

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 13
SCA CL 06/2020
(Appeal from CP 01/2020)

Registrar of the Supreme Court

(rep. by Mr. Stefan Knights)

Appellant

and

Public Service Appeal Board

(rep. by Mr. John Renaud)

1st Respondent

Sumita Andre

(rep. by Mr. Frank Elizabeth)

2nd Respondent

Attorney General

(rep. by Mrs. Aaishah Molle)

3rd Respondent

Neutral Citation: *Registrar of the Supreme Court v Public Service Appeals Board and Others*
(SCA CL 06/2020) [2021] SCCA 13
30th April 2021

Before: **Fernando, President, Robinson JA, Dingake JA**

Summary: Constitutional referral at the application for leave for Judicial Review stage

Heard: 19th April 2021

Delivered: 30th April 2021

ORDER

The appeal is upheld. There is no order as to costs.

JUDGMENT

DINGAKE JA

INTRODUCTION

- [1] The Appellant (Petitioner in the Constitutional Court) is the Registrar of the Supreme Court who prays that this Court set aside the ruling of the Constitutional Court in Registrar of the Supreme Court v Public Service Appeal Board & Ors (CP 01/2020) [2020] SCCC 884 (24 November 2020) (the “Judgment”).
- [2] The 1st Respondent is Public Service Appeal Board (the “PSAB”). The 2nd Respondent is Sumita Andre, employed as Assistant Registrar with the Judiciary. The 3rd Respondent is the Attorney General.

BACKGROUND

- [3] Ms Sumita Andre had lodged a complaint with the PSAB. Details of the complaint are well described in the Constitutional Court Judgment and it not material to traverse same. They are not of moment in this judgement. The PSAB, after a hearing, had issued an Order on the matter. The Registrar of the Supreme Court had applied to the Supreme Court for a Judicial Review. The Supreme Court had referred the matter to the Constitutional Court without ruling on the Application for Leave and stated during the Court Proceedings dated 12th February 2020 that once the Constitutional Court makes their determination “*then we deal with the issue of leave*”.
- [4] The case proceeded to the Constitutional Court where all the parties, including the Appellant (then Petitioner) submitted objections to the referral. Objections were dismissed and the Constitutional Court decided that as powers of the PSAB has already been decided by the Constitutional Court, the need for a referral did not arise. The matter was remitted back to the Supreme Court to make a determination as to whether the Order of the PSAB is ultra vires.

GROUND OF APPEAL

- [5] The Appellant submitted two grounds of appeal and two issues for determination by this Court. The Grounds of Appeal are as follows:

***Ground 1** – The Constitutional Court erred in failing to find that the referral by the Hon. Mme. Justice Carolus was premature;*

Issue 1: Whether the referral of the petition to the Constitutional Court was a procedural irregularity and if it was prematurely referred to the Constitutional Court;

***Ground 2** – The Constitutional Court erred in law by failing to find that the referral was ultra vires;*

Issue 2: Whether a Judge needs to give both parties in a matter an opportunity to provide submissions as to whether or not the constitutional question formulated by that Judge is frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal before the Judge refers the matter to the Constitutional Court?

Ground 1 – The Constitutional Court erred in failing to find that the referral by the Hon. Mme. Justice Carolus was premature

- [6] The issue that the Appellant is asking this Court to determine is whether the referral of the petition to the Constitutional Court was a procedural irregularity and whether it was prematurely referred to the Constitutional Court.
- [7] The Appellant submits that as the Judicial Review has two stages, first being the application for leave for Judicial Review, Judge Carolus should not have referred the constitutional issue at the first stage and should have waited for the second stage.

Application for leave to apply for Judicial Review

- [8] Under Article 125 (1) of the Constitution the Supreme Court has supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority. Judicial Review is governed by the Rules of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals, Adjudicating Bodies) Rules 1995 (the “Rules”). Application for Judicial Review undergoes two stages: the leave stage and the merits stage. The Rules applicable to leave stage are Rules 2-6. Rule 5 provides that the petition made under Rule 2 shall be listed ex-parte for the granting of leave to proceed. Rule 6 provides two matters to be considered when deciding whether to allow or reject the application for judicial review:

whether the petitioner has sufficient interest in the subject matter and whether the petition is being made in good faith.

[9] At the leave stage therefore the petition is listed ex-parte and the Court considers matters referred to by Rule 6. The Respondent under Rule 7 may take notice of application being registered under Rule 5 at any time and object orally or in writing to the grant of leave to proceed, or if leave to proceed had been granted object to the application at any time before the time fixed by Rule 12 for filing objection.

[10] It was correctly stated in the case of *Derrick Chitala v Attorney General* (1995) ZR that the purpose of the leave stage is to eliminate claims that are frivolous, vexatious or hopeless. In *R v Secretary of State for Home Department, ex-parte Cheblak* [1991] 1 WLR 980 Lord Donalds explained that the process operates as a filter to eliminate unarguable cases and if an arguable issue emerges, the Courts grant the leave (*Island Development Company v Marine Accident Investigation Board* (MA90/2019, arising in MC19/2019) [2020] SCSC 37).

Referral to Constitutional Court

[11] The issue of referral of constitutional question, and other question related to Charter Rights, by the Supreme Court is governed by Article 130(6).

[12] *“Constitutional questions before Constitutional Court*

130. (6) Where in the course of any proceedings in any court, other than the Court of Appeal or the Supreme Court sitting as the Constitutional Court, or tribunal, a question arises with regard to whether there has been or is likely to be a contravention of this Constitution, other than Chapter III, the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

In the course of any proceedings

[13] In consideration of the first element, that is question arising in the course of proceedings, *Adeline v Talma* (supra) and the Constitutional Court in this case also applied

interpretation from *Lizianne Reddy & Anor v Wavel Ramkalawan* CS97/2013 [2019] SCSC 41 (30 January 2019), which interpreted ‘in the course of any proceedings’:

"The question of constitutionality of a legal provision could arise at any stage in the case: the pleadings, the evidence or the submissions."

