

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (J.A), B. Renaud (J.A)]

Constitutional Appeal SCA CP 03/2017

Out of MA 157/2017

(Appeal from Constitutional Court Decision CP 03 /2017)

Marie-Ange Houareau 1st Appellant

Jane Georgette Carpin 2nd Appellant

Versus

Duraikannu Karunakaran 1st Respondent

The Constitutional Appointments
Authority 2nd Respondent

Honourable Attorney General 3rd Respondent

Heard: 12 September 2017

Counsel: Ms. Alexandra Madeleine for the Appellants

Mrs. Alexia Amesbury for the 1st Respondent

Mr. Anthony Derjacaques for the 2nd Respondent

Mr. David Esparon appearing in person as the 3rd Respondent

Delivered: 19 September 2017

JUDGMENT

B. Renaud (J.A)

[1] I have in principle concurred with the decision in the judgment of the President of this Court. My reasoning in determining this appeal is based on the approach set out hereunder.

- [2] Judge Durai Karunakaran entered Petition ref CP 3/17 before the Constitutional Court (hereinafter “the Court”) on 25th May, 2017 citing the Constitutional Appointments Authority (hereinafter “the CAA”) as the 1st Respondent and the Attorney General (hereinafter “the AG”) as the 2nd Respondent vide Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (hereinafter “the Rules”).
- [3] The Petitioner supported his Petition by an Affidavit and prayed for a declaration that the appointment of a Tribunal of Enquiry by the 1st Respondent is unconstitutional and null *ab initio*. He alleges that in establishing that Tribunal, the CAA acted arbitrarily and unconstitutionally, without making an assessment of the complaint as required under Article 134(2) of the Constitution of the Republic of Seychelles (hereinafter “the Constitution”).
- [4] On 26th May, 2017 Mrs. Marie Ange Hoareau the 1st Applicant and Ms Jane Carpin the 2nd Applicant (hereinafter “the Intended Intervenors”) entered an application supported by a joint Affidavit praying the Court to make order authorizing them to intervene as third parties in the pending Petition as they contend that they are interested parties in the matter and they ought to be made parties therein so that they can maintain their rights. The majority judgment was not given in their favour hence this present appeal.
- [5] The Petitioner and the 1st Respondent cited as the 1st and 2nd Respondents in the Application resist the application whilst the 2nd Respondent cited as the 3rd Respondent in the Application supports the application.
- [6] The Intended Intervenors in a joint Affidavit made reference to two paragraphs of the Affidavit of the Petitioner which are worded as follows:

“The Petition alleges that in setting up the Tribunal of Inquiry, the Constitutional Appointments Authority acted arbitrarily and unconstitutionally, without making assessment of the complaint as required under Articles 134(2) of the Constitution.

The Petition further refers to a Press Release by the newly constituted Constitutional Appointments Authority to the effect that there is nothing in the files left by its predecessor to indicate that there was any consideration of the complaints before the appointment of the tribunal and that it has had to assume that the former Constitutional Appointments Authority did not consider the complaints in depth but automatically appointed the Tribunal.” (Exhibit A1 a copy of the said Press Release)

[7] In objecting to the Application, the 1st Respondent sets out four pleas in *limine litis* as follows –

1. The 1st and 2nd Applicants do not satisfy the requirement of standing;
2. In light of plea (1), the Court has no jurisdiction to entertain the application for third party intervention;
3. The application for third party intervention discloses no cause of action; and
4. The process of the court is being abused.

[8] In essence, on the merits the Petitioner states that he has brought his Petition against the CAA as a body corporate and not against any of its members past or present in their personal capacity.

[9] The Chairman of the 2nd Respondent (CAA) filed an Affidavit in answer to the application for intervention on behalf of all the members of the 2nd Respondent. In essence the 2nd Respondent took the stance that the Intended Intervenors are not lawful interested persons as they are *functus officio* since their resignation from the CAA on 24th April, 2017.

[10] The Constitutional Court by a majority decision refused to grant leave to the Intended Intervenors to intervene in the pending Petition thereby disposing of their application.

