IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2020] SCCA …..
SCA 28/2020

In the matter between

Vijay Construction (Pty) Ltd **Appellant**
(rep. by Mr Bernard Georges)

and

Eastern European Engineering Limited **Respondent**
(rep. by Miss Alexandra Madeleine)

And in the matter between

Vijay Construction (Pty) Ltd **Appellant**
(rep. by Mr Philippe Boullé)

and

Eastern European Engineering Limited **Respondent**
(rep. by Miss Alexandra Madeleine)

Neutral Citation: *Vijay Construction (Pty) Ltd* v *Eastern European Engineering Limited* (SCA 28/2020) [2020] SCSC November 2020

Before: Fernando President of the Court of Appeal, Robinson JA, Dingake JA

Summary: Notice of motion supported by affidavit to declare judgments of the Court of Appeal delivered in the appeal Vijay Construction (Pty) Ltd versus Eastern European Engineering Limited, Civil Appeal SCA 28/2020, on the 2 October 2020, unconstitutional, null and void made to the Court of Appeal - Whether the three-judge panel who sat to hear the appeal violated the Constitution and the Seychelles Court of Appeal Rules 2005 stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated *ipso facto* upon her being appointed Chief Justice - Alleged breach of the constitutional right of appeal as of right under Article 120 (2) of the Constitution - Appellant abandoned its pleaded case - Judges are *ex-officio* members of the Court of Appeal under Article 121 (b) of the Constitution - *(orbiter)* The Constitution and the Rules authorise the President of the Court of Appeal to select any Judge of the Supreme Court to

constitute a panel not being less than three Judges to sit to hear an appeal. Notice of Motion dismissed with costs.

Heard: 5 November 2020

Delivered: 13 November 2020

ORDER

The Notice of Motion is dismissed with costs.

RULING OF THE COURT OF APPEAL

ROBINSON JA (FERNANDO PRESIDENT, DINGAKE JA CONCURRING)

[1] This matter is before the Court of Appeal of Seychelles by way of notice of motion supported by affidavit. The Appellant in this matter was the Appellant in the appeal heard by the Court of Appeal in Vijay Construction (Pty) Ltd versus Eastern European Engineering Limited, Civil Appeal SCA 28/2020 and the Respondent was the Respondent in the said appeal. For the purpose of this Ruling, I continue to refer to the parties as the Appellant and the Respondent, respectively.

The background

[2] A learned Judge of the Supreme Court delivered a judgment on the 30 June 2020, in the suit of Eastern European Engineering Ltd versus Vijay Construction (Pty) Ltd (CS23/2019) [2020] SCSC 350 (hereinafter referred to as the *"Judgment"*).

[3] In the Judgment, the learned Judge found it just and convenient that the Order of Mr Justice Cooke, dated 18 August 2015, and the Order of Mrs Justice Cockerill, dated 11 October 2018, be registered in terms of section 3 (1) of the Reciprocal Enforcement of British Judgments Act.

[4] As a result of her finding, the learned Judge made orders in favour of the Plaintiff under Rule 4 of the Practice and Procedure Rules GN 27 of 1923, in terms of the Order of Mr Justice Cooke, dated 18 August 2015, and the Order of Mrs Justice Cockerill, dated 11 October 2018, as follows —

> ″[155] […].
>
> 1. In accordance with the Order of Mr Justice Cook dated 18th August 2015 -
>
> a) In relation to the arbitration proceedings:
>
> i. the sum of Euros 15,963,858.90 (arbitral award in favour of plaintiff)
> ii. the sum of Euros 640,811.53 (plaintiff's legal and other costs of the arbitration)
> iii. the sum of US Dollars 126,000 (plaintiff's costs to the ICC; and
>
> b) In relation to the application for leave to enforce the arbitral award and to enter judgment in terms of the award, the costs of such application, including the costs of entering judgment, such costs to be summarily assessed if not agreed.
>
> c) In relation to posts award interest:
>
> i. Euros 14,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61;
> ii. Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01;
> iii. Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.
>
> 2. In accordance with the Order of Mrs Justice Cockerill dated 11th October 2018 —
>
> a) The Claimant (plaintiff) costs of (1) the defendant's application to set aside the Order of Mr Justice Cooke dated 18th August 2015 and (2) the defendant's application to cross-examine witnesses of the plaintiff, on the indemnity basis, to be assessed if not agreed.

b) An interim payment on account of the costs referred to in paragraph (a) above in the sum of £245,315.90.

[156] In accordance with —

(a) Section 3(3)(a) of the REBJA, as from the date of this judgment the Order of Mr Justice Cooke dated 18th August 2015 and the Order of Mrs Justice Cockerill dated 11 October 2018, shall be of the same force and effect, as if they had been Orders originally obtained or entered up on the date of this judgment;

(b) Section 3(3)(b) of the REBJA this Court shall have the same control over the said Orders as it has over similar judgments given by itself, but insofar only as it relates to execution of the Orders under section 3 of the REBJA;

(c) Section 3(3) (c) of the REBJA, the reasonable costs of and incidental to the registration of the Orders (including the costs of obtaining a certified copy thereof from the original court) and of the application for registration before this Court shall be borne by the defendant".

