Osman bin Zakariah v Tenaga Nasional Bhd & Ors [2021] MLJU 1918

Malayan Law Journal Unreported

HIGH COURT (MELAKA)

MAIDZUARA MOHAMMED JC

ORIGINATING SUMMONS NO MA-24NCvC-52-03 OF 2021

29 September 2021

Hizri Hasshan (Yong Ke-Qin with him) (Akram Hizri Azad & Azmir) for the plaintiff.
Hadi Mukhlis Khairulmaini (Michelle Mary Kuruvilla with him) (Steven Thiru & Sudhar Partnership) for the first defendant.
Mazuin bt Hashim (Pejabat Penasihat Undang-Undang Negeri Melaka) for the second, third and fourth defendants.

Maidzuara Mohammed JC:

GROUNDS OF JUDGMENT

[1]Enclosure 1 was an originating summons filed by the Plaintiff.

[2]In Enclosure 1, the Plaintiff sought the following orders:

"

(1) *Satu deklarasi diberikan bahawa keputusan Defendan Kedua (MMKN: 19A/11/2012) yang disampaikan melalui surat Defendan Ketiga bertarikh 26.06.2012 ("Keputusan Defendan Kedua tersebut") masih sah, berkuatkuasa dan mengikat Defendan Pertama;*

(2) *Satu deklarasi diberikan bahawa Defendan Pertama tidak berhak mencabar secara kolateral keabsahan Keputusan Defendan Kedua tersebut selepas permohonan semakan kehakiman Defendan Pertama telah dibatalkan Mahkamah Tinggi Melaka pada 01.03.2013 dan permohonan menghidupkan semula prosiding semakan kehakiman tersebut ditolak melalui Perintah Mahkamah Tinggi Melaka bertarikh 28.01.2016 (Permohonan Semakan Kehakiman No: 16NCVC-12-09/2012), Perintah Mahkamah Rayuan bertarikh 11.10.2016 (Rayuan Sivil No: M-01(NCVC)(A)-81-03/2016) dan Perintah Mahkamah Persekutuan bertarikh 23.02.2017 (Permohonan Sivil No: 08-568-11/2016);*

(3) *Satu perintah diberikan bahawa Defendan Pertama hendaklah mengemukakan permohonan pengambilan baki tanah berukuran 0.6037 hektar yang dipegang di bawah GMM 711 (dahulunya GMM 451), Lot 1210, Mukim Paya Rumput, Daerah Melaka Tengah, Negeri Melaka ("Tanah tersebut") dalam tempoh satu (1) bulan dari tarikh perintah ini dan selanjutnya membuat bayaran pampasan penuh kepada Plaintif dan pemilik-pemilik berdaftar Tanah tersebut;*

(4) *Kos permohonan ini hendaklah dibayar oleh Defendan Pertama kepada Plaintif, Defendan Kedua, Defendan Ketiga dan Defendan Keempat;*

(5) *Bahawa Defendan Kedua, Defendan Ketiga dan Defendan Keempat hendaklah memberikan kesan dan efek kepada Perintah ini;*

(6) *Plaintif diberikan kebebasan untuk memohon perintah sampingan lain bagi tujuan memberi kesan dan/atau efek kepada Perintah ini; dan*

(7) *Perintah-perintah atau relif lain yang Mahkamah Yang Mulia ini fikirkan adil dan suaimanfaat."*

[3]The second, third and fourth Defendants were named as nominal defendants in Enclosure 1.

Facts considered by the High Court

[4]In 2006, the Plaintiff and the other registered owners of the property in question lodged a complaint with the Land Administrator with regard to the first Defendant. The complaint related to the first Defendant coming onto the property to construct "*pencawang dan laluan elektrik*" on the property. The Plaintiff alleged that the first Defendant did not issue the requisite written notice to the Plaintiff and the other registered co-owners to come onto the property.

[5]On 5.9.2006, the third Defendant wrote to the first Defendant and informed the first Defendant of the complaint and stated that they will investigate the complaint.

[6]On 17.1.2007, and after a notice was issued by the third Defendant that an inquiry will

be held under section 16(1) of the Electricity Supply Act 1990 ("ESA") to assess the monetary compensation payable for the acquisition of land for the base of the transmission lines, the first Defendant was ordered to pay monetary compensation in the sum of RM40,070.00 to the Plaintiff and the other owners.

