IN THE SEYCHELLES COURT OF APPEAL

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

Constitutional Appeal SCA CP 04/2018

(Appeal from Constitutional Court Decision CP 03/2017)

Mr. Duraikannu Karunakaran	Appellant

Versus

The Constitutional Appointments Authority	First Respondent
The Honourable Attorney General	Second Respondent
Marie-Ange Houareau	First Intervener
Jane Carpin	Second Intervener

Heard: 23 April 2019

Counsel: Mrs. A. Amesbury for the appellant

Mr. A. Derjacques for the first respondent

Mr. D. Esparon for the second respondent

Ms. A. Madeleine for the first and second Interveners

Delivered: 21 June 2019

JUDGMENT

F. Robinson J.A and E. Carolus J

1. In dealing with the issues raised in this appeal, we keep in mind that the objectivity of our approach itself may incidentally be in issue. It is, thus, in a spirit of disconnected objective analysis, which is a distinguishing feature of judicial process that we endeavour to find answers to the issues which arise for consideration. We have discharged our duty faithfully bearing in mind the oath of office we have taken when we assumed the judicial office which we hold.

Preliminary point

2. The preliminary point was raised in April 2019, in the written submissions of the second respondent and the Interveners. On behalf of the second respondent, which point also apply, in substance, to the point raised on behalf of the Interveners, it has been briefly submitted that there is no live issue given the appellant's termination of his appointment under Article 131 (1) (c) of the Constitution of the Republic of Seychelles (the *"Constitution"*), on the 28 March 2019. We did not consider the preliminary point because all Counsel were ill prepared to argue the point.

Background to the Constitutional Petition

3. Mr. Duraikannu Karunakaran, the appellant, is a former Judge of the Supreme Court of Seychelles, appointed on the 8 March 1999, under Article 127 of the Constitution. The appellant terminated his appointment, before the hearing of the appeal.

4. By a letter, dated the 7 October 2016, the Constitutional Appointments Authority, the first respondent, notified the appellant that certain complaints of misbehaviour, contrary to Article 134 (1) of the Constitution, have been made against him by the Chief Justice of Seychelles. By the same letter the first respondent informed the appellant that it is of the view that it is necessary to inquire into his ability to perform the functions of the office of Judge, that it has appointed a tribunal of inquiry under Article 134 (2) (a) and (b) of the Constitution, and that the tribunal of inquiry will formally notify him of the substance of the complaints.

5. On the 10 October 2016, the President of the Republic of Seychelles suspended the appellant from performing the functions of a Judge, pursuant to Article 134 (4) of the Constitution.

6. The substance of the complaints, made against the appellant, was communicated to him by a letter, dated the 12 October 2016, signed by all three members of the first respondent, including Mrs. Marie-Ange Houareau and Mrs. Jane Carpin, the first and second Interveners respectively, (collectively the *"Interveners"),* on the 11 October 2016. The first Intervener is the former chairperson of the first respondent and the second Intervener is a former member of the first respondent, who both resigned from membership of the first respondent on the 24 April 2017. Mrs. Marie-Nella Azemia was appointed as a member of the first respondent on the 27 May 2016.

7. We reproduce the relevant pleadings of the parties in this case, in view of the issues which arise for consideration.

8. On the 25 May 2017, the appellant filed a Constitutional Petition accompanied by an affidavit of the facts in support thereof in the Registry of the Supreme Court under Rule 3 (1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, enabled under Article 136 (2) of the Constitution.

9. Paragraph 4 of the Constitutional Petition averred that: *"[t]he Petitioner is currently the subject of a Tribunal of Inquiry […] 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".*

10. Paragraph 5 of the Constitutional Petition averred that: *"*[a]*s a result of the enquiry mentioned in paragraph 4 above the President of the Republic suspended the Petitioner*

from performing the function of Judge with immediate effect and notified the Petitioner accordingly by letter dated 10th October 2016".

11. Paragraphs 6 and 7 of the Constitutional Petition contained the grievances of the appellant, 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. 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." (sic)*

12. Paragraph 8 of the Constitutional Petition averred that the interest of the appellant is being affected and continues to be affected by the said contravention mentioned in paragraph [7] of the Constitutional Petition, repeated in paragraph [11] hereof.

13. The appellant is seeking the following relief from the Constitutional Court:

> *"1. granting leave to file this Petition out of time.*
>
> *2. declaring the appointment of the Tribunal by the 1st Respondent is unconstitutional, null and void ab ibnitio.*
>
> *3. granting such other remedy under the Constitutions as this Honourable Court deems fit."*

14. The *FIRST RESPONDENT'S ANSWER TO CONSTITUTIONAL PETITION CP 3 of 2017*, dated the 20 October 2017, filed in the Registry of the Supreme Court, on the 23 October 2017, *(the "first respondent's answer to petition"),* accompanied by an affidavit in support thereof, contended, *inter alia*, that the constitutionality of the consideration of the complaints made against the appellant is called into question. In support of the

aforementioned contention, the first respondent averred in the *first respondent's answer to petition*, that:

> *"5.* [i]*t is admitted, as averred 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 further avers that:*
>
> *(i) The substance of the Charge was only put to the Petitioner by the 1st Respondent (as then 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;*
>
> *[…];*
>
> *(vii) the subject matter of the complaints themselves was never given any proper consideration by the 1st Respondent (as then constituted);*
>
> *[…]".*

There is no denial of the rest of the averments contained in paragraph [6] of the Constitutional Petition, repeated in paragraph [11] hereof; they must, therefore, be taken to be admitted[1]. The first respondent's answer to petition left the determination of the allegations made in paragraphs [7] and [8] of the Constitutional Petition, repeated in paragraphs [11] and [12] hereof, to the Constitutional Court.

15. The issue raised, by the Honourable Attorney General, the second respondent, in its *Answer to Petition*[2], is whether or not the first respondent, at the stage of consideration of the question of removing a Judge from office, should first give an opportunity to the aggrieved Judge to be heard on the complaints. The second respondent relied on Article

[1] *See Byrd v. Nunn (1877), 5 Ch. D.781; d. 284, C.A.; Green v. Sevin (1879), 13 Ch. D. 589; Collette v. Goods (1878), 7 Ch. D. 842.*

[2] *Answer to Petition, dated the 5 September 2017, filed in the Registry of the Supreme Court on the same date.*

134 (2) of the Constitution read with Article 142 (6) of the Constitution for the proposition that: *"[…] 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.".*

16. The Interveners were granted the right to intervene[3] by a majority opinion of the Court of Appeal of Seychelles only in relation to the appellant's contentions contained in the Constitutional Petition. In that regard, we reproduce paragraph [11] of the judgment of

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[3] With respect to the characteristics of voluntary intervention, we read the following notes from ***Dalloz Rèpertoire Pratique De Législation de Doctrine et de Jurisprudence Tome Septième Impôts – Malt, 1915, Intervention***, at notes 6, 7, 8, 9, 10 and 11:

"Sect. 1er. — De l'intervention volontaire

[…]

§2. — Caractères de l'intervention.

6. — 1o L'intervention n'est pas introductive d'instance. —Qu'elle ait pour objet une demande ou une defense, l'intervention n'est jamais introductive d'instance […].

7. —2o L'intervention est une demande principale par rapport à l'intervenant et une demande accessoire par rapport aux parties qui sont déjà en cause […].

8. Envisagée au regard des parties en cause, l'intervention a le caractère d'une demande accessoire ou incidente à l'instance principale […].

[…].

9. Le caractère accessoire de l'intervention entraine les consequences suivantes : […].

*10. —**3o L'intervention doit avoir un rapport direct avec la demande principale : elle ne peut être tender à une fin différente** (Orléans, 22 août 1816, R. 42 ; Limoges, 13 mai 1867, D.P. 67. 2. 81 ; Paris, 10 févr. 1882, S. 59 ; Trib. Civ. Seine, 18 juin 1885, S. 50, Le Droit du 19 juin 1885; Amiens, 9 janv. 1890, D.P. 91. 2. 7).*

*11. **Mais l'intervenant est fondé a élever, dans son intérêt personnel, des pretentions qui se rattachent étroitment aux conclusions prises par les parties et à demander à son propre profit la solution solicitée par le demandeur** (trib. Civ. Lille, 19 mai 1892, D.P. 93. 2. 311).*

(Emphasis supplied)

the Constitutional Court, dated the 26 June 2016, (the *"Judgment of the Constitutional Court"*):

> *"11.[…]. The Interveners were granted the right to intervene by judgment of the Court of Appeal. In the words of Renaud J A at paragraphs 32 and 33 of his judgment:*
>
> *"It is my considered judgment that the Intended Interveners are entitled to be heard in the pending Petition for the simple reason that they ought not to be denied the opportunity to explain how, what, and when they considered the complaint against the Petitioner prior to appointing the Tribunal […].*
>
> *In the interest of justice and fair hearing. I exercise my inherent discretion and grant the Intended Interveners 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.""*

17. In the light of the appellant's contentions contained in the Constitutional Petition and paragraphs [32] and [33], referred to in paragraph [16] hereof, and the notes referred to in footnote number 3 hereof, we consider the following paragraphs of the *STATEMENT OF DEMAND, (*the *"Statement of Demand"),* dated the 10 October 2017, filed in the Registry of the Supreme Court, on the 10 October 2017, to be relevant. We mention that the Interveners filed evidence in support of the allegations contained in the Statement of Demand, separately. In relation to the impugned consideration, the Statement of Demand averred the following:

> *"1. The 1st Intervener is the former chairperson and the 2nd Intervener is a former member of 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. *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 conduct of the Petitioner as a Judge. A copy of the said letter is kept on file at the premises of the 1st Respondent.*

5. *On 30th September 2016, the 1st Respondent, then 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.*

6. *The said letter of 30th 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.*

7. *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.*

8. *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.*

9. *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*

are *kept on the Tribunal file kept at the premises of the 1st Respondent.*

10. 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.

11. 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.

[…].

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

[…].

22. The interveners aver that in view of the matters averred under paragraphs 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 injure the reputation and integrity of the Interveners.

WHEREFORE the Interveners pray this Honourable Constitutional Court to be pleased not to grant the relief sought by the Petitioner and to that extent to dismiss the Petition.

[…]."

18. We now consider the *PETITIONER'S ANSWER TO INTERVENERS STATEMENT OF DEMAND*, dated the 6 November 2017, filed in the Registry of the Supreme Court, on the same date, (the *"petitioner's original answer"*), accompanied by an *AFFIDAVIT* in support thereof.