[5] The Judgment was appealed (see paragraph [1] hereof). On the 2 October 2020, Dingake JA delivered a judgment dismissing the appeal of the Appellant (the Defendant before the Supreme Court) with costs. Twomey JA concurred with Dingake's *"judgment, reasoning and order"* and, also wrote a separate concurring opinion in which she considered the purport of various provisions of the Seychelles Court of Appeal Rules 2005, enabled under the Constitution of the Republic of Seychelles [CAP 42]. The Constitution of the Republic of Seychelles [CAP 42] is hereinafter referred to as the *"Constitution"*. The Seychelles Court of Appeal Rules 2005, are hereinafter referred to as the *"Rules"*.

[6] Fernando President[1] wrote a dissenting opinion allowing the appeal, reversing the orders made by the learned Judge of the Supreme Court and dismissing the plaint of the Respondent, the Plaintiff before the Supreme Court.

The Notice of Motion

[7] The notice of motion filed by the Appellant on the 15 October 2020, is seeking the

[1] *Under section 2 (1) of the Rules: ""President" means the President of the Seychelles Court of Appeal appointed as such in terms of Article 123 of the Constitution;".*

following orders —

> ″i) declaring the judgments delivered in the above appeal on the 2 October 2020 unconstitutional null and void.
>
> ii) that this motion be heard as a matter of urgency.
>
> iii) that the execution of the judgment of the Supreme Court and the judgments of the Court of Appeal abovementioned be stayed pending the hearing of this motion, under rule 5 of the Seychelles Court of Appeal Rules.″

[8] The grounds advanced by the Appellant for declaring the judgments of the Court of Appeal unconstitutional, null and void are contained in an affidavit in support of the notice of motion sworn by Mr V. J. Patel of Royal Palm Residence, La Misere, Mahe, Seychelles, a director of the Appellant. I find it appropriate to repeat the relevant paragraphs of the affidavit of Mr V. J. Patel —

> ″1. I am a director of the Company Vijay Construction (Pty) Limited duly authorised to act on behalf of the company which is the Appellant.
>
> […]
>
> 4. The Bench that sat to hear the appeal abovementioned comprised of His Lordship A. Fernando Justice of Appeal and President of the Court of Appeal, His Lordship O. Dingake Justice of Appeal and Her Ladyship M. Twomey Chief Justice of the Supreme Court.
>
> 5. The Seychelles Court of Appeal Rules provide that in respect of any appeal, the Court of Appeal shall consist of not less than three Justices of Appeal acting as such.
>
> 6. A *(sic)* Ladyship M. Twomey being the Chief Justice of the Supreme Court appointed as such to hold that Constitutional office under article 125 (3) of the Constitution is therefore not a Justice of Appeal.
>
> 7. To the best of my information, knowledge and belief, upon being appointed Chief Justice, the previous appointment of Her Ladyship M. Twomey as a Justice of Appeal terminated ipso facto and Her Ladyship could no longer sit as a Justice of Appeal on the Court of Appeal.

8. To the best of my information, knowledge and belief, the Court of Appeal that heard the abovementioned appeal violated the Rules of the Court of Appeal abovementioned made under the Constitution, as there were only two Justices of Appeal on the Bench.

9. To the best of my information, knowledge and belief, the violation mentioned in paragraph 8 above, breached my constitutional right of appeal under Article 120 (2) of the Constitution as no valid Court of Appeal heard my abovementioned appeal.

10. To the best of my information, knowledge and belief, as a result of the breach of my Constitutional right mentioned in paragraph 9 above, the judgments mentioned in paragraph 3 above are unconstitutional, null and void.

[…]

14. To the best of my information, knowledge and belief, the Appellant has a good chance of success with respect to the order listed in the Notice of Motion and also in its appeal before the Court of Appeal which will be heard as a consequence of the Court of Appeal Judgments mentioned in paragraph 3 above being declared unconstitutional.

15. To the best of my information, knowledge and belief, it is fair, just and reasonable for the reasons set out above, that the Motion be heard as a matter of urgency and that the Judgment of the Supreme Court and the Judgments of the Court of Appeal be stayed pending the hearing of the Motion to declare the Judgments of the Court of Appeal to be unconstitutional."

[9] Mr Vadim Zaslanov of Beau-Belle, Beau Vallon, Mahe, Seychelles, a director of the Respondent, swore an affidavit in reply resisting the claims of the Appellant. I repeat the relevant paragraphs of the affidavit of Mr Vadim Zaslanov —

"7. I admit paragraph 4 of V. J. Patel's Affidavit.

8. Under paragraph 5 of V. J. Patel's Affidavit, based on legal advice from the EEEL's Attorney which I verily believe to be true, I admit that in respect of any appeal the Court shall consist of not less than three Judges. I am also advised by EEEL's Attorney and verily believe the same to be true that the three Judges are selected by the President of the Court of Appeal to sit for the purposes of hearing the appeal. In respect of the appeal SCA28/2020, the three Judges selected by the President of the Court of Appeal for the purposes of hearing the appeal were indeed his

Lordship A. Fernando, the President of the Court of Appeal, His Lordship O. Dingake and Her Ladyship M. Twomey.

9. I deny paragraph 6 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe that same to be true that her Ladyship M. Twomey sat on the panel selected to hear the appeal in accordance with the Constitution and the panel was therefore valid.

