Respondent no. 6 and, indeed, its involvement in this matter, is unclear. At one time, it wanted to be put out of cause but it has stayed in, presumably because it may still be involved as a licensing authority under the Excise Act and as the agent of the state in revenue matters, the outcome of the dispute may be of interest to it. It has not put in any affidavit.

It is the case of Respondent no. 7 (Tourism Authority) that it did issue to the developer a Tourist Enterprise Licence (TEL) on 15 October 2008 for the running of a tourist residence of 9 rooms with trade name "Les 9 Muses." It did so only after obtaining clearances from the Police, the Health Authority and the Fire Services. It adds that the application was first made in the name of Dive Dream Diving Centre Ltd but later the developer requested that it be issued in his personal name. It further adds that Dive Dream Diving Centre Ltd represented by the developer and Irene *Mohomud* holds a TEL for Scuba Diving Centre, valid until June 2010. It finally concludes that it did issue a TEL for restaurant (including liquor and alcoholic beverages) without entertainment to IAS Entertainment Ltd situate at Cnr Morcellement Jhubboo, Coastal Road, Trou aux Biches under the name of "Paradis Bar Restaurant." The licence expired on 22 October 2009 and was not renewed.

I find from the facts and circumstances as appear from the affidavit evidence that there exist a number of serious issues to be determined before the competent court in the main case which has been lodged against the respondents. For that reason, the applicants are entitled, in my view, to such the injunctive reliefs as are under my competence to issue out of the number prayed for.

The serious issues relate to the conduct of the applicant himself,

the encroachment of the construction over the *réserve* in the morcellement; the unauthorized additions of floors to the building of the developer; the culpable attitude of a couple of the authorities involved and, above all, the levity with which environment concerns have been dealt with by those who should have taken them seriously.

As regards the developer, it is fairly obvious that:

(a) (a) he has been in flagrant breach of the conditions attached to land use in the Morcellement or "lotissement" in question.

(b) (b) he has been also in flagrant breach of the conditions attached to the grant of the permits and licences granted by the District Council on 20 February 2007.

(c) (c) prosecuted for his illegality, he has not only persisted and continued in the breaches but also built on his dubious activities under the cover of one authority or another and/or under the inaction of one authority or another.

(d) (d) The developer, hiding behind the fact that the District Court did not order the pulling down of the building – which is itself questionable - thereby permitted himself to construct more floors and to add to his illegalities

(e) (e) The facts also suggest that the developer is also manipulative. Being a respondent in this case where these two individuals are applicants, how he was able to obtain a written note from them speaks for itself. If what he states about applicants 8 and 10 were true, it was open to the latter to come up with an affidavit and not, being plaintiffs, through the developer. The conduct of of the developer as well as that of applicants 8 and 10 speaks volumes of their work ethics.

(f) (f) The developer's one-page write-up filed and signed by SLS Madabaccus in fact brings to the fore what the document is silent about. What the document conceals is more eloquent than what it reveals:

i. i. it ignores conveniently the conditions attached to the land use in the Morcellement or "lotissement" Jhuboo;

ii. ii. it breathes not a word of the title-deed of the developer which is not attached;

iii. iii. it avoids speaking of the reserves;

iv. iv. it makes an abstraction of the conditions imposed on the owners of the morcellement;

v. v. the probative value to be given to that paper is next to nil.

(g) (g) The developer merits no equitable indulgence from me in all the circumstances of this case.

With respect to the comment of the applicants that the District Council could have appealed against the judgment of the learned Magistrate who did not order demolition of the illegal construction, I have to say that it makes sense. As an authority with the power to

discharge statutory duties, it should not have sat doing nothing. The least that it could have done is to seek legal advice. Had it obtained legal advice to appeal, any reasonable lawyer would have found that the reasoning for the court not to order demolition was patently flawed in that:

(a) (a) that "the building has been built and completed" is no valid ground for not ordering demolition of a building constructed illegally;

(b) (b) on such a reasoning, no building may be ordered to be pulled down ever

(c) (c) such an interpretation would frustrate the very purpose for which the legislature envisaged the sanction of demolition;

(d) (d) not to demolish a construction illegally built with impunity would supplant the Rule of Law with the Rule of Lawlessness;

(e) (e) the interest of justice demands that defaulters should not be allowed to benefit from their own crimes;

(f) (f) with the number of illegal constructions as are coming to court and the havoc they are wreaking in society, pulling down of illegal constructions may well have to be the rule rather than the exception/The District Council conceded that the developer had taken the law in his own hands but it failed to discharge its statutory duties with the vigilance demanded of it.

