

DHANJEE v MICHEL

(2012) SLR 1

A Amesbury and F Ally for the petitioner

R Govinden and V Benjamin for the first, sixth and seventh respondents

F Chang-Sam SC for the second, third and fourth respondents

K Shah SC for the fifth respondent

Judgment delivered on 17 January 2012

Before Karunakaran Ag CJ, Renaud, Dodin JJ

During the reign of the First and the Second Republic, the selection process and appointment of judges to the superior courts of Seychelles were solely made by the Executive; nevertheless, the degree of public concern in such matters was not so significant. However, after the adoption of the modern democratic Constitution of the Third Republic, judicial appointments are now being made through a selection process by an independent and impartial constitutional body – the Constitutional Appointments Authority (CAA); nonetheless, it is paradoxical that the degree of public concern now is more than ever before.

Indeed, the CAA, in terms of article 139(2) of the Constitution, shall not, in the performance of its functions, be subject to the direction or control of any person or external authority. The CAA, particularly in matters of judicial appointments shall and ought to function without interference from any of the branches of the Government, whether it be the Executive, Judiciary or Legislature. After completing the selection process, the CAA shall propose the names of the selected candidates to the President of the Republic, who in turn, in exercise of his constitutional prerogative shall make judicial appointments to the superior courts by issuing instruments under the public seal; in case of a person who is not a citizen of Seychelles, for a specific period not exceeding 7 years. A non-Seychellois thus appointed shall be given a contract of employment for the period of his appointment in Seychelles. This inbuilt constitutional mechanism is evidently designed to prevent or to say the least, minimize the role of the Executive in judicial appointments. Obviously, this is to ensure that an independent and impartial judiciary is maintained at all times. It is also intended to provide a security of tenure for non-Seychellois judges, for a period of 7 years, which is *a sine qua non* for democracy and good governance.

Despite such preventive constitutional mechanisms in place, at times, some of the citizens who have litigation in the superior courts, particularly against the State, still feel insecure and complain with trepidation that their constitutional right to have litigation adjudicated by an impartial and independent Court is jeopardized, especially, when judicial appointments are not made by the CAA in accordance with the provisions and the spirit of the Constitution.

In the instant case, the petitioner, who undisputedly has a number of pending cases against the State in the superior courts, has now come before this Court seeking constitutional redress for his grievance. He alleges that a recent reappointment of one of the sitting Justices of Appeal - Dr Satyabhooshun Gupt Domah - to the Seychelles Court of Appeal (hereinafter called the Court of Appeal) is unconstitutional as it has contravened article 131(4) of the Constitution as well as article 131(3) as read with article 131(4), article 1 and article 119(2) of the Constitution and particularly, that it affects or is likely to affect his interests.

It is pertinent to quote the relevant articles of the Constitution in this respect.

Article 131 of the Constitution inter alia, reads –

- (1) Subject to article 134, a person holding office of Justice of Appeal or Judge shall vacate that office -
 - (a) on death;
 - (b) if the person is removed from office under article 134;
 - (c) subject to clause (2), if the person resigns in writing addressed to the President and to the Constitutional Appointments Authority;
 - (d) in the case of a person who is a citizen of Seychelles, on attaining the age of seventy years;
 - (e) if the office is abolished with the consent of the person.
- (2) A resignation under clause (1)(c) shall have effect on the date on which it is received by the President.
- (3) Subject to clause (4), a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge for only one term of office of not more than seven years.
- (4) The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, for not more than seven years.

Article 1 reads – “Seychelles is a sovereign democratic Republic”.

Article 119 inter alia reads –

- (1) The judicial power of Seychelles shall be vested in the Seychelles Judiciary which shall consist of –
 - (a) the Court of Appeal of Seychelles;
 - (b) the Supreme Court of Seychelles; and
 - (c) such other subordinate courts or tribunals established pursuant to Article 137.
- (2) The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

The material facts of the case are these:

Admittedly, the petitioner, who is a citizen of Seychelles, has been a party to a number of proceedings before the Constitutional Court of Seychelles, the Supreme Court of Seychelles and the Court of Appeal, particularly, in the case of *Electoral Commissioner & ors v Viral Dhanjee* SCA 16/2011, and is a party to pending litigation in the Constitutional Court and as well as in the Supreme Court.

The first respondent is the President of the Republic of Seychelles and by virtue of article 123 of the Constitution of the Republic of Seychelles (hereinafter the Constitution) is empowered to appoint Justices of the Court of Appeal from candidates proposed to him by the CAA, or on the recommendation of the CAA in exceptional circumstances, is empowered under article 131(4) of the Constitution to appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal, for a second term of office of not more than seven years.

Incidentally, article 123 runs –

The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.

The second respondent herein is the Chairman, and the third and fourth respondents are members of the CAA. The CAA is established under article 139(1) of the Constitution. It is empowered under article 123 of the Constitution to propose candidates to the first respondent for appointment as Justices of the Court of Appeal and by virtue of article 131(4) of the Constitution, to recommend to the first respondent the appointment of a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal, in exceptional circumstances for a second term of office of not more than seven years.

The fifth respondent is a non-Seychellois citizen - a Mauritian national - a sitting judge of the Supreme Court of Mauritius, who was appointed as Justice of Appeal of the Seychelles Court of Appeal by the first respondent on 4 October 2006, for a term of five years and the term of his appointment came to an end or is deemed to have come to an end or would have come to an end on 3 October 2011 as per the instrument issued by the first respondent to the fifth respondent.

