# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA), B. Renaud (J.A), F. Robinson (J.A), E. Carolus (J.A)]

## Constitutional Appeal SCA CP 04/2018

**(Appeal from Constitutional Court Decision CP 03 /2017)**

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| Duraikannu Karunakaran | Appellant |
| Versus | |
| The Constitutional Appointments Authority | 1st Respondent |
| The Honourable Attorney General | 2nd Respondent |
| Marie-Ange Hoareau | 1st Intervener |
| Jane Carpin | 2nd Intervener |

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Heard: 23 April 2019

Counsel: Mrs. Alexia Amesbury for the Appellant

Mr. Anthony Derjacques for the 1st Respondent

Mr. David Esparon for the 2nd Respondent

Ms. Alexandra Madeleine for the 1st and 2nd Interveners

Delivered: 21 June 2019

**JUDGMENT**

**F. MacGregor (PCA)**

**Background**

1. The instant appeal arose out of a complaint referred by the Chief Justice to the Constitutional Appointments Authority (hereinafter "the CAA") concerning allegation of misbehavior by a Judge of the Supreme Court in order for the CAA to consider whether

that complaint ought to be investigated in terms of Article 134(1) and Article 134(2) of the Constitution. The CAA then referred the complaint to a Tribunal for investigation.

**Petition**

2. On 25th May, 2017, the Judge in issue filed a Petition, supported by Affidavit couched in similar wording, before the Constitutional Court citing the CAA as the 1st Respondent and the Attorney-General as the 2nd Respondent. The Petition and the remedies sought is worded as follows:

> 1. The Petitioner is a judge of the Supreme Court of Seychelles since 8th March 1999.
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> 2. The 1st Respondent is an authority established under article 139(1) of the Constitution, to perform the functions conferred upon it by the Constitution and any other law, inter alia they appoint and remove Judges of the Supreme Court through due process of appointing Tribunals provided in the Constitution.
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> 3. The 2nd Respondent is pleaded as a party in compliance to Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.
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> 4. The Petitioner is currently the subject of a Tribunal of Inquiry ("the Tribunal") set up under Article 134(2)(a) of the Constitution as originally notified to the Petitioner by letter dated 7th October 2016, as a result of a complaint received by the 1st Respondent from the Chief Justice, Mathilda Twomey on 30th September 2016.
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> 5. As a result of the enquiry mentioned in para 4 above the President of the Republic suspended the Petitioner from performing the functions of Judge with immediate effect and notified the Petitioner accordingly by letter dated 10th October, 2016.

6. Pursuant to the above-mentioned complaint by the Chief Justice, the 1st Respondent arbitrarily and unconstitutionally, without making an assessment of the complaint, in order to consider whether the question of removing a Judge ought to be investigated as required by Article 134(2) of the Constitution, appointed a tribunal. Vide letter from 1st Respondent dated 7th October, 2016.

7. The Petitioner avers that the appointment of the Tribunal is unconstitutional and it was made in contravention of Article 134 (2) of the Constitution, without proper consideration as mentioned in para 5 above.

8. The Petitioner avers that his interest is being affected and continues to be affected by the said contravention mentioned in para 6 above.

9. The contravention in para 6 above came to the knowledge of the Petitioner only on the 21st May 2017 at about 6pm, when the 1st Respondent released a press release to the public, and the Petitioner filed this petition at the earliest time possible after becoming aware of the abovementioned contravention.

10. As a result of the matters set out in para 8 above, it is fair just and reasonable that the Petitioner be granted leave to file this Petition out of time.

By this Petition, the Petitioner prayed the Supreme Court for the following;

1. Granting leave to file this petition out of time.
2. Declaring that the appointment of the Tribunal by the 1st Respondent is unconstitutional, null and void ab initio.
3. Granting such other remedy under the Constitution as the Honourable Court deems fit.

**Responses to the Petition**

3. The **1st Respondent** answered the Petition supported by Affidavit and admitted paragraph

1 and averred that:

(i) The Petitioner's tenure has since 10 October 2016 been subject to a suspension from office by the former President James Alix Michel, pending the full and final determination of an Inquiry by a Tribunal set up by the 1st Respondent (as then constituted) to inquire into the complaints made against the Petitioner by Chief Justice, Mathilda Twomey.

(ii) The Petitioner's suspension is subject to the final determination by a Court of law in proceedings before it relating to the issue of suspension; and

(iii) The Petitioner's suspension is subject to the President of the Republic making an order under Article 134(3) of the Constitution.

4. The 1st Respondent admitted paragraphs 2 and 3 of the Petition.

5. The 1st Respondent admitted the averment in paragraph 4 of the Petition that the Petitioner was, in a letter dated 7th October 2016 from the 1st Respondent (as constituted then), notified that a Tribunal of Inquiry was to be appointed. The 1st Respondent averred that:

(i) Although the letter of complaint from the Chief Justice is dated 30th September 2016, the letter was sent to and received by the 1st Respondent (as then constituted) on or after October 2016;

(ii) Through the passage of time, the Petitioner is no longer the subject of the Tribunal of Inquiry. The Tribunal submitted its findings to the President of the Republic on 28th August 2017.

(iii)

a. The 1st Respondent admitted paragraph of the Petition to the extent that the Petitioner was suspended on 10th October 2016. The 1st Respondent averred that:

(iv) The suspension of the Petitioner was made by former President James Alix Michel on 10th October 20166 before stepping down from office on 16th October 2016;

(v) The date that the Petitioner was to be suspended was not fortuitous because it had to be made before former President James Alix Michel stepped down on 16th October 2016.

6. The 1st Respondent admitted the averment in paragraph 6 of the Petition that a Tribunal of Inquiry was appointed by the 1st Respondent (as then constituted) on 7th October 2016. The 1st Respondent averred that:

(i) The substance of the Charge was only put to the Petitioner by the 1st Respondent (as the constituted) on 12th October 2016, five days after the Petitioner was informed that a Tribunal had been appointed by the 1st Respondent (as then constituted), and two days after the Petitioner was suspended by former President James Alix Michel;

(ii) The Petitioner was never heard by the 1st Respondent (as then constituted) at the consideration stage before a decision was made to appoint a Tribunal under Article 134 of the Constitution;

(iii) Past consideration of complaints made by the Constitutional Appointments Authority included the process of allowing the person complained against an opportunity to be heard before a decision was made whether a Tribunal should be appointed or not;

(iv) The 1st Respondent (as then constituted) was on 29th September 2016 aware that a complaint was to be lodged and had begun the process of identifying members to be appointed to a Tribunal of Inquiry;

(v) The minutes of meetings recorded by the 1st Respondent (as then constituted) following the complaint lodged against the Petitioner were only prepared on 10th October 2016, three days after the Petitioner was informed by the 1st Respondent (as then constituted) that a Tribunal was to be appointed;

(vi) The veracity of the facts stated and the decisions recorded in the minutes are doubtful;

(vii) The subject matter of the complaints themselves was never given any proper consideration by the 1st Respondent (as then constituted);

(viii) The 1st Respondent (as the constituted) was not acting as t is required by the Constitution, independently of the direction or control of any other person contrary to Article 139(2) of the Constitution.

7. The 1st Respondent stated that by reason of the foregoing, the 1st Respondent averred that the requirements of natural justice and procedural fairness were lacking at the consideration stage of the complaint and in the process that the 1st Respondent (as then constituted) undertook from 29th September 2016 when it first identified the members of the Tribunal of Inquiry to 11th October when a Press Release was issued.

8. The 1st Petitioner stated that as a consequence of the above the he constitutionality of the consideration of the complaint against the Petitioner is called into question.

9. The 1st Respondent further averred that the absence of procedural fairness vitiates the appointment of the Tribunal, the suspension made by former President James Alix Michel under Article 134(4) of the Constitution and any subsequent decision of the Tribunal.

10. The 1st Respondent will leave the determination of the allegations made in paragraphs 7 and 8 of the Petition to the Honourable Court following a full consideration of the facts and the law by it.

11. The 1st Respondent admitted paragraph 9 of the Petition to the extent that the 1st Respondent did issue a Press Release on 21st May 2017. The 1st Respondent averred that the Press Release was issued in good faith after a full, factual and legal assessment of the process leading to the appointment of a Tribunal by the 1st Respondent (s then constituted).

12. The 1st Respondent further averred that it needed to distance itself from a process that it believed lacked the requirements of natural justice and procedural fairness which it could not simply ignore.

13. The 1st Respondent concluded that it does not oppose the request made by the Petitioner in paragraph 10 of the Petition.

14. The **2nd Respondent** answered the Petition and admitted paragraphs 1, 2, 3, 4 and 5 thereof and denied paragraph 6 to which the Petitioner is put to strict proof thereof.

