IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[1] [Corum: D. Karunakaran J (presiding), B. Renaud J and M. Burhan J]

CP 3/2014

[2014] SCCC 6

Viral Dhanjee

Petitioner

versus

Mr. James Alix Michel

President of the Republic of Seychelles

1st Respondent

AND

Mr. Patrick Herminie

The Speaker of the National Speaker

2nd Respondent

AND

The Government of Seychelles

Represented by the Attorney-General

3rd Respondent

AND

The Attorney General

4th Respondent

Counsel: Mrs. Amesbury for the Petitioner

Mr. R Govinden for 1st; 2nd; 3rd; 4th and 5th Defendants.

Delivered: 15th July 2014

RULING

D. Karunakaran, J. (Presiding), B. Renaud, J.

As a citizen of Seychelles the Petitioner entered this Petition pursuant to Articles 46(1) and 130 (1) of the Constitution of Seychelles.

The 1st Respondent is the elected President of the Republic of Seychelles who took the Presidential Oath of Office on 28th May, 2011.

The 2nd Respondent is the Speaker of the National Assembly of the Republic of Seychelles who swore an Oath of Allegiance to the Constitution and took the Official Oath.

The 3rd Respondent represents the Government of Seychelles and from time to time initiates Bills in the National Assembly which may or may not be enacted into laws after Presidential Assent and publication in the Official Gazette.

The 4th Respondent is the Attorney-General of the Republic of Seychelles.

The Applicant had filed a case against the Respondents challenging the constitutional and legal validity of the Public Order Act 2013 (POA). The case was placed before this Bench including Hon. Judge Mohan Niranjit Burhan (hereinafter Judge Burhan). The Applicant stated that he had prior to that learnt that Judge Burhan's re-appointment and grant of citizenship by the 1st Respondent was the subject of a constitutional challenge. The Applicant being dissatisfied with the fact that the 1st Respondent in the case challenging the POA was the same as the one that had been made 1st Respondent in the case against Judge Burhan so he decided to ask Judge Burhan to recuse himself.

Mrs. Amesbury Learned Counsel for the Petitioner filed a Motion dated 13th May 2014 supported by the Affidavit of the Applicant Mr. Viral Dhanjee moving this Court for Judge Burhan, one of the three Presiding Judges to recuse himself from the case for reasons set out in the Affidavit.

In support of his Notice of Motion and Application, Mr. Viral Dhanjee deponed to an Affidavit which is reproduced hereunder:

1. Than I am the Applicant and the above-named deponent.

2. That I have been advised and believe that a case challenging the constitutional validity of Judge Burhan's appointment on the ground that he was granted Seychellois citizenship under Section 5(2) of the Citizenship Act 1994 by the 1st Respondent in the present case.

3. That under the said section of the Act the 1st Respondent can grant citizenship to a person who is not eligible nor entitled to Seychellois nationality.

4. That I aver and verily believe that the grant of citizenship to judge Burhan was a favour, followed thereafter with his re-appointment as a judge has seriously compromised his impartiality and independence.

5. That I have a right under Article 19(7) of the Constitution to have my case heard by an impartial and independent court established by law.

6. That until the Constitutional validity of judge Burhan's re-appointment is confirmed by this Court and/or the Seychelles Court of Appeal any court in which he sits will not be properly constituted.

7. That the Public Order Act 2013 (POA) is being challenged on the ground that it violates the Constitution and the 1st Respondent herein is also the 1st Respondent in the case brought by Naddy Dubois and Ors and I verily believed that based on all of the foregoing that judge Burhan should recuse himself from the case.

8. That the above statements are true and correct to the best of my knowledge information and belief.

In reply to the above-stated Affidavit, the Attorney-General Mr. R. J. Govinden acting as Learned Counsel for the 1st and 2nd Respondents and as the 3rd and 4th Respondents, deponed to an Affidavit in reply. The Affidavit is reproduced hereunder exactly as it appears.

1. I am the deponent above named.

2. I am the third and fourth Respondent in this case.

3. I aver that the averments found in the second paragraph of the

affidavit are admitted.

4. *I aver that the averments found in the third paragraph of the affidavit are denied and it is submitted that the subject matter or issue in the main petition is entirely different from the issue in this paragraph of the affidavit filed in support of this motion.*

5. *I aver that the averments found in the fourth paragraph of the affidavit are denied and the petitioner is put to the strict proof of the averments made there in. It is submitted that the averments are motivated and upon unfounded reasons.*

6. *I aver that the averments made in paragraph five of the affidavit are admitted to the extent that the rights under Article 19(7) of the Constitution is available to all citizens and put to the strict proof to the petitioner about the impartiality or non independence of the judiciary in the hearing of the present case. It is further submitted that the apprehension of impartiality expressed in the Petition are baseless and without any justified reasons. The mere expression of impartiality would not be enough. It should be satisfactorily shown that the apprehension is real, reasonable, genuine and bonafide and not imaginary or unwarranted and unjustified or motivated by some other intention.*

7. *I aver that the averments made in paragraph six of the petition are denied. It is submitted that the issue of appointment of the judge and the validity of his appointment are nothing to do with the prayer of the main petition. It is further submitted that it cannot be assumed or apprehended that the present case will be conducted with any bias or predetermined view by the bench merely because Judge Burhan is part of the Constitutional Bench. It is submitted that there is no material to show that the Bench as Constituted now is biased.*

8. *I aver that the averments made in paragraph seven of the*

petition are denied to the extent that Public Order At 2013(POA) is violative of the Constitution. It is admitted that the 1st Respondent in both cases - CC 3/2014 & CC 4/2014 is the same person/authority, who has been made as respondent by the petitioner. It is denied that there is any need statutorily or constitutionally for Judge Burhan should recuse himself from the cases just because of 1st respondent is the one and the same in both petitions and for the reasons adduced by the applicant in the affidavit.

