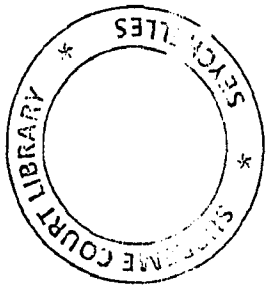
IN THE SEYCHELLES COURT OF APPEAL

The Bar Association of Seychelles — 1st Appellant

M[illegible] Tirant-Gherardi — 2nd Appellant



AGAINST

The President of the Republic — 1st Respondent

The Constitutional Appointments Authority — 2nd Respondent

The Attorney-General — 3rd Respondent

SCA. No 7/2004

[BEFORE: G J Strydom (Presiding), T D Cloete and J P Annandale, Acting Justices of Appeal.]

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Mr F Ally for the Appellants
Mr F G Bonte for the 1st Respondent
Mr J Renaud for the 2nd Respondent
Mr A Fernando, the 3rd Respondent

JUDGMENT OF THE COURT OF APPEAL

CLOETE AJA

INTRODUCTION

The present appeal concerns the appointment of higher judicial officers in the Republic of Seychelles. It is of particular importance to the government of the country generally and to the judicial arm of government in particular.

The first appellant is the Bar Association of Seychelles. The second appellant is a member of the first appellant. The first respondent is the President of the Republic of Seychelles. The second respondent is the Constitutional Appointments Authority ('CAA') which makes recommendations to the President of the Republic in regard to, amongst others, judicial appointments. The third respondent is the Attorney-General.

The primary question for determination is whether the Constitutional Court was correct in dismissing the first appellant's petition to set aside the appointment of Mr Justice Ramodibedi as the President of the Court of Appeal, and both appellants' petitions to set aside the reappointment of Mr Justice Matadeen and of Mr Justice Juddoo as a Justice of the Appeal Court and a Judge of the Supreme Court, respectively. Subsidiary questions are the standing of the first appellant to bring such proceedings; whether the orders sought by the appellants would involve the court's encroaching on the exercise by the President of the Republic of his prerogative as Head of State; and whether the Constitutional Court was correct in ordering the removal from the proceedings of the three Judges concerned, who had been joined as respondents, and if not, whether this order affected the validity

of the continued proceedings before the Constitutional Court and the order made by that court.

All of the respondents invoked Rule 9 of the Constitutional Court Rules, which provides:

'The respondent may before filing a defence to the petition raise any preliminary objection to the petition and the Constitutional Court shall hear the parties before making an order on the objection.'

The Constitutional Court dismissed the relief sought by the appellants on the basis that the respondents had no case to answer. The proceedings terminated before any defence was filed. Accordingly, and if and to the extent the appeals succeed, the matter will have to be remitted to the Constitutional Court.

STANDING

It would be convenient to deal with the standing of the first appellant at the outset. That was a preliminary objection raised on behalf of the CAA

but the Constitutional Court, because of the view it took of the matter, found it unnecessary to determine the question.

The first appellant alleges in paragraph 1 of the petition that it is a body corporate and an association of legal practitioners in Seychelles, whose objects are, inter alia, to represent and promote the interests and welfare of its members and to see that justice is administered according to law. These allegations are confirmed by the treasurer of the first appellant in his affidavit filed in support of the petition.

Art 130(1) of the Constitution reads:

'A person who alleges that any provisions of this Constitution, other than a provision of chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention may, subject to this article, apply to the Constitutional Court for redress.' (Chapter III of the Constitution contains the Seychellois Charter of Fundamental Human Rights and Freedoms.)

Standing provisions in constitutions are frequently interpreted widely and art 130(1) of the Seychelles Constitution is no exception. The Constitutional Court of this country, per Perera J, Juddoo J concurring, held in *Seychelles National Party v Government of Seychelles and Another* [2001] 2 LRC 178 at 183h-i that the petitioner, a registered political party, had standing to bring a petition in which it averred that there was a likelihood of its rights being affected in as much as the constitution of the board of the Seychelles Broadcasting Corporation was such that it would prevent objective broadcasting. In coming to the conclusion which he did, Perera J referred with approval to the finding in *Spencer v A-G of Antigua and Barbuda and Others* (1999) CHRLD 184 that the appellant, the leader of an opposition political party which opposed a project for the development of a tourist resort, had standing to bring proceedings for a declaration that an agreement for the

development of the resort violated the people's constitutional right to protection from discrimination, was accordingly unconstitutional, illegal and null and void. Perera J also approved the finding of the High Court of Kiribati in *Tong v Taniera and Another* [1987] LRC (Const) 1. In that matter the petitioner, who was the leader of the Christian Democratic Party and also a member of Parliament, was held to have standing as a member of Parliament to institute proceedings for a declaration that the Speaker of the House of Assembly had been in breach of the Constitution in not summoning the Assembly, upon being advised to do so by one third of the members, to debate an agreement between the Government of Kiribati and the Soviet Union for fishing rights in Kiribati waters. The Constitutional provision at issue in the *Tong* case was practically identical to art 130(1) of the Seychelles Constitution. But the