15. The 2nd Respondent averred that under Article 142(6) of the Constitution the CAA may regulate its own proceedings. In absence of any other law, rules and procedures relating to Consideration of Complaint it can be presumed that the (CAA) has acted correctly in their consideration that the question of removing a Judge from office ought to be investigated in accordance with Article 134(2) of the Constitution and hence the maxim of *"omnia prasesumuntur rite esse acta"* shall apply (all things are presumed to that have been done correctly).

16. The 2nd Respondent further averred that since Article 142(6) provides that the CAA may regulate its own proceedings of which such article gives a direction to the CAA to decide on the procedure to be adopted when a complaint is received depending on the facts and circumstances of each case.

17. The 2nd Respondent added that hence under Article 134(2) of the Constitution the CAA may decide to request the Judge concerned to comment on the contents of the Complaint before deciding to act under Article 134(2) but where there are a multiplicity of clear and unambiguous serious charges which ex-facie requires a comprehensive inquiry by the

tribunal there would be no necessity to require the Judge concerned to be called to a preliminary inquiry by CAA.

18. The 2nd Respondent denied paragraph 7 of the Petition and put the Petitioner to strict proof thereof, and repeated its answer made to paragraph 3.

19. The 2nd Respondent denied paragraph 8, 9 and 10 and put the Petitioner to strict proof thereof. It averred that that delay in filing the Petition should start running from the date of the appointment of the Tribunal from the 7th October, 2016.

20. The 2nd Respondent further averred that it is in the discretion of the Constitutional Court to decide as to whether leave should be granted to file the Petition out of time in terms of Rule 4(4) of the Constitutional Court (application, Contravention enforcement or Interpretation of the Constitution Rules) in the event that the petitioner shows sufficient reason to extend the time in filing the Petition under Rules 4(3) in view that the Petitioner sought relief from the wrong forum by filing an application for Judicial Review, instead of filing a petition before the Constitutional Court, hence causing the delay

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**Affidavit of Mrs. Marie-Nella Azemia**

21. Mrs. Marie-Nella Azemia was the third Member of the then CAA (as then constituted), who continues to be a Member of the CAA as presently constituted. She deponed to an Affidavit as follows:

    1. I am a member of the Constitutional Appointments Authority, the 1st Respondent. The other three members are M. Willy Confait, Mrs. Simone de Commarmond and Mrs. Annette Georges were appointed on 27th April, 2017. I remained as a member following my appointment to the post on 27th May, 2016. I attached a letter from Mr. Mohamed Afif, Secretray of State, Cabinet Affairs confirming this and my letter of appointment President Jams Michel (**MNZC1(a) and MNZC1(b)).**

2. The present Chairperson of the 1st Respondent, Mr. Michel Felix, was unanimously appointed by its members on 29th September 2017 following the resignation of its former Chairperson, Dr. Shelton Jolicoeur on 19th September 2017 **(MNZ2 and MNZ3 (a) and (b).**

3. At the time that I took office on 27th May 2016 the two other members were Mrs. Marie-Ange Hoareau, the Chairperson, and Mrs. Jane Carpin.

4. The 1st Respondent, as constituted at the time, did receive a letter of complaint and supporting documents from Chief Justice Mathilda Twomey against the Petitioner.

5. I do recall a meeting when the members of the 1st Respondent, as then constituted, did consider the letter from the Chief Justice and the accompanying documents. I cannot with any certainly state the date of that meeting.

6. I did sign a set of minutes dated 3rd October 2016 agreeing to the appointment of a Tribunal of Inquiry.

7. I was on overseas mission from 4th to 9th October 2016 and was not present at any deliberations of the 1st Respondent, as then constituted, which took place over that period.

8. I can confirm that Judge Duraikannu Karunakaran, the Petitioner, was never given the opportunity to address the 1st Respondent as then constituted, in respect of the complaints made against him by the Chief Justice.

9. None of the members of the 1st Respondent, as then constituted, had any legal background and knowledge.

10. The membership of 1st Respondent, as newly constituted, included two members who are lawyers by profession, Dr Shelton Jolicoeur and Mrs Annette Georges.

11. The 1st Respondent has, as presently constituted, unanimously agreed to appoint an in-house Attorney.

12. I now have personal knowledge of the facts, contents of emails and legal arguments previously unknown to me. These have been set out in the Answers to the Petition, Statement of Demand and supporting Affidavits sworn to by Mrs. Annette Georges and I verily believe them to be true and correct.

13. The other members of the 1st Respondent, including the Chairperson, and I have authorised Mrs. Annette Georges to swear the affidavits in support of the Answers by the 1st Respondent to the Petition and Statement of Demand by the Interveners.

14. I adopt and confirm the contents of the Affidavits sworn by Mrs. Annette Georges in support of the Answers to the Petition and Statement of Demand.

**Interveners – Statement of Demand**

22. Two persons, who served as Chairperson and member of the CAA as then constituted sought to intervene in the matter. The Constitutional Court declined their request. Upon appeal, this Court allowed them to intervene in order to respond to averments filed before the Constitutional Court which specifically referred to them in their capacity as the Chairperson and Member of the CAA as then constituted.

23. On 10th October 2017 the two Interveners filed a first Statement of Demand and subsequent to that, on 24th November 2017, amended their first Statement of Demand. The Amended Statement of Demand is reproduced hereunder and the amendments made by the Interveners to the first Statement of Demand are highlighted in bold, as follows:

**Preliminary Objections**

1. The Petition is out of time under the Constitutional Court Rules in that the decision to set up the Tribunal of Inquiry was known to the Petitioner on 7th October 2016.

2. The Petition is made contrary to Article 130(2) of the Constitution in that the same matters raised in the Petition have been raised and decided upon by the Supreme Court in *MC No. 111/2016 Duraikannu Karunakaran v The Constitutional Appointments Authority* alleging *(sic)* (MC No.111/2016) and the decision upheld by the Court of Appeal in *SCA 33/2016 Duraikannu Karunakaran v The Constitutional Appointments Authority ("SCA33/2016").*

**Merits**

1. The 1st Intervener is the former chairperson and the 2nd Intervener is a former member of the 1st Respondent.

2. The 1st and 2nd Interveners resigned from membership of the 1st Respondent on the 24th of April 2017.

3. The interveners together with another member – Mrs. Marie Nella Azemia – formed part of the 1st Respondent's determination to set up a Tribunal of Inquiry in relation to the Petitioner following complaints made against the said Petitioner by the Chief Justice Dr. Mathilda Twomey.

4. **All decisions taken by the 1st Respondent (as then constituted) in respect of the Petitioner were validly taken by a properly constituted 1st Respondent in terms of article 146(2) of the Constitution. In the absence of Mrs. Marie Nella Azemia, the 1st and 2nd Interveners validly took the decisions as witnessed by the minutes of meeting.**

5. **The 1st Respondent (as then constituted) was first notified of matters involving behaviour of the Petitioner as a Judge through an email from the Chief Justice to the 1st intervener (the then chairperson) on 22 October 2015. According to the said email, the Petitioner had disrespected the office of the Chief Justice by issuing an order against the Chief Justice in the case of *Monique Delpeche v Marie-Ange Gregoretti & ors CS4/2014.* The 1st Intervener as the Chairperson of the 1st Respondent (as then constituted) was later asked by the Chief Justice not to move to consider any action**

**against the Petitioner in view of the Petitioner's unreserved apology and undertaking to work with her as Chief Justice.**

6. By copy of a letter dated 20th September 2016 addressed to the Petitioner by the Chief Justice, the 1st Respondent, then comprising of the Interveners, was made aware of issues involving **the behavior** of the Petitioner as a Judge. **The said letter enclosed a set of documents including the minutes of the meeting held on 19th September 2016 at 11:00 am between the Chief Justice and the Petitioner in the presence of the Personal Assistant to the Chief Justice, Mrs. Jemina Lucas**. A copy of the said letter is kept on file at the premise of the 1st Respondent.

**7. On 29th September 2016, 1st Respondent comprising of the 1st and 2nd Interveners met with the Chief Justice, from 11:00 am to 2:30 pm at the premises of the 1st Respondent at La Ciotat, Mont Fleuri. At the meeting, the Chief Justice made an oral complaint regarding the persistent behavior of the Petitioner and went through a complaints' file, containing supporting documents consisting of mostly of court proceedings, with the 1st and 2nd Interveners. At the close of the meeting, the 1st Respondent comprising of the 1st and 2nd Interveners requested the Chief Justice to send a written complaint together with a full set of evidence. In view that the 1st Respondent did not have the resources to make photocopies of the complaint's file, Mrs. Lena Pragassen the secretary of the 1st Respondent, for and on behalf of the said 1st Respondent, requested that further copies are provided by the office of the Chief Justice.**

24. On 30th September 2016, the Respondent as then constituted comprising of the interveners, received a letter in terms of article 134(1) of the Constitution from the Chief Justice in relation to the Petitioner enclosing supporting documents in one black lever arch file. A copy of the said letter of 30th September 2016 and supporting documents kept in the black lever arch file are kept at the premises of the 1st Respondent.

