

MICHEL v DHANJEE

(2012) SLR 258

R Govinden, Attorney-General for first, second and third appellants
K Shah SC for fourth appellant
A Amesbury for the first respondent
F Chang-Sam SC (watching brief) for second, third and fourth respondents

Judgment delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

TWOMEY J:

Judges in Seychelles are recruited from all over the world. This is a result of our history, of a citizenry composed of non-indigenous peoples, the progeny of our European colonisation masters, African slaves and other races and their descendants. It is also inextricably linked to our micro - and mixed jurisdiction. In our early legal history as a dependency of Mauritius we only had a juge de paix and our cases were generally heard in Mauritius. Even a century after the first settlement on these islands, our legal cases were still being decided in Mauritius, East Africa and ultimately, the Privy Council of England. After independence in 1976 the Court of Appeal consisting of a majority of non-Seychellois judges continued to “travel” to Seychelles for their sessional sittings. Without doubt it was with great pride that Seychellois eventually saw some of its countrymen become judges. Even then it was only in 2004 that the Court of Appeal for the first time became almost wholly localized. It continues, however, to sit for only three sessions a year, with some of its members travelling from abroad to complete the quorum for the sittings.

This brief look at judicial history illustrates the background to foreign judges in Seychelles and our special links with Mauritian judges. Other factors to bear in mind are the small pool of lawyers from which recruitment to the judiciary can be made and the remuneration of judges set out in the Judiciary Act. The Constitution of Seychelles embraces these facts and provides for the appointment of judges to the Court of Appeal, differentiating however, between those judges who are citizens of Seychelles and those who are not. Its provisions seek to ensure not only the independence and impartiality of all judges but also the security of tenure of their appointments.

The body charged by the Constitution to discharge this function is the Constitutional Appointments Authority (CAA) whose membership is composed of an appointee by the President of the Republic of Seychelles, and an appointee by the leader of the Opposition and a Chairman agreed by the two members (vide article 139 *et seq* of the Constitution of Seychelles). The CAA proposes candidates to the President for appointment as judges to the Supreme Court and the Court of Appeal. Subject to the

inability to perform the functions of office (vide article 134(1)), if the judges appointed are citizens of Seychelles, their tenure in the post is up to the age of 70 (article 131(1) (d)). In the case of a non-citizen, the appointment is “for only one term of office of not more than seven years” (article 131(3)). However, “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 Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years” (article 131(4) of the Constitution).

These provisions present the backdrop to this case, the challenge to the reappointment of a Mauritian national, Justice Satyabhooshun Gupt Domah, the fourth appellant to the Court of Appeal of Seychelles. There has only been one other instance of a similar challenge in the history of Seychelles, that in the case of the *Bar Association of Seychelles and Anor v President of the Republic and Ors* (unreported) SCA 7/2004. But more of this later.

In a letter dated 16 April 2011, Justice Domah wrote to the CAA applying for a second term of office. In a letter dated 19 April 2011, the President of the Court of Appeal, Justice Francis MacGregor recommended the reappointment of Justice Domah, enumerating the exceptional circumstances which he perceived as warranting the reappointment. Two months later, on 17 June 2011, the CAA wrote to the President of the Republic of Seychelles recommending the reappointment of Justice Domah for a further term of two years. There has been much speculation about whether this was a request for reappointment, for approval of reappointment or for extension of a contract, but again, more of this later.

On 5 September 2011, the President of the Republic of Seychelles appointed Justice Domah for a further term of five years. On 4 October 2011, Viral Dhanjee, a citizen of Seychelles and the first respondent in this present appeal, filed a petition to the Constitutional Court praying for a declaration that the recommendation of the CAA and the reappointment of Justice Domah be declared null and void as it contravened the Constitution. He also prayed for the vacation of office by Justice Domah. The petition was extensively amended but the prayers remained the same.

The particulars of the contravention of the Constitution as canvassed before the Constitutional Court hearing can be summarised as follows:

- (1) At the time of his reappointment Justice Domah was still serving a term of office and was not entitled to be appointed for a second term.
- (2) There were no cogent, compelling, persuasive and exceptional circumstances warranting or justifying the recommendation of the CAA for the reappointment of Justice Domah for a second term of office.
- (3) The members of the CAA acted irrationally in coming to a decision that there were exceptional circumstances for the reappointment of Justice Domah.

- (4) The exceptional circumstances relied on by the CAA in making their recommendation are not those envisaged by the provisions of the Constitution; they should not be exceptional to Justice Domah but to the circumstances of the Judiciary of the Republic of Seychelles.
- (5) The President of the Republic of Seychelles was wrong to rely on the recommendations of the CAA as the exceptional circumstances relied on by the CAA did not amount to exceptional circumstances but rather related to the personal circumstances of Justice Domah.
- (6) The appointment of Justice Domah was in breach of articles 1 and 119(2) of the Constitution safeguarding the democratic state of Seychelles and protecting the independence of the judiciary.
- (7) The reappointment of Justice Domah follows the decision of the Court of Appeal in the case of *Gappy & Ors v Dhanjee* (2011) SLR 294 and hence is evidence that he did not act impartially in order to attract his reappointment.
- (8) The reappointment of Justice Domah is likely to affect the appellant's rights as a party to any judicial or legal proceedings to be heard in an independent, impartial or properly constituted Court.

The respondents for their part contended that the reappointment was to take effect after the completion of Justice Domah's first term of office, that there was enough relevant material before the members of the CAA that amounted to exceptional circumstances to warrant a recommendation to the President of the Republic of Seychelles for the reappointment of Justice Domah, and that in any case those circumstances are not exclusive to the ones outlined in the letter of recommendation. Further, they argued, the construction of exceptional circumstances is wide enough to include the attributes of a person, his contribution to the judiciary and jurisprudence and the national context under which the reappointment is recommended. In any case, they contended, Justice Domah's participation in the Court of Appeal in the case of *Gappy* (*supra*), concurring to a unanimous decision of a full bench of five judges was not evidence that he did not act impartially and independently or in a manner to attract a reappointment. In the circumstances, they continued, the averment that Justice Domah's reappointment is likely to affect the respondent's interest as a party in judicial or legal proceedings is unsubstantiated as there has never been an allegation of bias or impropriety against Justice Domah during his tenure of office. They also argued that the petition was full of speculation and surmises and consequently was frivolous and vexatious and that no *prima facie* case of a contravention or risk of contravention to the Constitution was made out by the respondent to result in shifting the burden of proving such a contravention on the State.

The Constitutional Court ruled that a *prima facie* case had been made out and in its judgment opined that most of the factors raised by the parties were peripheral and redundant "save for the core issue which relates to the constitutional validity of the appointment in question." It identified the three main issues arising from this case: (1) the CAA's exercise of its constitutional duties, (2) the interpretation of article 131 and (3) the definition of exceptional circumstances.

Musing on how the CAA deliberates, the Court was of the view that some of the selections made by the CAA were questionable and “worse still, [could] lend itself to perceived arbitrariness.” It went on to state that it viewed the recommendation for an “extension” of the term of office of Justice Domah “alien to the Constitution of Seychelles and inconsistent with article 131 (3) and (4) of the Constitution; such recommendation being unconstitutional, cannot be relied and acted upon.”

From this decision, four of the respondents at the Constitutional Court have appealed to the Court of Appeal. The members of the CAA have filed no appeal to the decision of the CAA but they were represented by counsel solely for observation of the appeal trial. No adverse inference is drawn from the position they adopted and no weight is attached to the exercise of their privilege.