[7]On 2.5.2008 and after repeatedly contacting the first Defendant to find out the status of the appeal by the Plaintiff, the Plaintiff wrote to the third Defendant and complained of the lack of response from the first Defendant.

[8]On 29.5.2008, the first Defendant wrote to the third Defendant. In the letter dated 29.5.2008, the first Defendant informed the third Defendant that:

"Ruj. Kami : TNB. 10/10/1174 Bhg. 2/

Tarikh : 29 Mei 2008

Pentadbir Tanah

Pejabat Daerah Dan Tanah Melaka Tengah

Aras Bawah Dan Aras 1, Bangunan Wisma Negeri

Jalan Wisma Negeri, Kompleks MITC

75450 Ayer Keroh

Melaka Bandaraya Bersejarah

(U/P: Puan Siti Azzyati Binti Hj. Abu Bakar)

Puan,

TALIAN PENGHANTARAN 275 kV PMU MELAKA KE PMU KELEMAK

(Pembinaan Menara Dan Laluan Elektrik Tanpa Notis Untuk Kemasukan Kali Ke Dua Di Atas Lot 886 Hakmilik MCL 451 Mukim Paya Rumput)

Dengan segala hormatnya saya merujuk kepada perbincangan di pejabat puan pada 15 Mei 2008 mengenai perkara tersebut di atas.

2. Sebagaimana yang dimaklumkan di dalam perbincangan tersebut bahawa pihak puan akan menyediakan kertas rayuan kepada Majlis Mesyuarat Kerajaan Negeri Melaka berkaitan dengan rayuan pemilik tanah untuk lot yang tersebut di atas. Sehubungan dengan itu pihak kami akan akur dengan sebarang keputusan yang akan dibuat oleh MMKN Melaka kelak.

Sekian, terima kasih.

"PENGGERAK KEMAJUAN NEGARA"

t.t.

(Mustaffa Awang)

b.p. Pengurus Besar

Pengurus Tanah & Izinlalu

Jabatan Pembangunan Aset

Bahagian penghantaran Tenaga Nasional Berhad

s.k. Encik Osman Bin Zakariah

No. 11, Jalan Pandan Jaya

Taman Pandan Jaya

75250 Melaka Bandaraya Bersejarah."

[9]On 12.6.2008, the first Defendant wrote to the Plaintiff. In the letter dated 12.6.2018, the first Defendant informed the Plaintiff that the first Defendant "*akan akur dengan sebarang keputusan yang akan dibuat oleh MMKN Melaka* (the second Defendant)".

[10]On 26.6.2012, the third Defendant wrote to the first Defendant. In the letter dated 26.6.2012, the third Defendant informed the first Defendant that the appeal by the Plaintiff for full compensation was approved. In the letter dated 26.6.2012, the third Defendant also stated that "*proses perwartaan akan dijalankan untuk pengambilan kesemua baki tanah tersebut dan perbicaraan akan dijalankan untuk menentukan jumlah pampasan penuh.*"

[11]On 29.8.2012, dissatisfied with the decision of the third Defendant as stated in the letter dated 26.6.2012, the first Defendant commenced judicial review proceedings to challenge the decision in the letter dated 26.6.2012.

[12]The judicial review proceedings was registered as MA- 16NCvC-12-09/2012 ("JR Proceedings"). The progress of the JR Proceedings was as follows:

(a) 10.12.2012 – leave granted by the High Court

(b) 21.12.2012 – the first Defendant filed the substantive motion

(c) 1.3.2013 – substantive motion struck out due to the non- attendance in court by counsel for the first Defendant

(d) 5.11.2015 – the first Defendant filed an application to re- instate substantive motion

(e) 28.1.2016 – the High Court dismissed the application to re-instate the substantive motion due to the delay by the first Defendant in applying to re-instate the substantive motion

(f) 29.2.2016 – the first Defendant appealed to the Court of Appeal against the Order dated 28.1.2016

(g) 11.10.2016 – the Court of Appeal dismissed the appeal by the first Defendant

(h) 8.11.2016 – the first Defendant filed a motion for leave to appeal to the Federal Court

(i) 23.2.2017 – the Federal Court dismissed the motion for leave filed by the first Defendant

Consideration by the High Court

[13]The first Defendant submitted that Enclosure 1 which was filed by the Plaintiff was time barred.