25. The said letter of 30 September 2016 containing at least 13 allegations against the Petitioner together with the supporting documents contained in the black lever arch file was notified to all three members including the chairperson.

26. In regulating its own proceedings pursuant to article **142(6)** of the Constitution the 1st Respondent, then comprising of the interveners, convened a meeting at which the letter of 30th September 2016 and the supporting documents contained in the black lever arch file were lengthily considered in the light of the powers of the 1st Respondent under article 134(2) of the Constitution.

27. In considering the allegations against the Petitioner, the 1st Respondent then comprising of the interveners acted fairly, properly and legally having regard to its Constitutional mandate under article 134(2) of the Constitution.

28. Following consideration of the 13 allegations made against the Petitioner having regard to their nature – which were clear and unambiguous – and their seriousness as made out in the supporting documents, the 1st Respondent, comprising of the interveners, being satisfied with the said complaints unanimously resolved that the question of removing the Petitioner from office ought to be investigated by a tribunal. The unanimous decision of the 1st Respondent, including the interveners were recorded in the minutes of meeting signed by all three members including the interveners. A copy of the signed minutes of meeting is kept on the Tribunal file kept at the premises of the 1st Respondent.

**29. In view that the members and chairperson of the 1st Respondent (as then constituted) did not have any legal background and the complaints against the Petitioner gave rise to the first impeachment process of its kind in Seychelles, the 1st Respondent sought the assistance of the Chief Justice to indicate and/or introduce to the 1st Respondent to persons who are experienced to sit on tribunals involved in the impeachment of judges. The Chief Justice provided initial assistance by initiating contact with Mr. Marc Guthrie of the Commonwealth Secretariat to ascertain his willingness to sit on the Tribunal and/or to nominate other persons who would be willing to do so. On 6th October 2016 the Chief Justice informed the 1st Intervener that it was no longer**

**appropriate for her to take part in choosing the tribunal and left it to the 1st Intervener to contact the persons proposed by the commonwealth secretariat. The 1st Respondent (as then constituted) then proceed to approach other persons as shown by the minutes of meeting kept on file at the premises of the 1st Respondent.**

29. The 1st Respondent is not required to hear the Petitioner on the allegations made against him in terms of article 134(2) of the Constitution as the complaints were to be investigated by the Tribunal of Inquiry which may or may not recommend removal of the Petitioner from office.

30. Therefore the 1st Respondent's decision to set up a Tribunal of Inquiry in relation to the Petitioner was fair, legal and constitutional in all circumstances and based on a proper consideration and/or assessment of the complaints within the limit of the mandate of the 1st Respondent under article 134(2) of the Constitution.

31. The Petitioner was advised that complaints of misbehavior had been made against him and a Tribunal of Inquiry had been appointed to inquire into the matter in a letter dated 7 October 2016.

32. The substance of the complaints made against the Petitioner were then communicated to the Petitioner by letter dated 12 October 2016 signed by all three members of the 1st Respondent, including the interveners, on 11th October 2016.

**33. Following the appointment of the Tribunal of Inquiry and suspension of the Petitioner, the 1st Respondent issued a press release regarding the setting up of the tribunal and suspension of the Petitioner. The said press release also contained an input of the Chief Justice, as the head of the Judiciary, on the impact of the Petitioner's suspension on the administration of judiciary, notably:** *"we have been assured by Chief Justice Mathilda Twomey that the Court is making immediate arrangements to ensure minimal delays in case proceedings and to reduce the impact it has on anny and all cases currently before the Court.*

33. At the time, the Petitioner, opted to file an application for exercise of supervisory jurisdiction against the 1st Respondent, comprising of the Interveners, in the Supreme Court in *MC No.111/2016 Duraikannu Karunakaran v The Constitutional Appointments Authority* alleging *(sic)* (MC No.111/2016) on 8th November 2016.

34. MC No.111/2016 alleged that the 1st Respondent's decision that the complaint ought to *(sic)* investigated by a tribunal was made arbitrarily, without due process and with procedural impropriety in breach of the rules of natural justice, in that the Petitioner was not given an opportunity to be heard or to respond in any manner to the allegations and constituted as abuse of right and was unreasonable and irrational in that there was no proper assessment of the complaints to arrive at a judicious decision.

35. On 7 November 2016, the Supreme Court per Nunkoo J refused the Petitioner leave to proceed with the application and the Petitioner appealed to the Court of Appeal in SCA 33/2016 Duraikannu Karunakaran v The Constitutional Appointments Authority ("SCA33/2016").

36. On 21 April 2017, the Court of Appeal dismissed the appeal and upheld the decision of the Supreme Court declaring that it was not the mandate of the 1st Respondent to hear the Petitioner on the complaints made but to take cognizance thereof and set up a tribunal.

37. The same matters raised in MC. No.111/2016, namely no assessment of the complaint, are being raised in the present Petition and which have been already determined by the Court of Appeal in SCA 33.2016.

38. Notwithstanding the determination of case SCA 33/2016 by the Court of Appeal, the 1st Respondent, as newly constituted, by letter dated 12 May 2017 advised the President of the Republic of Seychelles to revoke the suspension of the Petitioner and invited the President to consider appointing the Petitioner to the Court of Appeal. The said letter also informed that the newly constituted 1sy Respondent will suspend the Tribunal following a re-evaluation of the complaints against the Petitioner. A copy of the said letter was published in the issue of the "Independent" newspaper dated 25th August 2017.

39. This was followed by a press release by the newly constituted 1st Respondent on 21st May 2017 alleging that there is nothing left in the files by its predecessor to indicate that there was any consideration of the complaints before the appointment of the Tribunal. **The press release was similar to the press release published in the newspaper affiliated to the LDS.** A copy of the said Press release is attached to the Petition.

40. Based on paragraphs 19 and 20 of *(sic)* the Interveners aver that their reputation, integrity as former chairperson and member of the 1st Respondent has been seriously comprised *(sic)* in that it is insinuated that they failed to discharge their respective responsibility in accordance with the Constitution.

41. The interveners aver that in view of the matters averred under paragraph 1 to 18 above it is clear that they respectively discharged their functions as chairperson and member of the 1st Respondent in accordance with the Constitution and therefore, the Petition, letter of 12 May 2017 and press release of 21st May 2017 are false, misleading and calculated to the *(sic)* injure the reputation and integrity of the interveners.

42. Interveners further aver that the Petition and letter of 12 May 2017 and press release of 21st May 2017 preceding the said petition clearly shows that the 1st Respondent will not defend the Petition and acted in collusion with the Petitioner and the **LDS party.**

43. On 21st November 2017 the **1st Respondent** answered the first Statement of Demand.

44. On 29th January 2018 the **1st Respondent** answered the Amended Statement of Demand by the Interveners, supported by Affidavit, as follows:

    1. Save as set out hereunder, all averments made by the 1st Respondent in answer to the Interveners' first Statement of Demand dated 10th October 2017 are adopted.
    2. Paragraph 4 of the amended Statement of Demand is admitted to the extent that decisions were taken by the Interveners. The 1st Respondent averred that:

(i) The inappropriate process leading to the appointment of the Tribunal and

(ii) The failure of the Interveners to invite the Petitioner to respond to the complaints made against him before appointing the Tribunal rendered their decisions a nullity, which nullified any subsequent process in respect of the Petitioner.

3. Paragraph 5 of the amended Statement of Demand is admitted to the extent that on 22 October 2015 an email was sent by the Chief Justice to the 1st Intervener. The 1st Respondent averred:

(i) That although a copy of that *email* was on the Constitutional Appointments Authority file on complaints lodged by the Chief Justice against the Petitioner as it existed when 1st Respondent assumed office (**Exhibit AG 8**- Affidavit of Mrs. Annette Georges in answer to the first Statement of Demand), this *email* was not sent officially to the Constitutional Appointments Authority's email account;

(ii) That the Chief Justice's *email* of 22 October 2015 and the immediate reaction of the 1st Intervener, of the same date, to invite the Petitioner to respond to the complaint (**Exhibit AG22(b)**- Affidavit of Mrs. Annette Georges in answer to the first Statement of Demand), established that the 1st Intervener was aware of the legal necessity to invite the Petitioner to respond to the complaint made against him at the time, and

(iii) That given that the complaint had been withdrawn by the Chief Justice on the same day, 22 October 2015, it ought not have been considered save for the averment made in paragraph 3(ii) above.