Constitutional provision at issue in the *Spencer* case was different. It read:

'If any person alleges that any of the provisions of s 3 to 7 (inclusive) of this Constitution has been, or is likely to be contravened in relation to him... then, without prejudice to any other action with respect to the same matter that is lawfully available, that person... may apply to the High Court for redress.'

This provision is similar to the standing provision in Chapter III of the Constitution of Seychelles in relation to the Charter of Fundamental Human Rights and Freedoms, which reads :

'46 (1). A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.'

Section 24(1) of the Zimbabwe Constitution, to the extent relevant for present purposes, is similar to the section interpreted in the *Spencer*

case and to art 46 (1) of the Constitution of this country. It has consistently been interpreted narrowly. It reads:

'If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person... may... apply to the Supreme Court for redress.'

The Supreme Court of Zimbabwe said in *United Parties v Minister of Justice, Legal and Parliamentary Affairs* [1998] 1 LRC 614 at 618 that this section:

'[A]ffords the applicant locus standi in judicio to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of *itself* being affected by the law impugned before it can invoke a constitutional right to invalidate that law (see *Retrofit (Pvt) Ltd v Post and Telecommunications Corp* [1996] 4 LRC 489 at 497). So it was in *Re Wood* [1994] 4 LRC 153 at 156-157, that this court held that the right to

...ide in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Ms Wood and not in her. No constitutional right in relation to her was violated by the refusal of the immigration authorities to grant her a residence permit. See also *Ruwodo NO v Minister of Home Affairs* [1995] 2 LRC 86.'

The Supreme Court of Zimbabwe concluded that the applicant, United Parties, did not qualify as an applicant under s 24(1) to bring an action for redress on behalf of its members.

The High Court of the Solomon Islands has drawn a distinction between a provision which requires that, to have standing, a party must show a contravention of the Constitution which affects his interests (as in the *Tong* case and s 130 (1) of the Constitution of this country) as opposed to a contravention which affects him (as in the *Spencer* and *United Parties* cases). In *Ulufa'alu v Attorney-General and Others* [2002] 4 LRC 1 at 14b-h Palmer Ag CJ said:

'Locus standi simply means a place of standing or standing in court, a right of appearance in a court of law (see *Black's Law Dictionary* (6th ed, 1990)). It is a threshold question to be determined at the beginning of a case to weed out frivolous or vexatious claims or in which it is shown an applicant has no interest or insufficient interest. There are two gateways (ss 18 and 83) in our Constitution under which an applicant seeking redress for contraventions of provisions of the Constitution may proceed. Those two gateways, however, relate to specific parts of the Constitution. Section 83 provides remedy for allegations of contraventions of those chapters of the Constitution dealing with Citizenship (ChIII), the Executive (Ch V), the National Legislature (Ch VI), the Legal System (Ch VII), the Ombudsman (Ch IX), Finance (Ch X), Land (Ch XI), Provincial Government (Ch VXII), and the Public Service (Ch XIII). Section 18 deals with the protection of fundamental rights and freedoms of the individual. The test for locus standi in both provisions in my respectful view is quite distinct and to be determined primarily from the express terms contained in those provisions. For purposes of comparison it is pertinent to note that the standards expressed are different. Section 83 is outward looking '... if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and

that *his interests* are being or are likely to be affected by such contravention... it is broader and wider in terms of possible applicants that could apply for redress. An applicant satisfies that test if he has *sufficient interest.* Section 18, on the other hand, looks inward. This is plain from the sub-heading of Chapter II 'Protection of Fundamental Rights and Freedoms of the Individual'. It focuses on the protection of individual rights and freedoms, encapsulated in sections 3-16 of the Constitution, not his interests. The test of sufficient interest is more liberal than the test under section 18. Satisfying the locus standi requirements under section 83 does not imply an applicant should be granted locus standi under section 18. For instance, a close relative of an affected person may show that he/she has sufficient interest in the contraventions of the provisions in Chapter II in relation to an affected person, but he/she cannot and does not have locus standi to bring such action for and on behalf of the affected person. He/she may be able to do it under section 83 but definitely not under section 18. The allegations of contraventions of any provision of Chapter II must necessarily relate to and are confined in my respectful view, to the individual rights and freedoms of an applicant.' (Emphasis in the original judgment.)

