

CHOW v MICHEL

(2011) SLR 1

F Ally for the petitioner
R Govinden Attorney-General for the respondent

Ruling delivered on 1 February 2011

Before Egonda-Ntende CJ, Burhan, Dodin JJ

The petitioner in this case filed a petition dated 17 August 2010 against the aforementioned respondents stating that by virtue of article 170 read with Schedule 7 paragraph 2(5) of the transitional provisions to the Constitution, the State had been given a period of twelve months from the coming into force of the Constitution to bring the Seychelles Broadcasting Act (hereinafter referred to as the SBC Act) into conformity with article 168 of the Constitution.

It was further averred that the State had failed within the prescribed time to bring the said Act in conformity with article 168 of the Constitution and thus had contravened the requirements contained in the aforementioned provision of the Constitution.

The petitioner in paragraph 12.5 of the petition states that by virtue of article 40 of the Seychellois Charter of Fundamental Human Rights and Freedoms of the Constitution, a citizen has a fundamental duty to uphold and defend the Constitution and on this basis the petitioner avers that the said provision of the Constitution has been contravened by the first and second respondents.

The Attorney-General on behalf of the respondents filed a preliminary objection pursuant to rule 9 of the Constitutional Court (Application, Contravention, Enforcement of Interpretation of the Constitution) Rules (hereinafter referred to as the "Constitutional Court Rules") that in terms of rule 4(1)(b) and (c) of the said Rules, the petitioner had failed to file the petition in the prescribed period of 3 months from the date of coming into force of the Constitution, that is 21 June 1993, and moved that as the petition had been filed out of time it should be dismissed. This ruling pertains to the said preliminary objection taken by the Attorney-General.

Rule 4(1)(b) and (c) of the Constitutional Court Rules states:

Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the registry of the Supreme Court –

- a)
- b) in a case where the likely contravention is the result of an act or omission within 3 months of the act or omission.
- c) in a case where the likely contravention arises in consequence of any law within 3 months of the enactment of such law.

Paragraph 2(5) of Schedule 7 of the Constitution, which the petitioner alleges has been contravened, reads:

The State shall, within twelve months of the coming into force of this Constitution, bring the Seychelles Broadcasting Corporation Act 1992 into conformity with article 168.

Article 168 of the Constitution states that:

- (1) The State shall ensure that all broadcasting media which it owns or controls or which receive a contribution from the public fund are so constituted and managed that they may operate independently of the State and of the political or other influence of other bodies, persons or political parties.
- (2) For the purposes of clause (1), the broadcasting media referred to in that clause shall, subject to this Constitution and any other law, afford opportunities and facilities for the presentation of divergent views.

A careful reading of the Constitution clearly indicates that the said provision required and created a mandatory and not a discretionary duty or obligation on the State to bring the SBC Act into conformity with the Constitution.

Considering the position taken up by the third respondent in his submissions, it is not his contention at present that the SBC Act has been brought or need not be brought into conformity with the Constitution and thus indirectly admits that there is a need for the said Act to be brought into conformity with the Constitution. It is pertinent to note that the year we are in is 2011 and the time limit given by the Constitution for such steps to be taken is 12 months from 21 June 1993, the day the Constitution came into force.

If the spirit of the Constitution and the letter of the law of the Constitution is to be respected and fulfilled the said duty, namely that the said Act be brought in conformity with the Constitution within the prescribed time, must be performed. The burden of performing the said duty lies with the State. A failure by the State to perform this mandatory requirement or duty cast on it within the specified period of time results in a contravention or breach which is of a continuing nature till such time the State complies with the said requirement or duty imposed or mandated by the relevant provision of the Constitution.

It cannot be argued or accepted that the burden placed on the State to perform such a duty ceases after the expiry of a period of twelve months or that the State is excused from non-compliance with the relevant provision just because no person has sought to contest the contravention within a prescribed time. If this interpretation is given the spirit and intention of the framers of the Constitution would not be respected or fulfilled as an opportunity would exist for the State to continue oblivious and in total disregard to the said mandatory provision and no remedial measure would exist to rectify such a situation.

Failure by the State to perform this duty within the time limit set down by the Constitution in my view results in a contravention or breach which is of a continuing nature until such time the requirement as set down by the Constitution is fulfilled or the mandated duty performed.

In the case *Alewyn Percy Talma and another v James Alix Michel and others* SSC 2/2010, Egonda-Ntende CJ at paragraph 24 distinguished between a contravention in a completed transaction and a continuing contravention and held:

This is different from a contravention that is a completed transaction, for instance, holding a person in custody beyond the permitted period of 24 hours without being produced before a court of law. If he is held for 3 days and then released, the contravention is complete and is not continuing. He would have regained his liberty. On the other hand in the instant case if the contravention continues to inhibit the person entitled to enjoy a right in relation to land, for as long as it inhibits that person from the enjoyment of one's land as one would wish to do, the contravention is continuing.

The case of *Georgie Larue v Court Martial* Cons Case No 1 of 1996 too recognized the concept of a continuing breach in constitutional law, while in the case of *Darrel Green v The Seychelles Licensing Authority and another* Const case No 3 of 1997 Perera J in distinguishing between the above two cases held that the decision to hold in camera proceedings in the *Georgie Larue* case violated article 19(8) and 19(9) of the Constitution and therefore the whole proceedings were tainted with contravention and hence there was a continuity of the contravention up to the time the petition was filed in court.

For the aforementioned reasons, I am satisfied that the contravention complained of by the petitioner in this case is of a continuing nature and therefore the preliminary objection taken by the Attorney-General bears no merit and I would dismiss the said objection.

DODIN J: I concur.

EGONDA-NTENDE CJ: I concur. As a result the preliminary objection by the respondent is dismissed.