45. The averments made in paragraph 3 of the 1st Respondent's Answer to the Intervener's first Statement of Demand are repeated in answer to paragraph 6 of the Amended Statement of Demand:

> *Save that it is … that the 1st Respondent (as then constituted) received a copy of a letter dated 20th September 201 from the Chief Justice Mathilda Twomey, paragraph 4 of the Statement of Demand is denied. The 1t Respondent avers that the letter of 20th September 20166:*
>
> *(i) Dealt with internal issues within the Judiciary between the Chief Justice and the Petitioner;*
>
> *(ii) Was also copied to the former President Jams Alix Michel;*
>
> *(iii) Was not a complaint made under Article 134 of the Constitution;*
>
> *(iv) Refers to an agreement between the Chief Justice and the Petitioner to meet on 3rd October 2016 to discuss a road map for th disposal of cases; and*
>
> *is wrongly alluded to by the 1st Respondent (as then constituted) in its letter of 12th October 2016 to the members of the Tribunal.""*

46. The 1st Respondent further avers that although the letter of 20th September 2016 enclosed a number of documents, the fact remains that the letter also referred to an agreement between the Chief Justice and the Petitioner to meet on 3rd October to discuss a road map for the disposal of cases. The unfairness of the process leading to the appointment of the Tribunal is further demonstrated in an unmarked document listed by the Interveners as No.11 as a document to be relied upon – *Minutes of meeting between Chief Justice and Petitioner held on Monday 3rd October 2016 at 11:00 am in the Chief Justice Chambers and email regarding the holding of the said meeting* – on the amended Statement of Demand.

47. The 1st Respondent avers that as the said minutes state, the object of the meeting was to discuss and set up plans regarding clearing pending cases. This document shows that whilst the Chief Justice met with the Petitioner on 3rd October 2016 as agreed by them on 29th September (**Exhibit AG9** - Affidavit of Mrs. Annette Georges in answer to the first Statement of Demand) to discuss a road map, the Chief Justice had, on 3rd October 2016, not only allegedly made an oral complaint to the Interveners on 29th September 2016 for removal proceedings, but also, as admitted by the Interveners, contacted one Marc Guthrie on 2nd October 2016 to sit on the three-member Tribunal and was aware that Justice Frederick Egonda-Ntende and Judge Samia Govinden were to be the other two members on the Tribunal. It was only on 7th October 2016 that the Petitioner was first informed by the Interveners that complaints against him had been received and that a Tribunal had already been appointed (**Exhibit AG 23** – Affidavit of Mrs. Annette Georges in answer to the first Statement of Demand).

48. The 1st Respondent further avers that the process leading to the appointment of the Tribunal of Inquiry was patently not fair, proper or legal.

49. Paragraph 7 of the Amended Statement of Demand is denied. The 1st Respondent avers that:

    (i) There are no minuted records by the Interveners of any oral complaint having been made by the Chief Justice at a meeting between the Chief Justice and the Interveners on 29th September 2016;

    (ii) There are no minuted records of 29th September 2016 that the Interveners had to request that a written complaint be lodged by the Chief Justice.

50. The 1st Respondent further avers that:

    (i) The lack of photocopying facilities is of no relevance. The lack of natural justice cannot, in the 21st century, be explained by this excuse;

(ii) The Interveners should have availed themselves of the services of a company, situated at La Ciotat, on the ground floor, one office from theirs, which provides photocopying facilities to the public, facilities used by the Interveners in the past;

(iii) It was not the responsibility of a secretary to determine the capacity of the Interveners to make photocopies but that of the 1st Intervener as Chairperson of the Constitutional Appointments Authority;

(iv) There was no urgency as to why an oral complaint had to be made by the Chief Justice and accepted and acted upon by the Interveners on 29th September 2017 when the Interveners were aware of an agreement between the Chief Justice and the Petitioner to meet on 3rd October 2017 to discuss a road map **(Exhibit AG9** – Affidavit of Mrs. Annette Georges and Document 5 on list of documents to be relied on amended Statement of Demand).

51. Paragraph 3 of the Amended Statement of Demand is denied. The 1st Respondent avers that:

(i) Just as the Interveners have felt it necessary to employ the services of legal counsel in this matter, the same reasoning should have been obvious to them in a matter relating to the impeachment of a Judge. Rather than seek the assistance of the Chief Justice who was herself the complainant in the matter before the Interveners, it should have been obvious to the Interveners that the services of an Attorney, other than the Chief Justice, was necessary;

(ii) The fact that it was the first impeachment process of its kind in Seychelles is no excuse for the Interveners' total disregard of the rules of natural justice;

(iii) The Chief Justice did more than initiate contact with one Marc Guthrie but was, on 2nd October 2016, seeking his willingness to sit as the third

member of the Tribunal. The Chief Justice, as the complainant, was also making sure that everything was in place before former President James Michel stepped down on 16th October 2016. There is no evidence in the records of the 1st Respondent that the Interveners, at any time, attempted to distance themselves from the actions of the actions of the Chief Justice, the complainant;

(iv) It was not only inappropriate but an outright abuse of natural justice that the Chief Justice, as complainant, was being asked by the Interveners for assistance in the composition of the members of the Tribunal;

(v) On the 6th October 2016 (Document 10 on the list of documents to be relied on in the amended Statement of Demand) when the Chief Justice informed the 1st Intervener of the inappropriateness of her behavior, *two other persons* had already been identified by the Interveners since 29th September 2016 and were known to the Chief Justice, namely Justice Frederick Egond-Ntende and Judge Samia Govinden and the Chief Justice's main concern was the *time constraints.*

52. As a consequence of the above the 1st Respondent avers that the appointment of the Tribunal by the Interveners was an abuse of process disregarding every elementary rule of natural justice rendering their decision and each and every decision thereafter a nullity.

53. Paragraph 18 of the Amended Statement of Demand is admitted to the extent that it is an admission that the Interveners were on 11th October 2016 still seeking the input of the Chief Justice, the complainant, in a press release.

54. Paragraph 25 of the Amended Statement of Demand is admitted to the extent that a Press release was issued on 21st May 2017. The press release was sent to all the media houses and it was not under the control of the 1st Respondent who decided to reproduce or ignore its press release.

55. Paragraph 28 of the Amended Statement of Demand is strenuously denied. The 1st Respondent further avers that the letter of 21st May 2017 and the Press Release of 21 May 2017 were issued in good faith after a full, factual and legal assessment of the process leading to the appointment of the Tribunal of Inquiry by the Interveners revealed a flawed process which had ignored the rules of natural justice.

56. Any reference made to a black lever arch file kept at the premises of the 1st Respondent are denied. The only file that existed at the offices of the 1st Respondent when the new members of the 1st Respondent assumed office has been produced as **Exhibit AG8** by Mrs. Annette Georges in answer to the first Statement of Demand. The 1st Respondent cannot reproduce documents that are not on the file and not in its possession, unlike the Interveners who have had access to the contents of an unknown black lever arch file and a letter dated 28th August 2017 from the Chief Justice addressed to the 1st Respondent and copied only to the President, the Speaker of the National Assembly and the Leader of the Opposition, and which is referred to as Document 12 – Letter of explanation – in the list of documents to be relied upon by the Interveners at the hearing. \

57. The 1st Respondent avers that the letter of 28th August 2017 from the Chief Justice to the 1st Respondent, which somehow has ended up in the possession of the Interveners, stands on its own. The said letter underlines the Chief Justice's inappropriate involvement in the appointment of the Tribunal to hear complaints against the Petitioner. The issue before this Court is about the Interveners inappropriately seeking and allowing the involvement of the complainant in their consideration process and the absence of any observance of the rules of natural justice prior to their appointment of a Tribunal.

58. The 1st Respondent avers that the amendments to the Interveners' Statement of Demand are but an attempt to introduce matters that were within their knowledge at the time that the first Statement of Demand was made but that they chose to withhold and, further, are matters that the Interveners are now seeking to introduce following this Court's refusal to

allow them to provide a response to the Petitioner's and 1st Respondent's Answers to their Statement of Demand dated 10th October 2017.

59. The 1st Respondent avers that the amendments to the Statement of Demand are but an attempt by the Interveners at damage control and to deviate the Court's attention from what is the essential issue in this matter, namely whether the rules of natural justice were complied with by the Interveners prior to the appointment of the Tribunal and the order of suspension by the President. The 1st Respondent avers that the rules of natural justice were not observed by the Interveners thus rendering the whole process a nullity.