9. I aver that this application for recusal of Judge Burhan is completely unwarranted, vexatious, and frivolous and therefore be dismissed with costs.

10. I aver that the averments contained in this affidavit are true to the best of my knowledge, information and belief.

Learned Counsels for the parties made their written submissions which encapsulate their arguments in respect of their respective position in the matter. We have comprehensively set these out in order to clearly expose the position of the parties.

Learned Counsel for the Applicant submitted as follows:

<u>The Facts</u>

The applicant filed a case challenging the constitutional and legal validity of the Public Order Act 2013 (POA). The case was brought against the above respondents. The case was placed before a bench comprising of 3 judges one of whom is judge Burhan. He leaned that Judge Burhan's re-appointment and grant of citizenship by the 1st Respondent was the subject of a constitutional challenge. The applicant being dissatisfied with the fact that the 1st respondent in the case challenging the POA was the same as the one that had been made a 1st respondent in the case against judge Burhan so he decided to ask the judge to recuse himself.

Two weeks later Judge Burhan delivered a personal opinion on the question of his recusal and categorically refused to disqualify himself from the case, citing several cases where judges against whom, a constitutional challenge had been mounted and who subsequently delivered pending judgements (read by other judges) as part of his reasons for non-recusal. It did not matter that it was pointed out that none of the judges whose appointments had been challenged decided not to undertake judicial duties until the cases against them had been decided. The last challenge being that of Justice Domah who, did not even come to Seychelles until the case against him had been determined. The personal opinion was rejected as it could not be appealed against, and a formal "motion for recusal" and affidavit was filed.

The Applicant's affidavit clearly stated that he had been advised and believed that a case challenging the constitutional validity of Judge Burhan's appointment on the ground that he was granted Seychellois citizenship under section 5 (2) of the Citizenship Act 1994 by the 1st Respondent in the present case. And that under the said section of the Act the 1st Respondent granted citizenship to judge Burhan who, but for the opinion of the 1st Respondent that special circumstances existed was not eligible nor entitled to Seychellois nationality. The Applicant also averred that the grant of citizenship to judge Burhan was a favour, followed thereafter with his re-appointment as a judge, could seriously compromise his impartiality and independence, especially in view of the fact that the same party that granted the citizenship and re-appointment is now a **party** before a court presided by a bench comprising of Judge Burhan.

The Respondents Reply to the Motion and issues arising therefrom

In his "reply to motion" the Attorney-General, represents the President, 1st Respondent. He also represents the Speaker of the National Assembly, the 2nd Respondent. Next he represents, The Government, the 3rd Respondent. As 4th Respondent he represents himself and he is also the Amicus Curiae, the necessary Party.

In his capacity as counsel representing all the Respondents above mentioned, he swore an affidavit as a witness, testifying to facts not within his personal knowledge thereby perverting the course of justice. *Section 170 of the Seychelles Code of Civil Procedure "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with grounds thereof, may be admitted."*

“The reply to motion by the Respondents” with an accompanying affidavit, dated 21st March and served on the petitioner’s attorney, has the Attorney-General,simply regurgitating the averments contained in said “reply”, thereby becoming a witness in the case. Can the Attorney-General be Counsel, Party, Amicus Curiae and **witness** all in the same case? I submit that this is illegal and unconstitutional not only does it violate the principle of separation of powers, it also poses a serious question of professional ethics and conflict of interest, but it also portrays the Attorney-General as being incompetent especially in view of the fact that constitutionally he is the highest legal officer of the land.

Do the laws of Seychelles and the Constitution allow the highest legal officer of the land to turn himself into “Jezebel” and bring that once honourable institution into such disrepute?

Based on all of the above submit that the Attorney-General has shown himself to be totally incompetent and he too, should recuse himself from the case or the court should disqualify him from further appearances in the present case.

I submit that what follows next is a detailed look at the content and validity of the affidavit, a sworn statement in which witnesses testify to facts within their knowledge and is therefore evidence before the court. Therefore an affidavit in reply which “denies” and “admits” evidence, is defective and incompetent.

Paragraph 1 of the “reply” “denies” all and in singular averments contained in the ”petition” which petition? The Applicant filed a Motion for Recusal of Judge Burhan. There was no Petition save for the main one. Should this “Reply to motion” be understood as the motion for recusal? If it is so, why make reference to a petition? Is the Attorney-General denying all the averments of the Petition filed by the Petitioner challenging the constitutional validity of the POA? And paragraph 2 of the “reply” refers to averments ”found in the second paragraph of the affidavit” is it the affidavit accompanying the Petition? Or is it to be taken to mean the affidavit accompanying the Motion for recusal?

Paragraph 2 then refers to the affidavit, paragraph 2 of which is “admitted” evidence is not admitted or denied, this “reply to motion” couched as it is, is defective and incompetent and should be struck off.

Paragraph 3 is equally incomprehensible as it is “denying the averments of the third paragraph of the affidavit” and then says “it is submitted that the subject matter or issue in the main petition is

entirely different from the issue stated in the said paragraph." Which main petition there are two. Once again affidavits contain evidence put before the court and cannot be "denied" or "admitted".