The grounds of appeal of the appellants are consolidated and are reproduced below:

- (1) The petitioner had no locus standi to file a petition under article 130(1) challenging the reappointment of a Justice of Appeal in his capacity as a former and future litigant before the Court of Appeal as averred in paragraph 13 of the amended petition and contend that “his interest is being or is likely to be affected” by such appointment, since such interest would only be a vested or a perverse interest and not a legitimate or lawful interest which alone would be justiciable in a Constitutional challenge.
- (2) The Judges erred in law in holding that an appointment with reservation, for it to take effect in the future is unconstitutional and contrary to the provisions of article 131(4) of the Constitution of Seychelles since a reappointment to be “consecutive” should necessarily be made before the expiry of the term.
- (3) The Judges erred in law in not considering and reading together the wording “whether consecutive or not” for an appointment of a person who has already completed on term of office as a Justice of Appeal as per the provision of article 131(4) of the Constitution of Seychelles.
- (4) The Judges failed to consider that the President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint as per the proviso of article 131(4) of the Constitution of the Republic of Seychelles.
- (5) The Judges failed to consider what constitutes “exceptional circumstances” under article 131(4) of the Constitution and in particular whether the Constitutional Appointments Authority’s recommendation based on exceptional circumstances was reasonable in the absence of a definition, and that the President had acted reasonably and in accordance with the Constitution in reappointing the appellant as a Justice of Appeal with effect from 4 October 2011 for 5 years.
- (6) The Judges misconstrued the letter dated 17 June 2011 from the Constitutional Appointments Authority in failing to appreciate that it was a recommendation based on exceptional circumstance to the President to appoint the fourth appellant of a second term, even if the Constitutional Appointments Authority might have been under the mistaken belief that it had to be a two year extension in order to add up to seven years under

article 131(3). The period of the second term is the prerogative of the President subject to a maximum of seven years.

- (7) The Judges erred in giving part of the letter dated 17 June 2011 a strained and inappropriate meaning to the word “extension” and in disregarding the recommendation based on exceptional circumstances failed to adjudicate properly on the true meaning and intention to be accorded to this letter and coupled with the fact that there is no prescribed form of a letter of recommendation.
- (8) The Judges failed to appreciate and take into account the following factors:
 - (a) That the Seychelles Court of Appeal sits in session and not permanently;
 - (b) The appellant like all non-resident Justices of Appeal came to Seychelles for the sessions, and is remunerated for the sessions that he sits on (and not monthly) as particularized in the Judiciary Act;
 - (c) When the President appointed the appellant on 5 September 2011 for a second term with effect from 4 October 2011, he had effectively completed one term of office (the next session was in November 2011) and this consecutive appointment did not violate article 131(4) of the Constitution.

Before we proceed to deal specifically with the issues raised we think it is important to contextualise constitutionalism or the concept of limited government in relation to the case before us and other similar cases. This is especially important due to the increase of both constitutional and judicial review cases before the Constitutional Court and the Court of Appeal of Seychelles. There are inherent tensions in democratic government and these are exacerbated in judicial review cases. This is not peculiar to Seychelles. It is a fundamental difficulty in all democracies where constitutionalism is safeguarded through the process of judicial review. In cases such as the present one, an unelected body (the judiciary) tells an elected body – either the legislative (the National Assembly) or the executive (The President), who are elected by the people, that their will is incompatible with the fundamental aspirations of the people as formulated in the Constitution of the Seychelles. It is for this reason that the law has developed procedural and substantive safeguards to control the boundaries of judicial authority (and to prevent what Sedley J in his contribution to *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (1994), edited by Genn and Richardson, 38 called “the direct withering fire on the executive”). Hence this Court is minded in such cases to follow strictly the rules and procedures laid down in our laws. With this in mind we turn to the issues raised in this appeal.

The petitioner in this case alleged a contravention of the Constitution by the CAA and the President of the Republic of Seychelles in the exercise of their constitutional powers. This is therefore a judicial review case where the Constitutional Court is reviewing the decision making process of a decision making body or person. It can only review how the decision was made, declare on its fairness and ultimately on its constitutionality. In this respect therefore it has to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or

constitutional power to make the decision it did. The Court cannot substitute its opinion for that of the public authority. Article 130(4) of the Constitution of Seychelles empowers the Constitutional Court in such cases to make a declaration that the act is in contravention to the Constitution and to grant remedies “available to the Supreme Court” in such cases - not just any remedy.

The remedies available to the Supreme Court of Seychelles would be those available to the High Court of England in such cases (viz sections 4 and 5 of the Courts Act, Cap 42, Laws of Seychelles). When the Supreme Court is exercising a judicial review function the only remedies available to it are certiorari, mandamus, prohibition and injunctory relief. In fact Renaud J correctly and admirably summarized the powers of the court in such circumstances in the recent case of *Agnes Jouanneau v Seychelles International Business Authority* (2011) SLR 262. He correctly stated the rules in such cases and supported his findings by quoting from the great English cases of administrative review namely *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141:

Administrative law is not about judicial control of Executive power. It is not Government by Judges. It is simply about Judges controlling the manner in which the Executive chooses to exercise the power which Parliament has vested in them. It is about the exercise of Executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious. It should not be arbitrary, nor capricious, nor in bad faith, nor abusive, nor taking into consideration extraneous matters.

and *Khawaja v Secretary of State for Home Department* [1983] 1 All ER 765:

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.

With this in mind we now turn to the grounds of appeal.

Locus standi
Ground 1

The Constitution of Seychelles states in article 130(1) -

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 contains the Charter of Fundamental Human Rights and Freedoms and breaches of these rights and freedoms are actionable per se by the person whose rights or freedoms are violated. This is clearly not the case for breaches of other provisions of the Constitution as article 130(2) goes on to state -

The Constitutional Court may decline to entertain an application under clause (1) where the Court is satisfied that the applicant has obtained redress for the contravention under any law...

Further, article 130(7) provides -

Where in an application under clause(1) he 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 is clear from the above provisions that in matters raised by the present case certain conditions have to be met before the Constitutional Court could proceed to full hearing. Similarly in England from where we have inherited our laws relating to judicial review, leave (now called permission) of the Court must be sought before initiating proceedings.

The only purpose of these provisions is to weed out unmeritorious claims. This indeed was the point made by senior counsel, Mr Chang-Sam for the CAA when invoking rule 9 of the Rules of the Constitutional Court (“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”) and unfortunately ignored by the Constitutional Court in its ruling. It would seem to us that in all cases of this nature the petitioner must in his petition demonstrate that his interest is likely to be affected in some way. The clear and concise test to be applied to decide if a prima facie case is made out as contained in the provisions stated above may be summarised thus:

- (a) there is a contravention or likely to be a contravention of the Constitution
- (b) the person has a personal interest that is being or likely to be affected by the contravention (in other words he has locus standi in judicio to seek redress)
- (c) the person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law
- (d) the question raised by the petitioner is not frivolous or vexatious.

Then and only then can the case proceed to hearing. This test is of significant importance with the purpose of establishing if the petitioner has a bona fide argument for relief. The appellants contend that the reasons given by the appellant, namely that he is a past, present and future litigant and that the appointment of the fourth appellant as a judge is likely to affect his interests, are perverse and are neither legitimate nor lawful. There is some merit in this submission. If the respondent had been able to show clear bias in the past by the fourth appellant we would have had no difficulty in understanding this proposition. The case given as an example of Justice Domah’s bias concerns a unanimous decision by a full court of five judges of appeal. Is the respondent intimating that all the judges of the Court of Appeal are somehow prejudiced against him or that the court is biased against anyone who loses a case? Such a

preposterous proposition cannot be upheld and fails entirely. Further the averment is a serious and unfounded slur on the unblemished character of an admirable officer of this court who has served Seychelles to the best of his ability and who has thus far contributed immensely to the jurisprudence of Seychelles. It is reprehensible that affidavits of this nature are affirmed or sworn and yet in no way substantiated. Further, as submitted by the Attorney-General quoting *Subhash Kumar v State of Bihar and Ors* [1991] SCR (1) 5 -

A person invoking the jurisdiction of this Court [under provisions of the Constitution] must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this court for personal matters under the garb of public interest litigation.

Despite these findings, we find that the modern rule as to standing is expressed in *R v Inland Revenue Commissioners ex parte National Federation Of Self-Employed And Small Businesses* [1982] AC 617 by Lord Diplock when he said there would be a grave lacuna in public law if “outdated technical rules of locus standi” prevented a person bringing executive illegality to the attention of the courts. Locus standi should therefore not be used to prevent a litigant from arguing the substance of his case. The respondent has also averred that he is a citizen of Seychelles, domiciled and resident in Seychelles. Whilst judicial review is not a tool for busy bodies or opportunist litigants to challenge the decisions of decision making bodies simply because one does not agree with the decision, it must be possible for genuinely concerned citizens of breaches of democratic rights to bring actions. This is a balancing exercise that must be performed by the court in each individual case. Cloete J in the *Bar Association* case quoting the Supreme Court of Zambia in *Mwamba and Anor v Attorney-General of Zambia* (1993) 3 LRC 166 stated -

...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...