60. On 21st November 2017 the **2nd Respondent** answered the Statement of Demand of the Interveners as follows:

    1. Paragraphs 1 and 2 of the Statement of Demand are admitted.
    2. Paragraph 3 of the Statement of Demand is admitted.
    3. Paragraph 4 of the Statement of Demand is admitted.
    4. Save for the allegation that the Chief Justice is the complainant in the matter which is admitted paragraph 5 of the Statement of Demand the 2nd Respondent is unaware of the allegation mentioned in paragraph 5 and the Intervener is put to strict proof thereof.
    5. Save for the allegation that there were 13 allegations against the Petitioner which is admitted paragraph 6 of the Statement of Demand the 2nd Respondent is unaware of the allegation mentioned in paragraph 6 therein and the Intervener is put to the strict proof thereof.
    6. Save for the allegation that the 1st Respondent was regulating its own proceedings pursuant to Article 142(6) of the Constitution which is admitted, the 2nd Respondent avers that the 2nd Respondent is unaware of the allegation mentioned in paragraph 7 of the Statement of Demand and the Interveners are put to the strict thereof.

7. Paragraph 9 and 10 of the Statement of Demand the 2nd Respondent avers that under Article 142(6) since the CAA may regulate its own proceedings the Constitutional Appointments Authority may decide to act as such where there is a multiplicity of clear and unambiguous serious charges which ex-facie the pleadings require a comprehensive inquiry by the Tribunal whereby the Petitioner will get a right to a fair hearing before the Tribunal appointed for that purpose and hence there will be no necessity to require the Judge concerned to be called to a preliminary enquiry by the CAA before deciding to appoint a Tribunal.

8. Paragraphs 11 to avoid repetition the 2nd Respondent repeats paragraph 7 of the answer to the Statement of Demand and avers that the setting up of a Tribunal of Inquiry in relation to the Petitioner was fair, legal and constitutional and was in accordance with Article 134(2) of the Constitution and that the Petitioner will have a right to be heard before the Tribunal appointed for that purpose.

9. Paragraph 12 of the Statement of Demand is admitted.

10. Paragraph 13 of the Statement of Demand is admitted.

11. Paragraph 14 of the Statement of Demand is admitted.

12. Paragraph 15, 16, 17 and 18 of the Statement of Demand are admitted.

13. Paragraph 19 of the Statement of Demand is not within the knowledge of the 2nd Respondent and the Intervener is put to the strict proof thereof.

14. Save for the allegation that there was such a press release which is admitted paragraph 20 of the Statement of Demand is denied.

15. Paragraph 21 of the Statement of Demand is denied and the Intervener is put to the strict proof thereof.

16. Save for the allegation in paragraph 22 that the Chairperson and Member of the 1st Respondent has discharged their functions in accordance with the Constitution which is admitted, the rest of paragraph 22 is denied and the Intervener is put to the strict proof thereof.

17. Paragraph 23 of the Statement of Demand the 2nd Respondent avers that it is not within the knowledge of the 2nd Respondent and the Intervener is put to the strict proof thereof.

61. On 15th February 2018 the **Petitioner** answered the Amended Statement of Demand, supported by Affidavit, as follows:

1. The Petitioner's original answer dated 6th November 2017, filed in response to the Interveners' original Statement of Demand dated 10th October 2017, shall form part and parcel of the Petitioner's answer hereof to the Amended Statement of Demand of the Interveners dated 24tth November 2017. The said original answer of the Petitioner, the affidavits and all other exhibits attached thereto, *mutatis mutandis,* is adopted herein, which may be read as part of and in addition to the answer filed hereunder to the Amended Statement of Demand.

**Preliminary Objection No.1**

1. The Interveners have obtained leave to intervene as averred by them because "their reputation and integrity as former chairperson and member of the 1st Respondent has been seriously compromised in in that it is insinuated that they failed to discharge their respective responsibility in accordance with the Constitution."

2. Whether the Petition is out of time or not the petition is filed against Respondents and it is for the **Respondents** to raise this and any other preliminary objections as per Rule 9.

3. The Petitioner has averred in his petition that he only had **knowledge of the matter after the publication of the Press release by the 1st Respondent on**

**21st May 2017 and he filed at the earliest possible time after having knowledge of the contravention.** And if the court is to take the view that the petition is out of time the Petitioner has prayed that he is granted leave to file out of time pursuant to Rule 4 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, 1994 for reasons sated in the backdrop of facts marshalled in the affidavit attached to the Petitioner's original answer dated 6th November 200177, filed in this matter.

4. The Respondents have not raised any such preliminary objection. **Why do the Interveners want to throw the Petitioner's case out even before it is heard?** As was said by the Court of Appeal in Dhanjee v Domah this is a matter of great public interest and importance not just for the Country but for the Judiciary.

5. The Petitioner was denied leave to proceed for Judicial Review as per the Ruling of Nunkoo J who said at top of page 5 that the "application should have been made to the Constitutional Court". And further "the application is premature and made with the intention not to allow the proceedings before the appointed tribunal takes its course." The denial of leave was also thrown out by the Court of Appeal by Domah JA, which two cases, form the basis of the Interveners' objections.

6. The Petitioner was one of the Judges of the Constitutional Court that unanimously held that Mr. Domah's re-appointment as a judge after the expiration of his contract was a violation of the Constitution and continued to perform the function of a Justice of Appeal from October 2016 to April 2017 without a valid renewal or extension of his contract of employment which violation the 1st Intervener as Chairperson, and the 2nd Intervener as Member of the CAA as then constituted condoned.

7. The CAA under the Chairmanship of the 1st Intervener with the 2nd Intervener as Member:

(i) Did not give the Petitioner, an opportunity to be heard in breach of the first rule of natural justice.

(ii) The Supreme Court denied him leave to proceed to Judicial Review.

(iii) The Court of Appeal upheld this decision to deny him leave to proceed for Judicial Review.

(iv) And now the Interveners having denied him his right to be heard before the appointment of a Tribunal to investigate him **yet again.**

**Preliminary Objection No. 2**

8. Article 130(2) of the Constitution does not help the Interveners either, because for the Constitutional Court to decline to entertain the application it must be "satisfied that the applicant **has obtained redress for the contravention** under any law and where the applicant has obtained redress in the constitutional court for any matter for which an application may be made under clause (1), a court shall not entertain any application for redress for such matter … ". The question is "**Has the Petitioner obtained redress before any of the courts he has approached?**

**On the Merits**

1. Paragraphs 1 and 2 are admitted.

2. In answer to paragraph 3 the Petitioner avers that pursuant to Article 134(2) the 1stt Respondent is constitutionally mandated to **consider the question of removing a justice of Appeal or a judge ought to be investigated …"** nowhere does Article 134(2) give the 1st Respondent power to make a **determination to set up a tribunal of Inquiry.** The specific wording of Article 134(2) is that "when the CAA **CONSIDERS that the question of removing,** then it shall appoint a Tribunal … The Petitioner avers that if the Interveners made a **determination to set up a Tribunal.** They acted outside

their constitutional mandate. And proves what the Petitioner has said before different fora that his case was not **considered.**

3. In further answer to paragraph 3 the Petitioner avers that once the Chief Justice made the Complaint she became the **COMPLAINANT** and as Complainant she should have had no further dealings with the Interveners in any way or capacity whatsoever. It is this admission throughout the various correspondence and meetings between the Interveners and the Complainant that renders the appointment of the Tribunal by Complainant that renders the appointment of the Tribunal by the 1st Respondent unconstitutional null and void ab initio because it violates Article 139(2) "The Constitutional Appointments Authority **SHALL NOT IN THE PERFORMANCE OF ITS FUNCTIONS (one of which is to consider the question of removing a justice of Appeal or judge ought to be investigated) be subject to the direction of ANY PERSON.**

4. In paragraph 13 of the ASOD the interveners admit that a letter was received dated 6th October 2016 in which the **Complainant acknowledges that "it was no longer appropriate for her to take part in choosing the Tribunal panel and left the 1st Intervener to contact the persons proposed by the Commonwealth Secretariat."** This admission begs the question since the letter went out to the members of the Tribunal informing them of their appointment on **7th October 2016** what else was left to be done by the 1st Respondent at the time the letter was written? In fact, the members of the Tribunal were not even the members suggested by the Commonwealth Secretariat, but Ex-Chief Justice Frederick Egonda Ntende whom from internal documents show that he had raised the question of back log with the Petitioner and two other Judges directly under the control and direction of the Complainant as Chief Justice.

5. Paragraph 4 of the amended Statement of Demand is admitted to the extent that decisions were taken by the interveners but the Petitioner avers that the process leading to the appointment of the Tribunal and the failure of the interveners to give

the Petitioner an opportunity to be heard at the initial stage of the process renders their decision nullity.