The responsibility of the Ministry of Environment leaves something to be desired. From the state of the affidavit, it seems that all its concerns has been limited to doing the strict minimum: visit the place, seek explanations from developer and the local authority, prepare a report and its duty was discharged. It failed to follow up on an investigation and a visit which were, by and large, incomplete. Indeed, whether the local government had properly discharged its duties was not its preoccupation as a Ministry concerned with environmental issues. With respect to environment, all its preoccupation seems to have been that there was no environmental nuisance by odour, noise, solid waste and waste water discharge. That is the limited view it took of what the Act requires it to do.

One cannot be but alarmed at the restrictive manner in which it conceives its role

in the administration of such a paramount legislation as the Environmental Protection Act. I am not aware whether there has been proper sensitization and training given to the officers on the manner in which the Act should be interpreted and applied, whether at the time the Act was passed or later. It is often assumed, and dangerously at that, that an Act once passed and

placed on the shelf, takes good care of itself. I am entitled to assume that there must have been some exposure given to them. If there was, it must have been inadequate. That gap between the "law in the books" and "law in action" should be bridged. Something needs to be done such that all the authorities review their practices and policies in accordance with the pledge, the spirit and the letter of the law found in the Environmental Protection Act.

I find the responsibility of the Tourism Authority more seriously engaged. It exercised its power to issue a Tourist Enterprise Licence seemingly without proper enquiry as to the facts and circumstances of the developer, the history of his breaches, the conditions of the title-deed of the property and in the teeth of the objections raised by the Commissioner of Police. It has focused on development, not on sustainable development.

The attitude of the other bodies and authorities, the Ministry of Public Infrastructure, the CEB and the CWA show how lightly they have understood their own roles in this matter. All that they seem to have done, after being brought into the picture by the applicants at one time or another in the history of this dispute, is to sit on the fence. It did not occur to the Ministry of Public Infrastructure, the CEB and the CWA, for example, that when the morcellemnt was approved, a reserve in the morcellement was dedicated to them for use to provide public services and this interest in the reserve they should have watched. By their unconcern, the developer has allegedly encroached on this part.

On the question of delay, Learned counsel for the developer argued that the delay in the applicants' lodging this action should be fatal to this application. I am not persuaded. The history of this dispute shows that the applicants have been far from indolent. They have been on the "qui vive" vis-à-vis all the authorities so that the latter may bring to books the developer. It is only after such sustained efforts proved vain that the applicants decided to seize the Judge in Chambers, in August 2008. Indeed, one doubts whether there would have been any prosecution at all had it not been prompted by the applicants.

On the question of balance of convenience, I find that it is overwhelmingly on the side of the applicants whose concerns are legal, environmental, human, social and aesthetic. That of the developer is only economic. His business activity may very well be carried out from some other more appropriate location than from the place *in lite* which seriously impacts on the character of the

morcellement and the peace and quiet of the surroundings.

It is worth reminding ourselves that the Environment Protection Act in its section 2 states: *"It is declared that every person in Mauritius shall use his best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius."* Section 2 in the House Rules of the drafting of Mauritian laws is the definition section. The legislator's decision to make an exception thereto and replace it by a national pledge and move the definition section to section 3 is indicative of the high importance he attached to the commitment.

Both the citizen and the State have taken that pledge contained in section 2 that they would use their "*best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius."* The citizen includes the neighbour as well as the one who is not a neighbor. It includes the developer which includes the investor and all those involved with the developer. The State, in that pledge, includes the Legislature, the Executive and the Judiciary, with all the bodies and persons exercising authority on their behalf.