Similarly in the case of *Chow v Gappy and Ors* (unreported) SCA 10/2007 the Court of Appeal warned against too restrictive an approach in relation to standing:

The Constitution enshrines the freedoms of the people. Freedom is different from licence. A freedom to “*ester en justice*” is different from a licence to “*ester en justice*.” At the same time while checking the licence to “*ester en justice*,” a court should not demarcate the line so far that it basically restricts the freedom by a stroke of a pen.

In the *Bar Association* case, the first petitioner was the Bar Association of Seychelles and the second petitioner was a member of the said Bar Association and a legal practitioner. They both clearly had a personal interest in the matter. In the present case

the petitioner is a citizen of Seychelles. While it would normally not be sufficient to claim standing and “sufficient interest” by stating that one is a citizen and resident of Seychelles, we have decided to adopt a liberal and generous approach in this case given the exceptional importance of the issues raised. In the circumstances we are prepared to accept that the first respondent truly brings this case as a concerned citizen.

*The seal of office
Grounds 2 and 8*

These grounds of appeal relate to the seal of office of Justice Domah. The Constitutional Court found that as the seal of office is dated 5 September 2011, the reappointment took place before the term of office had concluded and that it was therefore unconstitutional. It is important at this stage to set out in extenso the contents of the seal of office:

WHEREAS you, SATYABHOOSHUN GUPT DOMAH, have been appointed as a JUSTICE OF APPEAL of the Seychelles Court of Appeal under Article 123 of the Constitution, and the said appointment will expire on the 3rd October 2011, AND WHEREAS you are not a citizen of Seychelles, AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as JUSTICE OF APPEAL for a second term of office, NOW THEREFORE, in exercise of the powers conferred to the President under article 131(4) of the Constitution, I, JAMES ALIX MICHEL, PRESIDENT, appoint you

SATYABHOOSHUN GUPT DOMAH

To be a JUSTICE OF APPEAL for a period of five years commencing on *4th October 2011*.

GIVEN under my hand and the Public Seal of Seychelles at State House on this 5th day of September 2011.

[our emphasis]

The seal of office clearly states that the reappointment does not start until 4 October 2011. Hence it would appear clearly that the Constitutional Court either completely misdirected itself on this salient fact or by literal interpretation came to the conclusion that the appointment was unconstitutional since it was an appointment made on 5 September 2011 “with reservation for it to take place in the future.” In our view it does not matter when the seal was dated as contained therein is the clear provision that the appointment was not to start until 4 October 2011. We have stated before and we state again that judges need to adopt a broad perspective in constitutional interpretation. We can only echo the words of the famous Australian constitutional judge Dixon, who stated in *Australian National Airways Pty Ltd v Commonwealth (No 1)* (1945) 71 CLR 29 at 81:

We should avoid pedantic and narrow construction in dealing with an instrument of government and I do not see why we should be fearful of making implications...

In any case those who practice law should be well acquainted with contracts, deeds and documents dated on one day to take effect on another.

Further, as pointed out by counsel it is a well-known fact that the Court of Appeal is sessional, sitting in April, August and November of each year. Hence when Justice Domah had sat in August 2011, he would not have sat again until the following November. Hence by no stretch of the imagination can one conclude that this consecutive appointment violates the Constitution. We do not unduly concern ourselves with the literal and narrow interpretation of the word “consecutive” used by the Constitutional Court and are satisfied that it can mean nothing else than successive and as the August session of appeal was completed and Justice Domah was not to sit until the next session in November his new term of office would indeed have been consecutive.

*The letter of recommendation from the CAA to the President of Seychelles
Grounds 3, 4, 6, 7.*

These grounds concern the letter of 17 June 2011 from the CAA to the President of Seychelles. It is important to quote it in full:

Dear Mr. President,

In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby *recommends per approval the extension of the contract of Justice S.B. Domah for an additional two year term as permitted by the Constitution (Article 131(3) in view of the exceptional circumstances related to Justice Domah.*

Justice Domah’s contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.

Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoléon which largely serves as the basis of our Civil Code.

Copies of Justice Domah’s letter referring to above and that of the president of the Court of Appeal’s recommendations are enclosed.

Yours faithfully,

Jérémie Bonnelame, Chairman CAA, Marlene Lionnet, Member CAA, Patrick Berlouis, Member CAA.

[our emphasis]

The respondents in their pleadings did not raise the issue of the wording of the letter at all. It would appear that this point was raised for the first time by the Court during the address of the first respondents’ counsel – “Court (JD): Mr Ally, is there a distinction between and extension of the contract and a reappointment?”

It may well be, therefore, that this point was in any case *ultra petita*. However, the Constitutional Court interpreted article 131(4) and came to the conclusion that the words “recommends per approval the extension of the contract” were “per se alien to the

Constitution, unconstitutional, cannot be relied and acted upon.” We respectfully cannot follow the logic of this finding. There is no prescribed form to follow in the circumstances where the CAA wants to recommend a candidate for reappointment. As long as the CAA’s intention in the letter is clear to the President, then the constitutional provisions are met. No one else is privy to the letter so the construction or interpretation of its contents by a third party is in any case academic. Both the CAA and the President in this case have through the submissions of their counsel and in their pleadings and affidavits reiterated that this was a letter of recommendation for reappointment and not extension. The proof that it was so understood is the fact that Justice Domah was indeed reappointed.

In any case even if one were to resort to rules of interpretation one must look at those laid out at section 8 of Schedule 2 to the Constitution:

For the purposes of interpretation -

- (a) The provisions of this Constitution shall be given their fair and liberal meaning;
- (b) This Constitution shall be read as a whole; and
- (c) This Constitution shall be treated as speaking from time to time.

It is therefore not open to the Constitutional Court to construe the meaning of “recommendation” in article 131(4) in a restrictive, literal or even pedantic manner. Bound by the interpretative rules of the Constitution, a fair and liberal construction of “recommendation” would encompass even the particular wording used in the letter of recommendation by the CAA. True it is that there are ambiguities in the letter or as put by Mr Chang-Sam during his arguments before the Constitutional Court, that it contains “infelicitous words”. It is also true that the pleadings of the CAA do not remove this ambiguity. However, any objective or common sense reading of the letter shows that the CAA was recommending the reappointment of Justice Domah. The use of the word “recommend” and the enunciation of the “exceptional circumstances” grounding the appointment in the letter puts paid to any doubt in our minds that this indeed was a letter for recommendation of a reappointment. Further, the extension of a contract where a judge has to complete work outside his term of office does not necessitate the intervention of the CAA (viz article 132(3) of the Constitution). The fact that the CAA involved itself is further proof that this indeed was a letter of recommendation for reappointment.

Further confirmation that a purposive interpretation must be given to the letter is provided by analogy to the Civil Code of Seychelles which in relation to contracts provides in its article 1156 that – “In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words”.

And article 1157 – “When a term can bear two meanings, the meaning which may render it effective shall be referred rather than the meaning which would render it without effect”.

In the case of *Cable and Wireless v Minister of Finance and Anor* (unreported) SCA 1998 the Court held that -

When several documents constitute one transaction, they must be construed together. Thus where a document contains a reference to another, the wording of the reference is to be read into the former document.

As the letter of the CAA contained the following words: "Copies of Justice Domah's letter referring to above and that of the president of the Court of Appeal's recommendations are enclosed" and those enclosures both go to supporting the proposition that indeed it was a reappointment that was sought, we come to the irresistible conclusion that the letter of the CAA to the President was indeed a letter of recommendation for the reappointment of Justice Domah.

It is worth noting at this juncture that much was made of the letters sent to the CAA by Justice Domah and the President of the Court of Appeal Justice MacGregor. Mr Ally for the first respondent at the Constitutional Court hearing called it lobbying and submitted that the CAA should have put "the President of the Court of Appeal in his place and should have put Justice Domah in his place..." How, may we ask, can the CAA ascertain if a judge is suitable for recommendation for the post unless they seek or are given information about his performance? Surely the best person to assess the suitability of a candidate for a post on the Court of Appeal is the President of the Court of Appeal. And what was wrong with Justice Domah applying for reappointment?