19. The petitioner's original answer averred:

> *"8. Paragraph 7 of the Statement of Demand is denied. The Petitioner avers that it is correct that Article 142 (6) has given power to the 1st Respondent to regulate its own proceedings. Undoubtedly, the Constitution has given this power to the 1st respondent on an implied condition that it should be exercised to accord with the provisions of the Constitution by allowing the complainant to process the setting up of the Tribunal before the complaint is lodged and without properly considering the question of removing the Petitioner from office ought to be investigated, as such due process of "consideration" is mandatory under this Article."*
>
> *9. Paragraph 8 of the Statement of Demand is categorically denied. The Petitioner avers that the entire process leading to the appointment of the Tribunal was not fair, proper, legal or constitutional having regard to all the facts and circumstances surrounding the appointment.*
>
> *10. Paragraph 9 of the Statement of Demand is categorically denied. The Petitioner avers that all minutes in the alleged "consideration stage" of the complaint were altered repeatedly by the 1st Intervener on dates subsequent to the alleged meetings obviously, with intent to cover up the illegal and unconstitutional acts behind the setting up of the Tribunal and appointment of its members.*
>
> *11. The Petitioner avers that the correctness of the dates and contents of three sets of minutes in the file as submitted by the 1st Respondent are not genuine for obvious reasons.*
>
> *12. The Petitioner further avers that the First Respondent (as then constituted) had on 29th September 2016 already identified the members who were to sit on the Tribunal even before the complaint was lodged, let alone the fact that it was done before the alleged meetings and the alleged consideration of the complaint.*
>
> *[…].*
>
> *17. As a result of all the above, the Petitioner avers that the process at the "consideration stage" of the complaint brought against the Petitioner is illegal, improper and unconstitutional.*

20. Paragraph 10 of the Statement of Demand is categorically denied. The Petitioner avers that Article 134 (2) of the Constitution obligates the 1st respondent to consider whether the question of removing the Petitioner from office ought to be investigated. This constitutional obligation of due process is entrenched in the said article as it imports a critical and evaluative function to be performed by the 1st Respondent as a filtering mechanism which is a constitutional prerequisite to ensure false or flimsy or vexatious or malicious and biased complaints are dismissed and whereas only matters that are credible and have legal and evidential foundation should be forwarded to the tribunal for investigation.

[…].

21. Paragraph 11 of the Statement of Demand is denied. The Petitioner avers that the 1st Respondent's decision was hastily and arbitrary as evidenced by emails of 2nd and 3rd October 2016 which mention that the tribunal should be set up 'before the President steps down on 16th October 2016' and the decision needed to be taken 'quickly' respectively.

[…].

Wherefore the Petitioner prays this Honourable Constitutional Court to be pleased to dismiss the Statement of Demand of the interveners, discharge the interveners from the present proceedings, and grant the reliefs sought by the Petitioner in the main petition and render justice."

20. The *1st RESPONDENT'S ANSWER TO STATEMENT OF DEMAND, (the "first respondent's original answer")*, dated the 20 October 2017, filed in the Registry of the Supreme Court on the same date, accompanied by an affidavit in support thereof averred the following:

"7. Paragraph 7 of the Statement of Demand is denied. The Article of the Constitution under which the Constitutional Appointments Authority may regulate its own proceedings is Article 142 (6). The 1st Respondent further avers that the subject matter of the complaints themselves was never given any proper consideration.

8. Paragraph 8 of the Statement of Demand is denied. The 1st Respondent avers that the process leading to the appointment of the Tribunal of Inquiry was not fair, proper or legal.

[…].

18. The 1st Respondent avers that, given the nature and complexity of the numerous complaints brought by Chief Justice Mathilda Twomey against the Petitioner no proper consideration of the complaints could have been made in a time frame of two and a half hours as the recorded minutes of 3 October 2016 profess was done.

20. Paragraph 10 of the Statement of Demand is denied.

21. The 1st Respondent avers that the elements of natural justice and procedural fairness are required and must be adhered to throughout the determination process under Article 134 (2), including at the preliminary stage of consideration of a complaint by the Constitutional Appointments Authority. […].

[…].

23. Paragraph 11 of the Statement of Demand is denied. The 1st Respondent avers that the requirements of natural justice and procedural fairness were lacking in the process that the 1st Respondent (as then constituted) undertook from the 29th September 2016 when it first identified the members of the Tribunal of Inquiry to 11th October when the Press Release was issued.

[…].

25. By reason of the foregoing, the 1st Respondent avers that there was an absence of procedural fairness in the process leading to the appointment of the Tribunal of Inquiry.".

21. We proceed to relate the salient paragraphs of the *INTERVENERS' REPLY TO 1ST RESPONDENT'S ANSWER TO THE STATEMENT OF DEMAND,* dated the 20 October 2017, (the *"Interveners' reply to the first respondent's original answer"*), which averred:

"5. Under paragraph 5, it is averred that the letter of 30th September 2016 was preceded by a meeting between 1st Respondent comprising of the 1st and 2nd Interveners and the Chief Justice, on 29th September from 11:00 am to 2:30 pm held at the premises of the 1st Respondent at La Ciotat. The fact that the said meeting took place on 29th September 2016 between the stated times is to the full

knowledge of Mrs. Lena Pragassen, the secretary of the 1st Respondent.

7. *[…]. The written complaint consisted in the letter of 30th September 2016, and the supporting documents were received and considered by the 1st Respondent (as then constituted) before the decision to appoint the tribunal to investigate the complaints against the Petitioner was taken.*

8. *Under paragraph 6, it is averred that the Chief Justice's complaints against the Petitioner, both oral and written as contained in the said letter of 30 September 2016, and the supporting documents were received and considered by the 1st Respondent (as then constituted) before the decision to appoint the tribunal to investigate the complaints against the Petitioner was taken.*

9. *Under the paragraph 7, it is averred that in regulating its own proceedings pursuant to article 142 (6) of the Constitution the 1st Respondent (as then constituted comprising of the 1st and 2nd Interveners together with Mrs. Marie-Nella Azemia), properly and validly considered the complaints having regard to its mandate under article 142 (2) of the Constitution. 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 six hours was solely dedicated to the consideration of the said complaints.*

10. *Under paragraph 8, the Interveners deny that the process leading to the appointment of the Tribunal was not fair, proper and legal. Interveners maintain that throughout the whole process involving the making, receiving and consideration of the complaint and setting up of the tribunal to investigate the complaints against the Petitioner it acted fairly, properly and legally having regards to its Constitutional mandate under article 134 (2) of the Said Constitution."*

22. *The Interveners filed a STATEMENT OF DEMAND (AMENDED),* dated the 24 November 2017. See the amendments made by the *STATEMENT OF DEMAND (AMENDED)* in bold:

> *"1. The 1st Intervener is the former chairperson and the 2nd Intervener is a former member of 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. Mari Nella Azemia, the 1st and 2nd Interveners 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 […]. 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 Petitioner's unreserved apology and undertaking to work with her as the 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 behaviour*** *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 1:00 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* ***and enclosures are*** *kept on file at the premises of the 1st Respondent.*

[…].

8. On 30th September 2016, the 1st Respondent, then 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.

9. The said letter of 30th 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.

10. 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.

11. 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.

12. 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 ***are*** *kept on the Tribunal file kept at the premises of the 1st*

Respondent.

[…].

14. 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.

15. 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.

16. The Petitioner was advised that complaints of misbehaviour 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.

17. 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.

[…].

27. The interveners aver that in view of the matters averred under paragraphs 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 […].

[…]."

WHEREFORE the Interveners pray this Honourable Constitutional Court to be pleased not to grant the relief sought by the Petitioner and to that extent to dismiss the Petition."

23. We now consider the *PETITIONER'S ANSWER TO AMENDED STATEMENT OF DEMAND* dated the 15 February 2018, filed in the Registry of the Supreme Court, on the

same date, (the *"petitioner's amended answer"*), accompanied by an *AFFIDAVIT* in support thereof.

24. The petitioner's amended answer averred:

> *"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 24th November 2017. The said original answer of the Petitioner, the affidavits and all other exhibits attached thereto, mutatis mutandis, is adopted herein, which may read as part of and in addition to the answer filed hereunder to the Amended Statement of Demand.*
>
> *[…].*
>
> *Answer on the merits of the Amended Statement of demand (ASOD)*
>
> *[...].*
>
> *2 In answer to paragraph 3 the Petitioner avers that pursuant to Article 134 (2) the 1st 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****…*
>
> *[…].*
>
> *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 a nullity.*
>
> *[…].*
>
> *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*

correspondences 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) (b) is the CAA mandated to "unanimously resolve" that the question of removing the Petitioner from office ought to be investigated. Neither is the 1st Respondent as previously constituted including the interveners, required to "unanimously decide"[…].*

[…].

[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.*

[…].

Wherefore the Petitioner prays this Honourable Constitutional Court to be pleased to dismiss the Amended Statement of Demand of the Interveners, discharge the Interveners from the present proceedings, and grant the reliefs sought by the Petitioner in the main petition and render justice."

25. The *1st RESPONDENT'S ANSWER TO THE AMENDED STATEMENT OF DEMAND, (the "first respondent's amended answer"),* accompanied by an *AFFIDAVIT IN ANSWER TO THE AMENDED STATEMENT OF DEMAND IN CP 3 of 2017*, dated the 29 January 2018, adopted the averments made by the first respondent in the first respondent's original answer, save as set out in the first respondent's amended answer.

26. The first respondent's amended answer averred the following matters in answer to the relevant averments contained in the *STATEMENT OF DEMAND (AMENDED):*

"1. Save as set out hereunder, all the 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 avers 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 decision a nullity, which nullified any subsequent process in respect of the Petitioner.

[…].

4. 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 admitted … that the 1st Respondent (as then constituted) received a copy of a letter dated 20th September 2016 from the Chief Justice Mathilda Twomey, paragraph 4 of the Statement of demand is denied. The 1st Respondent avers that the letter of 20th September 2016:

(i) dealt with internal issues within the Judiciary between the judiciary and the Chief Justice and the Petitioner;

(ii) was also copied to the former President James 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 the 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.

5. The 1st Respondent further avers that although the letter of 20th September 2016 enclosed a number of documents, the fact

remains that the said letter also referred to an agreement between the Chief Justice and the Petitioner to meet on 3rd October 2016 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 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.

[…].

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

8. 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.

[…].

11. 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.

[…].

15. Any reference 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 their 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 to 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.

[…].

17. 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.

18. 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 Petitioner was given a fair hearing by the Interveners and whether the rules of natural justice were complied with by the Interveners and 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.

***WHEREFORE** the 1st Respondent prays this Honourable Court to make such order as may be just and equitable in this matter".*

27. The second respondent's answers repeated the points made in the *Answer to Petition*, referred to in paragraph [15] hereof.