Paragraph 4 "denies" averments in 4th paragraph of the affidavit and puts the "petitioner" to "strict proof" How does one put a witness's evidence before court "to strict proof"? and which "petitioner" is being referred to? There was a "Motion for recusal" filed by an "Applicant".

Paragraph 5 "admits" averments of the affidavit and then puts the "petitioner" "to strict proof." Paragraph 6 above is repeated herein.

The Applicant further submits that paragraph 5, by requiring "strict proof" of evidence contained in his affidavit renders this paragraph too, defective.

Paragraph 6 of the "reply" is once again submitted to be defective as it "denies" averments contained in an affidavit, which is evidence before the court and also refers to "Paragraph 6 of the petition" another reason why this "reply" should be declared defective and inadmissible as the Attorney-General does not really know what he is referring to.

Paragraph 7 of the "Reply" is the absolute proof that the out come or end result of the Petition filed by the Applicant challenging the constitutionality and legality of the POA has been predetermined based on the content of this paragraph which says that "the averments made in paragraph 7 of the petition (which petition)? Are denied (cannot deny evidence) to the extent that Public Order Act (POA) 2013 is violative of the Constitution." The case has not even been heard or determined and yet for some reason the Attorney General confidently denies that it violates the Constitution! Despite the fact that this "reply" is only concerned with the motion for recusal and not the main, or substantive case.

Case Law on the Question of Recusal

In support of the above proposition and the case generally on the issue of recusal I will rely on the House of Lords case **"[Judgement in Re-Pinochet]** and on the cases referred to in **[James Alix Michel and Ors v. Viral Dhanjee and Ors.** copies of which are attached

herewith. Despite being lambasted by the Seychelles Court of Appeal on the issue of recusal in the above case, the same issue is once again before the court.

In further response to paragraph 5 of the "reply' I submit that there is a total lack of appreciation of the real issues requiring the automatic disqualification of the judge. In the case of Re- Pinochet quoted above Lord Hoffmann cast the deciding vote in regards to the issue of Pinochet's extradition and then it became known that Lord Hoffmann was connected to Amnesty International (AI) through some Charitable Organisation affiliated with it. AI having been permitted to intervene in the case their Lordships (HL) in an unprecedented judgement set aside their own previous judgement because an organization affiliated to AI appeared as a party before Lord Hoffmann, who cast the deciding vote in a 3/2 majority judgement.

Would a "reasonable, objective and informed person on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel." [***Africa and Others v South African Rugby Football Union and Others- Judgement on recusal application]*** on the facts of the case presently before the court, would an informed observer, having considered the relevant facts conclude that there was a real possibility of bias? When a judge receives a benefit from a party appearing before him? Would that infringe the constitutional guarantee of the Petitioner under Article 19 (7)? To a fair hearing by an independent and impartial Court established by law?

Seychelles, as a small jurisdiction, there is greater need for stressing the fundamental importance that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" because the impact of its non application is felt more forcefully. or should that legal principle be ignored because of what has been called "the exception of necessity"? "At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a

judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of the **litigant** for apprehending that the judicial officer, for whatever reason, was not or will not be impartial" **[Council of Review, South African Defence Force, and Ors v Monning and Ors]**

More recently, in [**Reg. v. Gough [(20) (1993) AC 646.],** Lord Goff of Chieveley, after examining the authorities in detail, reformulated the real danger test to be applied, where bias is alleged, as follows ((22) ibid. at 670.):"Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration". Lord Goff felt that it was unnecessary "to have recourse to a test based on mere suspicion, or even reasonable suspicion" ((23) ibid. at 668.). He also thought that the concept of the reasonable person was inapplicable because the court acted as the reasonable person and inquired into the circumstances about which the reasonable "observer" in the courtroom would not necessarily have any knowledge ((24) ibid. at 670.). Lord Goff said that he had adopted the real danger test instead of the real likelihood test "to ensure that the court is thinking in terms of possibility rather than probability of bias" ((25) ibid.).

In Gough, the House of Lords rejected the need to take account of the public perception of an incident which raises an issue of bias except in the case of a pecuniary interest. Behind this reasoning is the assumption that public confidence in the administration of justice will be maintained because the public will accept the conclusions of the judge. But the premise on which the decisions in the court are based is that public confidence in the administration of justice is more likely to be maintained if the court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question. (the underlining is mine)

Exception of Necessity v. Constitutional Provisions

Submit that the James Alix Michel case above, cited with approval the 15th century common laws rule "that a judge is not disqualified to try a case because of his personal interest in the matter at issue <u>if there is no other judge available to hear and decide the case."</u> In the recent months there have been two commonwealth judges appointed, one of whom has a case load that would, I submit permit him to be empanelled for the present case.

Submit that it is precisely because Seychelles is a small jurisdiction with a small judiciary, that when a situation arises which would "show that the judge is biased" rather than invoke the rule of necessity" which would "dictate" that the case is heard by a biased judge the constitution provides for the President to appoint a person(s) from candidates proposed by the Constitutional Authority to act as a judge, Article 128 (2) (a) (b) or (c) and if that Article was invoked there would be an unlimited number of potential candidates amongst the local Bar from which the CAA could choose, to sit as "ad hoc" judges. And under Article 128 (3) "An appointment under clause 2 (c) may be made without reference to any numerical limit imposed under article 125 (6).

Since Seychelles is a small jurisdiction would the "exception of necessity" permit a doctor to perform surgery on a close family member despite the presence of a pool of readily available and equally qualified doctors?