Another argument raised in the grounds of appeal relates to the fact that the Constitutional Court found that the reappointment of Justice Domah for five years was not based on the recommendation of the CAA and was therefore unconstitutional. According to the Court, the CAA had only recommended a term of two years and not five. This finding by the Court is a clear misreading of the pertinent provisions of the Constitution. The whole of article 131 of the Constitution deals with the appointment and reappointment of judges. The context for reappointment can only be gleaned by a reading of all the provisions of article 131. It is therefore disingenuous to read one provision in isolation from the others especially when the other provisions inform the interpretation as a whole. Article 131(3) states:

Subject to clause (4), a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge for only one term of not more than seven years. [our emphasis]

It is a trite principle of interpretation that the words "subject to" clearly conveys the idea of a provision yielding to another. It is clear that the provisions of clause 4 must be taken into account in the reading of clause 3. Clause 4 states:

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.

A careful and fair reading of the above leads to only one construction: it is the President and not the CAA who appoints and decides on the length of the term of appointment. The CAA's duties are to recommend in exceptional circumstances for reappointment the non-Seychellois judge. It is not their prerogative to dictate to the President how long the term should be. Hence there was no breach of the Constitution by the President in appointing Justice Domah for a term of five years.

*The definition of exceptional circumstances
Grounds 4 and 5*

Whilst the Constitutional Court stated that it would be purely academic to address the issue of "exceptional circumstances" it would appear that in fact much of their decision was taken up with the appointment of judges and the circumstances in which the appointments are made. In their exposé of "objective criteria" to be taken into account when making of judicial appointments generally, they stated at p 19 of their judgment:

In the making of judicial appointments, the CAA ought to take account of public sensitivities, which may manifest themselves in two ways: (i) a desire to see suitably qualified citizens of Seychelles being appointed to superior judicial positions; and (ii) a desire to have transparency in the appointment process. Sometimes, it is difficult to reconcile the desire of the appointment of a local person to a judicial position, with the necessity to appoint someone with impartiality or perceived impartiality when one is drawing from a very limited resource pool, such as ours. If that exceptional candidate does emerge locally then he/she must be the favoured candidate. It is vital however, that only the best candidates are recruited for judicial positions irrespective of the costs involved and economic situation of the country...

The Constitutional Court went on to define the term "exceptional circumstances" contained in article 131(4):

The exceptional circumstances, contemplated under article 131(4) of our Constitution, in our considered view, should be given a liberal interpretation so as to encompass all circumstances, which are reasonable and relevant to the appointment in question...

The duty of the CAA, is to take into account all relevant circumstances as they exist, at the time when such judicial vacancy arises, including the sensitivity of the public at large ...

We cannot fault the Court on this assessment but it may not be enough to provide guidance should similar circumstances arise. In attempting to further define exceptional circumstances, the Attorney-General cited the case of *R v Kelly (Edward)* [2000] 1 QB 198 at 208:

We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art ... To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

In the New South Wales Court of Appeal decision of *San v Rumble (No 2)* (2007) NSWCA 259 at [59]-[69], Campbell JA summarised cases where the expression has been defined:

- (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
- (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] EWCA Crim 1; [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913).
- (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
- (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912-913).
- (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

In the more recent case of *Re S* [2009] 2 All ER 700 at 709 Laws LJ stated that:

the categories of what is exceptional are not closed... Indeed they could not be: to formulate a definition of exceptional circumstances, whether inclusive or exclusive, would be to transform a broad principle into a hard-edged rule. But hard-edged rules are made if at all by the statute, not by the courts.

We are also of the opinion that the construction of "exceptional circumstances" can only be done by analysis of the consideration of existing facts in each individual case. Mr Shah quoting *R v Monopolies Commission and Anor, Ex parte South Yorkshire Transport Ltd and Anor* [1993] 1 WLR 23 at 29 stated:

The courts have repeatedly warned against the dangers of taking an inherently imprecise word and redefining it, thrusting on it a spurious degree of precision.

He also submitted that the test in assessing the CAA's exercise of its power should be an evaluative judgment and a "reasonableness review" (*R(A) v Croydon London Borough Council* [2009] 1 WLR 2567) and that -

Within the limits of fair process and *Wednesbury* reasonableness, there are no clear cut right or wrong answers.

We agree that it is dangerous to take a word that is itself inherently imprecise and impose one's own precise meaning upon it. We do not intend to venture in that realm. The rules of interpretation forbid it. Further given the restrictive powers of review no court has the power to stipulate criteria to be used by the CAA in exercising its functions nor do we have the jurisdiction to substitute our decision for that of the CAA. If it did it would be usurping the role of the CAA and would be applying its subjective criteria to that of the CAA (see *Bar Association of Seychelles and Anor v President of the Republic and Ors* SCA 7/2004 at 36). The only power the court has is to review the decision of the CAA and decide whether the criteria it used for deciding whether there were exceptional circumstances were not tainted with, to quote Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410, "illegality... irrationality... and procedural impropriety."

It would seem to us that the arguments advanced by the first respondent are not that exceptional circumstances did not exist but rather that they were not exceptional enough.

The facts before us extracted from all the affidavits and letter of recommendation are that at the time of Justice Domah's appointment:

- a. he had contributed to the good performance of the Court of Appeal
- b. he was appreciated and esteemed by his colleagues and public in general
- c. he was a capable team player and a hard and efficient worker
- d. he was a citizen of Mauritius with which country Seychelles had historic and legal ties
- e. he had extensive qualifications, experience and exceptional familiarity with the Civil Code of France and Seychelles unlike many other judges and practitioners in Seychelles
- f. he had judicial training and education qualifications
- g. he had experience in judicial administration
- h. there had been difficulty some four months previously in obtaining suitable candidates despite advertisement of a similar post.

None of these factors would on their own amount to "exceptional circumstances" but taken together it is reasonable to conclude that the CAA could have come to the decision that they did constitute "exceptional circumstances." Seychelles is an extraordinary place in terms of its legal tradition. It is a mixed jurisdiction combining both common law and civil law. Most of its practitioners are trained in only one of the traditions. In any case the members of the CAA have deponed, and we have no reason to disbelieve them, that their last attempt to recruit judges to the judiciary has been difficult. We also take judicial notice that at the time of this recommendation Justice Hodoul had just resigned and the Court of Appeal was already understaffed. We have no doubt that excellent candidates exist locally but the most able and trained practitioners are happy to practise their profession and earn their livelihood without wishing to serve on the judiciary. The responsibilities of the judge and the remuneration are definitely a factor. The Court of Appeal is the court of final resort of this Republic. It

needs to have the expertise of exceptional judges to nurture and develop its legal tradition. Its intensive schedule and extensive jurisprudence is testimony to the work it does. The composition of the Court of Appeal with common law and civil law experts is essential for the continuity of this legal tradition. We have no doubt that the CAA and President had addressed their minds to all these facts when they concluded that exceptional circumstances indeed existed to warrant the appointment of Justice Domah for a second term. In any case no evidence to the contrary was adduced.

For all these reasons we allow this appeal with costs.

FERNANDO J DISSENTING:

This is an appeal filed by the first, second and third appellants and a separate appeal by the fourth appellant, against the unanimous judgment of the Constitutional Court which annulled the appointment of the fourth appellant as a Justice of Appeal made by the first appellant under article 123 of the Constitution and made the declarations, findings and orders set out below. Since both appeals were in relation to the same issue, they were consolidated and treated as one appeal.

- 1) The declaration that the purported recommendation of the second, third, and fourth respondents (collectively the CAA), made through its letter dated 17 June 2011 to the first respondent, the President of the Republic of Seychelles, Mr James Michel, seeking his approval for the extension of the fifth respondent's (Mr Justice Dr Satyabhooshan Gupt Domah of the Court of Appeal of Seychelles) contract of employment for an additional two year period, is ultra vires and unconstitutional as it has contravened article 131(3) and (4) of the Constitution; consequently the appointment made by the first respondent on 5 September 2011 based on that recommendation is null and void ab initio;
- 2) The finding that while the CAA may recommend reappointment of a candidate for a second term, in exceptional circumstances, under no circumstances, does it have any constitutional mandate to extend the contract period of any Judicial Appointee for any further period exceeding or beyond the period stipulated for the first term of office in the original contract of employment;
- 3) The finding that the CAA has constitutional mandate only to recommend a candidate for a second term of office provided that that candidate (a) is not a citizen of Seychelles (b) has already completed one term of office as a Justice of Appeal and (c) "exceptional circumstances" do in fact exist in that particular case, as contemplated under article 131 (4) of the Constitution; and
- 4) The order setting aside the appointment of the fifth respondent for a second term of office as Justice of the Court of Appeal, in consequence of the above declaration and findings.