10. I deny paragraph 7 of V. J. Patel's Affidavit. I repeat paragraph 9 of this Affidavit. I am further advised and verily believe that the Court of Appeal has no jurisdiction to determine the question arising from the said paragraph 7 of V. J. Patel's Affidavit and the said question does not arise for determination in SCA28/2020.

11. I deny paragraph 8 of V. J. Patel's affidavit. I state that the appeal in SCA28/2020 was validly heard by the Court of Appeal consisting of a panel of three Judges selected by the President of the Court of Appeal in accordance with the Rules of the Court of Appeal.

12. Further, I am advised by EEEL's Attorney and verily believe the same to be true that the allegations made in paragraph 8 of V. J. Patel's Affifavit is without any constitutional and/or other legal basis whatsoever, is frivolous, vexatious and spurious and an abuse of process of the Court. The composition of the court of appeal for the purposes of hearing of the appeal was well known to the Appellant prior to the hearing of the appeal and the only reason for the Appellant's challenge of the composition of the Court that heard the appeal is the fact that the majority decision was entered against the Appellant.

12. *(sic)* I deny paragraph 9 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that the hearing of the appeal on 3 September 2020 by the Judges selected for that purpose by the President of the Court of Appeal and including Her Ladyship M. Twomey did not violate article 120 (2) of the Constitution. The composition of the Court that heard the appeal was valid and constitutional.

13. *(sic)* I deny paragraph 10 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that there has been no violation of article 120 (2) of the Constitution as alleged in view that the appeal was heard by the Court that had been validly constituted in accordance with the Constitution. The Judgments are constitutional, valid and enforceable.

[…]

17. *(sic)* I deny paragraph 14 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that the Appellant does not have a good chance of success with respect to the order annulling the Judgments and the appeal in that the Court of Appeal is now functus officio and cannot reconsider the appeal, there have not been a violation of article 120 (2) of the Constitution as alleged such that there is no question of denial of right to fair hearing by the Court which heard the appeal on the 3 September 2020 and delivered judgments on 2 October 2020. I am further advised by EEEL's Attorney that the application is purely frivolous, vexatious, spurious and an abuse of the process of the Court which should be dismissed with costs.

18. *(sic)* I deny paragraph 15 of V. J. Patel's Affidavit. I state that based on the matters aforementioned, there is no urgency in hearing the application and granting a stay of execution of the Judgments and the entire application should be dismissed with costs."

[10] The affidavit of Mr V. J. Patel revealed that the crux of the Appellant's case is that the three-judge panel selected by the President to sit to hear the appeal violated the Constitution and the Rules stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated *ipso facto* upon her being appointed Chief Justice under the Constitution. Consequently, no valid Court of Appeal heard the appeal as only two Justices of Appeal were selected to sit to hear the appeal, instead of three, which constituted a violation of the Rules that contravened the Appellant's constitutionally protected right of appeal as of right under Article 120 (2) of the Constitution.

[11] In bare outline, the Respondent in resisting the notice of motion supported by affidavit, contended that —

- the three-judge panel on which Her Ladyship Twomey sat for the purpose of hearing the appeal was validly selected to hear the appeal under the Constitution
- the Court of Appeal has no jurisdiction to determine the question arising from paragraph [7] of the affidavit of Mr V. J. Patel
- the appeal was *"validly heard"* by a three-judge panel selected by the President under the Rules

- because the judgments have been delivered, the Court of Appeal is *functus officio* and, thus, there is no jurisdiction to declare the judgments of 2 October 2020, unconstitutional, null and void
- the Court of Appeal selected by the President to sit to hear the appeal has not violated Article 120 (2) of the Constitution such that there is no question of denial of the Appellant's fundamental right to a fair hearing by the Court of Appeal
- this case is frivolous, vexatious and spurious and an abuse of the process of the Court.

[12] I find it appropriate, at this juncture, to narrate the exchanges between Fernando President and Counsel for the Appellant, from which Counsel for the Appellant came away with the understanding that the three-judge panel selected by the President to sit to hear the appeal consisted of Fernando President, Dingake, a Justice of Appeal, and Twomey, the Chief Justice, an *ex-officio* member of the Court of Appeal. There is no dispute between Fernando President and Counsel for the Appellant about what was said in that context.

The exchanges*:*

The sitting of 22 October 2020

[13] Because of Mr V. J. Patel's averments contained in paragraph [7] of the affidavit, on the 22 October 2020, at the first sitting of the Court of Appeal, Fernando President at the outset, drew the attention of Counsel for the Appellant to Article 121 (b) of the Constitution and the meaning assigned to the word *"Judge"* under Schedule 2 of the Constitution.

[14] Counsel for the Appellant acknowledged more than once in the exchanges with Fernando President that he has extensively considered the purport of the said provisions of the Constitution brought to his attention by Fernando President.