I also submit that the "defence" of necessity or "exception of necessity" can be used for a multiplicity, of situations, it has even used as justification for cannibalism! The decision in James Alix Michel v. Viral Dhanjee sounds like a death knell to challenges for recusal because "in any case even if we had been shown to be biased, which is not the case, the rule of necessity would dictate that we hear the appeals." One therefore has to look no further than the Constitution, if hope is to be restored, beyond the narrow "exception of necessity" concept.

In fact way before the 1993 constitution came into force both Mr. and Mrs. Georges and Mr. Pardiwalla served as magistrates in our courts.

Simply by way of an example; if a judge has a sexual relationship with say, a plaintiff or defendant and the opposing party finds out about that relationship could he/she raise the ground of bias in seeking the recusal of the judge or would the "exception of necessity" be used, or

would “the rule of necessity dictate” that the said judge continue “to hear the case”? because Seychelles is a small jurisdiction and the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified?

Recusal Some Questions

Did the court on its own motion have a constitutional obligation to remove judge Burhan from the bench after it was so informed of the constitutional challenge to his re-appointment? Does his continued presence on the bench render the court to be improperly constituted? Especially when the Constitutional itself provides a way out by providing in Article 129 that the jurisdiction of the court in determining constitutional questions “shall be exercised by not less than 2 judges sitting together.” I submit therefore that, there is no legal requirement that the bench must consist of 3 judges.

Further, how can the Attorney-General the highest legal officer in the land say that there is “statutorily and constitutionally” no reason for judge Burhan to recuse himself. Definitely in Seychelles unlike America, that has Recusal Statues there is no law requiring recusal of a judge save for gross misconduct when an application can be made for his removal to the Constitutional Appointments Authority (CAA). However Seychelles, with other Commonwealth countries has inherited a body of common law principles one of which is that no man can be judge in his own cause and further that where, there is the slightest possibility of bias the judge should recuse himself because failure to do so, would undermine the very foundation of judicial impartiality and in the present case submit that judge Burhan’s refusal to recuse himself is putting his brother judges in a position where they have to rule on the motion thereby further damaging the already embattled Judiciary in the eyes of the public.

And since 1993 there is a constitution that gives the Applicant the right to have his case determined by an “impartial and independent court established by law”, is it the Attorney-General position that the Applicant will get a fair hearing by an impartial and independent court when a judge on the bench hearing the case is beholden to a party against whom the case has been brought? Because that same party has granted a favour to the judge in question?

Conclusion

Submit that a motion for recusal in the present case is not made lightly. No lawyer wants to make a recusal motion because it means taking “on the judge by accusing him of biased conduct” “A lawyer’s duty is to zealously represent each client, but lawyers have other clients whose cases may come up before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge’s circle of friends and may be quite defensive of his honour.” [From “Without Merit: The Empty Promise of Judicial Discipline] by Elena Ruth Sassower under the paragraph captioned “The Myth of Recusal

In a case where, despite the legal difficulties for both counsel and applicant, and the added risks to counsel of alienating members of he judiciary, and at the possible cost of present and future litigants, what must be addressed is, “having ascertained the relevant circumstances, thecourt should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration"? And whether in the circumstances of this case the fact that Seychelles is a small jurisdiction the court should use the exception of necessity to hold in favour of non-recusal?

By way of an example, if a person does an exceptionally big favour for a judge or even a member of his family and then that same person appears in a case before the self same judge. Should a judge not immediately recuse himself informing his superior of the reasons why he cannot take the case?Is this not the wise approach because “no judge wants to have his legitimacy questioned when he hands in decisions?”

It was published both nationally and internationally via the internet that judge Burhan was granted Seychellois citizenship by the 1st respondent, and equally well published both nationally and internationally that he was re-appointed judge by the 1st respondent. And now, the same 1st respondent is a party in a case before a bench comprising of judge Burhan. Would a fair minded and informed

observer, having considered the relevant facts conclude that there was a real possibility of bias?

In the case of Judge Burhanhe received a favour from the 1st Respondent because, as the Act says he was "not eligible nor entitled" to citizenship save for the opinion of the 1st Respondent that "special reasons existed", followed two and half months later by a re-appointment as a puisne judge by the same 1st Respondent. The re-appointment, and matters incidental thereto is presently being challenged before the court, and now, the same 1st Respondent is a Party to a case over which he is presiding.

It is submitted that if public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored. In considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the Seychellois public a knowledge of the law and the judicial process which ordinary experience suggests is not the case.

Submit that the circumstances of Judge Burhan's re-appointment has everything to do with the present motion for his recusal, and that a fair-minded and informed observer such as the applicant would assume and apprehend that the present case will be conducted with bias or pre determined end-result by the court merely because judge Burhan is part of the Constitutional Bench especially if, as in the Pinochet case the said judge has to cast the deciding vote. Was the court aware of the fact that Judge Burhan's re-appointment had been challenged before selecting him to be part of the panel hearing the present case?

Therefore submit that for all of the above reasons the court should order the disqualification of judge Burhan from the bench. Further the Attorney-General signs as "the Third and Fourth Respondent and counsel for the First and Second Respondents" what has been omitted is that he is not only the 3rd and 4th Respondents but also their counsel and having sworn the affidavit accompanying his "reply" he is also a witness in the case.

Based on the "Reply" and the fact that the Attorney-General has filed it, as counsel for the 1st, 2nd and 3rd Respondents, it means that the President, the Speaker, the Government, plus the Attorney-General as *Amicus Curiae* and as 4th Respondents, **ALL OPPOSE THE RECUSAL OF JUDGE BURHAN, THE QUESTION IS WHY? WHAT INTEREST ARE THEY SUPPORTING THROUGH HIS CONTINUED PRESENCE ON THE BENCH?** And I submit is the strongest ground yet for his recusal from the bench.