The Judgment of the Constitutional Court

28. Upon a careful reading of the Judgment of the Constitutional Court, a three Judge bench of the Supreme Court, we observe that the Constitutional Court considered the main contention raised by the pleadings of the appellant to be:

- whether or not the first respondent's decision to appoint a tribunal without first giving the appellant a right to be heard by the first respondent was unconstitutional and in breach of the *audi alteram partem* principle, under Article 19 (1) and 19 (7) of the Constitution.

The Constitutional Court framed two issues for determination in relation to the aforementioned contention:

> *"i) was the CAA legally obliged to hear the Petitioner before appointing the Tribunal?*
>
> *ii) if the CAA was legally obliged to hear the Petitioner, was any prejudice caused to the Petitioner by the failure of the CAA to hear him at consideration stage, and was that failure fatal in respect of the appointment of the Tribunal?*

29. After having considered the two issues framed for determination, the Constitutional Court made the following findings:

> *"[38] Article 134 (2) separates the role of the CAA and the Tribunal of Inquiry by establishing a two-step procedure; the first one being consideration by the CAA as to whether a Tribunal needs to be appointed and the second step being investigation by the Tribunal after it has been appointed. The CAA has no powers of investigation, it only has powers of consideration. That mandate for investigation is given to the Tribunal which is mandated to look into the complaints made and make a recommendation as to whether or not the Judge concerned should be removed from office. The CAA is only empowered to <u>consider</u> whether the question of removing the Judge <u>ought to be investigated</u>. [Emphasis ours].*
>
> *[39] The Cambridge dictionary defines "consider" as "to think about a particular subject or thing or about doing something or about whether to do something". The Oxford Dictionary defines "consider" as "to think carefully about (something), typically before making a decision". The Cambridge dictionary defines "investigate" as "to examine a crime, problem, statement, etc. carefully, especially to discover the truth". The Oxford dictionary defines "investigate" as "to carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth". The Collins English dictionary defines "investigate" as "to inquire into (a situation or*

problem, esp a crime or death) thoroughly; examine systematically, esp in order to discover the truth".

[40] We are of the firm opinion that the CAA's sole role is to look at the complaints and make a decision as to whether the matter should move forward to the next step being investigation. It is not the role of the CAA to hear the Judge concerned or to come to a decision as to the truth of the complaints. That is for the Tribunal. However, since the CAA regulates its own proceedings, the CAA is not prevented from hearing any person who is the subject of complaints just as it is not obliged to hear the same person. Each case would depend on its own level of complexity. The CAA may request the Judge concerned to comment on the contents of the complaints before deciding to act under Article 134 (2) but where there are 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.

[41] The first step, the consideration stage, is similar to a Judge deciding whether a case should proceed to defence. Is there prima facie evidence that the Defendant should answer the allegations against him? It is not the volume of complaints that is important but the nature of the complaint. The CAA merely sifts through the complaints and sends it on to the next stage if it finds that the complaints are such that they fall within the two grounds for removal under Article 134 (1) being (i) inability to discharge functions of the office or for (ii) misbehaviour.

[…].

[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 se are not conducted before the CAA and the right to a fair hearing does not arise at the receipt of a complaint by the CAA nor at the time does the CAA consider referring the matter to a tribunal.

[…].

[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" "[t]he appointment of the Tribunal of Enquiry was

therefore in accordance with the provisions of the Constitution and the law."

30. Accordingly, the Constitutional Court dismissed the Constitutional Petition and made no order for costs.

Procedure for removing a Judge or Justice of Appeal under the Constitution

31. Article 131 of the Constitution deals with tenure of office of Justices of Appeal and Judges, as follows:

"131(1) Subject to article 134, a person holding office of Justice of Appeal or Judge shall vacate that office –

(a) on death;

(b) if the person is removed from office under article 134;

(c) subject to clause (2), if the person resigns in writing addressed to the President and to the Constitutional Appointments Authority;

(d) in the case of a person who is a citizen of Seychelles, on attaining the age of seventy years;

(e) in the case of a person who is not a citizen of Seychelles, at the end of the term for which the person was appointed;

(f) if the office is abolished with the consent of the person.

(2) A resignation under clause (1)(c) shall have effect on the date on which it is received by the President.

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

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

32. Chapter IX of the Constitution provides for the Constitutional Appointments Authority. It provides for its establishment (Article 139 of the Constitution, refers); its composition (Article 140 of the Constitution, refers) - Article 140 of the Constitution states, *inter alia*, that it shall consist of three members; the qualification for membership (Article 141 of the Constitution, refers); and tenure of office etc., (Article 142, refers).

33. Article 134 of the Constitution deals with the removal of a Justice of Appeal or a Judge from office as follows:

> *"134(1) A Justice of Appeal or Judge may be removed from office only –*
>
> *(a) for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour; and*
>
> *(b) in accordance with clauses (2) and (3).*
>
> *(2) 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.*
>
> *(3) Where, under clause (2), the tribunal recommends that a Justice of Appeal or Judge ought to be removed from office, the President shall remove the Justice of Appeal or Judge from office.*
>
> *(4) Where under this article the question of removing a Justice of Appeal or Judge has been referred to a tribunal, the President may suspend the Justice of Appeal or Judge from performing the functions of a Justice of Appeal or Judge […]".*

34. Article 142 (6) of the Constitution provides:

"142 … (6) The Constitutional Appointments Authority may regulate its own proceedings and may act notwithstanding one vacancy in its membership."

The Appeal

The Grounds of Appeal

35. The appellant dissatisfied with the Judgment of the Constitutional Court, has raised six grounds of appeal against it as follows:

"[2] Ground 1

The finding of the Constitutional Court that the CAA merely sifts through the complaints and sends it into the next stage if it finds that the complaints are such that they 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

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

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's right to a fair hearing, which is irrelevant as it is not the substance of the petition and neither was it pleaded nor found in the remedies sought.

Ground 4

The Constitutional Court failed to adjudicate on the contravention and the 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

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 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

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

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

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 Relief sought

36. The appellant is seeking the following relief from the Court of Appeal:

"(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."

The issues for consideration

37. We have carefully considered the pleadings in this case, the affidavit evidence of all parties in the light of the pleadings, the submissions of all Counsel, the Judgment of the Constitutional Court and the grounds of appeal.

38. The main issues for consideration are:

(i) Firstly, whether or not the Constitutional Court erred in its evaluation of the Constitutional Petition by proceeding to a finding as to whether or not there was an infringement of the appellant's right to a fair hearing under Article 19 of the Constitution.

(ii) Secondly, but still as part of the first issue, whether or not the Constitutional Court failed to adjudicate on the contravention and the remedy pleaded in the Constitutional Petition, that there was a contravention of Article 134 (2) of the Constitution preferring instead to find that the right to fair hearing was not vitiated, (ground 4 of the grounds of appeal, refers).

(iii) Thirdly, whether or not the impugned consideration, by the first respondent, that the question of removing the appellant from office under Article 134 (1) of the Constitution ought to be investigated is not tainted with unconstitutionality.

39. We consider the issues together.

Article 19 of the Constitution: Breach of right to fair hearing

40. The contentions of the appellant are contained in paragraphs [6] and [7] of the Constitutional Petition, referred to in paragraph [11] hereof. As we understand it, the contentions of the appellant are that the requirement of consideration is mandatory, and that the failure of the respondent to comply with that mandatory requirement has rendered the appointment of the tribunal of inquiry unconstitutional. We also remark that

the only particulars of claim were that the first respondent had not assessed the complaints.

41. The appellant strongly contended on appeal that the Constitutional Petition did not raise the issue of a breach of right to fair hearing under Article 19 of the Constitution.

42. Upon a consideration of the appellant's averments in the Constitutional Petition, contained in paragraph [11] hereof, and the written and oral submissions of Counsel offered at the appeal, we have come to the conclusion that the Constitutional Court was wrong to treat the issue raised in the Constitutional Petition as being whether or not the first respondent's decision to appoint a tribunal of inquiry without first giving the appellant a right to be heard by the first respondent was unconstitutional and in breach of the *audi alteram partem* principle, under Article 19 of the Constitution.

43. We, therefore, accept the contention of the appellant that the finding of the Constitutional Court set out in paragraph [46] of the Judgment of the Constitutional Court, repeated in paragraph [29] hereof, is *ultra petita*.

Article 134 (2) of the Constitution: Impugned consideration

44. The crucial issue for determination is whether or not the impugned consideration, by the first respondent, that the question of removing the appellant from office under Article 134 (1) of the Constitution ought to be investigated is tainted with unconstitutionality.

45. Leaving aside for the moment the issue for determination (this issue to be dealt with below), we focus on the impugned consideration by the first respondent in the light of the Judgment of the Constitutional Court.

46. The Constitutional Court's determination of the issue of whether or not the appellant was afforded a fair hearing, under Article 19 of the Constitution, involved a discussion of the consideration, by the first respondent, that the question of removing the appellant from office, under Article 134 (1) of the Constitution, ought to be investigated. In spite of the

best intention of the Constitutional Court, we fail to understand why it interpreted the word *"consider"* by reference to its ordinary dictionary meaning. In the case of *James Alix Michel and ors v Viral Dhanjee and ors, Civil Appeal SCA 5 and 6 of 2012*[4], the majority judgment of the Court of Appeal stated: *"if one were to resort to rules of interpretation one must look at those laid out at section 8 of Schedule 2 to the Constitution. For the purposes of interpretation — (a) the provision of this Constitution shall be given their fair and liberal meaning; (b) this Constitution shall be read as a whole; and (c) this Constitution shall be treated as speaking from time to time."* Article 134 (2) of the Constitution speaks of *"considers"*. Contrary to what the Interveners may argue, we find that, on a proper construction of Article 134 (2) of the Constitution, the Constitutional Court should not have interpreted the word *"consider"* by reference to its dictionary meaning. Words such as to *"look"* at the complaints or to *"merely sifts through the complaints"* clearly do not serve the purpose of Article 134 (2) of the Constitution. (Emphasis ours)

47. We consider the approach of the Belizean Supreme Court in the case[5] of *George Meerabux v. The Attorney General of Belize and the Bar Association of Belize, Supreme Court of Belize No. 185 of 2001,* a case dealing with the removal of Mr. George Meerabux, a former Justice of the Supreme Court of Belize, who was removed from office by the Governor-General on the advice of the Belize Advisory Council, following complaints of misbehaviour filed by the Bar Association of Belize and an attorney-at-law, to be useful. In **George Meerabux**, *(supra)*, the court considered the consideration by the Governor-General of the question of removing a Justice, under the Belizean Constitution[6]:

[4] The Court of Appeal judgment was delivered on the 31 August 2012.

[5] We are allowed by the Constitution to take judicial notice of the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions in interpreting the Constitution.