In passing, we would like to mention here that the fifth respondent, in the normal course of events, following his appointment as Justice of Appeal, should have obtained the above instrument from the appointing authority soon after his appointment but before assuming office as Justice of the Court of Appeal. Presumably, he should have then read the contents of the instrument particularly, as to his term of appointment or period of tenure for which he was appointed under that instrument. However, according to him - as he has stated in his letter dated 16 April 2011- in the absence of any written document he was assuming that his term of office was for seven years; but that it was only in April 2011 that he was allegedly informed that it was only for 5 years; and thereafter he wrote a letter to the CAA.

During the term of his office as Justice of Appeal, the fifth respondent on 16 April 2011, nearly 7 months prior to the expiry of his term, applied in writing to the CAA for the renewal of his term of office for a further period and in the same breath for a second term of office. Indeed, there is a world of difference between “renewal” of one’s contract of employment for a further period and “reappointing” a Judge /Justice of Appeal for a second term of office. The difference herein may appear to be formal but it is quite significant in the legal and constitutional context. Be that as it may, this letter reads –

The Chairperson
The Constitutional Appointments Authority
State House
Victoria

Dear Sir,

Renewal of Term of Office as Judge of Appeal

In the absence of a written document, I assumed that my term of office was for seven years. However, I was recently informed that it is for five years.

The years the Authority has entrusted me with the judicial office, I have made it a personal commitment of mine to contribute to the growth and development of law, justice and jurisprudence of Seychelles to the best of my ability.

Accordingly, if it pleased the Authority to entrust me *with a second term of office*, I pledge that my commitment and contribution will be no less if not more so that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles.

Permit me, for that reason, to apply for *a renewal of my term of office for a further period* on the like trust that the Authority originally laid upon me. I attach an updated CV for the purpose. [emphasis ours]

I thank you for your consideration,

Faithfully Yours

S.B. Domah
Judge of Appeal
Eclsd: An Up-dated CV

Two days after the fifth respondent wrote the above letter to the CAA, addressed to the State House, that is on 19 April 2011, nearly six months prior to the expiry of the fifth respondent’s first term of office, the President of the Court of Appeal Justice Francis MacGregor, admittedly, wrote a letter to the CAA, addressed to its office at Mont Fleuri. In that letter, Justice MacGregor enumerated 10 reasons to the CAA, which all according to his belief constituted exceptional circumstances under article 131(4) of the Constitution in order for the fifth respondent to be appointed by the CAA for a second term of office as Justice of Appeal. This letter, written by Justice MacGregor to the CAA

dated 19 April 2011 ostensibly recommending the appointment of his sitting brother-judge Justice Domah for a second term of office, reads –

To:
The Chairman
Constitutional Appointments Authority
La CIOTAT Building
Mont Fleuri

Dear Sir

I have received an application (sic) from Justice Domah applying for a second term of office as his contract expires next October.

I believe under article 131(4) of the Constitution there are exceptional circumstances in his case for the following reasons:

1. He has a very impressive CV copy already submitted to you and I believe no other judge or lawyer (sic) in Seychelles has such credentials to that extent. [Within brackets ours]
2. For the nearly four years he has worked with me and the court, he has proven to be more than a capable team player and with the right team spirit a hard and efficient worker.
3. Our present esteem of the Court of Appeal in the country and public opinion bears this out.
4. I have sounded out also the veterans in the legal profession which does hold him in good esteem.
5. Although not a citizen he comes from a friendly sister country of Mauritius of which we have strong historical, cultural and judicial ties. He is accordingly fluent in English, French and Creole.
6. Of our judicial links 8 of the past 21 Justices of Appeal, and many Judges of the Supreme Court were from Mauritius.
7. He has a strong grounding in the French Civil Law/Code Napoleon/Code Civil which forms a large part of our fundamental laws, that all the present foreign judges in Seychelles do not have, and a sizeable amount of the lawyers locally do not have.(sic) [Within brackets ours]
8. From his CV he has substantial judicial education/training qualities I want to further make use for potential judge training in Seychelles.
9. Has credentials in judicial administration that most of our judges do not have, and again would wish to make use of if in Seychelles.

10. He has a great esteem for Seychelles often seen and experienced by me from him in international judicial forums. He has often proven very supportive for Seychelles.

Yours faithfully
(sd) Justice F. MacGregor

On 17 June 2011, being nearly three and a half months before the completion of the fifth respondent's first term of office, the CAA prematurely considered the application of the fifth respondent for a "renewal" of his term of office for a further period. The CAA instead decided to grant an extension of his first contract of employment for an additional two year term, substantially relying on the recommendation and the exceptional circumstances formulated by Justice MacGregor in his letter quoted supra. Accordingly, the CAA wrote a letter dated 17 June 2011 (hereinafter called the "impugned letter") to the first respondent, the President of the Republic recommending for his approval the extension of the contract of the fifth respondent for an additional two year term. That recommendation, in the view of the CAA, is permitted by article 131(3) of the Constitution. According to the CAA, they did so, "in view of the exceptional circumstances related to Justice Domah". This letter of pivotal importance reads –

The President
Republic of Seychelles
State House

Dear Mr. President,

In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby recommends for approval the extension of the contract of Justice Domah for an additional two year term as permitted by the Constitution (Article 131(3)) in view of the exceptional circumstances related to Justice Domah.