It is reiterated that if public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored. In considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the Seychellois public a knowledge of the law and the judicial process which ordinary experience suggests is not the case.

Thus conclude the submission of Learned for the Applicant.

Submissions filed on behalf of the Respondents

Likewise we reproduce hereunder the entire submissions of the Counsel for the Respondents.

1. It is submitted that the Respondents herein denies the averments made in the written submission filed on behalf of the applicant herein. It is further submitted that with regard to the issue of an affidavit filed by the Attorney General, mere filing of an affidavit by the applicant does not make all the facts stated therein as true and the respondents has got every right of denial about the facts stated in the applicant's affidavit which are not correct. It is well settled principle that the Respondents has got every right to deny the averments made by way of filing an counter affidavit to put forth their case. In this motion, the filing of an affidavit by the Attorney General has been made only in the capacity as a party (3 & 4th Respondents) to the proceedings.

As a necessary party under Rule 3(3) of the Constitutional Court Rules the Attorney General is entitled to make averments with respect to Respondents who are Governmental/Statutory/Constitutional authorities including for himself. The Rule 3(3) of Constitutional Court Rule is a permissible rule and not a prohibitory rule.

2. It is submitted that with regard to the mentioning of petition in the reply filed by the respondents is meant only as a reply to the motion application seeking recusal of Judge Burhan and not to the main petition challenging the Constitutional validity of the POA.

3. It is submitted that the doctrine of judicial recusal is not the discretion or legal right of the parties/litigant concerned.

4. It is submitted that the general principles for seeking the recusal of a judge are as follows:-

   a. Where the judge has a personal bias or prejudice concerning a party.
   b. Where the judge has got a personal knowledge of dispute evidentiary facts of the proceedings.
   c. Where he has served as a lawyer or adviser or material witness in the matter in controversy.
   d. Where he has any pecuniary interest in the matter.
   e. Where he or his relatives has got vested interests in the matter.
   f. Where he is a party to the proceedings or an officer or director of a party in the said proceeding.

5. It is submitted that the applicant in this motion raised the ground of impartiality/bias by Judge Burhan due to the reason of his appointment as a Judge by the 1st Respondent in this case and also the first respondent is the respondent in both the cases filed by the counsel for the applicant in this matter.

6. It is submitted that the ground of bias raised by the applicant is not legally valid one, but motivated allegation of bias and based on unfounded reasons. In fact the apprehension of bias raised by the applicant is only on the ground of self perceived image of the Judge due to the fact of conviction and sentence imposed on them and who also have filed another case challenging the appointment of Judge Burhan, a member of this bench.

7. It is submitted that the mere expression and apprehension of bias without any valid and justifiable reasons is not enough to seek the relief of recusal of a Judge.

8. It is submitted that the ground on which (appointment) apprehension of bias raised by the applicant in this matter is a blanket and irrational apprehension and it is likely to squarely applicable to all the judges serving in this jurisdiction, in future. It is nothing but apparent intervention in the function of judiciary and questioning the judicial integrity of the Judges for no valid reason. Moreover, in the constitutional bench cases the decision/view of a single Judge (member of the bench) is not going influence the other members of the bench. Since, all the members are having their independent views and decision on the issue.

9. It is submitted that the motion for recusal of a Judge is not a bona fide motion but made with the motive or intent to

intimidate the court or to get rid of an “inconvenient Judge” or to confuse the court with extraneous motive and information or to cause obstruction or in any other way frustrate or obstruct the course of justice.

10. It is submitted that on the issue of bias, the well settled principles is that the test of double reasonableness should be applied. The starting point of the test is on the presumption that the judicial officers are impartial in adjudicating disputes and also they are functioning as judge under an oath of allegiance and that the onus rests on the applicant to rebut the presumption of impartially and further not only the person apprehending bias be a reasonable person by the apprehension itself must in the circumstances be reasonable, and that mere apprehensiveness on the part of the applicant that the Judge would be biased is not enough.

11. It is well settled principle in all over the world that the test of reasonableness is “that whether the fair minded person and informed observer, having considered the facts, would conclude that there was a real possibility that the judge is biased” at the same time the “observer”, must be taken to have a balanced approach, neither naïve or complacent nor unduly suspicious or cynical … He must be taken to have a reasonable working grasp or how things are usually done”. The applicant has not shown himself to be a bona fide observer as stated above. The applicant is not come with clean hand and he is a habitual court bird in matter like this.

12. It is submitted that in this application the applicant did not show any valid reasons or grounds for recusal of Judge Burhan except the reason of his appointment and grant of citizenship. It is

further submitted that Judge Burhan is discharging his judicial funcition in this jurisdiction for long time which such merit that the CAA gas found him suitable to appoint him. Moreover the there is no linkage between his appointment and issues raised in the main petition and his appointment was not made on the anticipation or filing of case challenging the constitutional validity of Public Order Act.

13. It is submitted that the reason for recusal adduced by the applicant is untenable one. The mere fact the first respondent is one and the same in two constitutional cases and who is happened to be an executive authority and for that reason there is an apprehension of bias in deciding the issue. It is further submitted that in both the cases the applicant/petitioner is different, the members of the constitutional bench as well as the issues are entirely different. Therefore, the mere apprehension of bias is not sufficient to seek recusal of a judge from the bench.

