

**IN THE CONSTITUTIONAL COURT OF SEYCHELLES**

DEMOCRATIC PARTY (DP)  
Rep by its President Paul Chow

PLAINTIFF

**VERSUS**

1. SEYCHELLES NATIONAL PARTY  
Rep by its Leader Wavel Ramkalawan
2. DR. PATRICK HERMINIE  
Speaker of the National Assembly

DEFENDANTS

Constitutional Case No 303 of 2007

.....  
**Before: A.R Perera J(Presiding), D. Karunakaran J & D. Gaswaga J**  
.....

Mrs Antao for the Plaintiff  
Mr. A. Juliette for the 1<sup>st</sup> Defendant  
Mr. A. F.T. Fernando, Attorney General (as amicus curiae)

**RULING**

**Perera J (Presiding)**

The matter before this Court originated as a referral made by the Hon. Chief Justice who is the trial Judge in case no. 303 of 2007 (Democratic Party V. Seychelles National Party and Dr. Patrick Herminie, Speaker of the National Assembly).

The referral reads as follows-

*"This case is referred and remitted to the C.C. for interpretation of Arts 102, 82 of the Constitution. Mention before C.C on 6.11.07 – 1.45 p.m."*

In the main case before the Supreme Court, filed on 30<sup>th</sup> October 2007 the plaintiff (*the Democratic Party*) is seeking specific performance of an oral contract with the 1<sup>st</sup> defendant (*the Seychelles National Party*) entered in the course <sup>of</sup> their Political negotiations for the 2007 National Assembly Elections. It has been averred that the said oral agreement is evidenced in writing contained in a series of facsimile transmissions and other documents. It has also been averred

that among other matters, it was agreed that *"regardless of the results of the election, the defendant agrees to appoint one person nominated by the Plaintiff's President as a proportionally elected member of the National Assembly .....*". The cause of action pleaded in the plaint is an alleged breach of "the express and/or implied terms of the contract" by the S.N.P. by replacing Mr. Frank Elizabeth, a Democratic Party member who had been serving as a proportionally elected member in pursuance of the said agreement. The plaintiff therefore prays for (1) specific performance of the contract, (2) an order prohibiting the 1<sup>st</sup> defendant from removing and replacing the Democratic Party Member from the National Assembly except with the written consent, permission or authorization of the Democratic party President, (3) order prohibiting the 2<sup>nd</sup> defendant from issuing a certificate in terms of Article 81(6) of the Constitution.

Together with the plaint, a notice of motion and affidavit were filed by the plaintiff on 30<sup>th</sup> October 2007 seeking interlocutory injunctions against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Although the injunction sought against the 2<sup>nd</sup> defendant in the plaint was to prohibit him from issuing a certificate under Article 81(6) of the Constitution, in the notice of motion, two additional orders were sought, namely to reinstate Mr Elizabeth and to rescind the appointment of the newly appointed member Mr. Jose Henri.

Mrs Antao submitted that the 2<sup>nd</sup> defendant was added as a party under Section 109 of the Code of Civil Procedure, which provides that "all persons may be joined as defendants against whom the right to any relief is sought to exist, whether jointly, severally, or in the alternative". There is no cause of action pleaded against the 2<sup>nd</sup> defendant in the plaint. It was held in the case of **Amon v. Raphael Tuck & Sons Ltd (1956)(1) Q.B. 347** that –

*"That only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action".*

In the present case, if the plaintiff is successful, reinstatement of Mr. Elizabeth or any other member of the Democratic Party would be a matter solely within the discretion of the 1<sup>st</sup> defendant being the Political Party qualified to appoint proportionately elected members. In that respect, the



adding of the 2<sup>nd</sup> defendant serves no purpose. However that is a matter to be decided by the trial Judge upon hearing the motion of the 2<sup>nd</sup> defendant.

Be that as it may, the Hon. Chief Justice upon considering that exparte application issued –

- (1) *An interim injunction prohibiting the leader of the S.N.P. Mr Wavel Ramkalawan from removing and replacing Mr. Frank Elizabeth as a proportionately elected member.*
- (2) *An interim injunction prohibiting the 2<sup>nd</sup> defendant, the Speaker of the National Assembly from issuing a certificate that Mr Elizabeth has ceased to be a member of the Assembly.*
- (3) *A mandatory injunction ordering the Speaker to reinstate Mr. Elizabeth as the proportionately elected member of the S.N.P. and to maintain the status quo.*
- (4) *A mandatory injunction ordering the Speaker to rescind the appointment of Mr. Jose Henri as the proportionately elected member of the S.N.P.*

The said injunctions were issued on the 1<sup>st</sup> and 2<sup>nd</sup> defendants, returnable on 15<sup>th</sup> November 2007 at 1.45 p.m.