Justice Domah's contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.

Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoleon which largely serves as the basis of our Civil Code.

Copies of Justice Domah's letter referring to above and that of the President of the Court of Appeal's recommendations are enclosed.

Yours faithfully,
(Sd) Mr. Jeremie Bonnelamme CHAIRMAN
Mrs. Marlene Lionet, C.A.A MEMBER
Mr. Patrick Berlouis C.A.A MEMBER

The petitioner contends that on or around 5 September 2011, and before the fifth respondent had completed his first term in office and before any vacancy for the office of Justice of Appeal had arisen, the first respondent appointed the fifth respondent for a second term of office as Justice of the Court of Appeal under article 131(4) of the Constitution. On 5 September 2011, the fifth respondent was duly sworn in a second time, as Justice of Appeal, even before the completion of his first term of office. However, according to the petitioner, the duration of the term of the appointment of the fifth respondent as Justice of Appeal at the time of the appointment, and until the filing of the petition, had not been made public.

The contention of the petitioner, in essence, is that the recommendation of the CAA to the first respondent, to either appoint the fifth respondent for a second term of office and/or extension of his term for a further period of two years, is contrary to and inconsistent with article 131(4) of the Constitution in that:

- (i) There were no exceptional circumstances that existed to recommend the fifth respondent's appointment for a second term or to extend his contract, as there was no evidence to show that the CAA had not been able to find suitably qualified candidates for it to propose to the first respondent for appointment as Justice of Appeal, to replace the fifth respondent, whose term was coming to an end.
- (ii) The CAA could not have rationally formed or founded the opinion that there were exceptional circumstances warranting the recommendation to the first respondent, to appoint the fifth respondent for a second term or to extend his contract as a Justice of the Court of Appeal. There was no evidence or any documentation before the CAA to conclude that no other person could be appointed to that office to replace the fifth respondent. The facts on which the CAA relied or found to justify and make the recommendation to the first respondent, do not amount to exceptional circumstances as envisaged by article 131(4) of the Constitution.
- (iii) According to Mr Ally, counsel for the petitioner, none of the reasons which the President of the Court of Appeal conveyed to the CAA, favouring Justice Domah's second appointment as Justice of Appeal, either singly or in combination, constitute exceptional circumstances contemplated under article 131(4) of the Constitution. All the reasons given by Justice MacGregor are commonplace or ordinary reasons that are required in the normal course of events, for the appointment of any candidate for that matter, as a Judge of the superior court. It is evident from article 122 that a person is qualified for appointment as a Justice of Appeal if, in the opinion of the Constitutional Appointments Authority, that person is suitably qualified in law and can effectively, competently and impartially discharge the functions of the office of Justice of Appeal under the Constitution. According to Mr Ally, the factors applicable to the individuals/persons cannot constitute the exceptional circumstances envisaged by article 131(4) of the Constitution. The circumstances contemplated therein are intended to maintain a democratic republic and an independent judiciary. Therefore, exceptional circumstances

envisaged therein should relate to the State and the Seychelles judiciary. However, none of the reasons given by either the CAA or Justice MacGregor to the first respondent for reappointment falls within that category of exceptional circumstances as envisaged by article 131(4) to maintain the democratic State and an independent judiciary - vide articles 1 and 119(2) of the Constitution, read with article 49 of the Constitution. Mr Ally also drew an analogy between the “exceptional circumstances” contemplated under the Constitution in this respect and the “special reasons” contemplated in the Dangerous Drugs Act (now repealed) for imposing a lesser sentence than the mandatory minimum for drug offenders. In considering what constitutes “special reasons” the Seychelles courts have repeatedly held that commonplace mitigating factors peculiar to the person/individual (offender) cannot constitute a “special reason”, but only the factors peculiar to the offence may constitute “special reasons” vide *Republic v Gervais Pool & Estico* (1984) SLR 33. Likewise, the exceptional circumstances discussed hereinbefore should relate to the State and the Seychelles judiciary, not to the person, Justice Domah.

- (iv) In any event, the CAA shall be an independent and impartial Authority in terms of article 139(2) of the Constitution. The determination as to what constitutes “exceptional circumstances” in a particular case should be based on the CAA’s own and independent opinion and the formation of which obviously, falls within its exclusive constitutional powers and functions. Therefore, the CAA cannot and should not relinquish or delegate its powers to any other authority, let alone the President of the Court of Appeal. The CAA cannot allow any other person or authority to interfere or influence or usurp its powers and functions and substitute its own opinion to that of the CAA in this respect, as has happened in the present case. This according to Mr Ally is in contravention of article 131(4) of the Constitution and in violation of the CAA’s independence guaranteed under article 139(2) of the Constitution.
- (v) In any event, in respect of a candidate who has already served one term, the Constitution has authorized the CAA specifically to recommend his/her reappointment for a second term of office only under exceptional circumstances, for a period not exceeding seven years. However the CAA has no constitutional mandate to recommend or seek approval of the first respondent for the “extension” of the contract of that candidate for an additional term to the original existing term. It is not permitted by the Constitution under article 131(3) to extend the term of any judge (from 5 years to 7 years) whether exceptional circumstances exist or not, whether it relates to Justice Domah or any other candidate for that matter. It is ultra vires its constitutional powers for the CAA to act otherwise. It is unconstitutional and ultra vires for the CAA to go beyond its powers to extend and seek approval from the first respondent for such extension of term specified under the original appointment.
- (vi) At the time the fifth respondent was recommended for a second term of office as Justice of Appeal, the fifth respondent was already serving a term as Justice of Appeal. As a result no vacancy to the said office had occurred and