14. It is submitted that it is nothing but interference in the administration of judiciary. This is nothing but making an attempt of forum/judge shopping by way of creating confusion among the members of the bench and also an pressurizing the judiciary with an ulterior motive to achieve something for their ulterior political/personal gain. The motion made by the applicant is nothing but abuse process of law, frivolous and vexatious one.

15. Therefore, it is humbly prayed that for the reasons stated above that this Honourable court may be pleased to dismiss this motion with costs and thus render justice.

We carefully perused the affidavits and the relevant documents adduced by the parties in this matter. We meticulously went through all authorities cited by counsel in support of their respective cases. We also gave diligent thought to the well-researched submissions presented by counsel on both sides in the light of the relevant provisions of law.

Evidently the Constitutional Court assigned to hear the Petition of the Applicant is constituted by a panel of three Judges of the Supreme Court. One of whom is indeed Judge Burhan. At all material times, Judge Burhan was not a citizen of Seychelles. In 2008, he was appointed first time as an expatriate Judge of the Supreme Court of Seychelles for a term of five years. In terms of Article 131 (1) (e) of the Constitution, a person holding the office of Judge, in the case of a person who is not a citizen of Seychelles shall vacate that office, at the end of the term for which the person was appointed, unless the Constitutional Appointments Authority (CAA) recommends the appointment of that person (who has completed one term of office as a Judge) to the President of the Republic, for a second term of office, whether consecutive or not, of not more than seven years. The CAA may make such recommendation for a second term of office only when it finds exceptional circumstances to do so in a particular case that justifies a second term of office. In passing, it is pertinent to mention that the tenure of office in the case of expatriate Judges is governed by the rule under Article 131(3) and an exception thereto, provided under Article 131(4) of the Constitution. The rule is simple and clear. That is, a person who is not a citizen of Seychelles may be appointed to the office of Judge for only one term of office. The exception to this rule is also equally simple and clear. That is, in exceptional circumstances, an expatriate judge who had been appointed for a first time and completed one term of office as such, may be appointed or reappointed, so to speak, for a second term of office.

Hon. Judge Burhan, who had been appointed as an expatriate Judge of the Supreme Court of Seychelles, completed his term of first appointment for

a five-year period by the end of 2013. Soon after the completion of his first term of office as an expatriate judge, it seems that in the eye of the CAA, no exceptional circumstances existed to qualify his reappointment for a second term of office or to say the least, the CAA did not recommend for his appointment as an expatriate judge for a second term of office. However, in the meantime, the Learned Judge applied to the Government for Seychellois Citizenship.

The 1st Respondent who is the President and Head of Government of the Republic of Seychelles granted him Citizenship and caused registration of Mr. Mohan Niranjit Burhan as a Citizen of Seychelles in exercise of the prerogative conferred on him by Section 5(2) of the Citizenship Act, which at the material time reads thus:

> *"The President may cause to be registered as a citizen any person not otherwise entitled to or eligible for citizenship of Seychelles with respect of whom, special circumstances exist, which in the opinion of the President, warrant such registration"*

Subsequent to and in consequence of such acquisition of citizenship, the Learned Judge was appointed as a Judge of the Supreme Court of Seychelles in February 2013, for his subsequent judicial tenure.

Following the grant of citizenship and his reappointment as a Judge, a couple of Court cases including a Judicial Review, have been instituted by different interested parties, against the Hon. Judge Burhan challenging his reappointment as a judge of the Supreme Court and questioning his apparent impartiality and independence in judicial functions. These cases are still pending before the Supreme Court and the Constitutional Court for determination.

The contention of Mrs. Amesbury is essentially based on the well-established principles uniformly adopted virtually in all Commonwealth

Jurisdictions and recently reaffirmed by the Seychelles Court of Appeal in the case of ***James Michel & others v/s Viral Dhanjee ors SCA 5 & 6 of 2012.*** They are:

(i) The principles of natural justice require that a decision maker should not sit when there is a perceived bias, which need not even be an actual bias. *This implies that it is not simply the reality that counts in any decision making process, rather human perception of the reality that counts more than the reality itself*.(in italics ours)

(ii) A person should not sit in a judgment seat, when public confidence in the administration of justice would be affected if the decision in which he participated was allowed to stand vide Pinochet, wherein the law lords agreed that Lord Hoffmann had sat while disqualified and ordered a fresh hearing.

(iii) On the issue of recusal, an objective test should be applied to ascertain whether there exists a reasonable apprehension or suspicion on the part of a fair-minded and informed observer or member of the public that the judge was not impartial in the given facts and circumstances of the case.

There is a notable difference between these two terms "recusal" and "disqualification". The term "recusal" is distinguishable from the term "disqualification". "Recusal" is the process by which a decision-maker voluntarily removes himself or herself from the judgment-seat, while "disqualification" is the process by which a party seeks to remove a judge from the case. In many commonwealth jurisdictions, the term "recusal" is used interchangeably with the term "disqualification". The former is a *species,* whereas the latter is the *genus*.

It is not simply a rule of natural justice nor is it a simple legal right of a litigant-public that a decision-maker ought to be impartial and should recuse himself, when he has an actual or perceived bias, for or against a party in

any adjudication; but it is indeed, a rule of the supreme law- a Constitutional right – sprouting from the Seychellois Charter of Fundamental Human Rights enshrined in our Constitution. Article 19(1) and (7) of the Constitution of Seychelles has guaranteed equally everyone in this land, a fundamental right to have an independent and impartial decision-maker to sit and adjudicate upon his or her legal rights and obligations in all litigations whatever be the nature of the litigation either civil or criminal.

