

IN THE SEYCHELLES COURT OF APPEAL

1. The Government of Seychelles
herein represented by the Attorney General
namely Mr. Ronny Govinden
National House, Victoria, Mahe 1st Applicant

2. The Attorney General
Mr. Ronny Govinden
National House, Victoria, Mahe 2nd Applicant

3. The Commissioner of Police
Herein represented by Mr. Ernest Quatre
Of Central Police Station, Victoria, Mahe 3rd Applicant

V/S

1. The Seychelles National Party
Herein rep. by its President
Mr. Wavel Ramkalawan 1st Respondent

2. The Seselwa United Party
herein rep. by its interim leader
Mr. Robert Ernesta, Mont Fleuri, Mahe 2nd Respondent

3. Citizens Democracy Watch
Herein rep. by its Vice Chairman Mr.
Gelage Hoareau, of St Anne & Spa
St Anne Island, Seychelles 3rd Respondent

**Application No. MA 34 & 35 of 2014
in SCA CP No. 04 of 2014**

BEFORE: MacGregor, Fernando, JJA

COUNSEL: Mr. R. Govinden, Attorney General with Mr. A. Subramaniam for the Applicants
Mr. A. Derjacques, for the Respondents

Date of Hearing: 26th September 2014

Date of Ruling: 26th September 2014

REASONS FOR RULING

A.F.T. FERNANDO. JA

1. The above numbered applications/motions were filed by the Hon. Attorney General on behalf of the Applicants seeking a ruling of this Court for an urgent hearing of the instant application, an order for the stay of all proceedings in the Constitutional case No.2 of 2014 until the final determination or decision of the Court of Appeal in SCA CP No. 4 of 2014 filed against the Ruling dated 8th of July 2014 in Application No. 150 of 2014 and praying for the listing of the appeal in SCA CP No. 4 of 2014 for the next session of the Court of Appeal.
2. In listing the applications for hearing and hearing Counsel for the Applicants and the Respondents on the 26th of September 2014 the application for an urgent hearing of the application was granted.
3. Having heard both parties and taking into consideration that Constitutional case No.2 of 2014 is set for hearing on the 7th of October 2014 before the Constitutional Court, we delivered our Ruling on the 26th of September 2014 itself, rejecting the application for the stay of proceedings in the Constitutional case No.2 of 2014 and listing for hearing the appeal in SCA CP No. 4 of 2014 for the next session of the Court of Appeal. We now give our reasons for the said Ruling.
4. The Affidavit in support of the application/motion has been filed by Mr. David Esparon, Principal State Counsel.
5. As per the affidavit of Mr. Esparon, the Respondents to this application had filed a case before the Constitutional Court numbered CC No.2 of 2014 challenging the constitutional validity of the

Public Order Act. After the constitution of the bench in such case, the Respondents herein had filed application No. 150 of 2014 seeking the recusal of Honourable Judge Mr. M. Burhan from the bench so constituted “on the ground of perception of bias due to his appointment as a Judge as well as acquisition of Seychelles citizenship”. After hearing submissions from all parties concerned, the Hon. Judges Mr. D. Karunakaran and Mr. B. Renaud had made the ruling dated 8th July 2014 disqualifying Hon. Judge Mr. Burhan from sitting on the bench in such case and further ordered him to recuse from the bench constituted to hear Constitutional Court case numbered CC No.2 of 2014.

6. The Applicants herein had filed a Notice of Appeal against the said ruling before this Court. It is the position of the Applicants that the reason for the appeal is the ruling dated 8th July 2014 disqualifying Hon. Judge Mr. Burhan from sitting on the bench in Constitutional Court case numbered CC No.2 of 2014 and ordering his recusal, conclusively determined the principle matter in question as final and the rights of the Applicants with regard to the said issue.
7. It is the position of the Applicants as borne out from the affidavit of Mr. Esparon that they have a strong arguable case and an overwhelming chance of success in the appeal filed by them against the ruling dated 8th July 2014 disqualifying Hon. Judge Mr. Burhan from sitting on the bench in Constitutional Court case numbered CC No.2 of 2014 and ordering his recusal. It is their position that the matter in appeal involves a “substantial question of law regarding the powers of Judges on a recusal application” and therefore of public importance and a “question of general principles which are going to be determined for the first time.”
8. The Constitutional Court case numbered CC No.2 of 2014 challenging the constitutional validity of the Public Order Act is set for hearing on the 7th of October 2014 before the Constitutional Court.
9. The Applicants have sought a stay of proceedings in the Constitutional Court case numbered CC No.2 of 2014 filed by the Respondents challenging the constitutional validity of the Public Order Act; on the basis that unless the stay is granted “the Applicants herein would be put to great hardship, irreparable harm and injustice in further proceedings of the case.”
10. The Respondents at the hearing before us raised two preliminary objections to the hearing of the instant application on the ground that the procedure in section 12(2) of the Courts Act (Cap 52) has not been complied with and that the affidavit filed in support of the application is defective in that it has been signed by Mr. D. Esparon who is a member of the Attorney General's Office. The need to comply with the procedure in section 12(2) of the Courts Act arises if this appeal is from an interlocutory judgment or order. In our view an interlocutory order contemplated by section 12(2) is generally intended to last for a limited period until the judgment determining the issues before the court and the rights of the parties are made and in