[6] *"The constitutional procedure*

[16] Chapter VII of the [Belize] Constitution provides for the establishment for Belize of a Supreme Court of Judicature and a Court of Appeal. Among its provisions is section 98, which deals with the tenure of justices of the Supreme Court. Subsections (3) to (7) of that section are in these terms:

"What must the Governor-General consider? How does he consider and what is the consideration to determine? As stated in subsection 5 of section 98 of the Constitution: "If the Governor-General considers that the question of removing a justice of the Supreme Court from office …? (Emphasis added)

The section speaks of "considers" and not "decides". I wonder if it would have made any difference, for as Megaw J. said in the Hanks v Minister of Housing and Local Government (1963) 1 All ER 47 at page 55:

> *"A consideration I apprehend, is something which one takes into account as a factor in arriving at a decision. I am prepared to assume … that, if it can be shown that an authority exercising a power has taken into account as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power, then the exercise of the power, normally at least is bad. Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is ought to be known to it, and which it ought to take into account, the exercise of the power is normally bad. I say 'normally' because I can conceive that there may be cases where the factor wrongly taken into account, or omitted, is insignificant, or where the wrong taking-into-account, or omission actually operated in favour of the person who later claims to be aggrieved by the decision […]."*

48. For the reasons stated above, and in view of the contentions of the appellant raised in the Constitutional Petition, we find the approach of the Constitutional Court to be erroneous.

"98 … (3) A justice of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
(4) A justice of the Supreme Court shall be removed from office by the Governor General if the question of the removal of that justice from office has been referred to the Belize Advisory Council in accordance with the next following subsection and the Belize Advisory Council has advised the Governor General that that justice ought to be removed from office for inability as aforesaid or for misbehaviour.
(5) ***If the Governor General considers that the question of removing a justice of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then-(a) the Governor General shall refer the matter to the Belize Advisory Council which shall sit as a tribunal in the manner provided in section 54 of this Constitution; and (b) the Belize Advisory Council shall enquire into the matter and report on the facts thereof to the Governor General and advise the Governor General whether that justice should be removed under this section.***
(6) If the question of removing a justice of the Supreme Court from office has been referred to the Belize Advisory Council under the preceding subsection, the Governor General may suspend the justice from performing the functions of his office, and any such suspension may at any time be revoked by the Governor General and shall in any case cease to have effect if the Belize Advisory Council advises the Governor General that the justice should not be removed from office.
(7) Except as otherwise provided in this section, the functions of the Governor General under this section shall be exercised by him in his own deliberate judgment."

See Weekly Law Reports (ICLR)/2005/Volume 2/Meerabux v Attorney General of Belize - [2005] 2 WLR 1307
(Emphasis supplied)

Article 134 (2) of the Constitution: Consideration - requirement for an informal hearing

49. The Constitutional Court's determination of the issue of whether or not the appellant was afforded a fair hearing, under Article 19 of the Constitution, also involved a discussion by the Constitutional Court, of whether or not the first respondent should provide the appellant with an opportunity to respond informally to the complaints at the consideration stage. We note that this issue was not raised by the appellant in his Constitutional Petition. We remark, however, that the appellant appeared to have raised this issue in the petitioner's amended answer. We state that: *"l'intervention n'est pas introductive d'instance":* see footnote 3, hereof. In *Blay v Pollard and Morris* (1930) 1 K.B. 628 (Court of Appeal), Scrutton L.J. stated that: *"*[c]*ases must be decided on the issues on the record. If it is desired to raise other issues they must be placed on the record by amendment."* It is also useful to bear in mind the object of pleadings as laid down in Odgers' Principles of Pleading in Civil Actions in the High Court of Justice, Twenty-Second Edition (1981) by D. B. Casson and I. H Dennis, at page 88:

> *"The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain its object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules,… The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at trial. But each must give his opponent a sufficient outline of his case."*. (Emphasis supplied)

50. Therefore, the finding of the Constitutional Court contained in paragraph [40] of the Judgment of the Constitutional Court, referred to in paragraph [29] hereof, in relation to the issue of whether or not the first respondent should have provided the appellant with an opportunity to respond informally to the complaints at the consideration stage, does not arise for consideration.

51. Nevertheless, we consider it appropriate to give our opinion in relation to this important issue. The issue of whether or not the principle that fairness generally requires that Judges should be given an opportunity to respond informally to complaints against them at the consideration stage of those complaints, was considered by a bench of the Court of Appeal, comprising of F. MacGregor (PCA), S. Domah (J.A) and J. Msoffe (J.A) in the case of *DuraiKannu Karunakaran v The Constitutional Appointments Authority Civil Appeal* 33/2016 [2017] SCCA 9 [14 April 2017]. We observe that the Court of Appeal in **DuraiKannu Karunakaran,** *(supra)*, did not expressly pronounce itself on this issue. The Court of Appeal stated:

> *"[14] The appellant relies heavily on the pronouncements in the Privy Council case of **Evan Rees & Ors v Richard Alfred Crane, [1994[2AC 173** a case of disciplinary proceedings against a judge where the judge commenced judicial proceedings on the basis of breach of his right to be heard at the very initial stage of a complaint's procedure. However, each jurisdiction has its own system anchored in its past history. We have ours, set up in 1994. In Trinidad and Tobago, the suspension was not done by the authority empowered, i.e. the Judicial and Legal Service Commission, but the Chief Justice himself, even if confirmed by the JLSC. **Rees v Crane**, therefore should be relied on with that distinction in mind. All she did was to remit the complaints to the CAA".*

We agree with the Court of Appeal that each jurisdiction has its own system anchored in its past history and that we have ours, set up under the 1993 Constitution. We hasten to add to that observation that our past and recent history dictate that the procedure under Article 134 of the Constitution should contain indispensable safeguards to ensure fairness. As stated by the Court of Appeal in the **DuraiKannu Karunakaran's** case, *(supra)*, this will ensure that there is no lurking political, personal or ill-motivated reason both at the stages of considering and investigating complaints.

52. One such indispensable safeguard is that a fair decision-making process at the stage of consideration should provide the aggrieved Justice of Appeal or Judge with an opportunity to respond informally to the allegations against him or her at the

consideration stage under Article 134 (2) of the Constitution. Our reasoning is based on the holding of the Board of the Privy Council in the **Evans Rees** case, *(supra),* as follows:

> *"That although in preliminary or initiating proceedings the person concerned generally had no right to be heard, particularly if he was entitled to be heard at a later stage, that was not a rigid rule; that, notwithstanding that the procedure for removing a Judge from office under section 137 had three stages only the first of which was before the Commission and at the two later stages the Judge had a right to know of and answer the complaints made against him, the Commission had a duty to act fairly in deciding whether a complaint had prima facie sufficient basis in fact and was serious enough to warrant making a representation to the President; that in view of the seriousness of the allegations and the suspicions both for the present and the future raised by a decision to suspend the Judge which a subsequent revocation of the suspension would not necessarily dissipate and in all the circumstances, the Commission had not treated the respondent fairly in failing to inform him at that stage of the allegations made against him or to give him a chance to reply to them in such a way as was appropriate, albeit not necessarily by an oral hearing; and that, accordingly, the Commission had acted in breach of the principle of natural justice and had contravened the respondent's right to the protection of the law, including the right to natural justice, afforded by section 4 (b) of the Constitution, and the Court of Appeal had correctly quashed the Commission's decision to represent that the question of the respondent's removal from office ought to be investigated and the consequential appointment of the tribunal, and he was entitled to damages […]."*

We also mention the Kenyan case of *Republic v Chief Justice of Kenya and Others, ex p. Ole Keiwua* [2010] eKLR (High Court of Kenya) in which it was decided that a fair decision making process at the preliminary stage should provide the Judge suspected of misconduct with an opportunity to respond informally to the allegations against him or her, before a decision is made to institute tribunal proceedings.

53. This approach is explained by the risk of damage that any official action on complaints against a Judge causes, which may affect the ability of the Judge to command the confidence of litigants and continue on the bench. This is an institutional interest that

goes beyond the personal interest in preserving the reputation that Judges have in common with all persons facing disciplinary action[7].

54. Hence, we do not endorse the view of the Constitutional Court contained in paragraph [40] of the Judgment of the Constitutional Court, contained in paragraph [29] hereof, which endorses the position of the Interveners and the second respondent, to the effect that:

> *"*[40] […] *since the CAA regulates its own proceedings, the CAA is not prevented from hearing any person who is the subject of complaints just as it is not obliged to hear the same person. Each case would depend on its own level of complexity. The CAA may request the Judge concerned to comment on the contents of the complaints before deciding to act under Article 134 (2) but where there are 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."*

55. We hold the view that an informal hearing will meet the requirement of Article 134 (2) of the Constitution, and that such requirement for an informal hearing must be strictly enforced by the first respondent: (see paragraphs 68 to 70 hereof).

56. However, we agree with the Constitutional Court's finding that there is no requirement for a formal hearing under Article 134 (2) of the Constitution at the stage of the consideration of the complaints. As stated in the case of *The Judicial Service Commission and the Hon. Mr. Justice Mbalu Mutava and the Attorney General, the Court of Appeal at Nairobi, High Court Petition No. 337 of 2013*: *"*[t]*o 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."* One of the issues raised in the said case was whether or not the Judicial Service Commission in initiating the process of removal of a Judge

[7] The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium of Best Practice at page 95. Published by the Commonwealth Secretariat 2015.

under article 168 (2) of the Kenyan Constitution is bound to afford a fair administrative action under article 47 (2) of the Kenyan Constitution and if so, to what extent.

Article 134 (2) of the Constitution: Quorum necessary and procedural requirement

57. We address the issue for determination, referred to in paragraph [38 (iii)] hereof, which we state is concerned with the requirement of quorum necessary for the performance of acts by the first respondent under Article 134 of the Constitution. We also consider the contentions of the appellant raised at the appeal, set out in paragraph [38 (ii)] hereof. The appellant contended that the first respondent did not assess the complaints in breach of Article 134 (2) of the Constitution. We consider both issues together.

58. Rule 13 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules provides:

> "Appeal procedure
>
> *(1) An appeal from a decision of the Constitutional Court to the Seychelles Court of Appeal shall be lodged at the Registry of the Supreme Court within 10 days from the date of such decision.*
>
> *(2) Subject to subrule (1), the Seychelles Court of Appeal Rules relating to appeals in civil matters shall be applicable to such an appeal."*

59. The Seychelles Court of Appeal Rules is enabled under Article 136 (1) of the Constitution. Rule 31 (3) of the Seychelles Court of Appeal Rules, which provides for the powers of the Court of Appeal on appeal, provides:

> *"31 (3) The court may draw inferences of fact, and give any judgment, and make any order which the Supreme Court ought to have given or made, and make such further or other orders as the case requires."* (Emphasis supplied)

60. Article 139 (1) of the Constitution provides that: *"*[t]*here shall be a Constitutional Appointments Authority which shall perform the functions conferred upon it by this*

Constitution and any other law". At the material time, Article 140 (1) of the Constitution required that the first respondent shall consist of three members. Under Article 142 (6) of the Constitution, the first respondent may regulate its own proceedings and may act notwithstanding one vacancy in its membership. At the material time, no member of the first respondent had resigned in terms of Article 142 (2) of the Constitution, nor was there a vacancy in the membership of the first respondent. It is clear on a careful reading of these provisions of the Constitution, that the members of the first respondent did not have power under the Constitution to fix the number of members which should form a quorum. We hold that the three members of the first respondent, exercising powers, under Article 134 of the Constitution, must act together and as a board, and may act notwithstanding one vacancy in its membership.