The sitting of 29 October 2020

[15] On the 29 October 2020, at the second sitting of the Court of Appeal, Fernando President again drew the attention of Counsel for the Appellant to the implications of Article 121 (b) of the Constitution. Shortly after, Fernando President stated —

> *"Court (President): And of course, I have mentioned 136 (1), that is under which the Rules were made and as I did point out, I might as well say it, because there are issues that you might as well come ready to address, it will help us all,* ***we have been concentrating on paragraph 7, which says: "To the best of my information, knowledge and belief, upon being appointed Chief Justice, the previous appointment of Her Ladyship M. Twomey as a Justice of Appeal terminated ipso facto and Her ladyship could no longer sit as a Justice of Appeal on the Court of Appeal***[2]*."* Emphasis supplied

Fernando President continued —

> *"Court (President): I believe it is a very important paragraph, which would have a bearing in the future. But, for the purpose of this case, we would like to hear you on how relevant that would be,* ***because at the time this case was heard, that is, on 3 September, she continued to be the Chief Justice and then, of course, as I did mention, according to Article 121 (b) of the Constitution, it says: "The Court of Appeal shall consist of the Judges who shall be ex-officio members of the Court". And a Judge has been defined in the Constitution as also including the Chief Justice***[3]*. "* Emphasis supplied

[16] Given the exchanges between Fernando President and Counsel for the Appellant, the latter responded by stating that the Appellant would not be: *"*[…] *address*[ing] *the issue of her standing as a Justice of Appeal*[4]*"*. In that regard, Fernando President responded by saying, *"yes*[5]*"*.

[17] Shortly after, Fernando President, added —

> *"Court (President): Of course, there is another issue. Hearing was on 3 September. This is another matter as I might as well bring to your attention, which again you can argue and then enlighten us, the fact remains the case was heard on the 3rd September, then Judgment was delivered on the 2nd of October. So, when she heard the case, she was an ex-officio Judge of the Court of Appeal. But when Judgment was delivered, her term of office as Chief Justice, as a result*

[2] Record of proceedings of 29 October 2020 at 10 a: m at pp. 5, 6
[3] Opcit., at p. 6
[4] Opcit., at p. 8
[5] Opcit.,

of her retirement, or rather resignation, had come to an end. Now, there is the other Article in the Constitution, which says: "A Justice of Appeal or Judge or a person acting as such pursuant to article 124 or article 128, whose appointment has terminated otherwise than by reason of being removed from office under article 134, may continue to sit as a Justice of Appeal or Judge, or to act as such, for the purpose of giving judgment or otherwise[6]."

[18] After that, Counsel for the Appellant, without any impediment to the presentation of the Appellant's case, stated to the Court of Appeal that the Appellant would be restricting its claim to the issue of whether or not Twomey, the Chief Justice, a Judge of the Supreme Court, had *"the authority to sit on the Court of Appeal as an ex-officio[7]"* member of the Court of Appeal to hear the appeal.

The sitting of 5 November 2020

[19] On the 5 November 2020, at the hearing of the notice of motion, Fernando President and Dingake JA intervened to explain that the Court of Appeal has not made any determination concerning the Appellant's allegations contained in the affidavit of Mr V. J. Patel, during the exchanges between Fernando President and Counsel for the Appellant, at the previous sittings of the Court of Appeal.

[20] The record of proceedings of 5 November 2020, revealed that Counsel for the Appellant clearly stated that he had understood Fernando President to be saying that Twomey, the Chief Justice, had sat on the three-judge panel to hear the appeal in her capacity as an *ex-officio* member of the Court of Appeal under the Constitution and the Rules[8].

The Appellant's case given the exchanges

[21] On the 5 November 2020, at the hearing of the notice of motion, despite the question at issue arising from the affidavit of Mr V. J. Patel, stated in paragraph [10] hereof, Counsel for the Appellant took the stand he considered fit to take on behalf of the Appellant. The

[6] Opcit., at pp. 8, 9

[7] Opcit., at p. 10

[8] As per the recording of proceedings of 5 November 2020 at 10 a:m at p. 56: *"Mr. Boullé: This is what, how I understood it. I understood that she had been chosen as a Judge and therefore, I say I am not going to challenge the issue, whether she resigned as a Justice of Appeal, or not, because she was chosen as a Judge and following that, your Lordship mentions that she sat on the 3rd, but when she delivered Judgment, she was no longer Chief Justice".*

record of proceedings revealed that Counsel for the Appellant presented his arguments concisely and was given full latitude with regard to the conduct of the Appellant's case.

[22] The main argument of the Appellant by Counsel was that, because of the specific and different definition attached to the word *"Judge"* under the Rules, in respect of any appeal, the Court of Appeal shall consist of only Justices of Appeal, not being less than three, whom the President shall select to sit to hear that appeal. (Emphasis supplied). In the view of Counsel for the Appellant, *"Judge"* as defined in the Rules, unambiguously for purposes of the Rules, means *"Justice of Appeal"*. Whereas under the Constitution, the enabling legislation, *"Judge"* as defined means *"the Chief Justice or a Puisne Judge*[9]*"*. Emphasis supplied

[23] Because of the different meanings attached to the word *"Judge"*, under the Constitution and the Rules, Counsel went on to argue that no valid Court of Appeal heard the appeal as only two Justices of Appeal were selected to sit to hear the appeal, instead of three, which constituted a violation of the Rules that contravened the Appellant's constitutionally protected right of appeal under Article 120 (2) of the Constitution.

[24] With respect to the submissions of Counsel for the Appellant, concerning Article 121 (b) of the Constitution, all that needs to be noted about their contents are that, because of the different meanings assigned to the word *"Judge"* in the Constitution and the Rules, although the Judges of the Supreme Court are *ex-officio* members of the Court of Appeal under Article 121 (b) of the Constitution, the Judges of the Supreme Court are not Judges of the Court of Appeal for the time being.