- the fifth respondent had not completed his first term of office. Article 131(4) clearly stipulates that such reappointment in exceptional circumstances can be made only on the completion of the first term, and not before as has been done in this case, which contravenes this provision of the Constitution.
- (vii) According to Mr Ally, there were competent persons who could have been proposed for appointment when the vacancy had occurred, but it was not advertised and the CAA did not seek suitably qualified candidates to recommend for appointment to replace the fifth respondent.
- (viii) Mr Ally further added that the CAA were not mindful of the following matters at the time they made the recommendation to the first respondent to appoint the fifth respondent for a second term:
- That the fifth respondent was still serving his first term;
 - That no vacancy had arisen in the office of Justice of Appeal;
 - That the CAA need not seek the approval of the first respondent to recommend or to appoint a Justice of Appeal but the CAA should only recommend the appointment and give reasons for the reappointment for a second term;
 - That if the post had been widely advertised in and outside Seychelles, several qualified persons could have applied for the post;
 - That there was the possibility of recommending other persons for the post;
 - That there was the possibility of appointing Supreme Court Judges to the Seychelles Court of Appeal;
 - That there was the possibility of approaching suitably qualified members of the legal profession in or outside Seychelles or inviting members of the judiciary overseas to submit their application or to be recommended to the first respondent, especially since in the past there has been precedents of such appointments and there has not been any shortage of suitably qualified persons as Justices of Appeal from the Commonwealth;
 - That there have been applications made by persons who have shown interest in the post by previously applying for it;
 - That the bases for the recommendation made by the CAA are flawed, and not cogent, compelling or persuasive or even sufficiently substantiated. In any event, they do not amount to exceptional circumstances warranting such a recommendation and appointment; and
 - That the fifth respondent applied for the renewal of his contract and it was only after his application was tendered that the CAA looked for reasons to justify the appointment for a second term, which is contrary to the letter and spirit of articles 131(4) and 119(2) of the Constitution.

In view of all the above, counsel for the petitioner urged this Court to declare the recommendation of the CAA and the appointment of the fifth respondent by the first respondent for a second term to the office of Justice of the Court of Appeal, to be a

contravention of the Constitution and null and void, and for the fifth respondent to vacate the office of Justice of the Court of Appeal; and with costs.

Mr Chang-Sam, counsel for the CAA (second, third and fourth respondents) submitted in essence, that the crux of the issue in this matter is whether there were exceptional circumstances for the CAA to recommend the fifth respondent for a second term of office, in terms of article 131(4) of the Constitution. According to counsel, the term “exceptional circumstances” used in this article is not defined in the Constitution. This implies that the framers of the Constitution wanted this expression to be open and inclusive so that there was no static position in defining this term. As the Constitution moves forward, and as the country moves forward, the exceptional circumstances can also change with time and the prevailing circumstances. Having thus submitted, counsel cited the authority *R v Kelly (Edward)* [2000] 1 QB 198 in that, the Court of Appeal (UK) held that exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered. Therefore, according to Mr Chang-Sam, it is for the CAA to decide what constitutes exceptional circumstances at a particular point in time and circumstances, provided they are fair and acting in a way that is not arbitrary. Furthermore, Mr Chang-Sam submitted that it is not a constitutional requirement that the CAA should advertise the vacancy to see whether there are other candidates or Seychellois candidates available for the post. In any event, such requirement may apply in the case of the first appointment, and not for the second term given under exceptional circumstances. It is the CAA, which would eventually determine whether there are exceptional circumstances in a particular case to recommend a candidate for the second term. However such determination according to counsel, should only be subject to judicial review. Moreover, counsel submitted that even before the vacancy arises, it is proper for the CAA to recommend the reappointment of a person for the second term, since there is nothing in the Constitution or in law that stops them from doing so or for considering a current member for a second term before the completion of his first term. As regards the alleged letter of recommendation written by the President of the Court of Appeal to the CAA outlining the exceptional circumstances, it is the submission of Mr Chang-Sam that there is nothing wrong on the part of the CAA if they have in their mind, adopted the letter as being correct position on exceptional circumstances. The CAA took nearly two months to consider the reasons given by Justice MacGregor in that letter. In the same breath, Mr Chang-Sam submitted that he was not in a position to tell the Court what were the exceptional circumstances, which the CAA relied and acted upon in this particular case. They might have considered some other factors as well as exceptional circumstances, but these are not disclosed either to the Court or in the impugned letter to the President of the Republic. Further Mr Chang-Sam submitted that the analogy drawn by Mr Ally between the “special reasons” under the Dangerous Drugs Act and the “exceptional circumstances” discussed herein is inappropriate. According to counsel, since there are insufficient matters relating to “exceptional circumstances” before the Court, it would not be able to rule on the issue.

It is also the submission of Mr Chang-Sam that the petition contains only allegations, and that they are not facts. Hence, according to him, the petitioner has adopted the wrong procedure in this matter.