The reason for the requirement of standing was also emphasized in the judgment of the Supreme Court of Zambia in *Mwamba and Another v Attorney-General of Zambia* [1993] 3 LRC 166 where the majority of the Supreme Court, without coming to a firm conclusion, said at 170g:

'[O]n the question of locus standi, we have to balance two aspects of the public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private "Attorney-Generals" to move the courts in matters that do not concern them. For present purposes, we are prepared to proceed, without coming to any firm conclusion on the point, on the footing that the appellants have a legitimate interest in the national leaders and the governance of this country.'

Musumali JSC in his minority judgment quoted the passage to which I have just referred and said at 174a-d:

'My firm view is that a citizen has a right to sue on constitutional issues unless the Constitution itself explicitly or by necessary implication has taken away that

liberty. For instance, in cases of human rights, the person who "alleges that any of the provisions of Art 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him...." has locus.

There may be other provisions in the Constitution where only such firmly interested persons may sue on them. In the absence of such provisions in respect of constitutional provisions, a citizen has liberty to come to the High Court, and on appeal, to this court and seek redress. This is the position, I am sure, in all countries with constitutions, written or not. This freedom is particularly important in democratic countries as it is one way in enabling a citizen to have a say in the governance of his country. So the citizen needs to know that he enjoys this right, whether or not she/he is a meddlesome type.'

In India, art 32 of the Constitution expressly grants a right to approach the Supreme Court to provide a remedy for the breach of any of the fundamental rights guaranteed. Early judgments adopted the traditional approach to standing, insisting that a person who challenged legislation or action as being unconstitutional had to be affected

personally – see e g. *Charanjit Lal v Union of India* AIR 951 SC 41. The present position however is that every citizen has a right to insist that he is governed by laws made in accordance with the Constitution: *Wadhwa v State of Bihar* AIR 1987 SC 579.

In England, since the decision of the House of Lords in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, the rules relating to standing have been simplified and considerably relaxed across the board. In general the courts have decided that pressure groups do have standing to challenge decisions which concern their areas of interest and expertise. (*Halsbury's Laws of England* 4 th edition 2001 re-issue Vol 1 (1) paragraph 66 and cases referred to in nn 8 – 10).

There is therefore a solid (albeit not unanimous) body of authority from other Commonwealth countries which supports the liberal approach

to standing in constitutional matters already taken by the Constitutional Court in the *Seychelles National Party* case, particularly where the section in question reads as art 130 (1) of the Constitution of this country does. The Constitutional Court's approach also accords with art 8 (a) of Schedule 2 of the Constitution, which provides that:

'For the purposes of interpretation –

(a) The provisions of this Constitution shall be given their fair and liberal meaning.' (Emphasis supplied.)

In my judgment the Constitutional Court's approach is correct. Whether the standing provisions of art 46(1) should be more narrowly interpreted than the standing provisions of art 130(1), is a question which can be left for future determination. For present purposes it suffices to say the following.

It is undoubtedly so that not all of the members of the first appellant would be eligible to be considered for the judicial offices

concerned in these proceedings, and that not all legal practitioners in the Republic are members of it. But each legal practitioner (if not every citizen) and therefore each member of the first appellant, and the first appellant itself, has an interest in ensuring that justice is administered according to law and therefore that those appointed to do so, including (and perhaps in particular) the President of the Court of Appeal, are properly qualified to perform this function. In addition, the second appellant is a member of the first appellant and she says that she is properly qualified in law to be considered for appointment and to be appointed as a Justice of Appeal and a Judge. I would be astonished to hear that no other members of the first appellant fall into this category. (Whether any would be recommended by the CAA is an entirely different question.) In my judgment there can be no objection, in litigation such as the present, to a professional body such as the first appellant in its own

name representing such of its members who are qualified to be appointed to either court, in furtherance of their interests. And if the objection by counsel for the President of the Republic is simply on the narrow ground that the first appellant has not been authorised by its members to bring these proceedings, which I understood to be counsel's final submission on this question, the answer is that the objection is premature. Authority, or lack of it, has not yet been raised as an issue.

I therefore conclude that, on the allegations currently before the court, the first appellant has standing to bring these proceedings. I now turn to deal with the procedural question relating to the removal of the individual judges as respondents.

JOINDER

Rule 3 of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules 1994 provides:

'3(1) An application to the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be made by petition accompanied by an affidavit of the facts in support thereof.

(2) All persons against whom any relief is sought in a petition under subrule (1) shall be made a respondent thereto.

(3) Except where the petition under subrule (1) is presented by the Attorney-General, the Attorney-General shall be made a respondent thereto.'