61. In determining whether or not the act of considering that the question of removing the appellant from office, under Article 134 (1) of the Constitution ought to be investigated, was performed by the three members of the first respondent and by the quorum provided under the Constitution, we have considered the pleadings and evidence in this case, in particular:

- the Statement of Demand dated the 10 October 2017

- the Interveners' reply to the first respondent's original answer, dated the 20 October 2017

- the *STATEMENT OF DEMAND (AMENDED)* dated the 24 November 2017

- an affidavit, dated the 20 October 2017, (marked Exhibit AG6), sworn to by Mrs. Marie-Nella Azemia, exhibited to the *AFFIDAVIT IN ANSWER TO THE PETITION AND STATEMENT OF DEMAND IN CP 3 of 2017,* dated the 20 October 2017, which averred, so far as relevant, that:

> *"[5] I do recall a meeting where the members of the first 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 the meeting.

[6] I sign a set of minutes dated 3rd October 2016 agreeing to the appointment of the tribunal of inquiry.

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

- the bundle of Minutes of Meeting of the Board of the first respondent, especially the *"Minutes of CAA BOARD MEETING Held on 3rd October 2016 at 9.30 a.m, La Ciotat Building, Victoria"*, signed by all three members of the first respondent, reproduced below:

*"**Minutes of CAA BOARD MEETING Held on 3rd October 2016 at 9.30 a.m,***

La Ciotat Building, Victoria

Present:	*Mrs Marie-Ange Houareau*	*(Chairman)*
	Mrs Jane carpin	*(Member)*
	Mrs Marie Nella Azemia	*(Member)*

In Attendance:

Mrs Lina Pragassen (Secretary)

RE: COMPLAINTS OF MISBEHAVIOUR

The Chairman welcome the members and tabled the documents for discussion, the first point being the letter received from the Chief Justice together with other documents regarding the behavior of Judge Karunakaran at the Supreme Court. The Chairman pointed out that this was not the first complaint received from Chief Justice since she took up the post involving judge Karunakaran.

The members discussed the letter and supporting documents and the complaints of misbehaviour were addressed and all discussed fully.

After much discussion it was unanimously agreed that the complaints of misbehaviour ought to be investigated and in terms of Article 134 (1) (a) of the Constitution, the Board came to the decision to appoint a Tribunal to inquire into the complaints. "The Board will seek advice in connection with names of the Tribunal members.

The President of the Republic will be advised in writing that the CAA will be appointing a Tribunal to investigate the complaints".

The Chairman agreed to sign all the relevant letters.

Any other Business

There being no other business, the meeting was adjourned at 12 pm.

MRS MARIE-ANGE HOUAREAU CHAIRMAN CAA | MRS JANE CARPIN MEMBER CAA | MRS MARIE NELLA AZEMIA MEMBER CAA".

62. The Statement of Demand, dated the 10 October 2017, stated that the first respondent, then comprising of the Interveners, convened a meeting at which the letter of the 30 September 2016, and the supporting documents, contained in the black lever arch file were lengthily considered in the light of the powers of the first respondent under Article 134 (2) of the Constitution. The Interveners' reply to the first respondent's original answer, dated the 20 October 2017, stated that the first respondent as then constituted, comprising of the Interveners together with Mrs. Marie-Nella Azemia, properly and validly considered the complaints having regard to its mandate under Article 134 (2) of the Constitution. The *STATEMENT OF DEMAND (AMENDED),* dated 24 November 2017, repeated the averments contained in the Statement of Demand. (Emphasis ours)

63. Having considered the aforementioned documents and the affidavit evidence of Mrs. Marie-Nella Azemia, we make the following observations. The documents and evidence under consideration other than the Minutes of Meeting referred to in paragraph [61] hereof do not state the date on which the impugned meeting was convened and held. We note with concern that Mrs. Marie-Nella Azemia in her Affidavit stated that she cannot *"with any certainty state the date of the meeting"* at which the members of the first respondent considered the letter from the Chief Justice and the accompanying documents. We note, however, that she recalled signing *"a set of minutes dated 3rd October 2016 agreeing to the appointment of the tribunal of inquiry"*. We note, further, that according to these very same Minutes dated 3 October 2016: *"*[t]*he members discussed the letter and supporting documents and the complaints of misbehavior were addressed and all discussed fully"* and that Mrs. Marie-Nella Azemia is recorded as being present at that

meeting. In the circumstances it is very telling that she can remember signing a set of minutes of meeting, dated the 3 October 2016, in relation to the appointment of the tribunal, but cannot remember the date on which the complaints were allegedly considered.

64. The change of position of the Interveners reflected in their Statement of Demand, the Interveners' reply to the first respondent's original answer and *STATEMENT OF DEMAND (AMENDED)* in relation to the question of quorum for which no explanation was given, and the matters observed above, cast serious doubt on the averments of the Interveners and Mrs. Marie-Nella Azemia. Moreover, the brevity and lack of detail concerning what was allegedly considered in the Minutes of Meeting cast further doubt as to whether or not such matters were considered. It is noteworthy that the order of the Court of Appeal to the effect that the interveners should explain *"how, what and when they considered the complaint against the petitioner prior to appointing the tribunal"*, contained in paragraph [16] hereof, was not complied with fully by the Interveners. (Emphasis ours)

65. This leads us to conclude either firstly, that if there was consideration, it was done by two members of the first respondent (the Interveners), in breach of the requirement of quorum under the Constitution, or secondly, that no meeting was convened and held on the 3 October 2016.

66. In the light of the above, in relation to the issue of quorum, we are of the view that if the first respondent had considered the complaints, this would have been done by two members of the first respondent (the Interveners) in breach of the Constitutional requirement of quorum. Consequently, the non-observance of the requirement of quorum by the first respondent, renders the appointment of the tribunal of inquiry unconstitutional, null *ab initio*.

67. In relation to the second issue, it follows that if no meeting was convened and held, this would mean that the question of removing the appellant from office was never considered by the first respondent, in breach of Article 134 (2) of the Constitution. As stated

previously the contentions of the appellant are that the requirement of consideration is mandatory under the Constitution, and that the failure of the first respondent to comply with that requirement renders the appointment of the tribunal of inquiry unconstitutional, null *ab initio*.

68. On mandatory and directory requirements we read the following excerpts from Halsbury's laws of England:

> *"Procedural Requirements under Statute*
>
> *27. 'Mandatory' and 'directory' requirements*
>
> *[…].*
>
> *In earlier case law, the view was taken that if, on the proper interpretation of the statute, a requirement was mandatory, the failure to comply would invalidate what followed. If the requirement was held to be directory, the failure to comply would not necessarily have an invalidating effect. It appears that where a provision was construed as merely directory, substantial compliance would suffice. However, a suggestion that non-mandatory requirements should be construed as merely permissive or an indication of what is desirable would probably not be correct .*
>
> *More recently, it has been held that the traditional dichotomy between 'mandatory' and 'directory' requirements has 'outlived its usefulness' and represents 'the end of the relevant inquiry, not the beginning'. The consequences of a failure to comply with a statutory procedure are now said to depend not on prior classification of the statutory provision as either mandatory or directory, but on an analysis of what Parliament had intended those consequences to be, and in particular whether Parliament can be taken to have intended the outcome of non-compliance to be total invalidity. Courts determine the consequences of non-compliance as an ordinary question of statutory interpretation."* (Emphasis supplied)

69. In line with the above reasoning, in determining the consequences of non-compliance with the requirement for consideration under Article 134 (2) of the Constitution, we consider the purpose of the requirement, the seriousness of the non-compliance and its actual or possible effect on the parties. If, in our opinion, the requirement is intended to

be strictly enforced, the requirement will be regarded as rendering unconstitutional an action taken in breach thereof.

70. We cannot hold otherwise than that the requirement for consideration of complaints under Article 134 (2) is to be strictly enforced by the first respondent. We state so because Constitutional guarantees of security of tenure and appropriate remuneration, under Articles 131 to 134 of the Constitution, play a direct role in sustaining an independent judiciary, which is one element of the rule of law: see *Charles v Charles Civ A 1/2003*. Article 119 (2) of the Constitution provides that the Judiciary shall be independent and be subject only to the Constitution and the other laws of Seychelles. We also consider as stated previously, the risk of damage that any official action on complaints against a Justice of Appeal or a Judge causes, which may affect the ability of the Justice of Appeal or the Judge to command the confidence of litigants and continue on the bench. Therefore, the consequence of non-compliance with the requirement for consideration, under Article 134 (2) of the Constitution renders the first respondent's act of appointing the tribunal of inquiry under Article 134 (2) (b) of the Constitution, unconstitutional and consequently null *ab initio*. Therefore, we allow the contention of the appellant that the Constitutional Court failed to adjudicate on the contravention of Article 134 of the Constitution preferring instead to find that the right to fair hearing was not vitiated.

Decision

71. For the reasons stated above, we allow the appeal and reverse the Judgment of the Constitutional Court with no order as to costs. We make order declaring the appointment of the tribunal of inquiry, by the first respondent, under Article 134 (2) (a) of the Constitution, unconstitutional, null and void *ab initio*.

F. Robinson (J. A) **…….....**

E. Carolus (J) **……...**

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

IN THE SEYCHELLES COURT OF APPEAL

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

Constitutional Appeal SCA CP 04/2018

(Appeal from Constitutional Court Decision CP 03 /2017)

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

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 misbehaviour 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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

.

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 misbehaviour …"** 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 misbehaviour 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

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)

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

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

B. Renaud (J.A)

Recusal

1. In the morning of the day that this matter was set for hearing, Learned Counsel for the Appellant sought the recusal of the Presiding Justice of Appeal in a private meeting. The recusal was refused by him and Learned Counsel for the Appellant raised the matter

formally in open Court prior to the start of the hearing. The Court heard Counsel and after having considered the request in Chambers, upheld the decision taken by the Presiding Justice of Appeal.

2. The reasons for upholding the decision that the recusal ought not to be upheld were essentially as follows. This matter has been before the Court for overs two years and all, except two judges of the Supreme Court have somehow been involved.