6. Paragraph 5 in regards to the emails sent, is not within the knowledge of the Petittioner save to aver that in the quoted case of (*Monique Delpeche v Marie-Ange Goretti & ors CS No. 4/2014)* he said "I request the Honourable Chief Justice to give reasons why the case has been removed from this court without my knowledge. This was a request not an order. And will adopt the response of the 1st Respondent as contained in the affidavit of Mrs. Georges in answer to the first Statement of Demand.

7. Paragraph 8 is denied. The Petitioner avers that if, as stated in the letter dated 20th September 2015 5th paragraph the Complainant felt it was her duty to conduct **"internal responses with regard to misbehavior …"** why was this letter copied to the 1st Intervener and to President James Alix Michel? The only two Parties vested with constitutional powers to investigate and ultimately remove the Petitioner from office. The Petitioner will adopt his answer to first Statement of Demand.

8. Paragraph 7 is denied. The Petitioner avers that if the 1st Respondent as then constituted did not have the resources as alleged a request for funds or assistance from the Ministry of Finance or other sources could have been made. In any event based on the voluminous numbers of photocopied documents produced by the Present 1st Respondent the Petitioner avers that this was yet another method used by the Complainant and Interveners who from all exhibited documents were at all times acting in collusion to bring about the removal of the Petitioner.

9. In answer to paragraph 7 the Petitioner asks whether the Tribunal of Inquiry at the completion of its task was faced with the same predicament that necessitated the assistance of the Office of the Chief Justice to make copies of the report before its presentation to the President and to CAA as per article 134(2)(b). In fact, the interference of the Complainant was so blatant that it went as far as to disclose the Tribunal report to the public and this despite the fact that the Tribunal is require to

"report on the facts to the CAA and the President." How did the Complainant get a copy to make it public? This proves the collusions not only between the intervener and the Complainant but also proves the collusion between the Complainant and the Tribunal.

10. The disclosure of documents contained in paragraphs 8,9 and 10 only serves to show that the interveners withheld documents that should have been placed before the court at the outset and have been or should be answered by the 1st Respondent in the present case.

11. Paragraph 11 is denied if the "allegations against the Petitioner were considered by the interveners as per the Constitutional mandate contained in Article 134(2) the Petitioner should have been heard on the allegations prior to the appointment of a tribunal of inquiry and nothing contained in the documents and correspondence show that the interveners acted "fairly properly, legally or constitutionally.

12. Paragraph 12 is denied. The petitioner avers that the function of the CAA when faced with a complaint about a judge is constitutionally mandated to **consider** whether or not a tribunal ought to be appointed to investigate the complaint. Nowhere under article 134(2)(bb)) is the CAA mandated to "unanimously resolve" that the question of removing the Petitioner from office ought to be investigated. Neither is the 1s Respondent as previously constituted including the interveners, required to "unanimously decide". Why can the interveners not say that they "considered" why "resolve" "decide" why not **Consider?**

13. The Petitioner avers that paragraph 13 is an admission of interference, direction and control of the CAA by the Complainant under the chairmanship of the 1st Intervener together with the 2nd Intervener as member and contradicts all the averments made about the legality, validity and constitutionality of the CAA's function under article 134(2)(b) and the Petitioner will go as far as to say that the predicament faced bt the Interveners as admitted in paragraph 13 goes to show why under Article 141(a) the qualification required is that a person "has held judicial

office in a court of unlimited jurisdiction" reference to the Chief Justice does not change the fact that she was the **Complainant** and should have distanced herself from all proceedings and the supreme Court but a judge with whom the Complainant had a most acrimonious relationship as is evident through the various emails.

14. In further answer to paragraph 13 the Petitioner avers that the Interveners as chairperson and member of the CAA as then constituted were at liberty to seek the advice of legal assistance from the private Bar. In all past cases filed against the CAA it was ably defended by very senior and highly regarded members of the private Bar. In the circumstances of this case, whether the assistance sought was initial or subsequent it was a violation of Article 139(2) "the Constitutional Appointments Authority **SHALLL NOT IN THE PERFORMANCE OF ITS FUNCTIONS (one of which is to consider the question of removing justice of Appeal or judge ought to be investigated) be subject to the direction of ANY PERSON.** The Chief Justice as Complainant should not, and could not have provided any assistance.

15. In further answer to paragraph 13 paragraph 4 hereinabove is repeated.

16. Paragraphs 14 and 15 are denied. Who advised the interveners that the 1st Respondent is no required to hear the Petitioner? How many times, and how often did the CAA as then constituted hear the Complainant? Procedural fairness requires that a person who is adversely affected by the decision will have an opportunity to make representations before a decision is made ***Rees v Crane [1994] 43 WLR 44***4 and this procedural fairness was denied to the opportunity to make representations to the CAA when a complaint was filed against him by Doris Louis?

17. Paragraph 16 is admitted to the extent that the Petitioner was advised that a tribunal of inquiry had been appointed in letter dated 7th October 2016. What the Petitioner was not "advised" about, is the fact that only the day **before** on 6th October 2016 as per paragraph 13, the Complainant had informed the 1st Intervener that **"it was**

**no longer appropriate for her to take part in choosing the tribunal panel."** And left it to the 1st Intervener to contact the persons proposed by the commonwealth secretariat although none of them was appointed because already on 29th September 2016 the member of the tribunal had been identified by the Interveners and were known to the complainant namely, Justice Frederick Egonda-Ntende and Judge Samia Govinden.

18. Paragraph 17 is admitted to the extent that a letter was sent to the Petitioner on **12th** October 2016 informing him of the substance of the complaints against him but this letter comes **AFTER** the tribunal has been appointed and is further proof of absence of observance of the rules of natural justice prior to their appointment of a tribunal.

19. The Petitioner has no personal knowledge of paragraph 18 save to observe that even for the press release the Interveners were sought an input from the complainant.

20. Save that in both cases the Petitioner was denied leave to proceed paragraphs 19, 20 and 21 are admitted.

21. Save that the Petitioner avers that despite MC No. 111/16 and SCA 33/17 he is still without a remedy as he has not been heard on the process leading to the appointment of the Tribunal of Inquiry which he avers was patently not fair, proper or legal or constitutional paragraphs 22 and 23 are admitted.

22. Paragraphs 24 and 25 are not within the knowledge of the Petitioner and cannot be denied or admitted.

23. Paragraphs 26 and 27 are specifically denied. The Petitioner avers that based on all of the above it is obvious that the Interveners failed to discharge their responsibility in accordance with the Constitution and if their reputation, and their integrity was injured that was caused entirely by the Interveners' action, *volunti non fit injuuria*, as disclosed in the above paragraphs.

**Decision of the Constitutional Court**

62. A unanimous decision of the Constitutional Court was given on 26th June 2018 in case – CON-00-CV-CP-0003-2017, *Duraikannu Karunakaran v The Constitutional Appointment Authority & ors.* The Constitutional Court found that the appointment of the Tribunal of Inquiry was in accordance with the provisions of the Constitution and the law and it dismissed the Petition. It is against that decision that the Petitioner, now Appellant, filed this appeal.

**The Appeal**

63. The Appellant appeals to this Court against the whole of the decision of the Constitutional Court, setting out 8 Grounds of Appeal and sought the following reliefs from this Court:

(a) Reversing the decision of the court below and granting the remedy sought before the Constitutional Court ; and

(b) Costs in this Court and the Court below.

**Grounds of Appeal**

**Ground 1**

64. The finding of the Constitutional Court that *the CAA merely sifts through the complaints and send it onto the next stage if it finds that the complaints are such that fall within the two grounds for removal under article 134 (1) (a)* is an erroneous interpretation of the law, which led to a flawed process of adjudication.

**Ground 2**

65. The finding of the Constitutional Court that *"we note en passant, that by letter dated 12th October, 2016 the CAA informed the petitioner of the complaint against him and invited him to answer the specific allegations and lodge a response to the Secretary of the Tribunal within 21 days"* to the extent that it forms part of the reasoning of the Constitutional Court to arrive at its conclusion, is devoid of rationale as it fails to import in the said reasoning

that the Tribunal had already been set up by the time of the said letter dated 12th October, 2016.

**Ground 3**

66. The Constitutional Court erred in its evaluation of the petition before the Court by proceeding to a finding as to whether or not there was an infringement of the petitioner right to a fair hearing, which is irrelevant as I is not the substance of the petition and neither was it pleaded nor found in the remedies sought.

**Ground 4**

67. The Constitutional Court failed to adjudicate on the contravention and he remedy pleaded in the petition, that there was a contravention of article 134(2) of the Constitution, preferring instead to find that right to a fair hearing was not violated.

