

**IN THE CONSTITUTIONAL COURT OF SEYCHELLES**

**Civil Side: MA 30/2016**

**(arising in CC01/2016)**

**[2016] SCCC 5**

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In re:

**Wavel John Charles Ramkalawan**

Petitioner

versus

**Electoral Commission, herein represented by Hendrick Gappy**

First Respondent

**James Alix Michel**

Second Respondent

**Attorney-General**

Third Respondent

Ex-Parte: **Wavel John Charles Ramkalawan**

Petitioner

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Heard: 16<sup>th</sup> 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: 18<sup>th</sup> February 2016

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**ORDER ON APPLICATION**

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## Order of the Court

- [1] The petitioner petitions the Court to have the second respondent, James Alix Michel of State House ordered to attend court for examination on his personal answers pursuant to section 163 of the Seychelles Code of Civil Procedure, Cap 213.
- [2] His petition contains four paragraphs in which he shows that:
1. He has filed an election petition against the respondents alleging, inter alia, the commission of illegal practices during the December 2015 Presidential Election by the second respondent and his agents.
  2. The second respondent has denied these allegations.
  3. He believes that the second respondent is in possession of information relating to a number of the alleged illegal practices and wishes to ascertain the position of the second respondent on these.
  4. He desires to obtain the personal answers not on oath of the second respondent on some of the denied allegations.
- [3] The petition is supported by a one-averment affidavit by the petitioner to the effect that the statements contained in the petition are true and correct.
- [4] Upon receiving the petition, this Court ordered that it be served on the respondents and oral submissions were invited from the petitioner and the second and third respondents in this suit.
- [5] It is important at this stage of the proceedings to bring to light the relevant provisions of the Seychelles Code of Civil Procedure. Article 162 (1) of the Code provides:
- “Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties.”

Article 163 of the Code, under which this application is made, provides:

“Whenever a party is desirous of obtaining the personal answers not upon oath of the adverse party, he may apply to the Judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or he may petition the court ex-parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party and the court on sufficient ground being shown shall make an order granting the application or petition. And the party having obtained such order shall serve a summons, together with a copy of the order, on the adverse party to appear in court on the day stated therein.”  
(our emphasis)

- [6] Mr. Hoareau, learned counsel for the second respondent, has submitted that the petition is brought out of time as it is brought at the hearing contrary to the provisions of section 163 which specifies that the petition shall be brought “prior to the date fixed for hearing”. He seeks, it would seem, to differentiate between the filing of the petition and the hearing of the petition proper. We respectfully cannot agree with this distinction. It is clear that suits or matters including petitions are commenced by their filing in the registry. The election petition was set for hearing on the 15<sup>th</sup> February and the application for personal answers was filed on 12<sup>th</sup> February. It was therefore, in our view, made in a timely manner. This procedural objection is dismissed.
- [7] Calling an opponent on personal answers (*examen sur faits et articles*) is a procedure originating from Article 324 of the French *Code de Procédure Civile* preserved by Articles 162 – 167 in the Seychelles Code of Civil Procedure (see *Ex-Parte Esmael* (1941) MR 17). Before the party calls or gives sworn evidence he is examined on acts, facts and circumstances pertinent to the cause of action, but not under oath. It is a well-established principle of jurisprudence in Seychelles that such a practice is used to obtain admissions with regards to the pleadings or to establish certain facts so as to adduce evidence excepted by the Civil Code. It is most often used to circumvent the strict application of article 1341 of the Civil Code which requires proof in writing of any matter, the value of which exceed SR5000.

- [8] The learned Attorney General has submitted that we would be breaking new ground in adopting this procedure in an election petition as it has not been done before. In fact it may well be that it has not been used in terms of a petition in Seychelles.
- [9] There is clearly a distinction between a petition and a plaint in our law – a plaint is prosecuted by calling oral evidence while a petition is prosecuted by affidavit evidence. An election petition is subject to the provisions of the Presidential Election and National Assembly Election (Election Petition) Rules, 1998 and must contain a concise statement of material facts and in cases where illegal practices are alleged to have been committed the names, particulars and dates and places of the commission of the illegal acts (see Rules 7(1) and 7 (2)).
- [10] In this case the election petition was supported by an extensive affidavit of the petitioner. The second respondent has filed a defence with no supporting affidavit. Had he filed an affidavit it is not disputed that he might have been called to be cross-examined as to its contents and this Court would have had to accede to such request.
- [11] The question arises as to whether the procedure for personal answers can be extended to matters instituted by petition. Section 162(1) of Seychelles Code of Civil Procedure states clearly that:

“Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties.” (our emphasis)

Cause is defined in the code as including “any action, suit or other original proceedings between a plaintiff and a defendant”. Matter is defined as “every proceeding in the court not in a cause”. Suit or action is defined as “a civil proceeding commenced by plaint”. It is therefore clear that a petition is caught by a combination of the definitions and while requests for personal answers are rarely if ever made in matters begun by petition one is certainly not precluded to do so. In the circumstances, we accept that an application to call the second respondent on his personal answers was correctly made in this case.

[12] In terms of the merits of the application, learned counsel for the petitioner, Mr. Georges, has submitted that the petition should be granted on the threshold of “sufficient ground” being provided to the Court. He has admitted that the applicant has to put up a case as to why the personal answers are required. He has also relied on the case of *Chez Deenu v Loizeau* (1988-1993) SCAR 27. That case is authority that the right to refuse a party the opportunity to examine his opponent on personal answers cannot be taken away except on strong grounds. Such “strong grounds” for refusing the application include where physical attendance is impossible or dangerous to life, or if it is proved that the person to be examined has no connection with the issue [see *Chez Deenu v Loizeau* (supra) at page 30 citing *Ex Parte Esmael*(1941) MR 17].

[13] We have already stated that the provisions for calling an opponent on his personal answers have French origins. These provisions came to us via Mauritius which administered Seychelles on behalf of the British Crown until 1903. Our rules in relation to personal answers are similar to those of Mauritius. In the Mauritian case of *Rey and Lenferna Ltd. v Desiré Nicolas Duval* 2012 SCJ, the court held:

“Regarding the calling of the respondent on his personal answers, it is a discretion which the Court applies judiciously and not for the mere asking just because the procedure of personal answers is obtainable in all cases.”

[14] We therefore agree with Mr. Georges that the right to examine on personal answers cannot be lightly taken away but add that although this might be the case, the right is exercised subject to the judicious discretion of the court. This is evident from the wording of section 163 of the Seychelles Code of Civil Procedure (supra).

[15] There are therefore two limbs to the test for permitting personal answers, which are to be weighed against each other: the first involves the applicant showing sufficient ground for the granting of the order and the second is the reasonable and judicious exercise of the court’s discretion that no strong grounds exist to nonetheless deny the request. This test will necessarily be applied on a case-by-case basis taking into account the totality of the circumstances surrounding the application.

- [16] In the case in hand, the petitioner chose to make his application by way of petition supported by affidavit. Mr. Hoareau, for the second respondent, has submitted that the application lacks sufficient ground being shown as it is lacking in detail and the supporting affidavit, a one liner, is so “sketchy” so as not to meet the requirements of section 170 of the Seychelles Code of Civil Procedure.
- [17] We have in a previous application related to the election petition case with which the present case is concerned outlined the law in relation to affidavits (See *Wavel John Charles Ramkalwan v the Agency of Social Protection* MC8/2016) and we do not see the need to repeat ourselves. We only wish to reiterate that affidavits are evidence made under oath and it is required that they contain facts that the deponent is able of his knowledge to prove. In this respect Mr. Georges’ submission that in this case the affidavit is necessarily vague so as not to unduly reveal his whole case to his opponent is unsustainable, particularly due to the fact that the petition itself lays out detailed averments relating to the alleged practices by the second respondent or his agents.
- [18] To show sufficient grounds for an application one must make full and frank disclosure to the Court of facts known to the applicant and how these relate to the application. If one opts to do so by application and affidavit it is in those pleadings that sufficient ground should be shown. This ultimately permits the Court to exercise its discretion fairly. In ordinary civil litigation, especially contractual situations where this procedure is most frequently used, the reasons underlying the application to call an adverse party on his or her personal answers are often self-evident to the Court and require little justification. Where it is not plainly apparent to the Court, a more detailed explanation is required in order to show sufficient grounds.
- [19] Mr. Hoareau has also submitted that, insofar as the petitioner made allegations that the second Respondent is in possession of information relating to a number of alleged illegal practices and that he wishes to ascertain the position of the second respondent on these allegations, these are also unsustainable as the second respondent in his defence has extensively denied these allegations. In Mr. Hoareau’s submission there would therefore be nothing to be gained by calling the second respondent on his

personal answers. It is relevant to the Court that the second respondent has filed a defence denying knowledge of the acts in question, and that being called to testify, not under oath, in relation to the denied allegations is not likely to render results which may possibly negate the need for the grant of an order summoning him on personal answers.