Discussion

[25] In light of the above, I find that the Appellant by Counsel has abandoned its claim contained in the affidavit of Mr V. J. Patel. The crux of the Appellant's pleaded case, as stated in paragraph [10] hereof, was that the three-judge panel selected by the President to sit to hear the appeal violated the Constitution and the Rules stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated

[9] Article 6 of the Constitution, which enables Schedule 2 of the Constitution - Principles of Interpretation

ipso facto upon her being appointed Chief Justice under the Constitution.

[26] The affidavit of Mr V. J. Patel does not contain the alternative claim to the effect that the three-judge panel of the Court of Appeal that sat to hear the appeal contravened the Rules because only two Justices of Appeal sat to hear the appeal, instead of three.

Decision

[27] Since Counsel for the Appellant, at his own choice, proceeded on a claim different to that pleaded and abandoned the Appellant's pleaded case, I have no choice but to dismiss the notice of motion with costs in favour of the Respondent.

[28] Therefore, prayer *(iii)* of the notice of motion - *"iii) that the execution of the judgment of the Supreme Court and the judgments of the Court of Appeal abovementioned be stayed pending the hearing of this motion, under rule 5 of the Seychelles Court of Appeal Rules"* - does not arise for consideration.

Signed, dated and delivered at Ile du Port on 13 November 2020

Robinson Justice Appeal

_____

I concur

_____

Fernando President

I concur

_____

Dingake Justice of Appeal

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2020] SCCA …
SCA MA 21/2020

In the matter between

Vijay Construction (Pty) Ltd **Applicant**
(rep. by Mr. Philippe Boulle)

and

Eastern European Engineering Limited **Respondent**
(rep. by Miss Alexandra Madeleine

Neutral Citation:	*Vijay Construction (Pty) Ltd v Eastern European Engineering Limited (SCA MA 21/2020) [2020] SCCA - 13 November 2020*
Before:	Fernando, President, Robinson JA, Dingake JA
Summary:	Jurisdiction: Court of Appeal not a court of first instance: jurisdiction of the court circumscribed by s 120 of the Constitution and s 12 of the Courts Act, 1964: thus, the question whether or not the Court of Appeal may review or set aside its own decision cannot be entertained by the Court of Appeal.
Heard:	5 November 2020
Delivered:	13 November 2020

ORDER

The appeal is dismissed with costs.

RULING

DINGAKE JA (CONCURRING)

[1] I have had the pleasure and profit of reading the judgment by my sister Robinson JA in this matter. I agree with the decision, being the dismissal of the application with costs. To the extent that my reasons for reaching the same conclusion may be different, I have considered it necessary to set out my own reasons and also having regard to the view I

take as to whether this litigation is “frivolous” and “vexatious” as contended by learned counsel for the respondent Ms Madeleine.

[2] A brief synopsis of the factual matrix in this case would put the issues of moment in sharp focus. The judgment sought to be impugned by this application canvasses matters that have a long and tortuous history and the amount of judicial time that this singular matter has taken including the resources of this court in the last two months alone is enormous.

[3] The applicant herein is coming to this court following an unsuccessful appeal, to complain essentially, that one of the presiding Justices was not a Justice of Appeal when the appeal was argued because her appointment as Chief Justice terminated her position as Justice of Appeal. In the course of arguing the appeal the applicant also sought to argue that the said Justice could also not sit as an ex-officio member of the Court of Appeal either.

[4] It is also worth noting that this application is a sequel to a series of unsuccessful attempts by the applicant in France, United Kingdom and Seychelles to oppose the enforcement of the arbitral award and or foreign judgment in Seychelles relating to an award that the respondent obtained in France against the applicant many years ago.

[5] I will return to the significance of the above historical footnote when I consider the argument of Madeleine, learned counsel for the respondent, that this application is frivolous, vexatious and an abuse of court process.

[6] The centrality of the applicant’s pleaded case is that “upon being appointed Chief Justice, the previous appointment of Her Ladyship M. Twomey as a Justice of Appeal terminated ipso facto and Her Ladyship could no longer sit as a Justice of Appeal on the Court of Appeal”. Consequent to this averment the applicant seeks, on the main, an order nullifying the earlier judgment as unconstitutional.

[7] It is not clear on the papers before us why the applicant did not raise these issues when the appeal was heard and no credible attempt to explain this was made during oral argument of this application.

[8] Having regard to the above, the question that sharply falls for determination is whether this court has jurisdiction to determine the application, based on the conferred constitutional/statutory jurisdiction and or inherent jurisdiction?

[9] It is trite learning that jurisdiction is a fundamental first step, and without jurisdiction, the court cannot do anything in relation to the suit before it. The question whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. When the issue is raised, as it was in this case, by learned counsel for the respondent, the court is obliged to deal with it right away.

[10] On this critical and fundamental issue, since I cannot do any better, I let the Court of Appeal in Kenya, in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** articulate the position:

> "[A] question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. ***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction***…".

[11] It is beyond dispute that jurisdiction refers to the power of a court to adjudicate disputes definitively. The Court of Appeal is a creature of the Constitution, wherein it derives its powers. It is not at liberty in the course of adjudicating to grant itself powers not granted by the Constitution or statute. This is because the Court of Appeal is subservient to the Constitution and not its overlord.