The Constitutional Court rule does not in terms require the joinder of persons who have an interest in constitutional litigation. By 'interest' I mean a direct and substantial interest of such a nature that the person ought to be heard before the relief sought is granted. But the Constitutional Court rule does not prohibit the joinder of interested persons. It does not provide that only persons against whom relief is sought shall be joined. It lays down a minimum, but not necessarily an exhaustive category. Now no court would grant relief, whether of a

constitutional nature or not, without affording an opportunity to be heard to a person who had an interest (in the sense I have indicated). In the *Mwamba* matter, to which I have already referred, the appellants moved the court for a declaration that the President had acted unconstitutionally in appointing a particular person as a minister and another as a deputy minister. Ngulube CJ (with the rest of the Supreme Court of Zambia concurring on this point) said at 172i-173d:

'We must now comment on the form and direction taken by these proceedings. Although the motion ostensibly questioned whether there was dignity and leadership in the exercise by the President of his constitutional power to appoint the two Ministers, the blows were landing on two individuals who have never been heard and who stood to be condemned unheard and stripped of office. No court of justice can be called upon to make a declaration, which is always a discretionary remedy, when obvious injustice would be visited upon persons who have not been heard but who would be directly affected by a declaratory order in proceedings to which they have not been made parties. In the normal course, for example under Order 53 of the

Rules of the Supreme Court... the person alleged to be acting in a public office for which he is not qualified would be the respondent in judicial review proceedings to oust him under the procedure which has replaced the old Quo Warranto proceedings. In a case from Kiribati, *Speaker v A-G* [1988] LRC (Const) 1 at 7, Maxwell CJ identified certain general principles which the courts have evolved to guide them in exercising their discretion to grant a declaration and one of them he expressed as follows:

> "... that the court will not make a declaratory judgment, unless all the parties interested are before it; even if a competent defendant is before the court, as in this case, the court will decline to make a declaration affecting the interests of persons who are not before it..."

We respectfully share the learned Chief Justice's view.'

So, with respect, do I. Nor is the principle limited to declaratory orders. Joinder depends not upon the form of relief sought but upon the manner in which, and the extent to which, the order sought would, if made, affect the interests of those not parties to the litigation.

It was suggested in argument that it was a sufficient protection of the interests of the three judges concerned that the Attorney-General had been joined; and reference was made to the decision in *Franky Simeon v Republic of Seychelles and the Attorney-General,* Criminal Appeal no. 26 of 2003, in support of that proposition. (In that matter the Constitutional Court held that it was unnecessary to join the Justices of Appeal or the Court of Appeal where the Republic and the Attorney-General had been joined.) I am unable to agree with the submission. Obviously, litigation in the public interest does not mean that every member of the public must be joined. Where the relief sought would affect a large section of the public, the Attorney-General is the proper person to be joined: *In re Chamberlain's Settlement; Chamberlain v Chamberlain* [1921] 2 Ch 533 at 548. Joinder of the Attorney-General is necessary in all constitutional matters, because of Constitutional Court

rule 3(3) quoted above. But in a matter such as the present the three judges concerned had a direct and substantial interest in their personal capacities. The relief sought, if granted, would impact on them personally and not merely on the courts on which they were appointed to serve.

I accordingly conclude, subject to what follows immediately, that the joinder of the three individual judges was not only proper, but essential. That does not mean, however, that the order of the Constitutional Court has resulted in the subsequent proceedings in that court being invalid or the order made by that court being a nullity. A court is entitled to proceed with a matter in the absence of joinder of a third party having a direct and substantial interest in the outcome of the litigation, where 'the court can be satisfied with the third party's waiver of his right to be joined, e.g., if the court is prepared, under all the

circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment' — per Fagan AJA in the South African case of *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659. Mere knowledge of proceedings would not be enough to make the decision of the court binding on the third party (ie *res judicata* against him); the third party would expressly or impliedly have to submit to the court's jurisdiction. In my view, that is precisely what happened here. The three Judges concerned were joined as parties to the proceedings. They could expressly have indicated that they abided the decision of the court. Or they could have refrained from participating in the proceedings, which would have amounted to the same thing. But they chose a different course and they were removed as respondents at their own request. They obviously realised that the proceedings would continue in their absence and that if the conclusion of

the court was adverse to them, their appointments would be declared invalid. It is unthinkable that, having sought their own removal from the litigation, they would subsequently seek to challenge the outcome at a later date. In the circumstances it must be inferred that they submitted to whatever order might be made by the court and gave up their right to participate further in the proceedings.