In the Constitutional Court the first respondent to this appeal had filed suit as petitioner, against the first, second, third and fourth appellants (then first, sixth, seventh and fifth respondents respectively), and the second, third and fourth respondents (also named as

second, third and fourth respondents in the constitutional petition) to this appeal, praying for a declaration that the recommendation of the second, third and fourth respondents and the appointment of the fourth appellant (then fifth respondent) by the first appellant for a second term to the office of Justice of the Court of Appeal, to be a contravention of the Constitution and null and void, and for the fourth appellant to vacate the office of Justice of the Court of Appeal, and with costs.

The second respondent is the Chairman, and the third and fourth respondents are members of the Constitutional Appointments Authority (hereinafter referred to as the CAA). According to the Constitution it is the CAA that proposes candidates to the President (first appellant) for appointment as the President of the Court of Appeal and other Justices of Appeal. Article 123 of the Constitution (hereinafter the reference to an article will always be a reference to an article of the Constitution) provides: "The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority". The fourth appellant is not a citizen of Seychelles. Articles 131(3) and 131(4) of the Constitution govern the appointment of non-Seychellois/e to the office of Justice of Appeal and Judge.

Article 131(3) states:

Subject to clause (4), a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge *for only one term of office* of not more than seven years.

Article 131(4) states:

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.

The first, second and third appellants have raised the following grounds of appeal:

- 1) The petitioner had no locus standi to file the petition under article 130(1) of the Constitution challenging the reappointment of a Justice of Appeal, in his capacity as a former and future litigant of the Court of Appeal as averred in paragraph 13 of the petition, and contend that his "interest is being or is likely to be affected" by such appointment, since such interest would only be a vested or perverse interest and not a legitimate or lawful interest which alone would be justiciable in a Constitutional challenge.
- 2) The Judges erred in law in holding that an appointment, with reservation, for it to take effect in future is unconstitutional and against the provision of article 131(4) of the Constitution since a reappointment to be 'consecutive' should necessarily be made before the expiry of the term.

- 3) The Judges erred in law in not considering and reading together the wordings 'whether consecutive or not' for an appointment of a person who has already completed one term of office as a Justice of Appeal as per the provisions of article 131(4) of the Constitution.
- 4) The Judges failed to consider that the President may, on the recommendation of the CAA in exceptional circumstances, appoint as per the provisions of article 131(4) of the Constitution.
- 5) The Judges failed to consider what constitutes 'Exceptional Circumstances' and whether those were such circumstances in the reappointment of the fourth appellant to a second term.
- 6) The Judges erred in giving a literal meaning to the words 'Extension' in the letter of the CAA dated 17 June 2011 when in fact, the reappointment by the President was for 5 years under article 131(4) of the Constitution. It was not an appointment under article 132(3) of the Constitution.
- 7) The Judges erred in law by not considering that the letter dated 17 June 2011 was a recommendation with exceptional circumstances clearly enumerated by the CAA and was the only requirement for them to consider under the Constitution for appointment of a Justice/Judge for a second term.

The first, second and third appellants have sought the following relief from the Court of Appeal:

- (i) To quash the decision of the Constitutional Court
- (ii) Declare that the first respondent to this appeal, who was the petitioner before the Constitutional Court did not have a locus standi and/or legitimate interest in challenging the reappointment of a sitting Justice of Appeal (fourth appellant).
- (iii) Declare the recommendation of the second, third and fourth respondents (collectively the CAA) made through its letter dated 17 June 2011 is legal, valid and constitutional and in consonance with article 131(4) of the Constitution.
- (iv) Declare that the appointment of the fourth appellant made by the first appellant on 5 September 2011 is legal, valid and in consonance with article 131(4) of the Constitution.

The fourth appellant has raised the following grounds of appeal:

- 1) Grounds 1 to 4 of appeal of the fourth appellant are identical to grounds 1 to 4 raised by the first, second and third appellants.
- 2) Ground 5 of appeal is similar to that of ground 5 raised by the first, second and third appellants but more detailed, namely it dwells on the issue whether the CAA recommendation based on exceptional circumstances was reasonable in the absence of a definition, and that the President had acted reasonably and in accordance with the Constitution in reappointing the appellant as a Justice of Appeal with effect from 4 October 2011 for 5 years.
- 3) Ground 6 of the fourth appellant is an elaboration of ground 6 of appeal raised by the first, second and third appellants and is to the effect that "the Learned Judges misconstrued the letter dated 17 June 2011 from the CAA in failing to appreciate that it was a recommendation based on exceptional circumstances to the President to appoint the appellant for a second term,

- even if the CAA might have been under the mistaken belief that it had to be a two year extension in order to add up to seven years under article 131(3). The period of the second term is the prerogative of the President subject to a maximum of seven years. (emphasis by me)*
- 4) Ground 7 of the fourth appellant is an elaboration of ground 7 of appeal raised by the first, second and third appellants and is to the effect that the Judges erred in giving part of the letter dated 17 June 2011 a strained and inappropriate meaning to 'extension' and in disregarding the recommendation based on exceptional circumstances failed to adjudicate properly on the true meaning and intention to be accorded to this letter and coupled with the fact that there is no prescribed form for a letter of recommendation.

The relief sought by the fourth appellant from the Court of Appeal is identical to that of the relief sought by the first, second and third appellants save that the fourth appellant has in addition sought that the first respondent be ordered to pay the costs of the appeal and that of the court below.

At the very outset it is noted that the second, third and fourth respondents have not appealed against the judgment of the Constitutional Court which declared their recommendation of the fourth appellant for appointment as a Justice of Appeal to the first appellant as ultra vires and unconstitutional. In the petition filed before the Constitutional Court the petitioner had prayed for a declaration that the recommendation of the second, third and fourth respondents and the appointment of the fourth appellant as a Justice of the Court of Appeal to be a contravention of the Constitution and null and void. In view of this, two questions necessarily arise for consideration. Firstly, what weight could be attached to the appeal brought by the appellants in the absence of an appeal from the second, third and fourth respondents, who by their silence have demonstrated that they accept the judgment of the Constitutional Court. In saying this I am conscious of the right of appeal available to any person from a judgment of the Constitutional Court. The silence of the second, third and fourth respondents cannot be compared to a case where the person who ought to have appealed is an individual who is dead or for some reason is disinterested in appealing. The CAA plays an integral role in making the appointment of constitutional appointees, for there can be no appointment of a constitutional appointee in the absence of a recommendation from the CAA. Secondly, whether the second, third and fourth respondents could have been named as "persons *directly affected by the appeal*", in view of the fact that, if at all they were the persons directly affected by the judgment of the Constitutional Court. The Seychelles Court of Appeal Rules 2005 have not defined the words "directly affected" but rule 54(5) of the repealed Seychelles Court of Appeal Rules 1978 in stating "It shall not be necessary to serve parties not so affected" gives an indication that it means something more than a 'party concerned in the appeal'.

The facts of this case are as follows:

- The fourth appellant had been appointed as a Justice of Appeal under article 131(3) of the Constitution for a term of 5 years. According to the petition the appointment was made on 4 October 2006, but as per the fourth appellant's

“updated CV” attached to his letter to the CAA dated 16 April 2011, he had been a “Judge of Appeal” since 2005. His Instrument of Appointment pertaining to this appointment was not part of the record. Neither the Attorney-General, nor counsel for the fourth appellant was able to assist the Court with the first Instrument of Appointment.

- The fourth appellant wrote to the Chairperson of the CAA the letter dated 16 April 2011, as set out below:

Dear Sir,

Renewal of Term of Office as Judge of Appeal

In the absence of a written document, *I assumed that my term of office was for seven years*. However, I was recently informed that it is for five years.