**Ground 5**

68. The conclusion of the Constitutional Court that there has not been a violation of the petitioner's right to a fair hearing is defective and ultra petita, as a result of which the judgment fails to address the pleadings and prayers in the petition and is therefore flawed on the merits and the law.

**Ground 6**

69. The Constitutional Court failed to apply the proper rules of interpretations and erroneously preferred instead the dictionary meanings of the word "*consider*" used in article 134(2) of the Constitution.

**Ground 7**

70. The pronouncement of the Constitutional Court that *"we are intrigued by the petitioner and 1st respondent's concerted approach and their stance of complete agreement with each other regardless of the merits of the contentions"* lacks judiciousness and weighs the pleadings against the petitioner contrary to a rational process of adjudication, which should

have found corroboration in favour of the petitioner.

**Ground 8**

71. The court erred in failing to apply the Latimer Principle to which Seychelles is a party and signatory and consider other International Instruments which has specific application in respect of the interpretation of the word "*consider"* in the particular context of the Constitutional provision, where the word is used.

**The issues**

72. I find that all the grounds of appeal are interlinked and/or fall into 2 broad categories.

Grounds 1, 2, 6, 7 & 8 deal with the word "consider".

Grounds 3, 4, & 5 deal with right to fair hearing being referred to by the Constitutional Court as ultra petita.

Under grounds 1, 2, 6, 7 & 8 –regarding to the word "consider" - the authorities cited and in consideration of the facts before this Court, those grounds fail or are without merit.

On grounds 3, 4 & 5 on the Court having considered the right to fair hearing and it is found that it was *ultra petita* the Petition. It was implied in the arguments below and in any event it does not affect the *ratio decidendi* of the judgment. In the circumstances the judgment was a proper application and interpretation of the Constitution in Article 134(2).

**The Law**

73. I now look specifically at the Article of the Constitution which is relevant here.

Article 134(2) reads as follows:

*"Where the Constitutional Appointments Authority considers that the question of removing a Justice of Appeal or Judge from office under clause (1) ought to be investigated –*

*(a) the Authority shall appoint a tribunal consisting of a President and at least two other members, all selected from among persons who hold or have held office as a Judge of a court having unlimited original jurisdiction or a court having jurisdiction in appeals from such a court or from among persons who are eminent jurists of proven integrity; and*

*(b) the tribunal shall inquire into the matter, report on the facts thereof to the Authority and recommend to the President whether or not the Justice of Appeal or Judge ought to be removed from office."*

74. The material words there, in the introductory part are – *"considers."* and *"ought to be investigated."* And in 134(2) (a) *"shall appoint a tribunal consisting of"* selected distinguished judges or jurists. In 134(2) (b) we have the words –*"the tribunal shall inquire into the matter, report on the facts thereof."*

75. It is clear from these words and sequence of their placement, that the two key and separate elements are the word *"consider"* separated and followed by the word *"inquire"* into the matter, report on the facts thereof.

76. The roles and limits of the two bodies, the Constitutional Appointments Authority and the Tribunal could not be clearer. The investigating and inquiring is the domain of the Tribunal, more so as it requires certain caliber of persons to be qualified to be its members. I take judicial notice that the CAA as then constituted was comprised of laymen, which is particularly fact conceded by the Appellant in his affidavit

77. The other material Article in the context of this case is Article 142(6) which reads –

*The Constitutional Appointments Authority may regulate its own proceedings and may act notwithstanding one vacancy in its membership.*

78. On the application and interpretation of Aticles 134(2) I considered the literal, plain and simple meaning and the principles of the interpretation under the Constitution, particularly in its Schedule 2 at clause 8(a) –

> *"For the purpose of interpretation –*
>
> *(a) the provisions of this Constitution shall be given their fair and liberal meaning."*

79. The leading authorities in the application of such articles relating to removal of Judges or closer to it, are found in the following cases:- ***Rees v Crane, 1994, Meerabux v Attorney General, Belize, 2001, President Court of Appeal v Prime Minister, Lesotho, 2014, Judicial service Commission of Kenya v Mutava 2015.***

80. The requirement and extent of natural justice and fair practice according to the said authorities, essentially deal with it at its application at the initial stage of proceedings for removal.

81. Among the said authorities, I pick out what is pertinent, what is common to our situation here and what is distinguishable. The authorities cite many other authorities which I need not cite here and distinguish depending on circumstances of the case and the nature of the situation.

82. First and foremost I take judicial notice of the fact that complaints had been made against the Appellant prior to the one at hand. The Appellant with the mediation and presence of Fernando JA sought to remedy the situation by seeking audience with the Chief Justice when he apologised. It is to be noted that these complaints were filed before the CAA as early back as 2015. When the Appellant apologized, the Chief Justice withdrew the complaints. However, the Appellant continued to behave in a manner that prompted the Chief Justice to invoke Article 134 later on. Being aware of what had transpired between the Appellant and the Chief Justice, when further allegations were presented to the CAA,

the latter considered it just to have the matter be investigated by the tribunal. The tribunal report of August 2017 bears evidence to this as it is stated in a number of paragraphs, recognizing that there was long standing acrimonious and protracted relationship between the Appellant and the Chief Justice.

83. The Appellant relies heavily on the cited cases of ***Evans Rees v Richard Alfred Crane [1994] 2AC 173*** **and** ***George Meerabux v the Attorney General & the Bar Association of Belize [A.D 2001]***. These two cases can be distinguished from the instant case. What we have here is not a constitutional or administrative body comprised of eminent jurist but a body that is only mandated to take complaints, form an opinion prima facie as to whether an investigation needs to be instituted. That been said, the very case of ***Rees*** recognizes the following and is stated on page 192 of the case;

> *"In considering whether this general practice should be followed the courts should not be bound by rigid rules. It is necessary to have regard to all circumstances of the case…there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case…"*

> *"it is clear from the English and Commonwealth decisions…that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer to them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later…"*

84. In the case of ***Judicial Service Commission v Mbalu Mutava & another [2015] eKLR,*** I find that the following excerpt is very relevant to the case at hand

> *"…it must evaluate the veracity of the allegations made against a judge to satisfy itself prima facie that it discloses grounds for removal of a judge and that the*

*complaint merited forwarding to the next stage; that the JSC is not required to make definitive findings whether the allegations against the judge have been proved; failure to accord the judge an opportunity to cross-examine witnesses does not amount to a breach of rules of natural justice as that would usurp the jurisdiction of the tribunal where the actual hearing takes place…"*

85. Furthermore, it was stated;

> *"To suggest that the Commission ought to conduct a hearing, at which oral evidence is presented, tested through cross-examination and a decision reached is to render redundant the tribunal that may be appointed at the end of the spectrum and subject the judge against whom the petition has been presented to double jeopardy. The Commission only acts as a sieve, a screening device and applies a different standard of proof (prima facie) from that of the tribunal."*

86. The rule of law and principle of fair hearing are universal, however, it ought to be born in mind that its application around the word is determined by the case itself and the circumstances surrounding the case. Tucker CJ in *Russel v Duke of Norfolk (1949) 1 AR 109, 118 f*amously said −

> *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth…."*

87. Again, the sentiment reflected above is re-echoed in the case of *President of the Court of Appeal (Rambodibedi) v The Prime Minister & Ors [2014] LSCA 1 (Lesotho) at paragraph 20*

> *"the principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that*

*the one- size fits all approach is inappropriate, has been explicitly recognized by the highest courts in England…this means, as I see it, that the strict rules of the audi principle are not immutable.*

88. What then are the circumstances in this case?

1. It is clear from the facts that there was a long standing hostile and strained relationship between the Chief Justice and the Appellant which was apparent to many.

2. It was not hidden as there were various and particular ventilations of the same, some even in the presence of judges at judges meetings.

3. Verbal threats, some even manifested in the Chambers of the Chief Justice.

4. An earlier complaint was made to the CAA and the Appellant made efforts to resolve the situation by apologising and the Chief Justice withdrew the complaints. However, what was thought to be an issue which had been cleared became even more hostile later. This prompted the Chief Justice to seek the intervention of the CAA.

5. The CAA being aware, took cognizance of the complaints, sent them to the Appellant to see the complaints against him and informed him that the tribunal would inquire into the matter.

6. The Appellant's Counsel sought further and better particulars of the complaint indicating that he required clarification to better address the complaints filed against him. This is found in Annexure of the Tribunal Report of August 2017.

7. The CAA by virtue of Article 134 (2) of the Constitution is incompetent to conduct any inquiry as that would be tantamount to usurping the role of the Tribunal. The CAA need only to take cognizance of the complaints and on

being satisfied prima facie that it discloses grounds for investigation, the CAA has to refer the matter to the tribunal which will then be required to conduct a full hearing of the said complaints.

