**IN THE CONSTITUTIONAL COURT OF SEYCHELLES**

**CP****04/20****17**

**[201****8] SCCC**

**RALPH VOLCERE PETITIONER**

**VERSUS**

**MICHEL FELIX 1ST RESPONDENT**

**AND**

**ANETTE GEORGES 2ND RESPONDENT**

**AND**

**SIMONE DE COMMARMOND 3RD RESPONDENT**

**AND**

**CONSTITUTIONAL APPOINTMENTS**

**AUTHORITY 4TH RESPONDENT**

**AND**

**WAVEL RAMKALAWAN 5TH RESPONDENT**

**AND**

**ATTORNEY GENERAL 6TH RESPONDENT**

Heard: 30 January 2018

Counsel: Miss Alexandra Madeleine for

 Mr Anthony Derjacques for 1st, 2nd, 3rd, 4th respondents

 Mrs Alexia Amesbury for 5th

 Mr Chinnasamy for the 6th respondent

Delivered: 30 January 2018

**RULING**

1. Introduction

In the Amended Petition before the court, the 1st respondent is the chairperson of the 4th respondent, appointed pursuant to article 140 (b) of the Constitution; the 2nd and 3rd respondents are members of the 4th respondent appointed by the Leader of the Opposition under article 140 (1) (a) of the constitution; the 4th respondent is the Constitutional Appointment Authority established under article 139 (1) of the Constitution. The 5th respondent is the Leader of the Opposition and the 6th respondent is the Attorney General, appearing as amicus curie, by virtue of Rule 3 (3) of the Constitutional Court Rules 1994. The Petition against the respondents seeks a declaration from this court that the petitioners right as a concerned citizen of Seychelles has been breached in that the 2nd respondent and 3rd respondent are not qualified to be appointed to the 4th respondent as the 2nd and 3rd respondent are not persons of proven integrity and impartiality and that their appointment were effected in violation of article 141 of the Constitution.

1. Background facts

On the 18th of April 2017, the President of the Republic of Seychelles assented to the 8th amendment to the Constitution which amended article 140 of the Constitution by adding two additional members to the 4th respondent, which prior tothe amendment consisted of 3 members, including the Chairman. On the 24th of April 2017 the previous Chairperson and a previous member of the 4th respondent resigned from the 3rd respondent. Pursuant to the terms of the new provisions of article 140 the 2nd and 3rd respondent were appointed by the 5th respondent on the 24th of April 2017. The petitioner has approached the Constitutional Court and argueed that articles 130 and 141 of the Constitution has been infringed in that the 2nd and 3rd respondents are not qualified to be appointed to the posts as they are not of proven integrity and impartiality and as such would not be impartial and independent. The Petitioner has averred that their impartiality is questionable given the two respondents’ direct and indirect connection with a political party and given the conflict of interest that would likely arise bearing in mind their professional activities.

1. Preliminary Objections

All the respondents have raised preliminary objections to the Amended Petition. This is a ruling arising out of Preliminary Objections taken against the Amended Petition by the 2nd to 6th respondents.

The gist of the Preliminary Objections raised by the 2nd to 6th respondent~~s~~ are that the Petitioner has no locus standi to pursue the Amended Petition before this court as the Petitioner is not an interested party and that none of his rights have been violated as pleaded and in law, and that as such, the petitioner has no reasonable cause of action disclosed before this court. They aver that the Petitioner has no locus standi to make the application under article 130 of the Constitution. It is their case that in all cases of this nature the Petitioner must in his petition demonstrate that his interest is likely to be affected in some way and that the Petitioner has not demonstrated that in his Petition.

The second preliminary objection taken by the 2nd to 6th respondent~~s~~ is that the Amended Petition is frivolous and vexatious in that it has no reasonable chance of success and is calculated to simply annoy.

The 5th respondent, in particular, avers that the Petition is brought for the purpose of vindication of personal grudges or enmity and based on bad faith and that the Constitution grants to the 5th respondent an absolute discretion in regards to the choice of persons to be appointed to the 3rd respondent.

The 5th respondent, in particular, further avers that the case of the Petitioner does not fall within the category of a “genuine concerned citizen”, but one where the Petitioner is vindictive.

The Attorney General supported the Preliminary Objections raised by the other respondents, both in terms of lack of personal interest of the Petitioner being affected and the existence of bad faith in the Amended Petition.

All respondents, besides the Attorney General, has attached to their responses a number of articles found in the newspaper “The Independent”, a newspaper edited by the Petitioner. According to them the content of these articles are evidence that shows enmity; personal grudges and bad faith on the part of the Petitioner.

The respondents accordingly move that the Amended Petition be dismissed with cost in their favour.

