IN THE SEYCHELLES COURT OF APPEAL

MATHEW A. SERVINA

V/S

1. THE SPEAKER, NATIONAL ASSEMBLY
2. THE ATTORNEY-GENERAL

Cons. App. No.13/95

(Before: H. Goburdhun, P., A.M. Silungwe, E.O. Ayoola, JJ.A.)

Mr. J. Hodoul for the Appellant
Mr. J. Renaud for the 1st Respondent
Mr. A. Fernando for the 2nd Respondent

JUDGMENT OF GOBURDHUN, P. AND AYOOLA, J.A.

This is an appeal from the decision of the Constitutional Court of Seychelles dismissing a petition by the appellant against the two respondents. The appellant sought declarations first, that the word Minister in Article 69(5) of the Constitution should be interpreted to include him and any person who, like himself, served as Minister under any previous Constitution; and, secondly, that the Ministerial Emoluments Act, 1993 which deprives him of a gratuity which it provides for Ministers contravenes the Constitution in regard to him. In addition to these declarations, he sought "any other remedy which the Court consider appropriate in the circumstances."

The appellant alleged that he was a Minister in the Government of Seychelles first from June 1977 till June 1979, and subsequently under the Constitution of the Republic of Seychelles, 1979 from June 1979 till November 1982. The main grievance which led to the proceedings in the Constitutional Court is that the National Assembly passed Act 3 of 1993, the Ministerial Emoluments Act, 1993, assented to and enacted on 22nd October 1993, which provides that

Ministers shall receive a gratuity but which excluded the petitioner of right and entitlement to such gratuity by excluding him from the definition of "Minister" in Article 69(5) of the present Constitution. It is contended in paragraphs 12 and 13 of the appellant's petition respectively:

> "12. That in passing Act 3 of 1993, the National Assembly has contravened the petitioner's said right and failed to exercise its legislative power in accordance with Article 85 of the present Constitution;
>
> 13. That as a result of the said contravention by the National Assembly, the interest of the petitioner, and that of persons he represents have been seriously prejudiced, such prejudice is continuing and aggravated with the passing of time."

The petition contains the petitioner's narration of the background to the presentation of Act No. 3 of 1993, but since this appeal does not concern the merits of the petition it is not necessary to rehearse the background facts. It suffices to observe that the respondents by their answers to the petition, joined issue on the material facts pleaded and did not at all accept that the contention of the appellant as contained in paragraphs 12 and 13 quoted above is valid.

As this appeal is concerned in the main with the procedural route taken by the Constitutional Court to the dismissal of the petition, it is expedient to set out the landmarks along that route. After he had filed an amended petition, sometime in July 1994 or thereabout, the petitioner applied by a motion on notice sometime in October 1994 for an order against Bernadin Renaud Esq., Chairman of the Constitutional Commission, to disclose and produce certain documents in his possession. After an extensive but inconclusive discussion of the propriety of the application on 25th October 1994, the Constitutional Court said:

> "If you satisfy us that yes, they are necessary for you and that you cite relevant authority of the Constitution or provisions of the law, we will make the appropriate order but that will have to be in the light of what we have to say. If the other side satisfies us otherwise then he will not make an order."

When the matter came up again on 14th February 1995, it was with an opening request by the Constitutional Court to the appellant to satisfy it what Article of the Constitution has

been contravened or is likely to be contravened. The Court went on to say:

> "We find that the petitioner has failed to satisfy us that there has been any breach or contravention or anything said in the discussion at the Constitutional Commission. Unless Mr. Servina satisfies us that any article of the Constitution has been contravened and he is going to be affected by it, I do not think this matter is properly brought before this Court."

After some further remarks, the court said:

> "We have already studied and we have told you what our position is. We are not satisfied that any article of the Constitution has been contravened. If we go under Article 85 which says (quote) you have to show us what article of this Constitution has not been complied with."

After yet further discussion during which Mr. Hodoul remarked that: "Evidence will be adduced," the Constitutional Court reiterated its earlier position that the appellant had failed to satisfy the court that any article had been contravened. Notwithstanding this apparently conclusive pronouncement made, at least for a third time, in the course of the proceedings, the Constitutional Court gave counsel for the appellant two weeks to make written submissions.