3. As this matter was heard by three Judges in the Constitutional Court, as is the practice, the appeal is heard by a panel of five judges. Two judges not having been involved in the matter was co-opted to constitute the panel since another Justice of Appeal had recused himself.

4. The matter was cause-listed over a month prior and the case was called days before the hearing date and all parties confirmed that they were ready to proceed with the hearing. The very morning of the hearing a final roll-call was made and again the parties confirmed their readiness to proceed. It was a matter of minutes before the hearing that the question of recusal of one of the Justice of Appeal was first brought up.
5. If the request for recusal was upheld the Court would have to also reconstitute itself by removing another judge as the appellate Court comprised either of three or five members.

6. The other four Appellate Justices, after careful consideration, were of the firm opinion that even the Justice of Appeal against whom recusal is being sought, it will not affect their freedom and independence to decide the matter, hence the continued presence of that Justice of Appeal would not affect a fair hearing of the appeal. Furthermore, it was of necessity that the hearing ought to be proceeded with by the panel as constituted. For these reasons the request for recusal was declined.

7. Regarding the appeal proper, I would like to make the following observations.

Merits

8. Article 142(6) of the Constitution of Seychelles (hereinafter "the Constitution") states as follows:

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

9. Since the coming into existence of the Constitutional Appointments Authority (hereinafter "the CAA") in 1993 by virtue of Article 139 of the new Constitution of the Third Republic, the CAA regulated its own proceedings when performing the functions falling within its jurisdiction. One of such functions relates to the issue of removal of judges vide Article 134 of the Constitution.

10. At the material time the CAA comprised of three lay members. The matter concerned complaints lodged by the Chief Justice against a long serving Judge. The CAA met with the Chief Justice for hours and also received from her many documents relating to the complaints. Understandably the CAA as then constituted realized that the matter in issue involved the possible removal of a Judge, and that such matter falls within the jurisdiction of a Tribunal. The CAA, as then constituted, acting in terms of Article 134(2) of the Constitution considered that the question in issue ought to be referred to a Tribunal.

11. The CAA accordingly appointed a Tribunal which investigated the matter. The Appellant started putting up appearance before the said Tribunal but ceased to do so upon taking the matter to Court.

12. Hitherto, the CAA as then constituted and throughout its operation over the last 20 years or so, never published procedures dealing with the issue of removal of judges. Had this been done, this Court when interpreting and applying the provisions of the Constitution would have read into it the provision of such procedures.

13. I take judicial notice that the membership of present 1st Respondent was increased from three to five members. It comprised of a very experienced Banker as its Chairman, a lawyer

with over 30 years standing, persons who held high offices for decades in the Public Service, Parastatal Service, and Government, including the Commonwealth Foundation, in addition to a member with decades of experience in Civil Society organizations. The CAA as presently constituted, in my considered view, is comparable to the composition of any Judicial Service Commission as may found in other jurisdictions.

14. I also take judicial notice that the 1st Respondent as presently constituted published in newspapers, detailed procedures relating to removal of judges when it was handling another similar issue. The procedures were set along the Latimer House/Bangalore Principles of Judicial Conduct. It is my considered judgment that the 1st Respondent ought to formally publish such procedures in furtherance of the provision of Article 139 of the Constitution, to be made applicable in similar circumstances in the future, thus further ensuring the security of tenure of judges.

15. Subject to the foregoing, I concur with the decision of the President of the Court of Appeal in dismissing this appeal in its entirety.

B. Renaud (J.A)

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

IN THE SEYCHELLES COURT OF APPEAL

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

Constitutional Appeal SCA CP04/2018

(Appeal fromConstitutional Court DecisionCP03/2017)

Duraikannu Karunakaran	Appellant
Versus	
The Constitutional Appointment Authority	1st Respondent
The Attorney General	2nd Respondent
Marie-Ange Hoareau	1st Intervenor
Jane Georgette Carpin	2nd Intervenor

Heard: 23 April 2019

Counsel: Mrs. Alexia Amesbury for the Appellant
Mr. Antony Derjacques for the 1st Respondent
Mr. David Esparon for the 2nd Respondent
Ms. Alexandra Madeleine for the 1st and 2nd

Delivered: 21 June 2019

JUDGMENT

R. Govinden (J.A)

Introduction

1. I have had the privileged of reading the draft judgment of Honourable President of the Court of Court of Appeal and Honourable Justice B Renaud. I do not subscribe to their

decisions in dismissing the grounds of appeal in this case, hence my dissenting decision in this judgment in that regards.

The Preliminary Objections

2. The Preliminary objection raised in this case by the Honourable Attorney General, the 2nd Respondent, is as follows; *"Since the Appellant has resigned in the office and no final decision has been taken by the President for his removal such a Petition and Appeal would serve no purpose since the contravention of the Appellant's Constitutional rights has now been rendered nugatory."*

   The one raised by the 1st and 2nd intervenors is that, *"Subsequent to the decision of the Constitutional Court delivered on 28th June 2018 being subject to the Appeal, the Appellant submitted a resignation from the office as Judge. The purpose to be served by this appeal after the turn of events are unknown and may as its best be purely academic. On this basis it is submitted that the appeal, in its entirety, will serve no purpose and should be dismissed"*

The submissions

3. During the course of the submissions on the Preliminary Objections, learned counsels of the 1st and 2nd Intervenors mutually supported one another's preliminary objections.

4. The learned Counsel for the Attorney General, on the other hand, submitted that the 1st Respondent does not take a decision and that the decision under article 134 of the Constitution is taken by the President of the Republic when he removes a Justice of Appeal or Judge from office, acting upon the recommendation of the Tribunal. In his submission there being no such decision of the President in this case the whole process is nullified. This view is also supported by counsel for the Intervenors.

5. Learned Counsel for the Appellant submitted to the contrary, Mrs Amesbury argument is that the 1st Respondent does take make a decision and that this very decision is the subject matter of the appeal before us and that at any rate the Appellant has a right to the dignity of his person that gives him a right to clear his name before this court as of right under

article 46 (1) of the Constitution.

Mr Derjacques, Learned counsel for the 1st Respondent, on the other hand, focuses on the bigger picture, it is his submission that this appeal carries with it a strong public interest element and constitutional importance and touches the security of tenure of a judge, which is a fundamental tenet of our democracy. That as such it should not be allowed to be dismissed on preliminary objections.

Issues for determination on the preliminary objections

6. Having carefully considered the submissions of counsels in favour of and against the Preliminary Objections, in the light of the facts and circumstances of this appeal and that of the judgment of the Court of first instance. I consider that the following issue is up for determination when it comes to these preliminary objections.

7. Has events posterior to the filing of the Appellant's memorandum of appeal rendered the appeal nugatory and academic.? This is the crux of the arguments raised in the Preliminary Objections. It is an uncontroverted fact that a tribunal was appointed by the 1st Respondents under article 134 (2) of the Constitution, then consisted partially of the 1st and 2nd Intervenors. It is also not disputed the tribunal so appointed recommended to the President to remove the Appellant from office under article 134 (3) of the Constitution and that in this appeal the Appellant is appealing against the constitutionality of the setting up of the said tribunal. The Constitutional Court having ruled that it was properly set up by the 1st Respondent. It is also not contested and it is common knowledge that pending the hearing of this appeal and before the President acted on the said recommendation, the Appellant submitted his resignation to the President and that the latter accepted his resignation. So that as we sat here to hear this appeal the Appellant was no longer a puisne judge of the Supreme Court, not as a result of his removal from office, but through his resignation. Nonetheless, though he has resigned, the Appellant is still maintaining that it is his wish and that he has a right to prosecute with his appeal before this court, whilst the Objectors says that he has no such right. It is in the background of these fact that the objections must be considered.

Discussion of issues

8. Firstly, at the outset, I believe that it should be clear to everyone that the pit and substance of the appeal before us, as reflected by the grounds of appeal, is not the final decision of the President to remove or not to remove the Appellant from office based on the Report of the tribunal under article 134 (3) of the Constitution. This ultimate act of the Head of State has become a factual impossibility as his decision to act on the said report has been circumvented by the Appellant through his decision to tender his resignation under article 131(1) (c) as read with article 131(2) of the Constitution, pending the hearing of this appeal. The pith and substance of the appeal before us relates to the decision of the 1st Respondent to appoint and the process of the appointment of a tribunal which has made a recommendation for removal of the Appellant from office under article 134 (2) (b) of the Constitution. This decision, as far as the Appellant is concerned, is still one that stands prejudicial to his constitutional rights. The decision consist of a finding of fact regarding misbehaviours that the Appellant committed as a former puisne judge of the Supreme Court. The Constitutional Court held that the process of coming to this determination by the 1st Respondent was not contrary to the Appellant's right to a fair hearing. The Appellant argues to the contrary. It is therefore my opinion that the decision of the Constitutional Court is liable to be questioned and put to rest before this court, depending on the willingness of the Appellant to pursue his appeal. In this case the Appellant has decided that it is his wish that that this Court consider his appeal, notwithstanding his resignation.

9. The lack of a final decision taken by the President for the removal of the Appellant does not nullified and render nugatory the finding of the tribunal as this appeal does not lie against the contravention or likely contravention of his rights by the President's decision but against the tribunal's recommendation to the President and the constitutional process of setting up of the tribunal, which the Constitutional Court has validated. It is against that decision that the Appellant says he stands aggrieved.

10. Secondly, to hold that the Appellant cannot proceed with his appeal before this Court as a result of no final decision of the President being taken is tantamount to saying that the

President's decision for removal of the Appellant from office under article 134 (3) and the finding of the tribunal under article 134 (2) (b) of the Constitution is one and the same decision and that they are so intrinsically link that the decision for removal of the Appellant can only be final, conclusive and appealable to this court provided the President acted on that recommendation. Having read those two provisions of the Constitution together, both a literal and a purposive interpretation leads me only to one conclusion. That those are two separate and distinct constitutional obligations. The tribunal has to make a recommendation. The President takes a decision based on the recommendation. The decision and the recommendation are mutually exclusive and they give rise to two different causes of actions under the Constitution. The President would not be able to remove a Justice of Appeal or judge from office without a recommendation. On the other hand, a recommendation of a tribunal does not remove a justice of appeal or judge from office, the President has to act on the recommendation under article 134 (3) of the Constitution.

11. A Justice of Appeal or Judge who has been the subject matter of a recommendation under article 134(2) (b) can, therefore, petition the Constitutional Court against the said recommendation and thereafter appeal to this Court. This is what has happened in this case.

12. On the other hand, a decision by the President to act on the recommendation and remove a Justice of Appeal or Judge from office may not be justiciable given the mandatory terms of article 134(3). This appear as one of the constitutional prerogatives of the President. Once he takes that decision it becomes irrevocable, unless the President acts under that provision without the recommendation of the 1st Respondent or act *ultra vires* the content of the recommendation.

