

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

Civil Side: MA 13/2016

(arising in CC01/2016)

[2016] SCCC 3

WAVEL JOHN CHARLES RAMKALAWAN

Petitioner

versus

ELECTORAL COMMISSION, HEREIN REPRESENTED BY HENDRICKGAPPY

First Respondent

JAMES ALIX MICHEL

Second Respondent

ATTORNEY-GENERAL

Third Respondent

Heard: 9th February 2016

Counsel: Mr. B. Georges for petitioner
Mrs. S. Aglae for the First Respondent
Mr B. Hoareau and Mrs. Valabhji for the Second Respondent
Mr. R Govinden and Mr. A. Subramanian for the Third Respondent

Delivered: 15th February 2016

ORDER ON APPLICATION

Order of the Court

- [1] This is an application for the removal of the third respondent, the Attorney-General, from an Election Petition case, *CP 01/2016 Ramkalawan v The Electoral Commission and others* which concerns certain alleged irregularities in the recent presidential elections held in December 2015. The Attorney-General is cited in those proceedings as the third respondent and is joined as is required by rule 7(4) of the Presidential Election and National Assembly Election (Election Petition) Rules 1998 (hereinafter referred to as the Election Petition Rules). The other respondents are the Electoral Commission (first respondent) and Mr. James Alix Michel (second respondent).
- [2] In this application Mr. Wavel John Charles Ramkalawan, the petitioner, is applying for the Attorney-General to be struck out of the proceedings. The legal basis on which this application is brought is section 115 of the Seychelles Code of Civil Procedure which provides that “any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before the trial by motion or at the trial of the action in a summary manner.” The remedy to remove a party is most usually relied upon when a party has been incorrectly joined to an action or where their presence is no longer required in the proceedings.
- [3] The petitioner submitted that the Attorney-General ought to be struck out of the proceedings because the Attorney-General’s supporting affidavit takes a stand on the Petition in support of the other two respondents; adopting the pleadings and evidence of the first and second respondents prior to it even being led. The petitioner argues further that the Attorney-General has taken a position on matters not in his knowledge and that the Attorney-General had placed himself in a partisan position akin to those whose interests were affected by the Petition. Moreover, the petitioner raised objection to the fact that the affidavit of the representative of the Attorney-General, Mr. David Esparon, which, on oath, denies that there were any irregularities in the election process. The petitioner argues that this places the Attorney-General in a conflict vis-à-vis his duty in terms of article 76(4) of the Constitution as the principal legal advisor to the Government with the power to institute and undertake criminal proceedings.

- [4] The petitioner therefore argued that the Attorney-General has over-stepped his duties and responsibilities of his office by openly siding with the other two respondents to the extent that he has and in advance of the leading of evidence. The petitioner argues further that the Attorney-General's duties when joined as a mandatory party are to represent and advise the Government and to assist the court in the determination of this Petition. The role therefore requires independence and impartiality which is reinforced by Article 76(10) of the Constitution which provides that "[i]n the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not be subject to the direction or control of any other person or authority".
- [5] The petitioner argues that the Attorney-General may be removed because he has no direct interest to protect in the proceedings, in that he is a party simply joined because of the Election Petition Rules. The petitioner drew a distinction between a legal respondent (one joined to an application as a matter of law) and a respondent in fact (one whose interests were directly affected by the outcome of the case). The petitioner argued that the rationale of joining the Attorney-General to the proceedings was so that he could assist the Court, and ensure that the Government's interests were represented.
- [6] In response, the first respondent has argued that the Attorney-General is a necessary party to the petition before the Court as per rule 7(4) of the Election Petition Rules, and that the partiality of the Attorney-General does not in any way cause any prejudice to the petitioner. Moreover, the first respondent raised object to the form of the application, stating that the notice of motion does not set out the ground upon which the application is being made.
- [7] The second respondent also opposed the application stating that the Attorney-General is a mandatory party to the Petition and that the application to strike out has no legal basis at all.
- [8] The Attorney-General argued that the ambit of his role is not strictly as a legal respondent but as a respondent in fact and that he was entitled to take a stance on the facts known to him as to whether an illegal practice had taken place or whether the Election laws had been infringed. The Attorney-General argued further that the fact that an Attorney-

General may take a partisan position is supported by the fact that the Attorney-General is empowered by Article 51(4) of the Constitution to institute proceedings, and further that under section 45(3) of the Elections Act, Cap68A the Attorney-General is given the power to cross examine witnesses. Further, the Attorney-General stated that his position taken in the pleadings was not outside of his knowledge but that he had consulted all the relevant stakeholders and had come to the conclusions which underlie his pleadings.

- [9] The legal issue at the core of this application is whether this Court can strike out the Attorney-General from an Election Petition on the basis that the Attorney-General has taken on a partisan viewpoint in siding with one or more of the parties to the petition.
- [10] The Attorney-General is a constitutionally appointed position created by article 76 of the Constitution. The mandate of the Attorney-General is laid out in clause (4) of article 76 which provides as follows:

The Attorney-General shall be the principal legal advisor to the Government and, subject to clause (11), shall have power, in any case in which the Attorney-General considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken under subclause (a) or by any other person or authority.

- [11] By appointing the Attorney-General directly through the Constitution and the Constitutional Appointments Authority, the intention of the drafters is that the role has political autonomy, allowing the Attorney-General to provide the Government with independent legal advice. This is further reinforced by clause (10) of article 76 which provides that “[i]n the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not be subject to the direction or control of any other person or authority.”