Environmental issue is an issue of human survival to-day. Any development to pass the threshold of legality should first pass the acid test of sustainability: can the environment in which the development is intended sustain it? Sustainable development is not a rhetoric of the law but its very reality. That is the new paradigm. We have not inherited environmental assets from our elders to pass on to our children, the American Indians say. We have borrowed them from our children on trust. We need to restore them to that generation, in an enhanced shape. If we cannot do that we have no right to return them in a depleted and degenerate state. That is the new paradigm of development in Mauritius today.

In that new paradigm, the concept of "public interest" is given a novel dimension. The balancing of the various interests in the determination of what is public interest includes ecological concerns:

« La mise en balance des intérêts en jeu devait inévitablement conduire à inclure la protection de l'environnement en tant qu'intérêt public nouveau éventuellement en conflit avec d'autres intérêts publics… » Michel Prieur, Droit de l'Environnement, 2ême éd., page 54.

The law does not begrudge development. It begrudges indiscriminate and abusive development. A development that integrates with the community and comes to support and serve the community is sustainable. But one that rides rough-shod on the character of the place and imposes its own character of development for development sake falls foul with present-day business ethics and the law. Public and private activities not aligning their policies and practices to that new paradigm run the risk of paying a heavy price for that omission.

Under the title *"Le contrôle de légalité conçernant des actions portant atteinte à l'environnement,"* the following remarks from Michel Prieur, (ibid.) are worth reproducing:

« A un moment ou il est beaucoup question, et à juste titre, d'environnement et de cadre de vie, il faut éviter que des projets par ailleurs utiles viennent aggraver la pollution ou détruire une partie du patrimoine naturel et culturel du pays » (concl. Réc 1971, p. 410). Dès 1972, le Conseil d'Etat a pris en compte effectivement dans son bilan les risques d'une expropriation pour « l'environnement naturel. » (CE 12 avr. 1972, Sieur Pelte, Rec., p. 269) … Puis il a fait figurer pour la première fois l'écologie comme un des intérêts en jeu dans un arrêt du 25 juillet 1975 (Syndicat CFDT des marins pécheurs de la rade de Brest, RJE, 1976, p. 63) en évoquant parmi les inconvénients d'une expropriation les inconvénients d'ordre social ou écologique. Il fera par la suite application de ce principe dans deux affaires. La première concerne un lotissement ou l'atteinte à l'environnement entâchant d'illégalité la déclarations d utilité publique, résulte de la proximité d'une abbaye et d'une église, le projet de lotissement risquant de nuire au caractère des lieux. L'autre annulation d'une déclaration d'utilité publique concerne une zone d'aménagement concertée en vue d'une opération touristique sur l'ile d'Oleron et portant atteinte à l'environnement du fait de l'atteinte au site littoral.» CE, 26 mars 1980, Premier minister c/Mme veuve Beau de Loménie, Rec., p. 171, RJE, 1980.2, p. 179.

The obligations resting on the nation as a whole and on the nation as a member of the global village may be gauged by the following remarks which emphasize the fact that risk assessment of environmental impact is not limited where the law has specifically imposed the production of a report on EIA. That requirement of the law should be generalized from the part of every one concerned, if informally,

even where the requirement is not specific by law (emphasis added):

« L'étude d'impact, règle de bon sens : Réfléchir avant d'agir est un précepte qui aurait dû guider en toute occasion l'action des hommes. Il est de fait que les constructeurs, aménageurs, ingénieurs, industriels ont toujours fait précéder leur projet d'études approfondies pour évaluer la solidité, l'utilité et la nocivité de leur construction. »

« Désormais, il conviendra d'aller beaucoup plus loin. Contrairement à ce que certains pensent, il ne suffira pas d'approfondir les études préalables déjà existantes. Avec l'étude d'impact, la recherche préalable change de nature et d'échelle, il s'agit d'étudier l'insertion du projet dans l'ensemble de son environnement en examinant les effets directs et indirects, immédiats et lointains, individuels et collectifs. On réalise une sorte de socialisation des actions d'investissements. L'écologie oblige à avoir une vision globale qui, à partir d'un projet donné, intègre toute une série de facteurs a priori extérieurs au projet. »