In the meantime, the plaintiff filed a notice of motion dated 5<sup>th</sup> November 2007, and an affidavit moving that the 1<sup>st</sup> and 2<sup>nd</sup> defendants be summoned to show cause why they should not be committed to imprisonment for failure to comply with the said orders of Court. The 2<sup>nd</sup> defendant also filed a motion dated 2<sup>nd</sup> November 2007 together with an affidavit moving that he be struck off as a defendant in the case on the following grounds-

1. *The plaint does not disclose a cause of action against him.*

2. *That in view of the provisions of Article 102(1) of the Constitution a member of the National Assembly which includes the Speaker, the 2<sup>nd</sup> defendant in this case, shall not be subject to the jurisdiction of any Court or to any proceedings whatsoever, when performing the functions of a member in the Assembly.*
  
3. *That in view of the provisions of Article 82(1) (b), it is only the Constitutional Court that has jurisdiction to hear and determine that the seat of a member of the National Assembly has become vacant and therefore the Supreme Court in exercising its original jurisdiction in Civil matters is not competent and has no jurisdiction to hear and determine the subject matter of this case.*

Both motions were served on the respective parties informing them that the hearing was fixed for 6<sup>th</sup> November 2007 at 1.45 p.m. However, the Hon. Chief Justice made the instant referral to be taken up on the same day, at the same time before this Court. Thus the hearing of the two motions before him was aborted .

Mrs Antao, Learned Counsel for the plaintiff and Mr. Juliette, Learned Counsel for the 1<sup>st</sup> defendant informed this Court that they had no notice of the referral and that they came prepared to the hearing of the two motions. The Hon. Attorney General informed Court that he had been mandated by the 2<sup>nd</sup> defendant to represent him and support the motion before the Supreme Court. However due to the change in forum, this Court acting under Rule 10(3) of the Constitutional Court Rules invited him to appear as amicus curiae in respect of the present matter. Mrs Antao, Mr Juliette and the Hon. Attorney General challenged the propriety of the referral.

Mrs Antao objected to the referral being considered by this Court and submitted that it was premature. She also submitted that no Constitutional question had arisen up to the filing of the two motions, and that hence a referral, if any, should have been made only in the course of the hearing of the motions.



Mr. A. Juliette invited the Court to the provisions of Article 130(9) of the Constitution and submitted that in any event, this Court had no jurisdiction to hear and determine a matter referred to it under Article 82(1) unless an application had been made in accordance with Article 82.

The Hon. Attorney General supported the submissions of Mrs Antao and Mr Juliette. He however made submissions of a more fundamental nature. In general, all those submissions are based on points of law, or mixed facts and law.

Before I consider them, it becomes necessary to set out the practice and procedure of a referral under Article 46(7) or Article 130(6) of the Constitution. Rule 10 of the Constitutional Court Rules (S.I. 33 of 1994) provides that-

- "10(1) A reference made to the Constitutional Court by any Court of Law or Tribunal for the determination of the Constitutional Court of any question with regard to the contravention or likely contravention of any provision of the Constitution shall be made in the form of a case stated setting out the facts, the question for determination and the names and addresses of the parties to the proceedings before that Court or Tribunal, in respect of which the question arose.*
- (2) A reference under Sub Rule 1 shall be made within 14 days of the date on which the question arose before the Court of Law or Tribunal but the Constitutional Court may for sufficient cause entertain such reference notwithstanding the lapse of time.*
- (3) The Constitutional Court shall give notice of the reference to the parties to the proceedings of the Court of Law or Tribunal in which the question rose and, where the Attorney General is not a party, to the Attorney General.*
- (4) The Constitutional Court shall hear the parties noticed under Sub Rule (3) and the Attorney General before making its determination on the question referred to it:*

Provided that if any party does not appear on notice served on him, the Constitutional Court may proceed to determine the question in the absence of that party".

In this respect, the referral dated 6<sup>th</sup> November 2007 has not complied with the requirements contained in Rule 10. However, as the parties were represented and heard, the failure to comply with the procedure prescribed in Rule 10 alone would not vitiate the referral.

Adverting to the legal submissions of the Hon. Attorney General, it was contended that the Supreme Court was not "competent" to make a referral under Article 130(6) of the Constitution in view of Sub Article (9) and Article 82, which he stated ousted the jurisdiction of this Court, as the basis of the plaint, ~~which~~ was the vacation of a seat of a member. Article 82 provides that it is the Constitutional Court that has jurisdiction to determine whether –

- " (a) A person has been validly elected as a member of the National Assembly  
or  
(b) The seat of a member of a National Assembly has become vacant".

He submitted that where the seat of a proportionately elected member becomes vacant, it was only the Constitutional Court that has jurisdiction to determine an application made by any member, the Political Party of which such member was a member at the time of the election, or the Attorney General under Article 81(3)(b) of the Constitution. He therefore contended that as the Supreme Court exercising original jurisdiction was not a "competent" Court to determine such matter, it was equally incompetent to make a referral under Article 130(6), as a referral can be made under that provision only by a Court of competent jurisdiction.