[14]In this respect, the first Defendant relied on section 6(1)(c) of the Limitation Act 1953.

[15]The first Defendant submitted that given section 6(1)(c) of the Limitation Act 1953, the Plaintiff had 6 years (i.e. until 26.6.2018) to file an action to enforce the decision in the letter dated 26.6.2012.

[16]The first Defendant also submitted that as Enclosure 1 was filed by the Plaintiff on 1.3.2021, Enclosure 1 was time barred.

[17]This Court was not with the first Defendant on their submission on the issue of limitation.

[18]This Court was of the view that Enclosure 1 was filed by the Plaintiff for consequential orders following the decision of the Federal Court on 23.2.2017.

[19]This Court found that in its decision delivered on 23.2.2017, the Federal Court did not make any orders or any directions as to how to move forward with the decision in the letter dated 26.6.2012.

[20]This Court noted that despite being present at the Federal Court on 23.2.2017 and being served with the Order dated 23.2.2017 granted by the Federal Court and notwithstanding a number of correspondence thereafter, the first Defendant did not take any steps with regard to the decision in the letter dated 26.6.2012.

[21]In *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 9 CLJ 358, the Federal Court had the occasion to decide on the powers of a court to grant consequential orders. The Federal Court held that:

> *"[36] From our case law, it is evident that liberty to apply for consequential orders in order to work out or given effect to the final judgment or order of the court is well within the inherent jurisdiction of the court.*"

[22]This Court was of the view that Enclosure 1 was filed by the Plaintiff to attend to "unfinished business" – so to speak – with regard to the decision in the letter dated 26.6.2012.

[23]In these circumstances, this Court found that the issue of limitation raised by the first Defendant was not a live issue. This Court was therefore not with the first Defendant on the issue of limitation.

[24]The first Defendant submitted that section 16(2) of ESA does not allow the State Authority to order that the remainder of the Plaintiff's land be acquired by the first Defendant.

[25]Section 16(2) ESA states as follows:

> *"(2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.*"

[26]The first Defendant relied on *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor*, a decision by the Federal Court in Civil Appeal No 01(f)-10-04/2016(B) to support their submission. The first Defendant submitted that the Federal Court in *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor* overturned the decision of the Court of Appeal and reinstated the decision of the High Court (although the decision of the High Court cited by the first Defendant made reference to a different set of parties).

[27]The first Defendant produced an Order of the Federal Court granted on 28.11.2016 in *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor*. This Court was given to understand that the Federal Court did not deliver any grounds in arriving at its decision. This Court was thus unable to ascertain the reasons for the decision of the Federal Court in *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor*.

[28]This Court also noted that at the leave stage, the questions allowed by the Federal Court in *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor* included "*Whether*

the State Authority, in determining an appeal under s.16(2) of the Electricity Supply Act 1990 *("ESA 1990"), may only vary or affirm the compensation awarded by the District Land Administrator under* s.16(1) ESA 1990?"

[29]Given the question before the Federal Court, this Court found that *Tenaga Nasional Berhad v I & P Seriemas Sdn Bhd & Anor* did not support the proposition put forward by the first Defendant that section 16(2) ESA does not allow the State Authority to order that the remainder of the Property be acquired by the first Defendant.

[30]The first Defendant submitted that the Plaintiff did not comply with the timeline in Section 16(2) ESA in that the appeal by the Plaintiff against the decision in the letter dated 26.6.2012 was outside the 21 days stipulated in Section 16(2) ESA. The first Defendant also submitted that in such situation, the State Authority did not have the jurisdiction or the power to entertain the appeal by the Plaintiff.