[12] The jurisdiction of the Court of Appeal is set out in the Constitution and the Courts Act. Section 120 of the Constitution, its plain and requires no interpretation. It provides as follows:

"**Establishment and jurisdiction of Court of Appeal**

120. (1) There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction ***to hear and determine appeals*** from a judgement, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.

. . . ." (emphasis mine)

[13] Similarly, section 120(1) of the Courts Act, provides as follows:

"**Appeals in civil matters**

12. (1) Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction ***to hear and determine appeals*** from any judgement or order of the Supreme Court given or made in its original or appellate jurisdiction." (emphasis mine.)

[14] It is plain from the above provisions that the Court of Appeal has appellate jurisdiction. It is not a court of first instance. It hears and determines appeals brought to it from the Supreme Court when the latter has exercised its original or appellate jurisdiction.

[15] It is precisely because jurisdiction is conferred by the constitution or statute that it is impermissible for a court of law to arrogate to itself jurisdiction exceeding that which is conferred upon it by law. If it does so it places itself above the constitution which it ought not to do. This is so because in this country as far as I can establish from its progressive constitution, (whose values are illuminated by memorable words in the preamble) there is only one system of law shaped by its constitution which is the supreme law and all institutions created by it must obey its command, including this court.

[16] In consequence of the above this court cannot expand its jurisdiction through judicial craft, innovation or avoidance. To this extent, Parliament may not, by statute, confer a power on a court that conflicts with the one dictated by the constitution.

[17] This court has considered the matter of its jurisdiction in the past. This was in the case of **Attorney General v Pou** (1 of 2005) (1 of 2005) [2005] SCCA 21 (24 November 2005), where the Court of Appeal, determined that it did not have inherent review jurisdiction over Supreme Court decisions. In that case Ramodibedi P, poignantly and correctly observed that:

> "[25]. . . . [T]his Court's jurisdiction is ***wholly confined to appeals only***." (emphasis mine.)

[18] This application requires that this court exercise jurisdiction as a court of first instance, which the Court of Appeal is not. For the reasons stated above it is not permissible for this court to do so.

[19] In the result, the Court of Appeal does not have jurisdiction to hear or determine this application, for the reason that it is not an appeal. Further, it does not fall into the category of matters that the court may hear at first instance, for example, applications for condonation or a breach of Charter rights issue arising in the course of proceedings in the Court of Appeal, as envisaged in s 46(7).

[20] Having regard to my conclusion above, one may still wonder whether this court has "inherent" jurisdiction to entertain this application. In my respectful and considered opinion the answer should be in the negative.

[21] Inherent jurisdiction is a creature of the English common law, and is generally understood as referring to the array of implied powers which are exercisable by judges for the purpose of regulating matters of procedure. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law. When a court is called to exercise its inherent jurisdiction, so that it can properly regulate its own proceedings, it is essentially called to exercise a function

that it already has or has already been clothed with. Effectively, such a court can do all it can unless there is a prohibitive statute that says otherwise.

[22] As a creature of the English common law, the concept of "inherent jurisdiction" can be traced back to 1840 in Baron Alderson's decision in ***Cocker v Tempest*** (1841) 7 M & W 501 where he commented: "the power of each court over its own processes is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice".

[23] It is often said that inherent jurisdiction is axiomatic to the very nature of a court – it is intended to ensure that a court must be able to function effectively as such.

[24] I am fortified in the above view by the following illuminating remarks by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14:

> "***The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial***; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; ***it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process*** … In sum, it may be said that the inherent jurisdiction of the court ***is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them***." (own emphasis.)

[25] It is clear from the above that inherent jurisdiction implies some residual powers that the courts may have to regulate their own process in certain circumstances. Generally speaking, superior courts have inherent jurisdiction, which means that these courts may do anything that the law does not forbid. They have jurisdiction to make orders, unlimited as to amount, in respect of matters that come before them, subject to certain limitations imposed in some instances by the common law, but more often by statute.

[26] A further illumination on the meaning and boundaries of " inherent" jurisdiction was offered in the case of ***Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al***., [1976] 2 S.C.R. 475, the Canadian Supreme Court stated that:

> "[T]he inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do."

[27] In my considered opinion inherent jurisdiction must only be exercised under exceptional circumstances and sparingly - it cannot be an elastic band that may be stretched in whatever direction the court wishes to stretch it because the court cannot stand the instruction by the constitution that it has no power to do certain things. In every situation where the court is inclined to invoke its inherent jurisdiction it must do it in a manner that accords with the requirements of the constitution and as far as possible with the procedure ordinarily followed by this Court in similar cases. Under no circumstances should the power be used to ignore or circumvent legislation that confers jurisdiction on the court.

[28] The above appears to be consistent with the views expressed by the court in the case ***Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited*** [1971] 4 W.W.R 542 at 547 where Chief Justice Freedman was careful to state that:

> "Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."