In the case before the Supreme Court, the cause of action is primarily based on the alleged breach of contract, which had been occasioned by the 1<sup>st</sup> defendant Political Party deciding to replace Mr. Elizabeth as a proportionately elected member, thus causing a vacancy in the National Assembly.



A "*cause of action*" is the wrong, for the prevention of which an action can be brought. In this case, the "*wrong*" which the plaintiff alleges is the replacing of Mr Elizabeth by allegedly breaching the contract. The referral arose not on the breach of contract but on the relief sought against the 2<sup>nd</sup> defendant. The Supreme Court exercising original jurisdiction is not competent to entertain an application which relates to the removal of a member thus causing a vacancy in the Assembly. No cause of action has been pleaded against the 2<sup>nd</sup> defendant except to pray for an order prohibiting him to issue a certificate under Article 81(6) of the Constitution. Hence the Supreme Court exercising original jurisdiction was not a competent Court to make a referral under Article 130(6) in respect of a matter under Article 82(1) (b).

As regards the replacement of a proportionately elected member, Article 81(1) provides that a person ceases to be a member and the seat occupied by him in the Assembly becomes vacant, inter alia,

*"(h)(i) The Political Party which nominated the person as a member nominates another person as member in place of the first mentioned person and notifies the Speaker in writing of the new nomination".*

Admittedly the 1<sup>st</sup> defendant had acted under that provision. The procedure and eligibility for appointing proportionately elected members are laid down in Schedule 4 of the Constitution. In that respect, the Constitution does not recognize any agreements, pacts, alliances or coalitions among Political Parties. Paragraph 2 of the Schedule provides that "*a Political Party which has nominated a candidate in a general election may, in accordance with this Schedule, nominate the proportionately elected members*". Their replacement is provided in Article 81(1)(h). For Constitutional purposes, it was the S.N.P that contested the elections and was therefore the Political Party that was entitled to a percentage of proportionate seats based on the total number of votes cast in favour of their candidates. Whether this Constitutional provision could be compromised by an agreement is a matter to be decided by the trial Court.

In considering the propriety of the present referral, I would proceed to consider the nature and scope of Article 130(6) under which it has been referred.



Article 130(6) provides that –

“(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.*

There are four elements needed for a referral under that Sub Article. First, the Constitutional question should have arisen “*in the course of any proceedings*” in the Court. Secondly, that question should involve a consideration of whether there “*has been or is likely to be a contravention of the Constitution other than Chapter III*”, thirdly, that question should not be “*frivolous or vexatious*”. Fourthly, such question should not have been the subject of a decision of the Constitutional Court or the Court of Appeal.

As regards the third element, I am of the view that the consideration of whether the question is frivolous or vexatious arises only when such question is raised by a party to the case. Obviously, no Court will make a referral *ex mero motu* if the question is frivolous or vexatious. So also, the third element has no application to the present matter.

The first element of Article 130(6) necessitates a consideration as to what constitutes “*in the course of any proceedings*”. These words should be given a fair and liberal meaning. There was no Constitutional question *ex facie* the plaint. It arose only with the filing of the motion and affidavit of the 2<sup>nd</sup> defendant. However the mere filing of those pleadings would not satisfy the requirement that it must arise “*in the course of proceedings in Court*”. Hence the motion of the 2<sup>nd</sup> defendant should be taken up for hearing in Court, and any Constitutional question must arise in the course of those proceedings. It was held in the case of Gorbbart v. W.Australian Newspapers (1968) *W.A. Rep 113 (cited in Strouds Judicial Dictionary Vol. 4 Page 2128 that –*

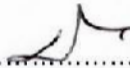


*"An affidavit filed in an office of the Court, but not brought up or used in the proceedings in open Court was not part of the public proceedings of a Court of Justice".*

Hence, before a referral is made under Article 130(6), the two motions should be taken up for consideration. The submission of Mrs Antao that the referral is premature is therefore upheld.

The record of proceedings together with the referral is remitted back to the trial Court to enable a proper referral being made in conformity with Rule 10, if a question other than under Article 82(1) (b) arises in the course of the proceedings for hearing of the motions with regard to any contravention or a likely contravention of a provision of the Constitution.

Ruling made accordingly.

.....  


A.R. PERERA  
**JUDGE (PRESIDING)**

Dated this 13<sup>th</sup> day of November 2007

D. Karunakaran J

I concur

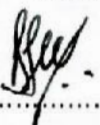
.....  


D. KARUNAKARAN  
**JUDGE**

Dated this 13<sup>th</sup> day of November 2007

D. Gaswaga J

I concur

.....  


D. GASWAGA  
**JUDGE**

Dated this 13<sup>th</sup> day of November 2007