The years the Authority has entrusted me with the judicial office, I have made it a personal commitment of mine to contribute to the growth and development of law, justice and jurisprudence of Seychelles to the best of my ability.

Accordingly, if it pleased the Authority to entrust me with a second term of office, I pledge that my commitment and contribution will be no less if not more so that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles.

Permit me, for that reason, to apply for renewal of my term of office for a further period on the like trust that the Authority originally laid upon me. I attach an up-dated CV for the purpose.

I thank you for your consideration,

Faithfully Yours

S.B.Domah
Judge of Appeal

Ecls: An “Up-dated CV”
[emphasis by me]

As to whether this letter was written “during the term of office” as averred at paragraph 8 of the petition and as admitted by all the respondents before the Constitutional Court or sometime after the fourth appellant’s term of office had in fact come to an end in view of his statement in his “up-dated CV” that he had been Judge Of Appeal since 2005, is not clear.

- Justice F MacGregor, President of the Court of Appeal wrote to the Chairperson of the CAA the letter dated 19 April 2011, as set out below verbatim (without making any corrections):

Dear Sir

I have received an application from Justice Domah applying for a second term of office as his *contra* expires *next October*.

I believe under article 131(4) of the Constitution there are exceptional circumstances in his case for the following reasons:

1. He has a very impressive CV copy already submitted to you and I believe no other judge or lawyer in Seychelles has such credentials to that extent.

2. For the *nearly four years he has worked with me* and the court, he has proven to be more than a capable team player and with the right team spirit a hard and efficient worker.

3. Our present esteem of the Court of Appeal in the country and public opinion bears this out.

4. I have sounded out also the veterans in the legal profession which does hold him in good esteem.

5. Although not a citizen he comes from a friendly sister country of Mauritius of which we have strong historical, cultural and judicial ties. He is accordingly fluent in English, French and Creole.

6. Of our judicial links 8 of the past 21 Justices of Appeal, and many Judges of the Supreme Court were from Mauritius.

7. He has a strong grounding in the French Civil Law/Code Napoleon/Code Civil which forms a large part of our fundamental laws, that all the present foreign judges in Seychelles do not have, and a sizeable amount of the lawyers locally do not have.

8. From his CV he has substantial judicial education/training qualities I want to further make use of for potential judge training in Seychelles.

9. Has credentials in judicial administration that most of our judges do not have, and again would wish to make use of it in Seychelles.

10. He has a great esteem for Seychelles often seen and experienced by me from him in international judicial forums. He has often proven supportive for Seychelles.

Yours faithfully

Justice F. MacGregor
President

Encl:

- Application

- CV

[emphasis by me]

The letter of the President of the Court of Appeal adds further confusion to the date of the first appointment of the fourth appellant.

- The CAA wrote to the President of the Republic of Seychelles the letter dated 17 June 2011, as set out below:

Dear Mr President,

In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby *recommends for approval the extension of the contract* of Justice S. B. Domah *for an additional two year term as permitted by the Constitution (Article 131(3))* in view of the exceptional circumstances related to Justice Domah.

Justice Domah's contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.

Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoleon which largely serves as the basis of our Civil Code.

Copies of Justice Domah's letter referring to above and that of the President of the Court of Appeal's recommendations are enclosed.

Yours faithfully

The letter had been signed by the 2nd, 3rd and 4th Respondents.
[emphasis placed by me]

- On 5 September 2011, the first appellant appointed the fourth appellant as Justice of Appeal for a period of five years commencing on 4 October 2011. The Instrument of Appointment is to the following effect:

WHEREAS you, SATABHOOSHUN GUPT DOMAH, have been appointed as a JUSTICE OF APPEAL of the Seychelles Court of Appeal under Article 123 of the Constitution, and the said appointment will expire on the 3rd October 2011.

AND WHEREAS you are not a citizen of Seychelles,

AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as a Justice of Appeal *for a second term of office*,

NOW THEREFORE. In exercise of the powers conferred on the President under Article 131(4) of the Constitution, I, JAMES ALIX MICHEL, PRESIDENT, appoint you

SATYABHOOSHUN GUPT DOMAH

to be a JUSTICE OF APPEAL for a period of five years commencing on 4th October 2011.

- As required of him under article 135 of the Constitution before entering office, the fourth appellant had taken and subscribed the Oath of Allegiance and the Judicial Oath for the due performance of the functions of the office of Justice of Appeal on the very date of his appointment, namely 5 September 2011 before the first appellant.

The only issue to be determined in this appeal is: was there a recommendation by the CAA to the first appellant, by its letter dated 17 June 2011 to appoint the fourth appellant who had already completed one term of office, for a second term of office, in exceptional circumstances in accordance with article 131(4) of the Constitution. This only calls for an interpretation of the contents of the letter dated 17 June 2011 and not an interpretation of the Constitution. The letter of 17 June 2011 set out at paragraph 9 above states that the CAA “*recommends for approval the extension of the contract of the fourth appellant for an additional two year term as permitted by the Constitution (Article 131(3)) in view of the exceptional circumstances*” related to the fourth appellant. The letter certainly does not make reference to article 131(4) of the Constitution, the only article in the Constitution which deals with an appointment for a second term of office. The letter does not make reference to “a second term of office” but rather an “an extension of the ‘contract’ for an additional two year term”. There can be no ‘extension to the contract’ if the CAA believed, as argued by the appellants, that the fourth appellant’s term had expired. It becomes helpful here to refer to the pleadings of the petitioner and the respondents before the Constitutional Court on this issue.

Paragraph 9 of the amended petition is to the effect:

By a written document dated 17 June 2011, the second, third and fourth respondents acting in their capacities as members of the CAA recommended to the first respondent [first appellant to this appeal], for the first respondent’s approval to extend the contract of the fifth respondent [fourth appellant to this appeal] for an additional two year term or to appoint the fifth respondent for a second term of office as Justice of the Court of Appeal by virtue of article 131(4) of the Constitution “in view of the exceptional circumstances related to Justice Domah.....

The first, second, third and fourth appellants have admitted this averment. It is clear on a reading of the letter dated 17 June 2011 there is an ambiguity which the second, third and fourth respondents alone, namely the authors of the letter, could have explained. Paragraph 5 of the reply to the amended petition, dated 18 November 2011, on behalf of the second, third and fourth respondents, in response to paragraph 9 of the said amended petition states:

Paragraph 9 of the petition is admitted ‘to the extent only’ that the respondents recommended (to the first respondent) [first appellant to this appeal] “for approval the extension of the contract of Justice S.B. Domah in view of the exceptional circumstances related to Justice Domah” but deny and put the petitioner to proof of the rest of the averment contained in that paragraph and the corresponding part of the affidavit.

There was no affidavit attached or any reference to any affidavit in the reply to the amended petition dated 18 November 2011, on behalf of the second, third and fourth respondents.

Thus there is a clear denial by the second, third and fourth respondents in their reply to the amended petition that they recommended to appoint the fourth appellant for a second term of office, as Justice of the Court of Appeal by virtue of article 131(4) of the Constitution “in view of the exceptional circumstances” related to him. It appears that the CAA in their mistaken belief thought that an extension of the first contract of the fourth appellant was possible under article 131(3), because the fourth appellant’s term of appointment had been for five years and the extension of two years was being recommended, to add up to the maximum period of seven years for which a non-Seychellois/e could be appointed under article 131(3), and that, in view of the exceptional circumstances related to the fourth appellant. That is why they used words such as: “for an *additional* two year term as *permitted* by the *Constitution (Article 131(3))*” and “*extension* of the contract.” There is no mention of the words “additional term” in article 131(4). The fourth appellant in his sixth ground of appeal has submitted on the same lines when he said: “even if the CAA might have been under the mistaken belief that it had to be a two year *extension in order to add up to seven years under article 131(3)*.” This is the only reasonable interpretation that could be placed on the letter dated 17 June 2011 in the absence of any further clarification of its contents by the second, third and fourth respondents at the hearing of the petition before the Constitutional Court. It is therefore clear that there was no recommendation from the second, third and fourth respondents to the first appellant under article 131(4).