THE MERITS OF THE APPEAL

The President of the Republic derives the power to appoint the President of the Court of Appeal from art 123, and the power to reappoint a Justice of the Court of Appeal and a Judge of the Supreme Court, from art 131(4), of the Constitution. These articles, to the extent relevant for present purposes, provide as follows:

'123. The President shall, by instrument under the Public Seal, appoint the President of Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.

131(4) The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years.'

Before considering the requirements of these articles in any detail, it would be convenient to dispose of the more general arguments advanced on behalf of the respondents.

The Attorney-General emphasised that the remedies available to a person who invokes the provisions of art 130(1) of the Constitution, quoted above, are limited by art 130(4), which provides as follows:

'Upon hearing an application under clause (1), the Constitutional Court may –

(a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;

(b) declare any law or the provision of any law which contravenes this Constitution to be void;

(c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate.'

The Attorney-General referred to art 125(1), which deals with the powers of the Supreme Court as follows:

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

(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;

(b) original jurisdiction in civil and criminal matters;

(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 maybe appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and

(d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.'

The Attorney-General then pointed out that 'adjudicating authority' mentioned in para (c) is defined in art 125(7) as 'including a body or authority established by law which performs a judicial or quasi-judicial function'. Against this background the Attorney-General's submission, as I have recorded it, was that review is the appropriate remedy to correct the decision of adjudicating authority; and that because neither the President of the Republic nor the CAA performs a judicial or quasi-judicial function when it comes to the process of appointing justices of the Appeal Court or judges of the Supreme Court, and neither is therefore adjudicating authority, the exercise of those powers is not subject to review. The unpalatable result of this argument, as the

Attorney-General freely conceded, is that if the President of the Republic or the CAA were to contravene the Constitution, a court would be powerless to remedy the situation.

The fallacy in the Attorney General's reasoning is this. It does not follow that because review will be the primary remedy used by the Supreme Court sitting as the Constitutional Court in exercising supervisory jurisdiction over adjudicating authority in terms of art 125(1)(c), that that court can only utilize this remedy in such a case. Put positively, the position is this. The remedy of review is a 'remedy available to the Supreme Court' as contemplated in art 130(4)(c) and can be used in any appropriate case in the exercise of that court's 'original jurisdiction in matters relating to the... contravention [and] enforcement... of this Constitution' as contemplated in art 125(1)(a) when that court sits as the Constitutional Court.

It was submitted on behalf of the President of the Republic in the Constitutional Court, and on behalf of the CAA in this court, that a decision by the President of the Republic to appoint a Justice of Appeal or a Judge of the Supreme Court constitutes an exercise of the prerogative of the Head of State and cannot therefore be questioned by a court. Counsel representing the CAA submitted further that the recommendations of the CAA should also not be subject to judicial scrutiny. In this latter regard counsel drew attention to the composition of the CAA, which comprises one person appointed by the President, one by the Leader of the Opposition and one, who is to be the chairman, appointed by agreement between those already appointed.

The argument cannot be sustained. The President of the Republic does not derive the power to make judicial appointments from his prerogative as the Head of State, but from the Constitution; and in

a country such as Seychelles, it is the Constitution which is supreme. Article 5 of the Constitution provides, in terms, that:

'This Constitution is the supreme law of Seychelles and any other law found to be inconsistent is, to the extent of the inconsistency, void.'

Conduct inconsistent with the Constitution would obviously also be void, and a violation of the Constitution is a matter to be remedied by the judiciary. As Bhagwati J trenchantly remarked in *State of Rajasthan and Others v Union of India* AIR 1977 SC 1361 at 1413 (in a passage particularly relevant bearing in mind the turbulent history of Seychelles during the latter part of the last century):

'So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is Supreme lex, the paramount law of the land, and there is no

department or branch of Government above or beyond it. Every organ of Government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.'

A similar approach has been followed by the Constitutional Court of South Africa in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 CC para [13], reaffirmed in *President of the Republic of South Africa and Others v South African Rugby Football*

Union and Others 2000 (1) SA 1 (CC) para [58], the Supreme Court of Sri Lanka in *Premachandra v Jayawickrema and Another*; *Dodangoda v Markar and Another* [1994] 4 LRC 95; the Supreme Court of Zambia in *Mwamba's* case referred to above; the High Court of the Solomon Islands in *Re Nori's Application* [1989] LRC (Const) 10; the Supreme Court of Malaya in *Mustapha v Mohammed and Another* [1987] LRC (Const) 16 at 44h-46c; the High Court of Malaysia in *Datuk (Datu) Amir Kahar Tun Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah and Others* [1994] 3 LRC 1; and the High Court of the Solomon Islands in *Re Nori's Application* referred to above.