8. The CAA, as then constituted, had no member who was legally trained (the position in Seychelles is different compared to many jurisdictions that have an initiating body comprised of high ranking and distinguished legal personnel, like the Governor General, the Prime Minister, the President and judges) and as such, I find that the CAA as then constituted was incompetent to carry out any inquiry involving a long standing judicial officer. This was to be the preserve of a highly qualified panel as laid out in Article 134(2) (a) of the Constitution.

89. The learned Judges of the Constitutional Court did state and I quote;

> "*We have considered all the cases mentioned above but do not find any which would lend support to the contention of the Petitioner (now Appellant) as the powers and authority of the Constitutional or administrative bodies in question varied considerably from the CAA. The closest we could actually get was the case of the President of the Court of Appeal (Rambodibedi) v The Prime Minister & Ors (Lesotho) and Judicial Services Commission v Mr Justice Mbalu Mutava and Attorney General."*

It is clear that the learned judges below considered the relevant Constitutional provisions and authorities applicable to this case.

90. It is also to be noted that the issues raised in these grounds of appeals were dealt with in this very Court in a judgment given 14 April 2017 by Domah (D. ***Karunakaran v The Constitutional Authority SCA 33/2016***. It is clearly stated in that case that it was not the duty of the CAA to make an inquiry. That duty was reserved for the Tribunal as the competent body to do so. The Judgment extensively gives adequate reason why the Constitution of the Republic deemed it prudent to let the inquiry stage be unertaken by a body that was competent to carry out the inquiry.

91. Furthermore as an *obiter* the right to fair hearing in Article 19(7) refers concisely to *any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.*

92. The Constitutional Appointments Authority has no power to determine the existence or extent of any civil right or obligation.

93. This is a case of a complaint made against a Judge of the Supreme Court for misbehavior under Article 134(1) of the Constitution submitted to the Constitutional Appointment Authority (referred herein as CAA) who considered the matter ought to be investigated by a Tribunal of Inquiry.

94. The Judge in that case, now Appellant here contests the decision of the CAA, filed a petition before the Constitutional Court to declare that the appointment of the Tribunal by the CAA to investigate the Appellant as unconstitutional, null and void. The Tribunal conducted an Inquiry to which the Appellant appeared 3 times raising preliminary issues and then discontinued participation.

95. The material paragraphs 6 & 7 pleaded per the petition read as follows:-

> "6. *Pursuant to the abovementioned complaint by the Chief Justice, the 1st Respondent arbitrarily and unconstitutionally, without making an assessment of the complaint, in order to consider whether the question of removing a Judge ought to be investigated as required by Article 134(2) of the Constitution, appointed a Tribunal."*
>
> "7. *The Petitioner avers that the appointment of the Tribunal is unconstitutional and it was made in contravention of Article 134(2) of the Constitution,*

*without proper consideration as mentioned in para 5 above."*

I believe reference to paragraph 5 was a mistake and intended to be paragraph 6.

96. The Constitutional Court below in its judgment at paragraph 44 and 46 concluded as follows:-

> *"[44] We therefore conclude that the CAA has very limited decision-making powers which are to consider whether in respect of complaints before it a Tribunal of Inquiry ought to be appointed or not. The CAA does not determine the existence or extent of a civil right or obligation which would require it to ensure that it abide by the principle of audi alteram partem. Since the CAA is not conferred by law to investigate, the proceedings per ce are not conducted before the CAA and the right to a fair hearing does not arise at the receipt of a complaint*."

> "[46] *We therefore find that the CAA was not under any legal requirement to hear the Petitioner before or at the time it met to consider whether a Tribunal of Inquiry needed to be set up to hear the complaint. Therefore the Petitioner's right to a fair hearing or the doctrine of audi alteram partem were not violated by the CAA. The appointment of the Tribunal of Inquiry was therefore in accordance with the provisions of the Constitution and the law."*

97. The Appellant has thus appealed that decision, on 8 grounds which are set out above.

98. Before the Appeal could be heard or determined, on the 28th of March 2019, the Appellant resigned with immediate effect from his post as Judge of the Supreme Court in accordance with Article 131 (1) (c) read together with sub clause (2). No reasons were given for the resignation.

99. As a result of the resignation of the Appellant, the 2nd Respondent in the case (the Attorney General) submitted a preliminary objection to the appeal. The objection read as follows:

> *"Since the Appellant has resigned in the office as a Judge and no final decision has been taken by the President for his removal, such a Petition and Appeal serve no purpose since the contravention or likely contravention of the Appellants Constitutional rights has now been rendered nugatory."*

100. What I gather from the above statement is that there is no point in hearing this appeal as the matter is moot in that the Appellant had already resigned and thus, no matter what this Court decides, it will not affect the status quo of the Appellant. In essence the decision of this Court will merely be an academic exercise. The substratum of the Appellant's case was against his removal as a judge and in the present circumstance he is no longer Judge, hence there is no situation of removal.

101. It is said that a suit, petition inter-alia, becomes an academic exercise if the subject matter is not justiciable. Essentially, in such a situation, the Court addresses its mind to whether the Court possesses the ability to provide adequate resolution of the dispute; where a court feels it cannot offer such a final determination, the matter is not justiciable. A court cannot competently entertain a suit that has no "live and genuine issues" in controversy for its determination. (**See *Odedo V INEC (2008) 17 NWLR (Pt. 1117) 554 at 660*.)**

102. I find pertinent to remark that at the hearing of this appeal, the Appellant's Counsel argued that although the removal issue was no longer live, the Appellant wanted to pursue the matter in order to clear his name and also his right to dignity. It is to be noted however, that these two issues were not part of the pleadings below nor argued then, nor do the present grounds of appeal address these issues. It was the Appellant's submission that the Appeal ought not to be dismissed based on the preliminary objection brought forth. It is significant to bear in mind that the Appellant waived his right when the Tribunal was conducting the inquiry. He chose not to appear before the Tribunal to address any issues raised there that could possibly affect his reputation and dignity as claimed now.

103. The Appeal at hand concerns the remedy sought in the Constitutional Court below, which was and is to make a declaration that the CAA acted unconstitutionally in appointing the Tribunal to inquire into the allegations brought before it. This is a subject that goes beyond the Appellant and his desire to clear his reputation. It is not every day that a Judge is found to be wanting in how he/she manages his office and as such I find that this Appeal must go on to provide clarity on how the law and procedures are to be applied with regards to Article 134 of the Constitution in Seychelles. The grounds of appeal raised pertinent issues for determination. This Appeal will serve a useful purpose in providing Jurisprudence on this very delicate matter.

104. Returning to the merits of the case, despite the 8 grounds of appeal as worded I consider the central issue is expressly pleaded in paragraph 6 & 7 of the Petition already referred to and I consider the key words there being ***"without making an assessment of the complaint".***

105. As to assessment, it is easily answered from the Affidavit of one of the Members of the CAA then and now Marie-Nella Azemia dated 2nd October 2017 tendered by the 1st Respondent at the pleadings below as **Exhibit AG6** in the following paragraphs:

> *"Para. 4: The 1st Respondent, as constituted at the time, did receive a letter of complaint and supporting documents from Chief Justice Mathilda Twomey against the Petitioner.*
>
> *Para. 5: I do recall a meeting when the members of the 1st Respondent, as then constituted, did consider the letter from the Chief Justice and the accompanying documents. I cannot with any certainty state the date of that meeting.*
>
> *Para. 6: I did sign a set of minutes dated 3rd October 2016 agreeing to the appointment of a Tribunal of Inquiry."*

106. The words *"did consider the letter from the Chief Justice and the supporting documents and accompanying documents"* are clearly and implicitly an assessment. This is consistent with the pleadings in para. 7 of the Interveners' Reply to the 1st Respondent's Answer to the Statement of Demand at F1 of the records, which reads at para. 9 –

> *"The process of consideration of the complaints against the Petitioner commenced with the oral complaint made at the meeting of the 1st Respondent (comprising of the 1st and 2nd Interveners) and the chief justice which lasted for about 3 and a half hours on 29 September 2016 and a subsequent meeting of all three members of the 1st Respondent after receipt of the written complaint and supporting documents dated 30 September 2016 which lasted for about two and a half hours. A total of 6 hours was solely dedicated to the consideration of the said complaints."*

107. It is more than clear from the above that an assessment was indeed made by the CAA as was then constituted before referring the matter to a Tribunal of Inquiry.

**Decision**

108. In conclusion, I find that these grounds of appeal have no merits and therefore are accordingly dismissed in its entirety.

**F. MacGregor (PCA)**

Signed, dated and delivered at Ile du Port on 21 June 2019