In any event, Mr Chang-Sam conceded that the CAA in the impugned letter addressed to the President, has employed, to say the least, improper use of words in the expressions such as “recommends for approval”, the “extension of contract” etc. Having thus argued, Mr Chang-Sam admitted in his submission that on a plain reading of the impugned letter, it is evident that the CAA has recommended to the President, the extension of Mr Justice Domah’s contract of employment for a period of only two years. However, he invited the Court to give a different meaning to those expressions, assuming that the CAA had really intended to recommend him for only a second term for “exceptional circumstances” but has unfortunately, used ill-chosen words. In Mr Chang-Sam’s own words, the CAA has used those “infelicitous words” but this Court should infer a meaning, validate and give a purpose to the impugned letter so that it would accord with article 131(4) of the Constitution. In view of all the above, Mr Chang-Sam urged the Court to dismiss this petition.

Mr Shah, counsel for the fifth respondent, having adopted the entire submission of Mr Chang-Sam, added that in any eventuality - even if this petition is allowed- this Court has jurisdiction, simply, to make a declaration that the appointment of the fifth respondent is unconstitutional and nothing more; it has no jurisdiction to order him to vacate the office since he has got a security of tenure under the instrument of appointment. In such an event, he can be removed from office only through the constitutional procedures contemplated under article 134 of the Constitution. Further, Mr Shah contended that whatever interpretation is given to the contents of the impugned letter, the intention of the CAA and the purpose of that letter was simply to seek the fifth respondent’s reappointment for a second term due to exceptional circumstances. The intention and purpose can easily be gathered from various terms used by the CAA in the impugned letter. According to Mr Shah substantial parts of the letter in dispute and the true construction of the words used therein have conveyed the correct intention of the CAA to the appointing authority. Hence, this letter can be relied and acted upon. In support of this proposition Mr Shah cited the authority *R v Monopoly and Merger Commission and another* [1993] 1 WLR 23.

On the issue of “exceptional circumstances” Mr Shah submitted that this expression used by the framers of the Constitution is wide enough to encompass the personal attributes of the person amongst others. Mr Shah added that the appropriate test, which this Court should apply to validate “exceptional circumstances” is the test of “reasonableness”. This, according to him, is the current approach taken by the courts in many jurisdictions such as England, USA and Canada. Although it appears to be unpalatable to many, Mr Shah submitted that the economic situation of the country may also be considered by the CAA, as a factor amongst others in determining what constitutes “exceptional circumstances”. Counsel contended in essence, that if a non-Seychellois Judge, who has already completed one term of office, is prepared to work or continue to work for a second term of office, accepting relatively, a lower salary, than

what is required to recruit eminently qualified judges from other places, then, in the given economic situation of the country, such a factor – an economic austerity measure, if I may call so - should also be taken into account amongst others, by the CAA while considering the “exceptional circumstances” for reappointing him for a second term. Mr Shah’s rhetorical question, which reflects his contention in this respect, runs –

The economic situation of the country also has an impact on recruitment of Judges. One can speculate it is theoretically possible to have eminently qualified judges from other places, but the question is, would that judge be prepared to come and work for the remuneration being offered?

Mr Benjamin, State Counsel, who is appearing for the first, sixth and seventh respondents submitted in essence, that any interpretation given to the expression “exceptional circumstances” contemplated under the relevant article, should be fair, which should meet the changing needs of time and society. In interpreting this expression, the Constitution should be read as a whole and treated as speaking from time to time. According to him, the exceptional circumstances in a particular case ought to be determined only by the CAA, before making their recommendation to the first respondent. He added that as far as the first respondent is concerned, he has no role to play in the determination of the facts as to what constitutes exceptional circumstances and who is qualified for the second term under such exceptional circumstances; once the CAA recommends the candidate/s for second appointment, the first respondent is under no constitutional obligation to review the CAA’s recommendation. In the circumstances, Mr Benjamin submitted there is no unconstitutionality in the appointment of the fifth respondent for a second term as Justice of Appeal. Hence State Counsel urged this Court to dismiss the petition.

We meticulously perused the pleadings, affidavits and other documents adduced by the parties in this matter. We carefully examined the relevant provisions of the Constitution. We gave diligent thought to the submissions made by counsel for and against the petition. Although the parties have raised a number of factual issues peripheral to the core, we are of the view that most of them are redundant. All of them do not necessarily call for determination by this Court, save for the core issue, which relates to the constitutional validity of the appointment in question.

Before going into the merits of the case, we observe that the air of mystery surrounding the selection process for constitutional appointments, the small base from which the selections are being made by the CAA may, on occasions, lead to questionable appointments and, worse still, lend itself to perceived arbitrariness. The Seychelles being a small jurisdiction and closed society, an indiscreet comment or a chance rumour is enough to rule out a local candidate’s perceived suitability for the post. One should be cautious that friendships, affiliations and obligations may also at times colour recommendations. Consensus in the CAA should therefore be arrived at without any semblance of external influence or extraneous consideration or bias for or against any candidate, as it would render the appointments arbitrary and suspicious in the eye of the general public. Notwithstanding, the CAA is not bound by any specific procedural rules other than what is provided for in the Constitution. Unless the selection process is made

transparent and the resource pool widened and some objective criteria are laid down, “arbitrariness” and “suspicion” will remain.