- [14] Section 23 of the Seychelles Code of Civil Procedure (the “SCCP”) states that suits are commenced by plaint and section 2 defined “suit” or “action” as a civil proceeding commenced by plaint. It follows therefore once the Plaint is filed with the registry it can be said that the proceedings has commenced. However, it must be noted that we are not dealing with a plaint but Application for Leave and Petition. It seems logical from the nature of judicial review that an Application for Leave, simply seeks permission to commence proceedings and therefore at that stage it cannot be said that proceedings have commenced.
- [15] The Appellant cites Brett J in *Stone v Yeovil Corpn* (1876) 1 CPD 691 at page 701 that effect must be given to every word of an Act unless word or phrase has no sensible meaning, in which case it must be eliminated. The Appellant then states that “in the course of” cannot be eliminated and that in Judicial Review proceedings ‘in the course of proceedings’ refers to the second stage of Judicial Review, after leave was granted. We agree that this submission has merit and should be upheld as we hereby do.
- [16] We want to emphasise that the reason why an Application for Leave cannot mark the beginning of judicial review proceedings is because the purpose of the leave stage is to eliminate claims that are frivolous, vexations or hopeless or to stop the so called busy bodies, the meddlesome interlopers, in their tracks.
- [17] In the result we hold that in judicial review proceedings commence when leave has been granted and the merits of the case are being considered. It follows in our view that this referral was prematurely made.

Question has already been the subject of a decision of the Constitutional Court or the Court of Appeal

[18] With regards to this element, the Constitutional Court has pointed out at paragraphs [28]-[30] that the jurisdiction of the PSAB has already been the subject of two judgments – *Government of Seychelles v Public Service Appeal Board & Anor* (II) (CP 16/2019) [2020] SCCC 4 (25 March 2020) and *Government of Seychelles v Public Service Appeal Board & Anor* (CP 15/2019 (Arising in MC87/2020)) [2020] SCCC 3 (27 March 2020) and therefore the need for the referral does not arise. We find no reason to fault this conclusion.

[19] We turn now to consider Ground 2.

Ground 2 – The Constitutional Court erred in law by failing to find that the referral was ultra vires

[20] During the Court Proceedings dated 12th February (page B1-B2 of the Court of Appeal Bundle) Judge Carolus decided to refer the matter to the Constitutional Court despite the Counsel stating that they are not the same view as the Court with regards to referral.

[21] The parties were not afforded the opportunity to address the Court on whether the constitutional issue is frivolous or vexatious.

[22] The Appellant also relies strongly on the *Reference by the Attorney-General* [2004] SCCA 6 in support of the submissions that the parties should have been heard on the issue of whether there is a constitutional question that arose, and contends that “*the learned Judge a quo flouted the principle of natural justice (audi alteram partem rule)*”.

“[15] Thirdly, even if a constitutional issue legitimately arose, however, the court a quo was, in my judgment, obliged and indeed enjoined by Article 46(7) of the Constitution to immediately adjourn the proceedings and refer the question for the determination by the Constitutional Court.” This he failed to do despite the peremptory nature of the Article as indicated by the use of the word “shall”.

[16] Fourthly, in adopting the approach that he did, without inviting counsel's submissions the learned Judge a quo flouted the principle of natural justice (audi alteram partem rule).” (emphasis added)

[23] We are persuaded by the force of the Appellant's submission on this point and reiterated the settled position of the law that the Supreme Court was obliged to hear the parties on whether the constitutional issue was frivolous or vexatious. In failing to do so, the court with respect fell into error.

CONCLUSION

[24] In summation, on Ground 1 that the Constitutional Court erred in failing to find that the referral was premature for the reasons stated above. We are of the view that given the nature and purpose of Application of Leave as indicated earlier the constitutional question may not arise at the leave stage as all that the Court needs to do at this point is to assess whether the Petitioner established sufficient interest and whether the Petition is in good faith.

[25] On Ground 2 we agree with the Appellant's contention that the Supreme Court was bound by the Court of Appeal directives in Reference by the Attorney General (2004) SCCA 6 that both parties should be given an opportunity to submit whether the constitutional question formulated by the judge is frivolous or vexatious.

[26] In the result the Appeal is upheld. There is no order as to costs.

Dingake JA

I agree with the conclusion reached by Justice Dingake that the appeal should be upheld and the Ruling of the Constitutional Court be quashed and wish to add that under **rule 6(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules**, made under article 136 (2) of the Constitution, by the learned Chief Justice it is stated: “*The Supreme Court shall not grant the petitioner ‘leave to proceed’ unless the Court is satisfied that the petitioner has sufficient interest in the subject matter of the petition and that the petition is being made in good faith*” (emphasis added). In my view ‘proceedings’ as specified in article 130(6) of the Constitution commence only when ‘leave to proceed’ has been granted. It would be a waste of time if after an examination and a determination of the constitutional question by the Constitutional Court referred to it by the Supreme Court; the Supreme Court were to dismiss the judicial review application on the ground that the petitioner has not satisfied the Supreme Court on the two threshold issues, namely that the petitioner has sufficient interest in the subject matter of the petition and that the petition is being made in good faith. I make no order as to costs.

Fernando, President

I concur

Robinson JA

Signed, dated and delivered at Ile du Port on 30 April 2021