order to prevent irreparable harm from occurring to a party to the proceedings or property during the pendency of a law suit. It can also be an order that conclusively decides an issue and which is essentially linked to the matter to be determined by the court in its final judgment as to substantially affect the final result of the case. It is our view that the ruling dated 8th July 2014 disqualifying Hon. Judge Mr. Burhan from sitting on the bench in Constitutional Court case numbered CC No.2 of 2014 and ordering his recusal, conclusively determined an issue wholly separate from the merits of the case before the Constitutional Court and may effectively be unreviewable on appeal from the final judgment in Constitutional Court case numbered CC No.2 of 2014, in view of the time limits set in the Seychelles Court of Appeal Rules for filing notice of appeal against a decision of the Supreme Court or the Constitutional Court. Although this appeal is from a ruling made at the commencement of a hearing of a case before the Constitutional Court, it has no bearing whatsoever on the Constitutional Court case numbered CC No.2 of 2014 challenging the constitutional validity of the Public Order Act and thus does not attract the provisions of section 12(2) of the Courts Act. We therefore had no hesitation in dismissing this preliminary objection. As regards the second preliminary objection we are of the view that it was legally incorrect to have relied on an affidavit of Mr. Esparon, in view of the fact that as per his own affidavit Mr. Esparon is “assisting the Honourable Attorney General in this Constitutional case...”. But in view of the nature of this case, the fact of Mr. Esparon signing the affidavit does not debar this court from entertaining this application since no prejudice has been caused to the Respondents as a result of it. However we wish to point out that Mr. Esparon could not have sworn an affidavit in relation to the “great hardship, irreparable harm and injustice” caused to the 3rd Applicant as these are matters that the 3rd Applicant only could have sworn to. We also fail to understand how the 1st and 2nd Applicants or even the 3rd Applicant, can be put to “great hardship, irreparable harm and injustice” as a result of the ruling dated 8th July 2014 disqualifying Hon. Judge Mr. Burhan from being a member of the bench in Constitutional Court case numbered CC No.2 of 2014 and ordering his recusal.

11. We now move to the more fundamental issue before us, namely the application seeking an order for the stay of all proceedings in the Constitutional case No.2 of 2014 until the final determination or decision of the Court of Appeal in SCA CP No. 4 of 2014 filed against the Ruling dated 8th July 2014 in Application No. 150 of 2014.

12. Rule 20 of the Seychelles Court of Appeal Rules 2005 states:

“(1) An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from:

Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due

performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction, or sentence, as the Supreme Court or the Court may deem reasonable.

(2) No intermediate act or proceeding shall be invalidated except in so far as the Supreme Court or the court may direct.”

13. It is clear the rule is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed and the granting of a stay of execution of an order is entirely at the discretion of the Court. It is also clear that a granting of a stay is necessarily followed by the imposition of terms including the furnishing of security which the Court may deem reasonable. The proviso to rule 20 applies where there is already an order by the Supreme Court or the Constitutional Court for the payment of any money, or the due performance or non-performance of any act or the suffering of any punishment. In this case no such order has been made by the Constitutional Court. The order disqualifying Hon. Judge Mr. Burhan in our view does not amount to ‘execution of an order’ per se in relation to the constitutional issue before the Constitutional Court and one that is contemplated by rule 20. Further an examination of the wording in rule 20 clearly shows that rule 20 cannot be relied upon to seek a stay in an appeal of this nature since the subject matter of the appeal is not concerning the constitutional issue to be determined by the Constitutional Court or in relation to a dispute between the parties before the Constitutional Court. The issue in this case is in relation to the propriety of two Judges to disqualify a fellow Judge of the same bench when there is an application for the recusal of a fellow Judge. The case before the Constitutional Court that is set for hearing on the 7th of October 2014 can proceed regardless of the hearing of this appeal and its final determination does not have any bearing on the constitutional case that is to be determined by the Constitutional Court.

14. The Hon. Attorney General during his submissions before us stated the matter in appeal is of public importance. Article 125(2) of the Constitution states: “Proceedings in respect of matters relating to the application, contravention, enforcement or interpretation of this Constitution shall take precedence over other matters of the Supreme Court.” and rule 12 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (S. I. 33 of 1994) states that: “Proceedings of the Constitutional Court shall take precedence over all matters of the Supreme Court.” Thus we fail to understand how a case which is of more public importance and of constitutional importance, namely the challenge to the validity of the Public Order Act should be stayed until the final determination of the present appeal before this Court challenging the order made by Hon. Judges Mr. D. Karunakaran and Mr. B. Renaud disqualifying Hon. Judge Mr. Burhan from sitting on the bench in Constitutional Court case numbered CC No.2 of 2014 and ordering him to recuse from the bench constituted to hear such case.

15. However, since the matter in appeal involves a question of law regarding the powers of Judges on a recusal application and has not been determined by this Court before, we ordered the listing of this appeal for hearing at the next session of the Court of Appeal.
16. After the delivery of the Ruling on the 26th of September; the Hon Attorney General withdrew Applications Numbered MA 36 & 37 filed before this Court as they related to the identical issues determined by this Ruling.

A.F. T. Fernando
Justice of Appeal

I agree

F. MacGregor
President, Court of Appeal

Dated this 29th day of September 2014, Victoria, Seychelles