It is a precondition for the exercise by the President of the Republic of his powers under the Constitution that there must be a recommendation by the CAA. In the absence of a recommendation, or a valid recommendation, the appointment would be liable to be set aside

by the Constitutional Court or this court on appeal. Nor are recommendations of the CAA, despite its composition, immune from judicial scrutiny. It is unnecessary to consider whether the discretion vested in the President of the Republic is reviewable if the preconditions for its exercise have been fulfilled (see e.g. the *State of Rajasthan* case referred to above, and the decision of the High Court of St Lucia in *Francois v Attorney-General* [2002] 5 LRC 696). It is necessary to enquire into whether, on the allegations made by the appellants, a case is made out that the recommendations by the CAA which were acted upon by the President of the Republic are liable to be set aside. I shall deal first with the appointment of the President of the Court of Appeal and thereafter, with the reappointment of Mr Justice Matadeen and Mr Justice Juddoo.

Article 122 of the Constitution deals with the qualifications of the President (and Justices) of the Court of Appeal. It provides:

'122. A person is qualified for appointment as, or to discharge the functions of, the President of the Court of Appeal or a Justice of Appeal if, in the opinion of the Constitutional Appointments Authority, the person is suitably qualified in law and can effectively, competently and impartially discharge the functions of the office of Justice of Appeal under this Constitution.'

The relevant part of the petition reads as follows:

'Mr Justice Michael Ramodibedi is not suitably qualified in our law to effectively and competently discharge the functions of President of the Seychelles Court of Appeal in that his judicial and legal experience and knowledge do not extend to civil law based on our French system of law and he is unable to comprehend and speak our national language of French which is also the language necessary to interpret our civil law, its jurisprudence, text-books and other authorities.'

These allegations were repeated verbatim in the affidavit filed by the first appellant in support of the petition and no further allegations of fact were

made. The petition and the first appellant's affidavit concluded with the prayer that the appointment of Mr Justice Ramodibedi as President of the Seychelles Court of Appeal be declared 'to be null and void and a contravention of the Constitution.' (The second appellant did not join in asking for this relief.)

The first appellant's allegations in regard to Mr Justice Ramodibedi must be accepted to be correct in all constituent parts for the purposes of this appeal. The question which arises is whether the allegations disclose a cause of action.

The first appellant's case, in a nutshell, is that Mr Justice Ramodibedi is not suitably qualified in law to hold the position to which he has been appointed. But it is the CAA, not a court of law, which is required to decide this question. A court of law cannot usurp the function entrusted to the CAA and substitute its own decision. It can only set the

decision of the CAA aside on review, and the grounds of review are limited.

The first appellant does not aver that the facts alleged were unknown to the CAA. Had such a statement been made, the first appellant may have been able to base its case on a material mistake of fact by the CAA. See in this regard *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (CA & HL) and *R v Criminal Injuries Compensation Board, Ex Parte A* [1999] 2 AC 330 (HL(E)); *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 147; *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) paras [32] to [49]; and contrast the decision of the High Court of Australia in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Ltd and Others* [1986-1987] 162 CLR 24 (HC of A) at 39. But the first appellant's papers fall short of making out this case. It may be

administrative courts to call for the whole dossier on an issue and examine the reasons for a decision in a way in which the English judges cannot.'

If these observations are correct then in this country the French approach may well be considered less appropriate than the English approach.

The onus on a petitioner who seeks judicial review is admittedly difficult to discharge; but it must not be exaggerated. There would, for example, be nothing in theory preventing the first appellant from alleging that the CAA must either have been unaware of major shortcomings of a candidate recommended by it (in which case it would argue that the recommendation should be set aside for this reason) or, alternatively, that the CAA made the recommendation despite being aware of such shortcomings (in which case it would argue that no reasonable person could have made the recommendation). It must be emphasized that the law relating to judicial review is clear and necessary to prevent courts

from usurping functions not entrusted to them. To quote again from the *Chief Constable of the North Wales Police* case (at 154d):

'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.'

I accordingly conclude that the appeal must fail insofar as it involves the appointment of Mr Justice Ramodibedi. I turn to consider the reappointments of Mr Justice Matadeen and Mr Justice Juddoo, both of whom are Mauritian nationals.

I have already quoted art 122 of the Constitution which deals with the qualifications of Justices of Appeal. The qualifications of Judges of the Supreme Court are set out in art 126 (1), which provides:

'A person is qualified for appointment as a Judge if –

(a) the person has been entitled to practise before a court of unlimited original jurisdiction for not less than seven years; and

(b) in the opinion of the Constitutional Appointments Authority the person has shown outstanding distinction in the practice of law and can effectively, competently and impartially discharge the functions of the office of a Judge under this Constitution.'