In view of the onerous task placed on the CAA by the Constitution under article 139 read with article 131(4) of the Constitution, an appointment under article 131(4) can be made only where there has been a clear recommendation to the President under article 131(4). Article 139 reads –

- (1) There shall be a Constitutional Appointments Authority *which shall perform the functions conferred upon it by this Constitution and any other law.*
- (2) Subject to this Constitution, the Constitutional Appointments Authority shall not, in the performance of its functions, be subject to the direction or control of any person or authority.

The punctuation in article 131(4) referred to at paragraph 3 above after the word ‘may’ and before the word ‘appoint’ suggests that the decision pertaining to the existence of exceptional circumstances is a function conferred on the CAA by the Constitution. This is confirmed by the wording in the Instrument of Appointment which states: “AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as a Justice of Appeal for a second term of office,..”. In this case, as stated earlier, there was no recommendation from the second, third and fourth respondents to the first appellant under article 131(4). The recommendation was as stated earlier for an extension of the fourth appellant’s contract for an additional two year term under article 131(3). It is not possible for one to

argue that the CAA was not empowered to make such a recommendation and therefore it should be taken as a recommendation under article 131(4). Also it is inconceivable for the appellants to argue that merely because of the use of the words “in view of the exceptional circumstances related to Justice Domah”, the letter of 17 June 2011 by the CAA to the first appellant should be treated as a recommendation under article 131(4) of the Constitution. The first appellant should necessarily have been advised to check with the CAA as to what their recommendation was, in view of its obvious ambiguity rather than be misadvised to make an appointment under article 131(4), based on a wrong interpretation of the contents of the letter dated 17 June 2011 of his advisers. I therefore dismiss grounds 6 and 7 of the appeal of the appellants.

In view of my holding that there was no recommendation from the CAA under 131(4) there is no need to consider what constitutes ‘exceptional circumstances’ under article 131(4) or whether there were such circumstances in the reappointment of the fourth appellant to a second term. I therefore dismiss grounds 4 and 5 of the appeal of the appellants.

Grounds 2 and 3 of the appeal of both appellants and ground 8 of the appeal of the fourth appellant do not arise for consideration in view of my finding that there was no recommendation from the CAA under article 131(4) of the Constitution for the first appellant to make a valid appointment under article 123 of the Constitution. Thus issues such as when a reappointment under article 131(4) could be made, whether it can be made before the expiry of the first term or necessarily after the expiry of the first term strictly do not arise for consideration in this case, although I have decided to deal with them. I wish to state that it was totally inappropriate for the fourth appellant to have applied for a renewal of his term of office as a Justice of Appeal on 16 April 2011 when he was yet to sit as a Justice of Appeal in the April (April session was from 18 to 29 April) and August sessions of 2011; for the President of the Court of Appeal by his letter dated 19 April 2011 to have made an unsolicited recommendation in the manner he had done; and for the CAA to have been guided by it as evidenced from their letter of 17 June 2011 to the first appellant. I am of the view that in the case of a person appointed under article 131(3), the CAA should not expect of him/her to, and the person appointed should not make an application for re-appointment in view of the wording of articles 131(3) and 131(4). There is also no need to gloat over one’s qualifications and competence at this stage, as they would have certainly been considered at the time of his appointment, in view of article 122 of the Constitution which reads –

A person is qualified for appointment as, or to discharge the functions of,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.

I also dismiss the first, second and third appellant’s contention under grounds 2 and 3 of the appeal and that of the fourth appellant under ground 8 of his appeal, that “a reappointment to be ‘consecutive’ should necessarily be made before the expiry of the

term”, in view of the clear provisions of articles 131(4) and 131(1)(e). I have referred to article 131(4) at paragraph 3 above. Article 131(1)(e) states:

....a person holding office of Justice of Appeal.....*shall vacate that office* in the case of a person who is not a citizen of Seychelles, *at the end of the term for which the person was appointed.* [emphasis by me]

The appellants are labouring under the mistaken notion that for the second appointment to be ‘consecutive’, it need necessarily commence on the day after the first appointment comes to an end, like that of a consecutive jail term, where a prisoner cannot be set free at the end of the first sentence he/she serves. I am of the view that if the recommendation for the appointment and the appointment is made a few months after the expiry of the first term, the appointment would yet be consecutive. The need to decide whether ‘exceptional circumstances’ exists arises only when the first term of office of a Justice of Appeal or Judge has come to an end, for circumstances can always keep on changing. If we are to agree with the appellants, then there is nothing to prevent a recommendation going out from the CAA to the President even one or two years before the expiry of the first term of the incumbent, thus possibly compromising the independence of the Judiciary, which the Constitution had sought to prevent, and making a mockery of articles 131(4) and 131(1)(e). The appellants have not suggested a limitation of the period during which a recommendation under article 131(4) may be made prior to the expiry of the first contract by the CAA and this is because it would amount to adding words to the unambiguous wording in article 131(4) of the Constitution. In this case the recommendation by the CAA was made 3 1/2 months before the expiry of the first term of the fourth appellant.

In the Seychelles context, where the Court of Appeal sessions are held during the months of April, August and December, there was no need to rush through an appointment on 5 September 2011 to take effect as from 4 October 2011, since the next Court of Appeal session commenced only on 28 November 2011. The CAA would not have breached the appellants’ argument as to the need for a consecutive appointment if the recommendation had been made after the expiry of the fourth appellant’s first term of office, namely 3 October 2011 and the appointment made any time before 28 November 2011. There could not have been a change to the ‘exceptional circumstances’ as set out in the letter of the CAA dated 17 June 2011 for the extension of the contract of the fourth appellant, referred to at paragraph 9 above, between 17 June 2011 and 4 October 2011.

In order to understand the full implications of article 131(4) of the Constitution it has to be read in conjunction with articles 131(3) and 131(1)(d) and (e). Article 131(1)(d) states:

Subject to article 134, a person holding office of Justice of Appeal or Judge shall vacate that office in the case of a person who is a citizen of Seychelles, on attaining the age of seventy years.

Article 131(1)(e) states:

Subject to article 34, a person holding office of Justice of Appeal or Judge shall vacate that office in the case of a person who is not a citizen of Seychelles, at the end of the term for which the person was appointed.

Article 134 speaks of removal of Justices of Appeal and Judges for inability to perform functions of the office, arising from infirmity of body or mind or from any other cause, or for misbehavior. These are the only grounds upon which a Justice of Appeal or Judge once appointed can be removed from office during his or her term of office. Security of tenure, a fixed term of office and the inability to influence Judges and Justices of Appeal by offers of extensions of contract or further appointments, among other things is a sine qua non for ensuring the independence of the Judiciary. When it comes to expatriate Justices of Appeal and Judges, the norm as provided in article 131(3) is that their appointments shall be for 'only one term of office' of not more than seven years. The only exception to this rule is when an appointment is made for a second term of office, where there are exceptional circumstances. The CAA in making a recommendation for a second term when a Justice of Appeal or Judge is not yet holding office may amount to compromising the independence of the Judiciary, which the Constitution makes every effort to prevent. It is for this reason that I take the view that a recommendation for a second term of office under article 131(4) should be made only after the Justice of Appeal or Judge has already completed his first term or at least completed the last session of the Court of Appeal before the expiry of his term and only in exceptional circumstances. I am also of the view that once the period of the term is determined in an instrument of appointment there can be no extensions to add up to the seven years. Thus the appointment may be for a period of one year or less or for seven years, and at the end of that period a person holding office of Justice of Appeal or Judge 'shall vacate that office'.

Ground 1 of the appeal of both appellants is to the effect that the petitioner had no locus standi to file the petition under article 130(1) of the Constitution. The appellants as respondents before the Constitutional Court had not in their answer to the petition raised the issue of lack of locus standi of the petitioner as an objection to the maintenance of the petition nor argued it before the Constitutional Court. Consequently we do not have the benefit of the decision on this matter from the Constitutional Court, although the Constitutional Court had alluded to it in their judgment when they said:

...at times, some of the citizens, who have litigations in the superior courts, particularly against the State, still feel insecure and complain with trepidation that their Constitutional right to have the litigations adjudicated by an impartial and independent Court is jeopardized, especially, when judicial appointments are not made by the CAA in accordance with the provisions and the spirit of the Constitution. In the instant case, the petitioner, who undisputedly, has a number of pending litigations against the State in the superior courts, has now come before this Court seeking a Constitutional redress for his grievance. He alleges

that a recent reappointment of one of the sitting Justices of Appeal- Dr Satyabhooshun Gupt Domah – to the Seychelles Court of Appeal (hereinafter called the Court of Appeal) is unconstitutional as it has contravened article 131(4) of the Constitution as well as article 131(3) as read with article 131(4), article 1 and article 119(2) of the Constitution and particularly, it affects or is likely to affect his interests.