Objective criteria

In the making of judicial appointments, the CAA ought to take account of public sensitivities, which may manifest themselves in two ways: (i) a desire to see suitably qualified citizens of Seychelles being appointed to superior judicial positions; and (ii) a desire to have transparency in the appointment process. Sometimes, it is difficult to reconcile the desire for the appointment of a local person to a judicial position, with the necessity to appoint someone with impartiality or perceived impartiality when one is drawing from a very limited local resource pool, such as ours. In considering the aspect of impartiality of a potential local candidate, the CAA may draw guidance from what Lord Bingham once stated –

The key to successful making of appointments must, I would suggest, lie in an assumption shared by appointer, appointee and public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality. Impartiality and independence may not, even in this context, be synonyms, but there is a very close blood-tie between them: for, a judge, who is truly impartial, deciding each case on its merits as they appear to him, is of necessity, independent.

Particularly in a small jurisdiction such as ours, an individual is known by a large majority of the population. Family connections may be quite extensive in a small community. The judge may have grown up in close proximity to the very people he/she would, as a judge, be called upon to try. By the time the person is ready to take up a judicial appointment, he/she might have formed allegiances, social, professional and even political. These are known throughout the length and breadth of a small community. Lawyers tend to become rather vocal politically and are often seen to be aligned to a particular political grouping. Lawyers are reluctant to join a service which attracts modest remuneration. Able lawyers earn substantially more in private practice than a government with limited means can afford to pay, and indeed practitioners who may often be the most suitable candidates for an appointment to preside in the civil courts are those who have built up a substantial practice at the civil bar. They are thus more likely to meet their former clients if they are to sit as a judge. It is the exceptional individual who emerges as both willing and able to perform the functions of a judge in technical and personal terms. If that exceptional individual does emerge locally then he/she must be the favoured candidate. However, that bias in favour of a local appointee should not lead to the appointment of an unsuitable candidate.

Although the tendency in some jurisdictions nowadays is also to recruit from overseas, there now seems to have grown in those jurisdictions a good practice of openly advertising judicial posts and conducting an open competition along with local candidates. The CAA may also adopt that approach, interview the applicants and inform them of the outcome. This is to be commended whether there are local candidates or not. It is vital however, that only the best candidates are recruited for judicial positions

irrespective of the costs involved and the economic situation of the country. The submission of Mr Shah to the effect that one should sacrifice quality for the sake of saving costs in the current economic climate, does not appeal to us in the least. It is not as though the most economic and appropriate candidate will emerge by making a tender for the post, advertised on page 10 of the *Seychelles Nation*. Furthermore, an open recruitment system gives credibility to an appointment and curtails possible public criticism that an appointment is made other than on merit.

To what extent should the CAA interact with other institutions such as the Judiciary, the local Bar etc on judicial appointments? The CAA is, of course, an independent and impartial constitutional body, which should function without interference from any corridor of power or institution. However, it will be natural for the CAA to acquire information from relevant institutions to ascertain the suitability of the potential appointee, particularly if the potential appointee is known to those institutions. This may be done only to ascertain if there is anything known about that person which ought to be taken into consideration. Seychelles being a small jurisdiction, the members of the Bench and the Bar will all be too familiar with a local candidate. It is not like a large jurisdiction where such matters can be dealt with impersonally; obviously, in a small jurisdiction matters tend to become personalised.

Having said that, we are of the view that it is not improper for the CAA to acquire information from the members of the Bench as well as of the Bar, to assist it in forming an “informed opinion” of its own about a prospective appointee, but it should not go as far as to formally consult them for appointments or to seek others’ opinions and then to completely and solely rely and act upon them. The dividing line between the “acquisition of information” and “formal consultation” is indeed very fine. At any rate, it would be unconstitutional for the CAA to relegate its constitutional powers and functions to the Bench or to the Bar or to any other person or authority to select candidates for judicial appointments, in the thin disguise of seeking information or advice from them. At the same time, no other authority Executive, Judicial or Legislative or any other institution, shall be allowed to usurp the constitutional powers and functions of the CAA in the name of giving information or advice to them.

Needless to say, the judicial appointment process can make or break a country’s judiciary. The judicial appointment process must always be seen to be as immaculate, as transparent, as fair and as meritocratic as possible. A cloudy appointment process will no doubt bring potentially dubious persons into the judiciary. Only men and women of integrity and competence, legal qualifications and experience, of independent and impartial character should be appointed. Incorruptibility must be the ethos.

Coming back to the merits of the case, it is evident that the fundamental issue that requires determination in this matter is the constitutional validity of the purported second appointment of the fifth respondent as Justice of Appeal. Obviously, the determination of this issue is solely based on the interpretation one gives to the provisions of article 131(3) and (4) of the Constitution and to the contents of the impugned letter. Undoubtedly, the rule under article 131(3) of the Constitution unequivocally stipulates

that a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal for only one term of office of not more than seven (7) years. The only exception to this fundamental rule is found in article 131(4) of the Constitution, which provides that the first respondent may, on the recommendation of the CAA in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal for a second term of office. Needless to mention, the fifth respondent or any other Justice of Appeal for that matter, should have or ought to have known that the question as to exceptional circumstances contemplated under article 131(4), ought to be determined only by the CAA, which is a self-directed and independent body, created by the Constitution for the purpose inter alia, of selecting suitable candidates and recommending them to the President for judicial appointments. In interpreting article 131(3) and (4) of the Constitution and construing the meaning conveyed through the contents of the impugned letter of the CAA, it is pertinent to consider what Lord Wensleydale stated in *Grey v Pearson* (1857) 6 HL Case 61, 106; 10 ER 1216, which runs –

It is 'the universal rule', that in construing statutes, as well as in construing all other written instruments 'the grammatical and ordinary sense of the word' is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further.