Counsel for the appellant submitted a written submission to the Constitutional Court in which he showed the article of the Constitution he alleged had been contravened and in what regard in relation to him. At the end of his submission he submitted:

> ".... that Justice requires that this Honourable Court hears the petitioner and the other parties before pronouncing itself on the merits of interpretation and contravention which the petitioner as of right, has submitted in his petition."

When the matter came before the Constitutional Court again on 14th March 1995, it was noted that Mr. Hodoul, counsel for the petitioner, had filed his submission. Mr. Renaud,

counsel for the 1st respondent at the Constitutional Court was initially of the view, but later resiled from that view that there was "a case for the Court to hear oral address." The Constitutional Court however reserved its ruling on the question whether there was a proper case made out by the petitioner to invoke the jurisdiction of the court.

On 9th May 1995, the Constitutional Court gave a ruling dismissing the petition on two main grounds: first, that "the petitioner's failure to plead that any particular provision of the Constitution has been contravened, is fatal to his application made in pursuant to Article 130 of the Constitution"; and, secondly, that Article 69 of the Constitution refers only to present and future holders of office of a Minister.

Three grounds have been argued against the decision of the Constitutional Court on his appeal as follows:

> "1. The learned Judges were wrong to hold that the appellant had failed to plead that any particular provision of the Constitution has been contravened and the pleadings failed to disclose a prima facie case.
>
> 2. The Learned Judges were wrong to have adopted a procedure not conducive to a proper hearing and fair determination of the case.
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> 3. Having found that the pleadings did not disclose a prima facie case, the learned Judges were wrong to have proceeded to make "a careful examination of fact, assertions and submissions before the Court" for the purpose of "seeking a finality to the matters in issue."

There being, obviously, merit in each of these grounds and having regard to the clarity of their contents, it is not necessary to rehearse the submissions made thereon by counsel on behalf of the appellant in any detail. The argument of counsel on behalf of the respondents has been largely to show that on a proper interpretation of the relevant provisions of the Constitution, the appellant's petition

lacked merit. It was argued by counsel for the Attorney-General that the Constitutional Court had to satisfy itself that the allegations made by the petitioner are substantial and that that was what the Constitutional Court did. It is evident from the grounds of appeal that this Court is not now called upon to pronounce on what the proper interpretation of the word "Minister" in Article 69(5) of the Constitution is or whether on a proper interpretation of that article, the petition could be sustained. What this appeal is concerned with are whether the Constitutional Court did not misconceive the contents of the petition and whether it should have dealt with the issue of substance at that stage of the proceedings when the matter before it was an interlocutory application for certain documents to be produced and without hearing the parties on the substantive issues.

A careful reading of the petition shows that there is much substance in the criticism of the view held by the Constitutional Court that the appellant had failed to plead that any particular provisions of the Constitution have been contravened. The case of the appellant, put in nutshell, is that Article 69(5) of the Constitution requires the legislature to prescribe by an Act such salary, allowances and gratuity which a Minister shall receive; that he is a "Minister" whose gratuity should be so prescribed; and, that the Ministerial Emoluments Act, 1993 which deprives him of right and entitlement to such a gratuity by excluding him from the definition of "Minister" is a contravention of his rights. The appellant's case as contained in the petition rested on the interpretation of the word "Minister" in Article 69(5) of the Constitution. With greatest respect to their Lordships of the Constitutional Court, it is difficult to agree with them that there was a failure to plead that any particular provision of the Constitution has been contravened. It is evident that if the petitioner is a "Minister" whose right to receive gratuity is declared by

Article 69(5) of the Constitution an Act which deprives him of that right will be in contravention of the Constitution. The fact that there may be a credible dispute as to the meaning of "Minister" in Article 69(5) should not lead to the conclusion that the petitioner had not pleaded a contravention of the Constitution.

The third ground taken by counsel for the appellant which merely reinforces the first ground, exposed an apparent contradiction in the reasoning of the Constitutional Court. If that Court was right in the view it held that the appellant had failed to plead that any particular provisions of the Constitution have been contravened, then there would have been no issue to pronounce upon and the petition should have been struck out. But the Constitutional Court went further "to determine the contravention alleged by the petitioner." Their Lordships of the Constitutional Court clearly and rightly appreciated the contravention alleged by the appellant when they said:

> "There is no doubt that section 3(2) of Act No.3 of 1993 affects the interests of the petitioner but (were) do the provisions of article 69(5) being contravened by section 3(2) of Act No.3 of 1993?"