In her Amended written submissions in reply to the preliminary objections, counsel for the Petitioner strenuously object to the objections raised. It is averred by the Petitioner that, ex facie, the Petitioner has shown that there is a contravention of article 141 and 139 (2) of the Constitution and that further the Petitioner’s interest , as a citizen, is likely to be affected by any unconstitutional appointment to the 4th respondent having regards to the mandate of the 4th respondent . Further, it is submitted that the issues raised in the Petition is comparable to the issues raised in the case of Michel and ors v Dhanjee (2012) SLR, 258 , hereinafter herein referred to as the “ *the Michel’s case*”, in that they are equally of “exceptional importance”. In other words they both allegedly concerns the appointment of persons who do not meet the qualifications under the Constitution and that this court should as such approach the question of locus standi liberally and generously as in the Michel’s case.

1. Submissions of Parties

During the course of the hearing of the preliminary objection, Mr Derjacques, for the 2nd to 4th respondents made an application that his clients be allowed to join in the motion of the 5th respondent, given that the prayers of the respondents were substantially the same, except that the 5th respondent has averred mala fides. The court allowed the application and the counsels were allowed to refer to one another’s pleadings, including affidavits in their submissions.

Counsel for the 2nd to 4th respondents submitted that the Petition is made in extreme bad faith and not by a concerned citizen and that the Petition is based on a perception of lack of impartiality and integrity rather than proof of lack of integrity and impartiality.

Many references were made, by counsel for the 2nd to 4th respondents, to the content of “The Independent” newspaper articles as evidence of bad faith. Mr Derjacques submits that these are evidence of the mind of a person with a personal grudge; malice and avendetta.

The second thrust of counsel submission was that the case of the Petitioner is speculative and based on mere perception and is not supported by evidence.

Finally, Mr Derjacques argued that the appointers are the President and the Leader of the Opposition, andas such one cannot argue that political appointees are per se disqualified. However, he goes further and submits that though politicians can be appointed, they would not be able to act as politicians whilst in office is wrong given the constitutional independence of the 4th respondent.

On the other hand, counsel for the 5th respondent submitted that the Petitioner has not demonstrated that he had any interest in the case and that there is no evidence to show the said interest. Counsel heavily relied upon the majority decision in the Constitutional Court case of Dubois and ors vs Michel and ors C/S 23/16 in support of her submission that the Petitioner has not shown that any of his interest has been affected and that the case relies on perception only.

Counsel for the Attorney General, appearing as amicus curie supported the submissions of the respondents in their entirety.

As for counsel for the Petitioner, she submitted that the Petitioner’s case meetsall the conditions laid down in the Michel’s case. She submit that there is a clear contravention of the provisions of the Constitution ex facie the Petition and that there is no other means of redress; that the questions involved are not frivolous and vexatious and that in respect of the interest of the Petitioner being affected that this is satisfied because the question involved are exceptionally important and that the petitioner is bringing the petition as a concerned citizen.

1. The legal issues

The objection in this case is taken by the Respondents in pursuant to Rule 9 of the Constitutional Court Rules 1994, ( the constitutional court Rules ) , as read with article 130 of the constitution of Seychelles.

Rule 9 of the constitutional Court Rules allows a Respondent to, before filing a Defence to the Petition, raise any preliminary objection to the petition and allows the constitutional court to hear the parties before making an order on the objection.

Article 130 (1), on the other hand, is the article of the constitution that the Petitioner has brought the Petition before this court. Hence, the Petitioner has to prove that a provision of the constitution has been contravened and that the Petitioners interest is being or is likely to be affected by the contravention.

The respondents preliminary objections, in a gist, is to the effect that the Petitioner has failed to demonstrate to this court sufficient connection to and harm from the action challenged in order to support the petitioner’s participation in the case . In other words the “locus standi” of the petitioner. In their written objections all the respondents appear to have taken more or less the same preliminary objections based on lack of locus standi, though the 5th respondent appears to have gone further and has averred that the Petition is founded on bad faith; personal grudge and enmity. Objections that were adopted by the 2nd to 4 respondents during the course of the oral submission.

Rules as to standing are derived from the constitution, common law and the Rules of this court. The primary rule requires the challenger to establish that the impugned provisions deprives him or her or may deprive him or her of a particular constitutional right.

In the case of *Cahill vs Sutton (1980) 1 IR 269*, the Irish Supreme Court listed the justifications for the impositions of a requirement of locus standi. They may be summarized as follows;

1. To avoid running theoretical or abstract cases. The rule seeks to ensure that a litigant comes to court to protect his or her own interest and not the interest of a third party. The court indicated that a person arguing another’s case may fail to render that case justice.
2. Secondly, it was stated that the purpose of the rule was to exclude the litigious person or the crank, the obstructionist, the meddlesome, the persons, or the officious man of straw. The court also stated that the standing rules would prevent political opposition to a legislative act being brought in the courts, having failed in the parliament.
3. Finally, the court indicated that the rule was designed to prevent the negative consequences resulting from a possible vacuum in the rule of striking down of legislations.