[29] In the South African context, in **Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service** 1996 (3) SA 1 (A), the Supreme Court of Appeal had this to say about its inherent jurisdiction:

> "The short answer is that ***the Court's "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice***" (per Corbett JA in Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G), ***does not extend to the assumption of jurisdiction not conferred upon it by statute***. As explained in R v F Milne and Erleigh (6) 1951 (1) SA 1 (A) at 5, "***(this) Court was created by the South Africa Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment". Nowadays its jurisdiction derives from the Supreme Court Act and other statutes but the position remains basically the same***. (Sefatsa and Others v Attorney-General, Transvaal, and Another 1989 (1) SA 821 (A) at 833E-834F; S v Malinde and Others 1990 (1) SA 57 (A) at 67A-B.) ***The Court's inherent power is in any event reserved for extraordinary cases where grave injustice cannot otherwise be prevented*** (Enyati Colliery Ltd and Another v Alleson 1922 AD 24 at 32; Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A) at 469G-I)."

[30] The position is similar in the context of Lesotho, where in the case of ***Teboho Lepule v Manthabiseng Lepule & others*** C of A (CIV) NO. 34/2014 Constitutional Case No. 04/2013, Mokgoro AJA opined:

> "***The direct jurisdiction of apex courts to review their own decisions is not an inherent power***. ***In jurisdictions where apex courts have that power, it is vested and provided for in the laws of the land***. Thus, because the Lesotho Constitution and the relevant legislation do not provide the Court of Appeal with the jurisdiction to review its own judgments, it is in our view not unreasonable to draw an inference and conclude that this Court does not have that jurisdiction, at least not directly. That conclusion is consonant with the fundamental common law principles of res judicata and stare decisis, that the decisions of courts of last resort settle the issues and are final with regard to questions of law."

[31] During the course of argument our attention was drawn by counsel for the applicant to two authorities, namely the cases of **Karunakaran v Attorney General (CP18/2019) [2020] SCCC 5 (12 May 2020)** and **Attorney General v Mazorchi and Another SCA Civil Appeal 6 of 1996.**

[32] In the case of **Karunakaran**, the petitioner challenged the composition of the Court of Appeal quorum that had heard and dismissed his appeal. He alleged that only two Justices of Appeal heard the appeal, instead of three, since one of the judges was from the Supreme Court. This, he said, infringed his constitutionally protected right of appeal, provided for under Article 120(2) of the Constitution, as no validly constituted Court of Appeal heard his appeal.

[33] Relying on earlier judgments where it was determined that where a constitutional issue arises out of a procedural irregularity in the Court of Appeal, these should be raised by way of motion in the Court of Appeal in the course of proceedings, the Constitutional Court held that the petitioner had not availed these avenues for redress. The Court determined that it was not the appropriate forum when it comes to allegations of constitutional contravention which are procedural in nature and that occurs in the course of the proceedings of the Court of Appeal. It concluded, on this point: "In such instances, it would be the Court of Appeal that would be able to hear the procedural irregularity and grant a remedy."

[34] The Constitutional Court relied on ***Mazorchi*** for the proposition that the petitioner could have approached the Court of Appeal for an order to set aside its earlier order and judgment due to an irregularity in the proceedings. So it is no surprise that it held that the petitioner had this avenue available to him. It is plain from reading the judgment that the court relied on ***Mazorchi*** without any analysis of its correctness as regards the court's inherent jurisdiction. The court in ***Mazorchi*** in turn relied on an excerpt from paragraph 556 of Halsbury's Laws of England, Vol.26, 4th Edition, which stipulates that: "where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside."

[35] This excerpt was applied, it would appear, without regard to the Court of Appeal's jurisdiction under the Constitution and the relevant statues. The Court's inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice, it is worth repeating, does not extend to the assumption of jurisdiction not conferred upon it by statute. ***Mazorchi*** does not address this essential issue, and the court instead clothed itself with jurisdiction on the basis of a secondary source, disregarding the primary source of its jurisdiction, namely, the Constitution.

[36] In my considered and respectful opinion, ***Karunakaran v Attorney General*** operates under the same misconception as to the jurisdiction of the Court of Appeal as ***Mazorchi***. Both these judgments were in my respectful view wrongly decided.

[37] There is one last matter that I undertook to address. This relates to the submission by learned counsel for the respondent that this application is frivolous, vexatious and an abuse of court process. The meaning the courts have attached to "frivolous" and "vexatious" in most Commonwealth jurisdictions, as I shall illustrate hereunder, is fairly similar – and Seychelles case law I read, is to the same effect.

[38] In law a frivolous litigation is one that is plainly and obviously untenable, that cannot possibly succeed and bound to fail. A vexatious claim is one that is said to be a sham and amounts in effect to harassing the opposite party and put that party to unnecessary trouble and expense in opposing a wholly unmeritorious litigation. (**R v Agathine (CO 38/2005) [2007] SCSC 128 (21 June 2007)** The Supreme Court in Papua New Guinea also came to the same conclusion in several cases including in the following cases: **Ronny Wabia v. BP Exploration Co. Limited and 2 Others [1998] PNGLR 8** and **Philip Takori and Others v. Simon Yager and 2 Others SC 905.**

[39] In **Elizabeth v President Court of Appeal (2010) SLR 382**, the Constitutional Court noted that the words frivolous and vexatious had not been defined in prevailing legislation, and observed that there was no legislative interpretation of the words in the jurisdictions the court had reviewed. The court resolved that the words should be given their ordinary dictionary meaning.