[20] Mr. Hoareau has also relied on the Mauritian cases of *Bouvet v Mauritius Turf Club* (1962) MR 213 and *New Goodwill v Mrs. Tan Yan* (1977) MR 329 to further submit that the procedure under section 163 of the Seychelles Code of Civil Procedure is only permitted where a party to a suit is unable to supply adequate proof whether written or verbal of the averments made in the pleadings. In the present proceedings he submitted there is no such disclosure. We agree that this is a relevant factor in the balancing exercise performed by the Court in considering whether sufficient ground is shown in order that it may exercise its discretion to grant or refuse the order.

[21] The Learned Attorney General has supported Mr. Hoareau's submission and has added that the aim of calling a person on personal answers is to obtain a judicial admission from them especially to overcome the hurdle of a beginning of proof in writing as provided in the Civil Code for some actions.

[22] He has further submitted that since the petition is alleging an illegal practice by a respondent, the proceedings are of a quasi-criminal nature especially since the Elections Act contains provisions imposing penalties where one is found to have been involved in illegal practices and persons may face subsequent criminal prosecution for the illegal practices. In such circumstances, he has submitted, the Court should be slow to allow a civil procedure that might breach the constitutional right of the person called to testify, namely the rights to a fair trial and the right against self-incrimination of the second respondent under articles 19(1) and 19(2) of the Constitution respectively. He has relied on several Indian authorities including *Ishardas Rohani v Alok Mishra and Ors* [2012]13 S.C.R. 297. He has further likened these proceedings to the case of *Loizeau, Ex-Parte* (1948) SLR 166 where proceedings were instituted to

strike a barrister off the roll on grounds of misconduct and the court refused the application for the respondent to be called on his personal answers.

[23] Mr. Georges has conceded that he might ask the second respondent questions about the illegal practices or he might not, and this failure to disclose fully the grounds on which the application is sought further frustrates our analysis in this application. We can only rely on the application which clearly states that the petitioner wishes to ascertain the position of the second respondent with regard to his denial of the commission of illegal practices during the December 2015 Presidential Elections by the second Respondent and his agents.

[24] While we are not convinced that articles 19(1) and 19(2) of the Constitution apply to completely shield witnesses from testifying in quasi-criminal proceedings, it is a fundamental tenet of law that a person is protected against self-incrimination, subject to certain restrictions. However, this was a point which was not fully argued before us. We are, nevertheless, of the opinion that a court should be hesitant to compel a witness to give testimony the sole purpose of which is to question him on his knowledge of illegal practices which could lead to the imposition of quasi-criminal penalties and criminal prosecution.

[25] We are cognisant of the fact that the second respondent is the President of the Republic and for reasons of decorum and respect for the position some would urge us to be hesitant to summons the second respondent to court. However, we are required by the Elections Act to take our mandate seriously which is to determine whether a person has been validly elected to the office of the President. We cannot therefore treat any person in this process as being above the law or worthy of special treatment. Merely having won an election does not grant an individual immunity from the scrutiny of the Court in an Election Petition.

[26] However, in terms of the two stage test outlined above and, in the totality of the circumstances, we are not satisfied that the Petitioner has shown sufficient grounds for the granting of the order in the application. We are compelled by the strong grounds against granting the application, namely the fact that the relevance of the second



respondent's testimony to proving the allegations in the petition is not clear to the court; the interrogation centres around illegal practices with a stated aim being the self-incrimination of the second respondent (either in person or as an accessory with knowledge of illegal acts); and that the second respondent has already denied all knowledge of the facts in official pleadings. In the circumstances this application is refused.

Signed, dated and delivered at Ile du Port on 18<sup>th</sup> February 2016.

M. Twomey  
Chief Justice

C. McKee  
**Judge**

D. Akiiki-Kiiza  
**Judge**