The provisions of art 131 (4) which deal with the reappointment of Justices and Judges who are not citizens of Seychelles have been quoted above.

It is immediately apparent when art 131(4) (reappointments) is compared to arts 122 (Justices of Appeal) and 126(1)(b) (Judges of the Supreme Court) that there is a fundamental difference between them. The latter two articles refer to 'the opinion of the CAA'. Article 131(4) does not: the article does not read 'the President may, on the recommendation of the CAA and if in the opinion of the CAA exceptional

circumstances exist'; nor does it read 'the President may, on the recommendation of the CAA if in his opinion exceptional circumstances exist'. Article 131(4) requires the existence of exceptional circumstances (as well as a recommendation by the CAA) before the President can validly appoint a Justice or a Judge who is not a citizen of Seychelles for a second term of office. Whether exceptional circumstances did exist is a matter for determination by the Constitutional Court and on appeal, if necessary, by this court.

In England, in the now notorious wartime decision of *Liversidge v Anderson* [1942] AC 206 (HL), the majority of the House of Lords interpreted a regulation which read 'If the Secretary... has reasonable cause to believe any person to be of hostile origins or associations' as requiring only the honest, subjective 'satisfaction' of the Secretary. After much criticism in the Privy Council and the House of Lords in the years

Théry; D 1980, 401 note Kerlhon. The first appellant's case bc... ... papers and in argument was that the CAA was wrong in making the recommendation. That does not suffice for judicial review. As Lord Brightman said in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL(E)) 155c: 'Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.'

No French authority was quoted to this court. It may be (I express no view on the point as there was no argument on it) that English decisions could possibly provide a safer guide. Bell, *'A French lesson in judicial review'* (1982) 2 *Oxford Journal of Legal Studies* 142, has said:

'The Conseil d' Etat not only has a judicial branch, but is also institutionally the hierarchical superior of the administration. The spirit in which the judicial section is prepared to criticise executive decisions would suggest it is not uninfluenced by the position of the Conseil as a whole... This position is reinforced by the ability of the

that the CAA was well aware of all the facts alleged and nevertheless considered Mr Justice Ramodibedi to be a suitable candidate. If that was its attitude, there could be another ground for review — namely, that the CAA's recommendation was such that no sensible person who had applied his mind to the question could have made it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, approved and explained by the House of Lords in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] LRC (Const) 948 at 1026 g-h. But such a case was not made out either. Nor did the first appellant's counsel seek to argue such a case.

There was also no allegation or argument to the effect that the CAA was guilty of an obvious error of evaluation (*erreur manifeste d'appréciation)*: see e.g. CE 25.4.1980, *Ministre de L'Education C Institut Technique Privé de Dunkerque*, ADJA 1980, 491 conclusions

which followed, the *Liversidge* case was expressly overruled in *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952 (H L(E)) and the dissenting speech of Lord Atkin approved. Lord Atkin had said (at 226):

'The meaning... [that] appears to have found favour with some of your Lordships is that... the words "if the Secretary of State has reasonable cause" merely mean "if the Secretary of State thinks that he has reasonable cause." '

Lord Wilberforce said in the *Rossminster* case at 1000:

'[I]t is undisputed that the words "has reasonable cause to believe" are open to examination in spite of their subjective form... The existence of this reasonable cause and of the belief founded upon it is ultimately a question of fact to be tried on evidence.'

Article 131(4) is an *a fortiori* case. There is simply no room for a subjective approach. Exceptional circumstances are required. It is their existence, not the reasonableness or otherwise of the opinion of the

President of the Republic or the C... as to their existence, which is justiciable.

The appellants have averred categorically and without qualification that there were no exceptional circumstances. That allegation is sufficient to constitute a prima facie case. It is difficult to conceive what further factual allegations could have been made by the appellants: it can hardly be required of them to put up skittles and knock them down by postulating circumstances which could legitimately be regarded as exceptional and then showing that they do not exist. Furthermore the burden of proving that exceptional circumstances did exist now falls upon the State because of the provisions of article 130 (7) of the Constitution, which provides:

'Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause (6), the person alleging the contravention or risk of contravention establishes a *prima facie* case, the burden of proving that there has

not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.'

It would be desirable to say something about the position of the President of the Republic in view of the argument advanced on his behalf referred to earlier in this judgment. It is not inconceivable that a Head of State in his official capacity should give evidence, and be cross-examined, in a court of law. President Nelson Mandela of the Republic of South Africa did just that in the proceedings brought against him, in his capacity as the President, by the South African Football Union (in the case referred to above). On appeal, all eleven justices of the Constitutional Court joined in making the following remarks in paras [242] and [243]:

'[242] A review of the law of foreign jurisdictions fails to reveal a case in which a head of State has been compelled to give oral evidence before a court in relation to the performance of official duties. Even where a head of State may be called as a

witness, special arrangements are often provided for the way in which the evidence is given. There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded.