There is a need, thus, of what has been termed a « collective conscience » in the preservation of the ecology of the place:

« La règle de bon sens initiale: réfléchir avant d'agir, est doublée de la redécouverte d'une évidence : tout est dans tout, qui exprime une conscience collective …. : « La morale de l'environnement. » Aucune action privée ou publique n'est neutre pour l'environnement ; il est donc désormais obligatoire d'en apprécier à l'avance les conséquences collectives. La liberté d'entreprendre n'est pas supprimée, elles est contrôlée ; l'intérêt individuel doit céder devant l'intérêt écologique, forme nouvelle de l'intérêt collectif. »

The new culture for each and every one – citizen as well as state – is to lift our policies and up-grade our practices in the way we do things: no longer as before. It is not enough to claim that we are discharging our duties honourably. We have to go beyond. We have claim that we are discharging our duties responsibly, after having revisited our practices and policies in accordance with the new paradigm, the ecological imperative. It is a culture for such developing societies as ours of enlightened rationalism on the part of all concerned, especially the authorities and the institutions entrusted with the duty to run public affairs on trust on behalf of the present and future generations. Administrative rationalism is what has given the countries in

the developed world *"an environment which is cleaner, safer and more aesthetically pleasing than it would have been without the last thirty years of administrative rationalism."* **See Jane Holder and Maris Lee, Environmental Protection, Law and Policy, 2nd Ed. Text and Materials, Cambridge University Press, 2007; p. 417-419.**

To come back to this case, the developer, the Council, the Ministries and the Tourism Authority have all sinned, some more than the others, with the developed the most. Over and above their breaches in one form or another, they have rendered section 2 of the Environmental Protection Act a dead letter. That they should not do.

With the above, we come to the orders in this case, as rightly submitted by learned counsel for the developer, it is not within my competence as a Judge in Chambers to order the pulling down of the building. That would be for the competent court. My competence is limited to issuing interlocutory and ancillary reliefs in the circumstances. As I see it, the operator may only safely operate "Shops - 4 units and Studios – 6 units" on the conditions imposed upon him on 20 February 2007 with: inter alia, the "parking provision shown in the approved plans .... retained for the parking of vehicles visiting the development site," the preservation of the reserves for drain, for water pipes, electrical poles and essential services. It is in this sense that I see the stand of the authorities concerned with these matters culpably unconcerned.

For that reason, I make the following orders:

(a) (a) The developer is hereby prohibited and restrained from operating his commercial building for a purpose other than that for which it had been originally imposed in the Development Permit given by respondent no. 2 on 20 February 2007;

(b) (b) As a consequence, all permits and/or licences and/or authorizations given by Respondent no. 7 (the Tourism Authority) to Respondent No. 1, his agent or proxy to operate the land and the building otherwise than in accordance with the permit and the conditions imposed by the District Council on 20 February 2007 are deemed suspended with immediate effect until the disposal of the main case which applicants have lodged before the competent court;

(c) (c) The developer is further prohibited and restrained forthwith from adding any further construction to the existing building;

(d) (d) Respondent No. 7 (The Tourism Authority) is ordered not to entertain any application from the developer, his agent or proxy or any other person in relation to the use of the land and building *in lite* until the disposal of the main case;

(e) (e) Respondents No. 2 to 5 are hereby ordered to be vigilant in taking all legal and remedial steps to ensure that the developer as well as his agent and proxy adhere to the conditions imposed at the time of original approval given by the District Council in February 2008;

(f) (f) Account taken of the nature of the action, the particular facts of the case and the liberties taken by the respondent such vigilance should be exercised with Police assistance, if necessary.

I so order. With costs

S. B. Domah

Judge

18 April 2010

For Applicant: Mr A. Gayan, SC, instructed by Mr Attorney B. Rampoortab

For Respondent No 1: Mr K. Pertab of Counsel, instructed by Mr Attorney

A. Ragavoodoo

For Respondent No 2: Mr N. Kistnen, of Counsel, instructed by Mr Attorney

A.O. Jankee

For Respondent No 3-6: State Attorney/Counsel

For Respondent No. 7: Mr N. Appa Jala, Attorney