[11] The Intended Intervenors have now appealed to this Court against that majority Ruling setting out 6 grounds of appeal and in essence are seeking a right to be heard in the Petition before the Constitutional Court in order to assert their right to be heard in reply

to the contents to the two paragraphs of the Petitioner's Affidavit as stated above.

[12] The essence of their appeal is to be found in grounds 5 and 6-

- that the learned judges in law in failing to hold that the only relevant consideration for the determination of the application was whether the Appellants were interested in the event of the Petition, in terms of section 117 of the Seychelles Code of Civil Procedure; and
- that the learned judges in their majority Ruling erred in law in failing to hold that third party whose personal interest can be affected by the result of the legal proceedings between the other parties, has a right to intervene in such legal proceedings.

[13] From the reading of the Application and supporting Affidavit of the Intended Intervenors it is evident to me that the right that they are claiming is a right to reply to certain depositions made by the Petitioner as contained in the Press Release of the 2nd Respondent (CAA) which they believe have abused their personal reputation. The Petitioner had attached copy of the said Press Release and cited certain extracts of its contents as part of his Affidavit in support of his Petition.

[14] The Intended Intervenors are seeking from this Court for a declaration that they are interested parties; they are allowed to intervene in the Petition CP03/2017 and to file a reply; and for such other or further orders as this Courts shall think fit to make.

[15] Article 129 of the Constitution sets out the jurisdiction and powers of the Supreme Court when it constitutes itself as the Constitutional Court.

[16] Article 130(1) provides that –

“any person who alleges that any provisions of this Constitution, other than a provision of Chapter III, has been contravened and that 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”.

- [17] There is no constitutional provisions relating to intervention by a third party in pending matters before the Constitutional Court.
- [18] The Rules provide for the practice and procedure of the Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution. There is nothing specific in the Rules which makes provisions for “intervention” by third parties.
- [19] However, Rule 2(2) of the Rules provides that –
“Where any matter is not provided for in these Rules, the Seychelles Code of Civil Procedure shall apply to the practice and procedure of the Constitutional Court as they apply to a civil proceedings before the Supreme Court.”
- [20] When an Intended Intervenor intends to apply for intervention in a pending suit before the Supreme Court that person must comply with the provision of Section 117 of the SCCP which provide that –
*“Section 117 –
Every person interested in the event of a pending suit shall be entitled to be made a party thereto in order to maintain his rights, provided that his application to intervene is made before all parties to the suit have closed their cases.”*
- [21] The purport of the above cited provisions is that the permitting of intervention by an interested person in a suit before the Supreme Court, is simply to allow such person to vindicate or maintain his/her rights that may be affected by the final decision of the Supreme Court in the pending suit.
- [22] The question that arises therefore is that –
“Is a person interested in the event of a pending petition before the Constitutional Court likewise entitled to apply to intervene in order to be made a party so as to vindicate or maintain his/her rights?”
- [23] Unlike the Supreme Court where a **suit** may be filed, there is no provision to file a **suit**

before the Constitutional Court, as only petitions are entertained by the latter. The Constitutional Court does not hear any petition from any person other than from person who alleges that a provisions of the Constitution has been contravened and that his/her right is being or is likely to be affected by such contravention, or and is seeking a redress.

[24] It follows therefore that for an Intended Intervenor to seek intervention in any pending petition before the Constitutional Court, must firstly show what constitutional right has been or is likely to be contravened in relation to him or her; secondly must show what right that will be adversely affected by the petition if he/she is not allowed to be made a party to the petition in order to defend and/or protect.

[25] This Court sets out the proper course of action with regard to intervention by a third party in pending petition before the Constitutional Court when it upheld the decision of the Constitutional Court in allowing Mrs. Marise Berlouis to intervene in the pending petition of ***Morel du Boil v Government of Seychelles***. Likewise, in the case of ***Poole v Government of Seychelles***, this Court upheld the decision of the Constitutional Court in allowing ‘Noddyn’ and ‘Reem’ to intervene in the pending petition. The reason why such interventions were permitted was because the Intervenors had shown that they had a constitutional right to property under Article 26 of the Constitution as at the material time they held in their respective name different part of the property which was the subject matter of the petition before the Constitutional Court; secondly, they showed that they had their interest to defend at that stage otherwise they may lose their constitutional right to property.