13. Thirdly, Article 120 (1) of the Constitution gives to the Appellant a right of appeal against a decision of the Supreme Court or the Supreme Court sitting as the Constitutional Court under article 129 (1) of the Constitution. It grants to the Appellant a right of appeal against a decision of the Supreme Court in whatever capacity that it hears a case in the first instance, be it as the Supreme Court or as the Constitutional

Court. This right of appeal is subject only to other provisions of the Constitution and the Rules of this court. I find nothing in the other provisions of the Constitution or the Seychelles Court of Appeal Rules that prohibits the Appellant to prosecute his right of appeal in this case. There is in existence a valid and competent decision by the Constitutional Court which is appealable before the Court of Appeal.

14. Fourthly, I am of the view that the Preliminary Objections has nothing to do with the effect of or the outcome of the appeal in terms of the declarations sought by the Appellant before this Court. The decision of this court on the merits may or may not be rendered in favour of the Appellant, depending on how convincing are the arguments of the parties on the issue of the right to fair hearing and how well founded is the judgment of the Constitutional Court in its appreciation of and application of that right. Whether this happened or not, the novel issue of law raised in the preliminary would remain live before us. The fact that the appeal on the merits and the orders being sought from this Court would be rendered otiose as a result of the resignation of the Appellant, given the terms of his prayers, is different from saying that the appeal is otiose because under the constitution the decision of the President and that of the 1st Respondent is one and the same or that the 1st Respondent does not take a constitutional decision that can give rise to as separate and distinct cause of action that should as a constitutional necessity be finally disposed of by this court. It is because I believe that the Preliminary Objections are separately justiciable and is divorced from the merits of this case and should be treated as such that I find that this case should proceed forward.

Determination

15. Therefore, I am of the view that the Preliminary Objections raised by the 2st Respondent and the 1st and 2nd Intervenors should fail and I dismiss these objections and consider that this appeal should be heard on its merits.

Merits of the Appeal

Grounds of Appeal

16. The grounds of appeal in this case can easily be consolidated into one ground of appeal.

That is, whether or not the 1st Respondent is bound to observe the right to fair hearing, more particularly the principle of "*audi alterem partem*", when it considers that the question of removing a Justice of Appeal or Judge ought to be investigated by a tribunal under article 134 (2) of the Constitution. The other grounds of appeal being only ancillary or consequential to the issue of fair hearing. Therefore, I will limit my decision to this principal contention in this case.

The submissions

17. Counsel for the Appellant submitted that the 1st Respondent was duty bound to hear him before deciding on whether or not the question of removing him from office ought to be decided by a tribunal and that the Constitutional Court erred in holding that this was not the case. The Appellant relies on a number of decisions, mainly from the members states of the Commonwealth of Nations in support. He is supported in this submission by the learned counsel 1st Respondent. On the other hand learned Counsel for the Attorney General and the 1st and 2nd intervenors finds no errors in the decision of the court below, it is their submission that their lordship finding should be upheld in all respect.

18. **Issues for determination**

According to article 19 (7) of the Constitution of the Republic of Seychelles,

> *"Any court or authority required or empowered by law to determine the existence of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings are instituted by any person before such court or authority the case shall be given a fair hearing within a reasonable time"*.

19. The constitutional obligation under article 19(7) applies to both courts and other authorities required or empowered by law. As far as the courts are concern, we all know what they are, they are courts set up pursuant to article 119 (1) of the Constitution; they consist of the Court of Appeal; the Supreme Court, and the Supreme Court when exercising the jurisdiction of the Constitutional Court under article 129 (1) of the

Constitution and such other courts or tribunals established in pursuant to article 137 of the Constitution, which would consist of the Magistrates Court.

20. As far as authorities required or empowered by law are concerned, they would consist of both constitutionally created authorities and statutory authorities. In the event that the 1st Respondent is found to be one of those authorities falling under the purview of article 19 (7) in this case, it would be constitutionally obliged to apply the Right to fair hearing including that of *"audi alterem partem"* in all cases coming before it for its determination and this within a reasonable time. This is such given the mandatory terms of article 19 (7). There would be no discretion on the part of the 1st Respondent whether or not it should extend the right to fair hearing to those proceedings because it would be constitutionally obligated to do so. In the same vein if it is so obligated under the said article, the 1st Respondent would have no liberty to decide on what are those cases that it can choose to extend that right to and what are those that it can choose not to so extend the right.

21. Therefore, given the appeal before us, which principally revolve around whether the 1st Respondent gave to the Appellant a fair hearing before it acted under article 134(2) of the Constitution and considered that the question of removing the Appellant from office ought to be investigated, this court is invited to scrutinize the constitutional roles and obligations of the 1st Respondent under various constitutional provisions in the light of the provisions of article 19 (7) and decide whether or not the 1st Respondent is one of the authorities that stands obligated by the said article to grant the right to a fair hearing to parties before it.

22. The Right to Far Hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case; an opportunity to answer it and the opportunity to present their own case in reply.

23. The Right to Fair Hearing is now part and parcel of international customary law due to its almost universal acceptance amongst the community of nations. It is present in the United Nations Declarations of Human Rights; the International Covenant on Civil and Political

Rights; the European Convention on Human Rights; the African Charter on Human and Peoples Rights and in the constitution of all democratic societies.

Discussions of the issues

The 1st Respondent is an "authority"

24. An authority is created by a legislative text. The law setting it up will provide for its objects; functions; composition; independence and if need be, the security of tenure of the members of that authority. The first issue that needs to be dealt with is whether or not the Constitutional Appointment Authority is an authority for the purpose of article 19 (7). This question appears to invite an obvious answer. To my mind, as the appellation of the 1st Respondent itself plainly reveals, it is an authority, it is an authority created by the supreme law itself under article 139. It is a creature of the constitution. The function of this authority, which now consist of seven members, including its Chairperson, is to recommend candidates for appointment as Justices of Appeal and Judges of the Supreme Court to the President under article 122 and 126 (b) of the Constitution, respectively. The 1ST Respondent is also empowered to recommend appointment to any other statutory bodies, where a law empowers it to do so. It also has power to appoint a tribunal under article 134 (2) which enquires into and recommends to the President the removal of Justices of Appeal and Judges from office. This constitutional authority, of which its members are commonly referred to as Constitutional , have its independence guaranteed under article 139 (2) of the Constitution. The 1st Respondent cannot, in the performance of its functions, be subject to the direction or control of any person or authority. The security of tenure of office of members of the 1st Respondent is similar to that of a Justice of Appeal and a Judge and is guaranteed under article 166 (1) of the Constitution.

25. Hence, I find that the 1st Respondent is an authority set up by law, being the Constitution and the Supreme law of the land. This authority is a constitutional authority as compare to a statutory whose members are appointed under laws enacted by the President and that National Assembly.

The 1st Respondent makes a "determination"

26. Does the 1st Respondent, as an authority, makes a determination? This is sine qua non for the operation of article 19 (7) of the Constitution. If there is no determination there would be no requirement for complying to the Right to Fair Hearing. This is a question that invites the interpretation of the constitutional provision governing the functions of the 1st Respondent. In my firm opinion, having thoroughly studied those functions in the context of the Constitution read as a whole, I find that the 1st Respondent does make determinations. It makes many determinations, some of which are not relevant here. For example, it determines who are those candidates who should be recommended as Justices of Appeal or Judges of the Supreme Court. In the context of this case it determines whether the question of removing a Justice of Appeal or a Judge ought to be investigated by a tribunal under article 134(2) of the Constitution. This determination is a necessary precursor to the appointment of the tribunal. The 1st Respondent shall appoint a tribunal under article 134 (2) (a) only and only if they have made a determination under article 134(2) that a tribunal ought to be appointed. No amount of submissions can convince me otherwise. The 1st Respondent has to make a determination of fact based on evidence placed before it. Moreover, it can make that determination only if it is satisfied that evidence placed before it is enough for it to make a fair and just decision based on the standard of proof that I would related to later on in this judgment. If the 1st Respondent fails to make this determination and simply glossed over the complaint instituted by the complainant, this would be a failure to comply with its constitutional obligation under article 134 (2) of the Constitution. It must be shown that there was enough facts placed before it that justified its decision that a Justice of Appeal or Judge ought to be removed from office, following which a tribunal was appointed under article 134 (2) of the Constitution. On the other hand, the 1st Respondent may also make a determination that based on the facts place before it, a Justice of Appeal or Judge ought not be removed from office and hence decide not to appoint the tribunal.

27. Ought to or ought not to be removed? This is the question that was before the 1st Respondent. In answering this question it made the determination. It is not a constitutional discretion. It is a justiciable constitutional decision. Whatever way the determination of the 1st Respondent on this issue goes, it would be very important to a citizen of Seychelles. If it decides that a Justice of Appeal or Judge ought not be

removed from office, we would find the complainant feeling that justice might not done have been done in his or her regards because he or she firmly believes that he or she has adduced enough evidence that should have satisfied the 1st Respondent that the Justice of Appeal or Judge should be brought before the tribunal. If, on the other hand, the 1st Respondent decides that the Justice of Appeal or Judge ought to be removed from office and hence start the process of impeachment of the Justice of Appeal or Judge, we would find a career man or woman of law, whose very office depends on his personal and professional dignity and integrity being tried in a public forum and suspended from office.

28. Hence, and so, I find that nothing short of a determination by the 1st Respondent would do in order to meet the sanctity of the occasion or fairness in its broadest sense of the word. I cannot, therefore, support the finding of the court below that the 1st Respondent does not make a determination but, *"merely sift through the complaints and move it on to the next stage if it finds that the complaints are such that they fall within the two grounds for removal under article 134(1)"*. To do this would be an abnegation of the 1st Respondent constitutional obligation to make a finding or determination of fact that carries with it such huge implications.

Determining the existence of any civil right or obligation.

29. For the 1st Respondent to come under the purview of article 19 (7), it needs not only to be an authority set up by law to make a determination but also one that makes a determination on the existence of a civil right or obligation. At the outset it is clear that the 1st Respondent does not make a determination on the existence of a civil right. This would be something left for a court dealing with matters arising in the realm of the civil law. In this instance what the 1st Respondent does is to make a determination, be it not a final determination, on the misbehavior or of unsoundness of body or mind of a Justice of Appeal or Judge that would make them incompetent to exercise the office of Justice of Appeal or Judge. This is a constitutional obligation arising under article 134 (1), as a Justice of Appeal or a Judge has the obligation to perform his or her function without infirmity of mind or body and not to commit any misbehaviors. He or she holds office

subject to his good behavior and he is constitutionally obliged to be of good behavior.

30. Accordingly, I find that the 1st Respondent makes a determination on a constitutional obligation when it seeks to determine, on a prima facie basis, whether or not there is a breach of article 134(1) of the Constitution by the Justice of Appeal or Judge.