[243] We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the Executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The Judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of State and the integrity of the executive arm of government. On the other hand,

there is the equally important need to ensure that courts are not impeded in the administration of justice.'

(Footnotes omitted.)

It is difficult to conceive why it would be desirable, much less necessary for the President of the Republic of Seychelles to give evidence in a case such as the present. The President of the Republic obviously needs to be cited in his official capacity as a respondent (because of the provisions of Constitutional Court rule 3(2), quoted above). But the matter could and should be disposed of without his further involvement (barring, perhaps, exceptional circumstances, the nature of which I am unable to forsee). Counsel representing the appellants submitted that the President of the Republic had acted on wrong advice. He did not seek to impugn the exercise by the President of the Republic of the power vested in him by art 131 (4) on any other

basis; and I have already left open the question whether such an attack would be competent.

It must be emphasized that no question of public policy arises as to the publication of the deliberations of the CAA in regard to the suitability of candidates which that body proposes for appointment to the President of the Republic — the danger to which counsel representing the CAA adverted. The enquiry will be confined to ascertaining whether exceptional circumstances did exist. That, as I have said, is not a question on which the opinion of the President of the Republic or the CAA is relevant. Accordingly, although the obligation to place evidence before the court and prove that exceptional circumstances did exist, will be on the State, and although the President of the Republic and the members of the CAA would be competent witnesses, their evidence

would not be essential or even necessary for the determination of this fact.

In the circumstances the decision of the Constitutional Court on this part of the case must be set aside and the matter remitted to that court so that the hearing can continue.

COSTS

The appellants have been partially successful in this court. So have the respondents. In my view it would be fair for this court to exercise the wide discretion it has in relation to costs by making no order as to the costs of the appeal. So far as the proceedings in the Constitutional Court are concerned, it would be appropriate for the award of costs to await the final outcome of the litigation. The costs order of that court will accordingly be set aside.

There was no discussion on the question of costs in the judgment of the Constitutional Court. The court apparently applied the usual rule that costs follow the result. Another approach is followed by the Constitutional Court in South Africa, which (without attempting to be prescriptive in any way) I would commend to the attention of the Constitutional Court in this country. According to that approach, *bona fide* and reasonable litigants who raise genuine constitutional questions of broad concern should not be discouraged from attempting to assert their constitutional rights by having to pay the costs of their governmental adversaries if unsuccessful. (See for example *African National Congress and Another v Minister of Local Government and Housing, Kwazulu – Natal, and Others* 1998 (3) SA 1 (CC) para [34] and cases there referred to; *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier, Province of the Free*

State and Others 1998 (3) S.A. 692 (A) para [4] and cases there referred to.)

The Attorney-General emphasized that he had never sought costs in a case such as the present and this appears to me to be the proper approach for him to take.

ORDER

The following order is made:

A. The order of the Constitutional Court made on 20 February 2004, in terms of which the preliminary objections of the respondents were upheld and the petitions of the appellants were dismissed in their entirety, and the costs order, ~~are~~ is set aside and the following order is substituted:

'1. The first petitioner's petition to declare the appointment of Mr Justice Ramodibedi as President of the Seychelles Court of Appeal is dismissed.

2. The respondents' applications to dismiss, at this stage of the proceedings, the first and second petitioner's petition to declare invalid the appointment of Mr Justice Matadeen to the Seychelles Court of Appeal and of Mr Justice Juddoo to the Supreme Court of Seychelles, is refused.

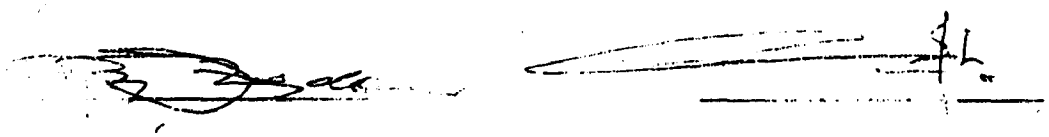
3. The costs of all proceedings to date in this court are reserved for determination at the end of the matter.

B. The matter is remitted to the Constitutional Court, and reinstated on that court's cause list.

T.D. CLOETE

Acting Justice of Appeal.

We concur in the reasoning of the judgment of Cloete AJA and the order made.



G.J. STRYDOM

Acting Justice of Appeal.

J.P. ANNANDALE

Acting Justice of Appeal.

Delivered at Victoria, Mahe, this 11th day of June 2004