[31]In the JR Proceedings, the first Defendant relied on various grounds in support of their JR Proceedings including:

"

(1) *Responden Pertama (dan/atau Responden Ke-2) telah melakukan satu kesilapan undang-undang dan bertindak melebihi bidang kuasa apabila ia mengambil bidang kuasa dan bermaksud untuk membenarkan Rayuan Responden Ke-4 dan memerintahkan agar tanah tersebut diperoleh oleh Pihak Berkuasa Negeri pada hal ia tidak diberi kuasa oleh undang-undang untuk berbuat demikian;*

(2) *keputusan Responden Pertama (dan/atau Responden Ke-2) bertarikh 26.6.2012 telah dibuat secara kesilapan undang-undang di mana beliau/mereka bermaksud untuk membuat keputusan itu tanpa mempunyai bidang kuasa atau kuasa yang perlu untuk berbuat demikian.*

Keputusan tersebut itu dengan itu tercemar oleh kepenyalahan undang-undang; dan

(3) *keputusan Responden Pertama (dan/atau Responden Ke-2) bertarikh 26.6.2012 telah dibuat secara kesilapan undang-undang di mana beliau/mereka bermaksud untuk membuat keputusan itu tanpa mempunyai bidang kuasa atau kuasa yang perlu untuk mendengar rayuan Responden Ke-4 yang dikatakan itu memandangkan ianya adalah dilarang masa dan dengan itu keputusan yang tercabar tersebut adalah ultra vires Akta Bekalan Elektrik 1990 dan oleh itu adalah terbatal dalam undang- undang. Keputusan tersebut itu dengan itu tercemar oleh kepenyalahan undang-undang."*

[32]This Court noted that the issues raised by the first Defendant in the JR Proceedings were again raised in the instant action.

[33]This Court found that given the events which transpired in the JR Proceedings culminating with the decision of the Federal Court on 23.2.2017, the first Defendant was estopped in law to raise the same issues in this action.

[34]The first Defendant also sought to rely on a decision of the High Court in *Tenaga Nasional Berhad v Majlis Mesyuarat Kerajaan Negeri Selangor & Ors* [2014] 8 CLJ 386 at [37].

[35]This Court reviewed and considered the decision of the High Court in *Tenaga Nasional Berhad v Majlis Mesyuarat Kerajaan Negeri Selangor & Ors.*

[36]This Court found that the decision in that case was arrived at based on its own specific facts namely that:

- The third respondent was awarded monetary compensation

- The first respondent lodged an appeal against the monetary award

- The High Court found that the only issue was the amount of compensation

- The High Court determined that in determining an appeal with regard to monetary compensation, the State Authority did not have the power to make any order to direct TNB to acquire the land belonging to the first respondent.

[37]Returning to the instant case.

[38]The Plaintiff was awarded and was paid monetary compensation in the sum of RM40,070.00. The monetary compensation was for a portion of the Plaintiff's land acquired by the first Defendant to construct the base of the transmission lines.

[39]The Plaintiff's complaint was not limited to the monetary compensation of RM40,070.00. From the outset, the Plaintiff also complained that with the construction of

the transmission lines on parts of his land, the Plaintiff was no longer able to cultivate the remainder of his land, and lease or sell the remainder of his land. As a consequence, the Plaintiff's position was that the first Defendant ought to acquire the remainder of his land. In such circumstances, the State Authority was entitled to accept or reject the Plaintiff's position. On the facts of the instant case, the State Authority accepted the Plaintiff's position.

[40]This Court found that there was sufficient material before the State Authority to arrive that its decision in favour of the Plaintiff.

[41]Furthermore, the JR Proceedings were commenced by the first Defendant on 29.8.2012 where the first Defendant raised, among others, the issue of the jurisdiction and power of a statutory authority under ESA. The decision in *Tenaga Nasional Berhad v Majlis Mesyuarat Kerajaan Negeri Selangor & Ors*, where, among others, the issue of the jurisdiction and powers of a statutory authority under ESA was considered by the High Court, was delivered on 5.3.2014. It was an abuse of process of the court for the first Defendant to raise matters in subsequent proceedings (i.e. in the instant case) where such matters should and could have (and were in fact) raised by the first Defendant in the JR Proceedings.

[42]In this respect, reference is also made to the decision of the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC and *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd* [2013] 10 MLJ 1.

Decision by the High Court

[43]On 13.7.2021, this Court allowed prayers (1), (2), (3), (5) and (6) in Enclosure 1. This Court also ordered that costs in the sum of RM5,000.00 shall be paid by the first Defendant to the Plaintiff.

[44]This Court made no orders with regard to the remaining Defendants who as stated at the outset were named as nominal defendants.

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