The Seychelles Code of Judicial Conduct also emphasizes the importance of recusal or disqualification, when impartiality of the Judge is reasonably questioned vide Section 2.2.4, which inter alia, reads thus:

> *"A Judge shall refrain from participating in any proceeding in which the impartiality of the Judge might reasonably be questioned".*

It may be true that the Code of Judicial Conduct is not necessarily legally enforceable on judicial officers, however, it is a paramount moral duty of all judicial officers to voluntarily observe the Code of Conduct by the dictates of their conscience through self-analysis and inner-discipline. There is also as much an obligation for any judicial officer not to recuse himself when there is no necessity for him to do so as there is for him to do so when there is.

Indeed, the appearance, as well as the actuality of "independence and impartiality" is critical to the rule of law. Its presence creates confidence not only among the parties but also among the general public; on the contrary, its absence undermines the public confidence in the judicial process. The issues as to recusal will always be one of fact and degree, including the passage of time between the event said to give rise to the appearance of bias and the challenge based on it. Any real doubt should be resolved in

favour of the accused or, in civil litigation, of any litigant. At the same time, any fanciful doubt should be resolved in favour of the impugned judge and no litigant or attorney should be allowed to use recusal motions in disguise as a means of judge shopping in our small jurisdiction.

We are of the view that an impugned judge should be proactive, not reactive to the concern expressed by the litigants, who believe or reasonably suspect that he would be biased. And if he does sit with bias, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. He should be responsive to self-analysis of all facts and circumstances that may be perceived as potentially, disqualifying features and be astute (though not too astute) to disclose them.

At the same time we believe that a mere indication by a party that it wishes a judge to disqualify himself or herself is not of itself a proper ground for the judge to recuse or be disqualified. Obviously, Judges are required to discharge their professional duties unless disqualified by law or lawful order of the competent Court. They should not accede too readily to applications for disqualification otherwise litigants may succeed in effectively influencing the choice of judge in their own cause. Recusal motions should not be used as strategic devices to “judge shop”. Attorneys may even be sanctioned at times, for frivolous, improper and unsupported motions, if made maliciously to disqualify a judge. These are the quintessence of guidelines we found in many of the authorities cited and the position of case law set by the Courts in the UK and many other Commonwealth Jurisdictions. We approach and analyze the facts and circumstances surrounding the instant case in the light of the said guidelines.

Needless to say, bias may involve actual or apprehended bias. A judge affected by actual bias will not be able to fulfil his Judicial Oath. Therefore, he would be disqualified from sitting. In such a case, the question for

determination is whether there is a bias in fact. It involves a question of fact. Decisions about recusal are very much fact-dependent and the approach to be taken in a particular case may vary depending on the factual matrix.

On the other hand, in the case of apprehended bias, the determination as to whether a judge should recuse or disqualify him or herself by reason of *apprehended bias* involves question of fact and degree. The test is based on an objective estimate of the entire facts and circumstances, which allegedly gave rise to the apprehended bias. The determination of disqualification for apprehended bias is not a judge's introspective estimate of his own ability to hear the case impartially but is what a reasonable person knowing all the relevant facts and circumstances would think about the impartiality of the judge in question. Obviously, the test is an objective one. Having gone through a number of authorities, we find that the relevant test, which is applicable to the case on hand, is well formulated and applied virtually in all Commonwealth Jurisdictions. The Seychelles Court of Appeal has lucidly and succinctly held in the case of ***Michel vs. Dhanjee*** supra - thus:

> *"The test for recusal is objective and it must be applied to determine whether there exists a* ***reasonable*** *apprehension or suspicion on the part of a fair-minded and informed observer or member of the public that the judge will not be impartial"*

Coming back to the case on hand, there is no doubt nor is it in dispute that the parties to the instant case or the deponent of the affidavit sworn in support of his respective case, are fair minded and informed observer or members of the public, let alone the weight and credibility the court might attach to the contents of this affidavit. To our mind, the fundamental questions that now require determination in this matter are only these:

(i) Is the Petitioner's motion for recusal frivolous or malicious and intended for judge shopping?

(ii) Is the petitioner's claim genuine in respect of his apprehension or suspicion *that there is* a real danger or likelihood of bias *and the impugned judge will not be impartial?* and

(iii) If so, is his apprehension or suspicion ***reasonable*** in the given matrix of facts, having regard to all the circumstances of this particular case?

As regards, the first and second questions, we find that the Petitioner's motion for recusal is neither frivolous nor malicious or intended for judge shopping. We also find that the Petitioner's claim is genuine in respect of his apprehension or suspicion that there is a real danger or likelihood of bias and the impugned judge will not be impartial.

This is the second case of this nature that this Court has been called upon to determined very recently. No doubt, the Petitioner has *locus standi* as a citizen of Seychelles and a litigant before this Bench. As a concerned citizen, it goes without saying that he has substantive interest in the promotion and protection of Constitutionalism and ensuring that the laws enacted by the Legislature are consistent with the provisions of the Constitution. He has come before the Constitutional Court with the instant Petition alleging that certain Fundamental rights and other provisions of the Constitution have been contravened and that obviously entails that his interest is being affected by such contraventions. Hence, he is seeking Constitutional remedy for a declaration that those Sections in the Act, which allegedly contravene the Constitution of the Republic of Seychelles, are void.