When writing statutory or constitutional provisions, the use of ordinary English words in their ordinary sense has always been the rule, practice and intention. If the meaning is plain, the sole function of the courts is to enforce it according to its terms, and the duty of interpretation does not arise. The judge considers what the provision actually says, rather than what it might mean. In order to achieve this, the judge will give the words in the provision a literal meaning, that is, their plain ordinary everyday meaning, even if the effect of this is to produce what might be considered as an otherwise, unjust or undesirable outcome.

As Lord Diplock stated in the case of *Duport Steel v Sirs* [1980] 1 All ER 529:

Where the meaning of the statutory words is plain and unambiguous it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.

A clear illustration is in the ancient case of *Whitley v Chappell* (1868) LR 4 QB 147, where the electoral provision stated "It is illegal to impersonate any person entitled to vote." The defendant impersonated a dead person. It was held a dead person is not entitled to vote, and the defendant was acquitted.

Similarly the use of the words "shall" and "may" in statutes also mirror common ordinary usage; "shall" is mandatory and "may" is permissive. Unless the outcome of the ordinary

use of the word was to result in some absurdity or inconsistency the ordinary literal effect of the words must be maintained.

In considering the question whether a person can be appointed for a second term of office of Justice of Appeal, the provisions of article 131(1)(e) and article 134 must be applied as intended by the Constitution. There is no ambiguity in the meaning and intention of the provision, that a person holding the office of a Justice of Appeal or a Judge shall vacate that office, in the case of a person who is not a citizen of Seychelles, at the end of the term for which the person was appointed. This provision is only subject to article 134 and definitely not subject to article 131(4).

Article 131(4) is also clear and unambiguous in its wording and application, in that it can only be invoked if the person is not a citizen of Seychelles and has already completed one term of office as Justice of Appeal or Judge. These two provisions do not work in tandem but rather separately and consecutively, in that article 131(4) can only become operational after article 131(1)(e) has become effective.

Hence the contention of State Counsel Mr V Benjamin that there should be a reasonable period prior to the expiration of the term of office of the Justice of Appeal or Judge who is not a Seychellois citizen when a re-appointment can be made, is misconceived.

By the natural expansion and interpretation of the above principles, it also follows that the term of office of a Justice of Appeal or a Judge who is not a citizen of Seychelles cannot be extended. There must by necessity be a new appointment. Hence a recommendation by the CAA for an extension of the term of office of a Justice of Appeal or a Judge who is not a citizen of Seychelles, is, *per se* alien to the Constitution of Seychelles and inconsistent with article 131(3) and (4) of the Constitution; such recommendation being unconstitutional, cannot be relied and acted upon.

On the question of whether the CAA can recommend the re-appointment of a Justice of Appeal or a Judge, prior to the expiration of that person's first term of office, the Constitution makes no provision restricting the CAA from making a recommendation at any time. The control is on appointment, which power is vested solely in the first respondent/President. Hence, the CAA can recommend at any time but the President can only appoint when all the conditions precedent have been met; that is to say, (i) the recommendation has been made for second appointment; (ii) the person is not a citizen of Seychelles; (iii) exceptional circumstances have been shown to exist; and (iv) the person has already completed the first term of office.

In the actual case, the CAA made a "recommendation" for extension of contract on 17 June 2011. Since the Constitution does not allow extension of appointment, that particular recommendation is, in itself unconstitutional. Such recommendation could not have been acted upon by the first respondent. However, even if one were to read the word extension as re-appointment, such re-appointment cannot be made until that person has already completed the existing term of office; that is to say, until after 3

October 2011. An appointment, with reservation, for it to take effect in the future, is against the plain and clear meaning of article 131(4) and therefore unconstitutional.

Intention of the “impugned letter”

We find ourselves unable to subscribe to the line of approach taken by Counsel Messrs Chang Sam and Shah in their respective submissions as to the meaning that this Court should ascribe to the letter of the CAA to the first respondent dated 17 June 2011. The contents of that letter are very clear and unambiguous, and we believe that there is no justification in the circumstances to rewrite it. Members of the CAA are very eminent persons, who in our opinion are well versed in the English language; moreover, it is not the first time that they have addressed such letters to the appointing authority for appointment of judges. It is our finding and unwavering conclusion that the words and the spirit of that letter were simply to recommend for the approval of the President the extension of the existing 5 year term of office of Justice Domah as a Justice of Appeal, by adding another two years to bring it to a total of 7 years being the maximum term permitted by article 131(3) of the Constitution. This is very evident in that, the CAA itself has stated in that letter that it was so extending the term by virtue of article 131(3) of the Constitution, not for a second term of office under article 131(4).

Were we to accept the submissions of Mr Chang-Sam and Mr Shah, counsel for the respondents, that is to say, to import what is not written in the impugned letter, we would be rewriting a fresh letter of recommendation under article 131(4) to the first respondent recommending a second appointment of the fifth respondent for exceptional circumstances. This, we are not empowered to do, as such importation and rewriting would not only usurp the Constitutional powers and functions of the CAA, but would also defeat the provisions and the very sanctity of the Constitution. With due respect to both counsel, we cannot and should not attempt such ventures, in the guise of interpretation.