In my view locus standi of the petitioner cannot be raised for the first time in this appeal, especially in a case like this, as this could have been determined as a threshold issue before the Constitutional Court since it did not need a full consideration of the merits of the complaint.

I am however of the view that as averred at paragraph 14 of the petition, the petitioner as a citizen of Seychelles has a fundamental duty to uphold and defend the Constitution and has a right to claim that the appointment of the fourth appellant contravenes the Constitution. Article 40 of the Constitution in setting out the Fundamental Duties provides:

It shall be the duty of every citizen to uphold and defend the Constitution and to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution.

An independent judiciary is the sine qua non for upholding the rule of law and developing a democratic society; a pledge the people of Seychelles have made in the Preamble of the Constitution. Article 119(2) has specifically provided that the Judiciary shall be independent. It is to be noted that the Preamble to the Constitution provides that “all powers of Government spring from the will of the people”. This in my view gives a right to any citizen to challenge a constitutional appointment under article 130(1) of the Constitution, which he or she believes contravenes the Constitution. Article 130(1) of the Constitution states:

A person who alleges that any provisions of this Constitution,, 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.

The interest of any citizen is likely to be affected when an unconstitutional appointment is made to the Judiciary, for complying with the constitutional provisions in making appointments to the Judiciary is a sine qua non in ensuring the independence of the Judiciary. In this case the appellants have admitted in ground 1 of the appeal that the petitioner’s interest “would be a vested...interest,” thus bringing his application completely within article 130(1). A vested interest can be both legitimate and lawful. I am of the view that there is no evidence from which one could conclude that the petitioner “smacks with personal vendetta and for personal gain and can be nothing in the interest of the public”(sic) as argued by the first, second and third appellants in their heads of arguments.

I am surprised to find the fourth appellant in his heads of argument arguing on the basis as if the petition is one filed under article 46(1), when in his grounds of appeal he specifically acknowledges that it is one filed under article 130(1). Nowhere in the petition does the petitioner allege that a provision of the Seychellois Charter of Fundamental Human Rights and Freedoms has been or is likely to be contravened in relation to him which would necessitate treating this application as one brought under article 46(1). The petitioner at paragraph 17 of his affidavit in support of his averments at paragraph 14 of the petition has stated:

I aver that as a citizen of Seychelles I have a fundamental duty to uphold and defend the Constitution and as I verily believe that the appointment of the fifth respondent contravened the Constitution I have a constitutional duty, right and obligation to apply to this Court for redress.

He had gone on to state: "...that the contravention.... has affected my interest and/or is likely to affect my interest as a party to pending or any future judicial or legal proceedings."

I am of the view that it is necessary to understand the basis under which applications are made to the Constitutional Court under articles 46(1) and 130(1) of the Constitution. This necessitates an examination of the two articles.

Article 46(1) states:

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.

Article 130(1) states:

A person who alleges that any provision 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 contravention may, subject to this article, apply to the Constitutional Court for redress.(emphasis by me)

In an application under article 46(1) in view of the use of the words "contravened in relation to the person", a direct link must be shown between the contravention and its effect on the person making the application. In other words the contravention should have been in relation to the person.

In an application under article 130(1) the test is not that stringent. All that one has to show is that there has been a contravention and that the person's interest is being or is likely to be affected by such contravention. Here the contravention need not be directly linked to its effect on the person making the application but something that flows out of it or ancillary to it but has to be proved in order to succeed in an application.

An applicant can succeed under article 130(1) even when the person's interest is likely to be affected. Under 46(1) one cannot succeed on the basis of a likelihood of his interests being affected, there need necessarily be a contravention in relation to the person. The reason for this differentiation is that 46(1) deals with contraventions of the Seychellois Charter of Fundamental Human Rights and Freedoms which sets out specifically the individual rights of persons which are personal to him or her. This explains why the words "in relation to the person" have been used.

Article 130(1), on the other hand, is more general and deals with contraventions of the Constitution which may affect everyone. It is because of this we see another difference between articles 46(1) and 130(1) and that is an application under article 130(1) can be made only when there has been a contravention of the Constitution, whereas under article 46(1) an application can be made even when there is likely to be a contravention of the Constitution. A person defending his/her individual rights cannot wait until there is a contravention of the Fundamental Rights Charter in relation to him or her. The person has to make a move on the likelihood of a contravention because the contravention will affect him or her directly.

In *Paul Chow v Hendricks Gappy & Others* SCA 10 of 2007 a bench of this Court comprising of Bwana Acting P, Hodoul and Domah JJ in interpreting article 130(1) of the Constitution said:

A Constitutional Court..... sits between the power of the people and the authority of the organized government *to ensure that public affairs are conducted within the frame-work tacitly agreed upon and enshrined in the Charter*. It is the temple and the throne to which the citizen – pecunious or impecunious – rushes to with a view to ensuring that the people's power delegated to authority are properly used and not abused. Its prime purpose is to make the Constitution work.

Basically, what locus standi means is the right of a litigant to act or be heard before the courts. Originating in private law, it has become "one of the most amorphous concepts in the entire domain of public law". The right of a citizen to act or be heard before the courts could exist as a private right as well as a public right. Although our Constitution does not use the term "locus standi", it is a concept which encapsulates the enabling provisions of articles 46 or 130. But if it is being used to restrict or disable the provisions, it is being improperly used....
[emphasis by me]

I have no hesitation therefore in dismissing ground 1 of the appeal of the appellants.

I was particularly disturbed about a statement made in the heads of argument filed before this Court on behalf of the fourth appellant, Dr Satyabhooshun Gupt Domah in relation to the locus standi of the petitioner –

And, if he has been able to find his way up to the appellate stage, one would not err in one's conclusion that *the Constitutional Court gave an impermissible leeway at public expense to an applicant who provided a platform to the judges to launch into an unfair attack on the CAA*.

This statement was made after the statement: "If anybody was a potential candidate, it was the Judges of the Constitutional Court before whom VD brought the case." The statement is highly derogatory of the Constitutional Court judges who heard this case and a personal attack on them without a basis. I believe that this is a totally unfair, unwarranted and improper statement to be made by Dr Satyabhooshun Gupt Domah, and not in accordance with the sentiments expressed about him by Justice F MacGregor, President of the Court of Appeal in his letter to the Chairperson of the CAA on 19 April 2011, as referred to at point 10 in paragraph 9 above. This statement is also contrary to the views expressed by Dr S G Domah along with Justices Bwana and Hodoul about the Constitutional Court in the case of *Paul Chow v Hendricks Gappy & Others* SCA 10 of 2007, as referred to in paragraph 26 above. It must be emphasized as stated at paragraph 8 above that the second, third and fourth respondents, the three members of the CAA, have not appealed against the judgment of the Constitutional Court which declared their recommendation of the fourth appellant for appointment as a Justice of Appeal to the first appellant as ultra vires and unconstitutional. When the statement was drawn to the attention of the Attorney-General, counsel for the first, second and third appellants, he submitted it was totally inappropriate and counsel for the fourth appellant sought to withdraw the statement. Senior counsel should not be permitted to make baseless and derogatory statements about judges in papers filed before this Court and seek to withdraw them, when their attention is drawn to such statements by Court. In the case of *Solamalay v The King* (1910) MR 36 it was held that the appellant was bound by his attorney's acts. That judgment was confirmed in the case of *Seecharan v R* (1934) MR 4 and *Ransley v Soobratty* (1952) MR 206. Litigants and counsel representing them should refrain from making such derogatory statements against members of the Judiciary and impute motives pertaining to their decisions, especially when there is no basis whatsoever.

I would therefore dismiss the appeal of all the appellants and order costs against the second and fourth appellants to the petitioner.