[40] In this regard, the court resorted to the Oxford Dictionary and Thesaurus where frivolous is defined as "adj. 1 *paltry, trifling, trumpery*. 2 *lacking seriousness; given to trifling…*" In relation to a claim or petition, the court considered this to mean that the claim or petition had no reasonable chances of success.

[41] Writing for the Court of Appeal in **Reference by the Attorney General under section 342A of the Criminal Procedure Code (Cap 54) as amended: Number 18 of 2003**, Ramodibedi P opined that the words "not frivolous or vexatious" in the context of referrals under Article 46(7) of the Constitution, indicate that the makers of the Constitution sought to discourage busybodies in constitutional litigation thus leaving the Constitutional Court or the Court of Appeal with more deserving constitutional cases. "Thus interpreted, the makers of the Constitution were clearly conscious not to clog the Constitutional Court or the Court of Appeal with "frivolous" or "vexatious" cases."

[42] The South African Constitutional Court in the case of **Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 (CC),** citing a High Court case of **Bisset v Boland Bank Ltd 1991 (4) SA 603 (D) at 608D-F**, stated that:

"[19] ***What is "vexatious"? In Bisset the Court said this was litigation that was "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". And a frivolous complaint? That is one with no serious purpose or value***. ***Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious***." (own emphasis.)

[43] In **Allisop v FIU [2016] SCCA 1**, the Court of Appeal determined, inter alia, that the appeal against the refusal by the Constitutional Court to allow an amendment of the appellant's constitutional petition was frivolous and vexatious, because the amendment was clearly intended to introduce a new matter not pleaded in the petition which was prohibited by Rule 5(3) of the Constitutional Court Rules. At paragraph 16 the court stated that:

"Th[e] appeal was ill advised; in our view frivolous and vexatious and is a clear example of practices "bent upon dislocating the course of trial and prolonging the proceedings by every means", vide *Prakash Boolell v The State of Mauritius* [2006] UKPC 46."[d]

[44] In order discourage vexatious and frivolous appeals in the future, the court in **Allisop** invoked its powers under Rule 31 (5) of the Seychelles Court of Appeal Rules which provides:

"In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, ***or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised***."

[45] Having regard to the fact that years had passed in the matter, the delay tactics, the court came to the conclusion that there had been an abuse of process in this case. It opted to send a warning in relation to wasted costs, recognising however, that there was no statutory provision for wasted costs in Seychelles but concluded that it was permitted by Rule 31(5) to make any order in the interests of justice. The court adopted the three stage approach of **Re a Barrister (wasted costs order) [1994] 3 All ER 429** when considering a costs order: (1) Has there been an improper, unreasonable or negligent act or omission? (2) As a result, had any costs been incurred by a party? (3) Should the court exercise its discretion to order the lawyer to meet the whole or any part of the relevant costs?

[46] In the end, the Court determined that it should exercise its discretion to order the lawyers in the matter to meet the whole of the costs of the case.

[47] In the South African case of **SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1) SA 565 (CC)**, the court indicated that costs debonis propriis would made against an attorney where a court is satisfied that there was negligence in a serious degree with warrants an order of costs being made as a mark of the court's displeasure.

[48] In the case of **Xaba and Others v I G Tooling & Light Engineering (Pty) Ltd and Others (JR 200/16) [2018] ZALCJHB 395; (2019) 40 ILJ 638 (LC) (28 November 2018)** the court ordered costs de bonis against an attorney for pursuing meritless cases after being cautioned by opposing counsel that their case had no merit. The court concluded that the claim had been filed without any regard to the Labour Relations Act, the cases on the subject matter, and without making any assessment as to the prospects of success.

[49] Similarly, in **Indwe Risk Services (Pty) Ltd v Van Zyl (2010) 31 ILJ 956 (LC)**, para 39, the Court considered circumstances where a de bonis propriis cost order was warranted and held that:

> "I am also mindful of the fact that an order for costs de bonis propriis is only awarded ***in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office***. Such an ***order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment***. ***However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative***. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus Superior Court Practice at E12-27.)"

[50] At the end of the day this court, sitting at the apex of the court hierarchy is obliged, in order to preserve its credibility and integrity, to jealously guard its processes against abuse and where that is done the court must mark its disapproval by ordering punitive costs –including costs debonis, in appropriate cases.

[51] Having regard to the extensive authorities I have cited, it is my considered and respectful opinion that this application is frivolous and vexatious; it is wholly without merit and has

the effect of simply harassing the respondent and put it to unnecessary trouble and expense in opposing an application that should not have been brought in the first place.

[52] The application is an abuse of court process as it is in effect a disguised attempt to rehear the appeal that this court has determined, and with respect to which it is now *functus officio.* It relates to the same matter with respect to which the applicant has been unsuccessful on many occasions; and quite plainly, in my mind at least, the applicant's continued litigation on matters already determined by the court has the effect of subjecting the respondent to inconvenience and amounts in effect to harassment.

[53] In view of the above, I have considered ordering costs *de bonis propriis* against the applicant' counsel, but I will temper justice with mercy and not do so, primarily because this was not a prayer of the respondent and the court did not hear the applicant' counsel on why costs *de bonis* should not be ordered against counsel for the applicant.

[54] In the result, and for the reasons stated above I will dismiss the application with costs on the basis that this court has no jurisdiction to entertain the application.

Signed, dated and delivered at IIe du Port on 13 November 2020

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Dingake JA