[26] In the instant case, the Intended Intervenors also make reference to the part of the Affidavit of the 2nd Respondent in the Petition (CAA) where it is *inter alia* stated –

“... *there is nothing in the files left by its predecessor to indicate that there was any consideration of the complaints before the appointment of the Tribunal of Enquiry and has had to assume that the former Constitutional Appointments Authority did not consider the complaints in depth but automatically appointed the Tribunal.*”

[27] The word “predecessor” as used here by the deponent can only mean chairman and/or members of and not the CAA itself, since the CAA as a constitutional corporate body had no “predecessor”. The CAA was incepted by the promulgation of the Constitution in 1992 and as such only the chairmanship and membership changed over the years but not the Institution itself.

[28] Prior to their resignation the Intended Intervenors were indeed respectively the previous chairman and a member out of the three actual members who composed the CCA at the time. The third person who composed the previous membership of the CAA, but who has not resigned, is Mrs. Marie-Nella Azemia. At paragraph 5 of her Affidavit dated 26th June 2017, Mrs. Azemia deponed in her personal capacity as a member of the CAA as previously composed and *inter alia* states that –

“I confirm that the complaint was considered by the Constitutional Appointments Authority and can further confirm that at no time did the Constitutional Appointments Authority ever give Judge Duraikannu Karunakaran the opportunity to address the Constitutional Appointments Authority with respect to the said complaint.”

[29] The deposition of the 2nd Respondent as earlier quoted above connotes an allegation of dereliction of duty which may have a negative effect on the reputation of the Intended Intervenors in the proper discharge of the functions of their high Office. In my considered view that is an allegation that the Intended Intervenors ought to be permitted to clarify, for reason that I will give later in this judgment.

[30] The Intended Intervenors, unbelievable as it may appear, made serious if not contemptuous allegation of collusion between the 2nd Respondent (CAA) and the Petitioner when they *inter alia* deponed that –

“ as a matter of fact ... the CAA as presently constituted – is acting in collusion with the Petitioner to interfere with the establishment of the Tribunal of Enquiry against the Petitioner”.

- [31] Obviously such allegation negatively impacted on the reputation, integrity and status of the CAA as presently composed as well as the Petitioner, however, as this in itself may be the subject of a distinct cause of action, I am not inclined to address this issue as part of the instant Appeal.
- [32] It is my considered judgment that the Intended Intervenors are entitled to be heard in the pending Petition for the simple reason that they ought not to be denied the opportunity to be heard in the petition without being given the opportunity to *explain how, what and when they “considered”* the complaint against the Petitioner prior to appointing the Tribunal. As such, in the light of the rule of *audi alterem partem*” or the rule of natural justice or fair hearing, they are entitled to be given a right of reply. Their reply to that specific issue will assist the Court in its determination of the fundamental matter in issue.
- [33] In the interest and justice and fair hearing, I exercise my inherent discretion and grant the Intended Intervenors the right to be heard in reply to the two pertinent paragraphs of the Affidavit of the 2nd Respondent to the Petition and to the deposition in paragraph 5 of the Affidavit of Mrs. Marie-Nella Azemia dated 26th June, 2017.
- [34] In conclusion firstly, I find that the learned Judges, in the circumstances, erred in holding that the **only** relevant consideration for the determination of the application was whether the Appellants were interested in the event of the Petition, in terms of section 117 of the Seychelles Code of Civil Procedure.
- [35] Secondly, the learned Judges erred in holding that a third party whose personal interest can be affected by the result of the legal proceedings between the other parties, has no right to intervene in such legal proceedings.
- [36] It is on the basis of the matters discussed above, that I concur with the President of this Court and grant leave to the 1st and 2nd Applicants to respond to the relevant and pertinent parts of the affidavits in the pending Petition by filing their respective statement of demand to which the other parties shall be allowed to respond.

B. Renaud (J.A)

Signed, dated and delivered at Ile du Port on 19 September 2017