They went on to determine that question by holding the view that "the Constitution nowhere provides for the interpretation that a Minister includes an ex-Minister," and proceeded to reason why "Minister" should be interpreted as meaning present and future holders of office of a Minister. It is not for this court to say now whether they were right in their interpretation or not. That the Constitutional Court went on to determine the substantive question raised by the petition shows that they were in error in the view they held that there was no contravention alleged on the pleadings.

The second ground of appeal raised the question of

the procedure adopted by the Constitutional Court. It was argued that it was prejudicial to "a proper hearing and fair determination of the case." Having regard to the course which the proceedings took, already narrated at some length earlier in the judgment, it is difficult not to uphold the contention of the appellant on this ground. Some of the defects in the procedure which appear not conducive to a proper and fair hearing of the petition can be briefly enumerated. First, even though the matter immediately before the Constitutional Court was an interlocutory application for production of certain documents, that court instead of confining itself to dealing with that application proceeded to dismiss the substantive petition. Secondly, several remarks made in the course of the interlocutory proceedings showed that that court had already predetermined the substantive matter even before the petitioner (now appellant) was heard. Thirdly, reading the entire proceedings, it was not clear what the petitioner was called upon to satisfy the Constitutional Court on at that stage. The proceedings of 14th February 1995, showed that initially that Court wanted the appellant to show what article of the Constitution has been contravened but later he was required to satisfy that court that any article of the Constitution has been contravened. In the course of the proceedings on the same date that court had already ruled, without hearing the parties on the question, that: "there is no contravention of any former Minister's rights under the Constitution." Later when Mr. Hodoul said: "May I be allowed to submit that this is a question of interpretation which this court will be asked to study and pronounce itself on." The Constitutional Court stated:

> "We had already studied and we have told you what our position is. We are not satisfied that any article of the Constitution has been contravened."

After the Constitutional Court had repeatedly stated that the appellant had failed to satisfy it that any article of the

Constitution has been contravened, the permission given to the appellant to make a written submission if he wanted to must appear to an objective observer as a mere effort to satisfy the importunity of the appellant's counsel. The petitioner in his submission at the Constitutional Court explained that the issue before the Constitutional Court in the substantive petition was to pronounce on the correct interpretation of the word Minister in Article 69(5) of the Constitution and concluded with a submission which hears repeating, that:

> "..... justice requires that the Honourable Court hears the petitioner and the other parties before pronouncing itself on the matters of interpretation and contravention which the petitioner, as of right, has submitted in his petition."

One of the requirements of fair hearing is that the parties should have an opportunity of presenting argument on the matter at issue before the court or tribunal decides. Argument presented <u>after</u> the court had already decided the issue would not satisfy that requirement, nor would such requirement be satisfied when the court on its own formulates the issue on which it calls for argument in an uncertain manner. To determine a case finally when the stage in the proceedings has not been reached for such determination and prematurely, in the course of interlocutory proceedings without notice to the aggrieved party that the court was in the process of determining the substantive issues in question would not only be procedurally irregular but also would be contrary to the principles of fair and proper hearing.
The right to be heard is a right which inheres in a party regardless of whether what he would say is with or without substance. The duty of the court is to hear the parties, particularly the party likely to be aggrieved by its decision before it decides, barring proceedings which are permitted to be <u>ex parte.</u> It is unnecessary to speculate what materials and arguments the appellant, were he given the opportunity,

might have been able to place before the Constitutional Court to convince their Lordships of that Court that the word "Minister" should be construed as including former Ministers. What is important is that the Constitutional Court should not have deprived the appellant of that opportunity.

Need more be said! The conclusion seems to follow inexorably that the procedure adopted by the Constitutional Court was open to criticism. In the result, this appeal succeeds on all the grounds urged on behalf of the appellant. We would allow the appeal and set aside the order of the Constitutional Court dismissing the petition and order that the petition be remitted to the Constitutional Court to be properly heard.

There would be no order as to costs.

Dated this 1st day of March, 1996.

..... PRESIDENT
(H. GOBURDHUN)

..... JUSTICE OF APPEAL
(E.O.AYOOLA)

I concur

A.M. SILUNGWE