It is trite to say that a person, which includes any individual, company or association or body of persons whether corporate or un-incorporate, who claims that a provision of the Charter or any other provision of the Constitution has been or is likely to be violated, has a constitutional right to

come before this Court for a Constitutional remedy if he has any grievance based on a reasonable cause of action. Equally, as we found supra, in terms of Article 19 (1) and (7) of the Constitution of Seychelles it is the fundamental right of any citizen of Seychelles to have an independent and impartial decision-maker to sit and adjudicate upon his/her legal rights and obligations in all litigations, a fortiori in matters of Constitutional importance.

The Petitioner did not plead that there was actual bias on the part of the impugned judge, or a want of integrity or good faith in him. He is simply claiming that there was a real likelihood of bias and that that danger is evident in the public perception. On this aspect, we do not have any reasonable ground to disagree with the Petitioner. At this juncture we endorse the oft-repeated saying of Lord Hewart CJ in ***R v Sussex Justices, ex parte McCarthy (1924) 1 KB 256 at p259:*** that "*It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".*

In considering whether there was a real danger or likelihood of bias, we do not look into the mind of the individual judge who sits in a judicial capacity nor into the mind of – a noble brother, who sits with us on this Bench. We do not look to see if there is a real danger or likelihood that he would in fact favour one side at the expense of the other. We have no reason to doubt our colleague's integrity. But, we simply look at the impression which would be given to other people, especially to any informed member of the public, who knows all relevant details as to the facts and circumstances under which he obtained citizenship and the subsequent appointment as a puisne judge; the sequence of events and the proximity including the passage of time between the events said to give rise to the appearance of bias and the challenge now based on those events. Undoubtedly, these apparent factors would give any informed member of the public, the impression that the impugned judge would be biased. Even if he is as impartial as could be, nevertheless if a fair-minded and informed member of

the public would think that, in the given circumstances, there is a real danger or even likelihood of bias on his part then, he should not sit. There are circumstances in our considered view, from which a reasonable man would think it likely or probable that the judge would favour one side unfairly at the expense of the other. The Court will not inquire whether he will, in fact, favour one side unfairly. Suffice it that reasonable people might think he will. The reason is plain enough. Justice must be rooted in confidence. The confidence is destroyed when right-minded people go away thinking: "The judge was biased". That is bad not only for the image of an individual judge but also for that of the institution.

In the light of all the above, we find answers to the first two fundamental questions as follows:

(i) The petitioner's motion for recusal is neither frivolous nor malicious nor intended for judge shopping and so we hold; and

(ii) The petitioner's claim is genuine as to his apprehension or suspicion *that there is* a real danger or likelihood of bias in that *the impugned judge will not be seen to be impartial and so we hold.*

We now, turn to the last question as to the reasonableness of the Petitioner's apprehension on the perceived bias. In determining the issue whether it is **reasonable** the court has to make an objective assessment of the entire facts and circumstances of the case and consider whether the apprehension is reasonable or not*. "In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do, in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight, as he thinks 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 him to exclude from his consideration matters, which*

he ought to take into account" ***per Lord Green in Cumming Vs. Jansen (1942) 2 All ELR at p656.***

The speculative factors such as the alleged *ulterior motive, intimidating the Court, getting rid of an "inconvenient Judge", presumption of impartiality, judge shopping, obstructing the course of justice, abuse of process as* canvassed by the Honourable Attorney General in our consideration have little or no weight in the equation; and argument based on speculative and unsubstantiated grounds does not appeal to us in the least. However, other factors such as real danger of bias, public perception, the proximity between acquisition of citizenship and appointment as judge, reasonableness of apprehension are decisive as canvassed by Mrs. Amesbury in her submissions; but in considering reasonableness in the instant case we take all relevant factors into consideration and have not excluded from our consideration, matters, which we ought to take into account. The relevant factors in our considered view include the background facts of the main case as well, which were recounted herein before.

Having so done, we find answer to the last fundamental question in the affirmative as follows:

> *"The petitioner's apprehension or suspicion is reasonable in the given matrix of facts, having regard to all the circumstances of this particular case".*

Since the Constitution of the Third Republic came into force in 1993, this is the second time that the Constitutional Court is invited to determine issues about recusal of a sitting judge on the Constitutional Court, which generally consists of a panel of three judges. Until the recent decision of this Court, the Constitutional Court had no previous administrative guidelines as to the processes and practice to be followed to determine issues about recusal. The absence of guidelines obviously resulted in uncertainty, miscommunication and surprises between the Bar and the Bench and even

among the judges on the panel. This Court found it an opportune time and occasion to set out and indeed set out "CONSTITUTIONAL COURT RECUSAL GUIDELINES" to regulate the processes and practices to be followed to determine issues about recusal in future.

Coming back to the case on hand, we would conclude by restating what Lord Bingham stated **in *Locabail (UK) Ltd v Bay field Properties Ltd [2000] QB 451***

> *"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger [now possibility] of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)"*
>
> *"In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal"*

We repeat: Every application for recusal must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger or possibility of bias and the case in which the objection is raised, the weaker the objection will be;

and the lesser the said passage of time, the stronger the objection will be, which is the case in the present motion for recusal.

For these reasons, we grant the motion for recusal, order disqualification and direct the Hon. Judge Mohan Niranjit Burhan to recuse himself from hearing the instant petition. For the avoidance of doubt, the Ruling delivered hereof, is not only the Ruling of the majority of the Judges on this bench, but also the Ruling of the Constitutional Court, which would prevail as such for all intents and purposes, since two Judges herein constitute a valid quorum and full Constitutional Court in this matter. We make no order as to costs.

Signed, dated and delivered at Ile du Port on 15th July 2014

D Karunakaran

Judge of the Supreme Court (Presiding)

B Renaud

Judge of the Supreme Court