- [12] In all criminal matters, the Attorney-General represents the Republic of Seychelles and is responsible for prosecuting the case. In civil matters, the Attorney-General represents the government and government agencies when they are litigants in court proceedings. In the past the Attorney-General has appeared for both other respondents to this case from time to time. At such times, the Attorney-General is seen by the Court as representing the interests of those government agencies or persons. In the case of *Michel v Talma* (2012) SLR 95, the Court of Appeal held that when the Attorney-General appears in constitutional cases representing the Government the presumption is that his views are not in variance with the Government. In *Gappy v Dhanjee* (2011) SLR 294 the Court of Appeal held further that “when the Attorney-General decides to undertake the defence of another independent authority, a court does not have to be wary in accepting the submissions of the Attorney-General on the basis he is partisan.” It is presumed that the Attorney-General will put forward the interests of the party he represents and he has no further duty to the Court. The corollary of this statement, however, is that when the Attorney-General is not representing another party, the Court should be wary in accepting the submissions of the Attorney-General where they are partisan.
- [13] Furthermore, the Attorney-General can appear in court without representing a government department or agency when enabled or required to attend by legislation. Specific pieces of legislation permits the Attorney-General to intervene in a civil matter, such as under the Civil Code of Seychelles Cap 33, where the Attorney-General may intervene in public interest matters, such as in guardianship matters (see for example article 376).
- [14] In rare situations the Attorney-General is joined as a respondent to the proceedings by virtue of a piece of legislation. Rule 7(4) of the Election Petition Rules, which is at the heart of today’s application, provides that “where the petitioner is not the Attorney-General, the Attorney-General shall be made a respondent to the petition.” Similarly, in Constitutional Court cases the Attorney-General is joined by virtue of Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of The Constitution) Rules, 1994. When the Attorney-General is joined as a respondent in a Constitutional Case, the Court of Appeal has held in *Michel v Talma* that “his appearance is indeed amicus curiae as he is not representing any party

but is there to advise the court independently.” We adopt this reasoning in the context of an Election Petition.

- [15] We accept the Attorney-General’s point that the Attorney-General is not anticipated to be a mere spectator in an Elections Petition. This is why he is granted the power to cross-examine, and the power to institute a petition should he wish. Moreover, in order to exercise those powers, it is necessary for the Attorney General to take a view on the facts and law in the petition. However, his constitutionally appointed role is to remain independent in his point of view. He has a duty not to align himself with a side or particular interest of one of the parties but to arrive at his position independently. This is the approach that best assists the court and best fits with the Constitutional mandate of the Attorney General to be independent.
- [16] When the Attorney-General is named as a respondent in terms of these rules, his overall duty is to his client which is the Government of Seychelles. It must be borne in mind that the interests of the government as a whole may be distinct from the interests of the President or from those of another agency of the Government. In an Election Petition, the best interests of the Government are possibly separate from those of the individual hopeful candidates, the president elect, or the incumbent president.
- [17] We adopt the reasoning of the Courts before that the role of the Attorney-General when not representing a client is to represent the interests of the government, and to provide assistance to the court. Therefore, we are of the opinion that the Attorney-General was incorrect to align his response with the pleadings and the evidence to be presented by the first and second respondent without independent grounds for doing so. Whilst it is not permissible for the Attorney-General to adopt the pleadings of another party, this does not preclude the Attorney-General from coming to a similar opinion as that held by one of the parties. By being joined as a respondent, the Attorney-General may choose to respond completely to a petition and thus enter into the fray, or to abide the decision of the Court, and choose to remain a spectator in the proceedings.
- [18] Furthermore, even if the Attorney-General has formed an independent opinion that there have been no irregularities in the election process, it does not follow that this information

is within his personal knowledge and is therefore suitable or appropriate to be provided as evidence in the court record. It is not essential for the Attorney-General to form an opinion on every aspect of the matter and indeed it would be inappropriate in many circumstances to even comment on some elements of the case, even where these affect the interests of the main parties to the case. In the present case, given the Attorney-General's role with regard to public prosecution and the fact that this case concerns election irregularities, many of which are crimes to commit, we agree with the petitioner that it is inappropriate for the Attorney-General to comment on whether there were or were not irregularities.

[19] Section 170 of the Seychelles Code of Civil Procedure, Cap 213 restricts the contents of affidavits to the “facts as the witness is able of his own knowledge to prove, except in interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted.” In his defence to the petition, the supporting affidavit of Principal State Counsel, Mr. David Esparon, places on record his belief that the elections were free from irregularities. Moreover, it adopts the pleadings and evidence of the first and second respondents. This is clearly not within Mr. Esparon's personal knowledge or ability to prove, and as such this affidavit fails to meet the requirements of section 170 and cannot be admitted into the court record.

[20] However, we agree with the respondents that the Attorney-General is a mandatory party to the proceedings in terms of rule 7(4) of the Election Petition Rules, and therefore must be joined when he is not a petitioner in the matter. There is nothing in the present situation that suggests that the Attorney-General's role as *amicus curiae* to the court is lessened notwithstanding his partisan affidavit and we do not believe that it would be appropriate to remove the Attorney-General from a case of such importance. However, we wish to take this opportunity to remind the Attorney-General of his role to this Court to provide an independent perspective, and when matters fall outside his knowledge or expertise, to remain silent on such.

[21] Therefore, we make the following orders:

- a.** The application to strike out the Attorney-General is dismissed.

- b.** The affidavit of Mr. Esparon is struck out of the proceedings.

- c.** The Defence on the Merits of the Attorney-General is struck out of the proceedings.

Signed, dated and delivered at Ile du Port on 15th February 2016.

M. Twomey
Chief Justice

C. McKee
Judge

D. Akiiki-Kiiza
Judge