Further, Mr Shah’s contention is that substantial parts of the impugned letter and the words used - rather randomly found therein - has conveyed the correct intention of the CAA, in recommending a second appointment to the appointing authority. Hence, he contended that this letter can be relied and acted upon by the first respondent.

In fact, a letter is a vehicle of thought; it conveys the intention of the maker of it, to the reader. It should contain apt words; more importantly, to convey the correct intention to the reader, those words used therein ought to have been arranged in a particular order. It is not simply a handful of words randomly scattered across a document that are pecked at by the reader, in order to make some palatable or favourable sense out of it. We are completely astounded by the argument of Mr Shah in this respect. In support of this proposition, Mr Shah also cited the authority *R v Monopoly and Merger Commission and another* [1993] 1 WLR 23. In that case, a bus company sought judicial review on the ground that the Commission was investigating a merger that only affected a small part of the country, the UK. The company argued that the Commission had jurisdiction only if the area affected was a substantial part of the UK, and that the court had to decide whether that was the case and impose it on the Commission in order to keep it

within its jurisdiction. The Court held, that even after eliminating inappropriate senses of the word “substantial”, one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. As we see it, with due respect to counsel, the authority cited herein is of no relevance whatsoever to the issue on hand.

Exceptional circumstances

Having concluded as above, it would now be purely academic to address the issue of exceptional circumstances, although a brief remark on the issue may be made here.

Exceptional circumstances is a phrase or descriptor most often used to denote the conditions required to grant additional powers to a government or institution or person so as to alleviate or mitigate unforeseen or unconventional occurrences. There cannot be any exhaustive means of identifying or defining what constitutes exceptional circumstances.

The exceptional circumstances contemplated under article 131(4) of our Constitution, in our considered view, should be given a liberal interpretation so as to encompass all circumstances, which are reasonable and relevant to the appointment in question. In considering reasonableness, it is in our opinion, perfectly clear, that the duty of the CAA is to take into account all relevant circumstances as they exist at the time when such judicial vacancy arises, including the sensitivity of the public at large. After all, the CAA in selecting potential appointees is only performing its constitutional duty on behalf of the people of Seychelles. In so doing, the CAA must consider all those circumstances, in what we venture to call a broad commonsense way as people of the world, not simply as judges of facts, and come to their conclusion giving such weight as they think right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for them to exclude from their consideration matters which they ought to take into account – vide Lord Green in *Cumming v Danson* [1942] 2 All ER 653 and 656.

Jurisdiction

On the issue of jurisdiction raised by Mr Shah, it is evident from article 130(4)(c) of the Constitution that the Constitutional Court, in addition to its jurisdiction to grant declaratory relief as to any contravention of the Constitution, has also been conferred the jurisdiction to grant any consequential relief or remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court. In such circumstances, it

can grant any consequential relief as the Court considers appropriate. In our view, this Court, in the absence of anything to the contrary in the Constitution, has unfettered jurisdiction to grant any such consequential relief as it deems appropriate, following the declaratory relief in matters relating to the application, contravention, enforcement or interpretation of the Constitution vide article 129(1) thereof. It is truism that a special procedure has been prescribed under article 134 of the Constitution for removal of a Justice of Appeal or a Judge from office for his or her inability to perform the functions of the office, due to infirmity of body or mind or any other cause or misbehaviour. But, this article in our considered view has nothing to do with the unfettered jurisdiction conferred on this Court by article 130(4)(c) of the Constitution to grant any consequential relief or remedy, as it considers appropriate, having regard to all the circumstances of the case. Obviously, "where there is a right there is a remedy": *Ubi jus, ibi remedium*.

In the final analysis, having given careful thought to the submissions made by counsel for and against the petition, taking into account the entire circumstances of the case, and on the strength of the interpretation we give to article 131(3) and (4) of the Constitution, in our unanimous judgment, this Court makes the following declaration, findings and orders in this matter.

- (i) This Court hereby declares that the purported recommendation of the second, third and fourth respondents (collectively the CAA), made through its letter dated 17 June 2011, to the first respondent seeking his approval for the extension of the fifth respondent's contract of employment for an additional two year period, is ultra vires and unconstitutional as it has contravened article 131(3) and (4) of the Constitution; consequently, the appointment made by the first respondent on 5 September 2011, based on that recommendation is null and void ab initio;
- (ii) Further, this Court finds that, while the CAA may recommend reappointment of a candidate for a second term in exceptional circumstances, under no circumstances does it have any constitutional mandate to extend the contract period of any judicial appointee for any further period exceeding or beyond the period stipulated for the first term of office in the original contract of employment;
- (iii) For the avoidance of doubt, this Court also finds that the CAA has constitutional mandate only to recommend a candidate for a second term of office provided that that candidate (a) is not a citizen of Seychelles (b) has already completed one term of office as a Justice of Appeal and (c) "exceptional circumstances" do, in fact, exist in that particular case, as contemplated under article 131(4) of the Constitution;
- (iv) In consequence of the above declaration and findings, this Court hereby makes an order setting aside the appointment of the fifth respondent for a second term of office as Justice of the Court of Appeal; and
- (v) This Court makes no order as to costs.