31. I further find that civil obligation under article 19 (7) applies to both an authority set up to adjudicate purely on the existence of a civil obligation and an authority set up to determine on the existence of a constitutional obligation. I am of the view that Article 19 (7), when it used the term "*civil obligation"* is using it in its widest possible sense, as it would make no sense for the constitution to grant the right to fair hearing before an authority deciding on the existence and extent of the existence of simple civil obligation, whilst denying one the same right before an authority deciding on the existence of or extent of the existence of a constitutional obligation.

32. Furthermore, I am of the view that here the term "*civil*" is juxtapose to the term *"criminal"*. Article 19 (7) was enacted in order to put emphasis on the fact that civil courts; tribunals and some authorities as compared to criminal courts; tribunals are also obliged to follow the Rules of fair hearing in their deliberations. As regards criminal matters, article 19(1) to 19 (13), excluding article 19(7), extensively covers all criminal aspects of the Right to Fair hearing before criminal courts and tribunals.

33. For these reasons I would differ with the opinion of my learned brother judges of the Constitutional Court, where at paragraph 44 of their judgment where they held,

> *"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 abide by the principle of audi alterem partem"*.

To the contrary, I am of the view that the 1st Respondent does determine the existence of a constitutional obligation, albeit on the following standard of proof.

Standard of Proof

34. The existence of an obligation to determine a constitutional obligation does not mean that the 1st Respondent needs to prove the presence or absence of the obligation on a balance of probabilities as in all civil proceedings or even beyond a reasonable doubt, as in a criminal cases. A complete reading of article 134 of the Constitution would make this quite clear. If the 1st Respondent was to decide the existence of such an obligation on these burden of proofs it would be usurping the competence of the tribunal that the very 1st Respondent appoints under article 134 (2) (a) in the first place. It is the constitutional role of the tribunal to decide on the merits of the case whether the Justice of Appeal or the Judge has failed in his or her constitutional obligation to be or to ac in accordance with article 134 (1) of the Constitution and not that of the 1st Respondent

35. The tribunal that made its recommendation to the President in this case has found that the standard of proof in proving the case against the Appellant is between a balance of probabilities and beyond a reasonable doubt. I will not venture to pronounce on the legality of this finding as such an issue is not on appeal before this court. I take it that the tribunal was right in this determination. If that be the case the standard to prove the case before the 1st Respondent should therefore be one below this one. This lower standard is on a prima facie basis. Here I would subscribed to the Constitutional court opinion that the 1st Respondent decides the existence of the obligation arising under article 134(1) on a prima facie basis. However, it is in how the Constitutional Court considered that this standard of proof to be discharged that I again differ with their findings. My learned brothers in the court below held that then it is up to the 1st Respondent to decide on a prima facie basis whether the complaint before the 1st Respondent is proven and then it pass it on for consideration by the tribunal. In so doing that court limited themselves to the complaint only. I find that this is contrary to the 1st Respondent's constitutional obligation under article 19(7). Prima facie is a latin expression meaning on its first encounter or at first sight. The literal meaning would be *"at the first sight"* or *"first appearance"*. To my mind, this standard of proof does not take away the possibility of listening to and hearing both parties. I am of the view that the proceedings before the 1st Respondent is adversarial, with some degree of inquisitorial powers resting in the 1st

Respondent. To that extent each sides to the proceedings has a burden of proof. The person that institute the proceedings has to prove its complaint and the Respondent Justice of Appeal or Judge has to disprove it, all be it on a prima facie basis, without the need to call for or adducing evidence under oath. In such a way we reconcile the need for fairness with the need to preserve the integrity of the subsequent "*inter partes*" investigation before the tribunal. It is the tribunal that must come with a definitive answer after hearing the parties under oath.

36. The existence of a state fact proving a failure to comply with a constitutional obligation may be proven by a number of standards of proof and before a number of courts; tribunals and authorities. Article 19 (7) does not limit the level of proof that need to be applicable in the determination of the constitutional right or obligation in order for it to operate. I share the opinion that provided that there is a determination on the existence of a constitutional obligation, it would be applicable. Therefore this article would find its full effect whether the determination is on a prima facie basis or on a higher standard. I do not subscribe to the view that it would apply only in instances where the court or authority would be call upon to make a final determination on a higher standard of proof.

37. Furthermore, Article 19 (7) also does not limit its applicability only to cases where there is a full and final determination of the existence of a constitutional obligation. Accordingly, the right to fair hearing is not limited to these instances. If there is a process whereby two bodies are called upon to make two separate and independent determinations, albeit on two different standards of proof, one being the precursor to the other, I am of the view that this right would be applicable before each bodies if the provisions of article 19 (7) are met in respect of each bodies. The extent to which it would apply would be dependent on the facts of the case and the legal provisions involved.

38. This said, there are those cases where the doctrine of "*res ipso liquitur*" (the thing speaks for itself) would apply. This would be where the substance of the complaint would be so self evident that there would be no need or necessity to provide extraneous details and materials to substantiate or defend the complaint before the 1st Respondent. These are

cases where any reasonable persons would immediately find the facts of the complaint unsubstantiated, even on a prima facie basis, without the need to call for a reply from the Justice of Appeal or Judge. One should be able to reconcile these cases with a Respondent constitutional obligation under article 19(7) as the right to a fair hearing will not operate when the rights of the Justice of Appeal and the Judge complained of would not be in issue, as in those instances.

Existence of international practices

39. Under article 48 (d) of the Constitution this court is oblige to take judicial notice to the decisions of the courts of other democratic states or nations in respect of its decision when interpreting a charter right. The court is interpreting article 19 (7) in this case, which is a right falling under the Seychellois Charter of Fundamental Human Rights and Freedom. The members of the Commonwealth of Nations consist of democratic states of which the Republic of Seychelles is a member. It is of little surprise, therefore, that many decisions of commonwealth countries were referred to in this appeal. However, a comprehensive study of the existing systems and procedures for removal of judges from office in member states of this organisation would should show that there are a myriads of bodies mandated to consider the of institution of this process. Some of those are political entities others are statutory or constitutional entities. Some would be bound by their respective national constitutions or statutes to observe the principle of fairness and notify the judges of the complaints before they considered whether or not to set up a tribunals, vide the Trinidad and Tobago, as shown in the case of *Rees vs Crane (2016) UKPC,37*. Others are not so bound to call for reply or to effect a notification, such as in Lesotho, as shown in the case of *President of the Court of Appeal vs Lesotho, LSC 1, 141*.In some states the requirement are in the form of a formal request and a formal answer, others are in the form of an informal request for an informal answer. There is clearly no one size fits all in the Commonwealth of Nations in this respect. This despite the Commonwealth (Latimer House) principles, adopted by the Commonwealth of

Nations in 2003. The latter recommending for a right to be heard during the stage of consideration of setting up of the tribunals.

40. Given the multitudes of different procedures, it was quite apparent from the start that this appeal would turn out to be a contest of which side submit the most authorities and the most convincing authorities in support of their respective cases and the outcome of the hearing has lived up to this expectation.

41. This said, to my mind, there was no need for extensive reference to international precedence in this case in the light of the clear and unambiguous provisions of article 19 (7) as read with article 134 of the Constitution. A fair and liberal constructions of these legal provisions clearly leads one to one conclusion. That is it calls for the principle "*audi alterem partem"* to be applied before the 1st Respondent reaches a determination to appoint a tribunal under article 134(2). Nonetheless, I would subscribe to those decisions of the member states of the Commonwealth of Nations which in their application of the fairness principle have open the door to greater scrutiny rather than shut it out.

Article 141 and 141 (6)

42. Under article 141 (6) of the Constitution the 1st Respondent may regulate its own proceedings and may act notwithstanding one vacancy in its membership. At the time that it took its decision in this case the 1st Respondent had no written rules set up to regulate is proceedings. The absence of such rules cannot be used as an argument in favour of arbitrariness and unfairness. The rules were absent however article 19 (7) of the Constitution was present, the latter being the yardstick that the conduct of the process of the 1st Respondent should and must be measured. The 1st Respondent's right to regulate its proceedings is not an arbitrary one, it is one that is subject to the Constitution. As a constitutional authority determining a constitutional obligation, all of its rules and code of practice, whether set down in writing or not, has to be in consonant with the Right to Fair Hearing , if they are not, they are liable to be struck down for their unconstitutionalities.

43. Whilst I do agree that at the material times the members of the 1st Respondent were not legally trained, I do not find that this can afford a reason to absolve it from complying

with article 19 (7). If the members of the 1st Respondent were not legal specialists they should have sought for and obtain legal advice. The provisions of the Constitution which relates to the appointment of members of the 1st Respondent is article141of the Constitution. Article 141 gives the option to the appointers of the 1st respondent to appoint judicial officers or persons of integrity and impartiality who has served with distinction in a high office in the Government of Seychelles or under this constitution or in a profession or vocation. Hence, it is not a "*sine qua non*" condition that the 1st Respondent must consist entirely or partly of legal experts. It may, as it was the case in this instance, that the 1st Respondent be perfectly constitutionally properly constituted of lay persons. If it is consisted of only the latter it may need to seek legal advice on matters that has legal connotations, be it in respect of setting up of a tribunal or on any other matters of a legal nature that comes for their consideration. This is particularly so as though the 1st Respondent regulates its own proceedings and it is also subject to the scrutiny of the Constitutional Court. However, what it cannot do is to forfeit its constitutional mandate to another person. The legal advisors will advise, the 1st Respondent will then determine whether or not to act on the said advice. This option was available to the 1st Respondent in this case.

Determination

44. In my final determination, therefore, I find that the 1st Respondent was constitutionally obligated to hear the Appellant before it considered that the question of removing the Appellant from office ought to be investigated by a tribunal. Having not done, so its decision is null and void to the extent of the inconsistency in pursuant to article 5 of the Constitution.

However, coming back to the facts of this case, it is evident that a tribunal was appointed by the 1st Respondent and that the said tribunal had gone on to recommend to the President the removal of the Appellant from office under article 134 (2) b of the Constitution. The tribunal did this recommendation after conducting a full "*inter partes"* hearing, in which the Appellant was given an opportunity to be heard and in which all his right of fair hearing under article 19(7) was observed. In doing so, the tribunal used a

higher standard of proof than the one that would have been observed by the 1st Respondent. It was one higher than on a balance of probabilities but lower that beyond a reasonable doubt. Hence above a prima facie basis. I am therefore of the view that the 1st Respondent would hence have come to the same determination as the tribunal, though using a lower standard of proof. Accordingly, any irregularities have been cured by the subsequent findings of the tribunal.

R. Govinden (J.A)

Signed, dated and delivered at Ile du Port on21 June 2019