The first obstacle facing any Petitioner in a constitutional court case is the requirement to establish that he or she has sufficient standing to maintain the proceedings. This is a threshold requirement that must be met in all cases.

In Seychelles the locus standi requirement for constitutional court’s petition has evolved over the years, from only one restrictive rule as set out in the case *of Chetty v Principal Secretary SCA 21 /1995 ; United Opposition v Attorney General SCA 14 /1996,* to more open rules as recently established in the *Michel case*. This latest decision is founded on the often quoted case of *R VS Inland Revenue Commissioner Ex Parte National Federation of Self Employed Small Business* where Lord Diplock held *“there would be a grave lacuna in public law if outdated technical rules of locus standi prevent a person bringing executive illegality to the attention of the court”*

In the Michel’s case the court set out two tests for locus standi .For the purpose of this Ruling we would call the first test as the *“ordinary test*”, which is a more restrictive test and the second test as *“the exceptional test*”. This one being a more liberal test. Both test appears to be mutually exclusive and would be applicable depending on the facts of each case.

In setting out the first test the court of appeal held*, “It would seem to us that in all cases of this nature the petitioner must in his petition demonstrate that his interest is likely to be affected in some way. The clear and concise test to be applied to decide if a prima facie case is made out as contained in the provisions stated above may be summarized thus:*

1. *There is a contravention or likely to be a contravention of the constitution.*
2. *The person has a personal interest that is being or likely to be affected by the contravention ( in other words he has locus standi in judicio to seek redress)*

*(c)The person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law.*

*(d) The question raised by the petitioner is not frivolous or vexatious.”*

In the same judgment the Court of Appeal later went on to set out the second exceptional test by applying the ratio in the cases *Mwamba and Attorney General of Zambia (1993) 3 LRC 166;Chow vs Gappy and ors SCA 10 /07* and that of the *Bar Association V President of the Republic C/S 2 /95* cases .

In applying the extraordinary test, the Court of Appeal held, *“While it would normally not be sufficient to claim standing and sufficient interest by stating that one is a citizen and resident of Seychelles, we have decided to adopt a liberal and generous approach in this case given the exceptional circumstance of the issue raised. In the circumstances we are prepared to accept that the first respondent truly brings this case as a concerned citizen.”*

Accordingly, we are of the view that this case must first pass the ordinary test. However, if it fails to pass the first test, all is not lost for the Petitioner. He would be able to overcome the locus standi constraint if he manages to establish that the facts of this case demonstrate that there are exceptional circumstances raised in this case that allows him to petition this court as a concerned citizen.

1. Issues to be determined

We find therefore that the following questions needs to be determined by the court, given the joint Preliminary Objections of the respondents in this case.

* + - 1. Can the Petitioner establish and demonstrate that he has the necessary locus standi in this suit, notwithstanding his antagonistic views and apparent mala fide towards the 2nd to 5th respondent as shown by evidence adduced before the court?
			2. Does the Petition pass the ordinary test for the establishment of his locus standi as laid by the court of appeal in the Michel’s case?
			3. If the case does not pass the ordinary test as laid out in this case, does it meet the requirements of the exceptional test?
1. Mala fide Petition

In determining the first issue to be decided here we are inspired by the decision in the recent United Kingdom case of *Willers vs Joyce and anor ( 2016 UK SC 43),*in which the Supreme Court of United Kingdom finally extended the tort of Malicious Prosecution to civil proceedings . Giving his decision for the majority Lord Tolson stated, *“ it is instinctively unjust for someone not to be entitled to compensation in respect of injury suffered as a result of a malicious prosecution for which there was no reasonable ground “* The majority of the justices held that no duty of care was created by this tort , and that this was simply a case of imposing liability for malicious bringing of actions without reasonable and probable cause and yet not be entitled for the compensation for the injury intentionally caused by the person responsible for it. The court imposed the combination of requirements that the claimant must prove not only the absence of reasonable and probable cause , but also that the defendant did not have a bona fide reason to bring the proceedings, meaning that the claimant has a heavy burden to discharge.

In the case at hand whilst we maintain that the burden of proof still lies on the Petitioner to demonstrate his standi, we find that the respondent has to convince the court that ex facie the petition is brought without reasonable and probable cause and without bona fide. Something that would have entitled the 2nd to 5th respondent toan award of damages for civil malicious prosecution.

The Petitioner has strong views on the respondents, especially the 5th respondent. His views of this respondent , as reflected in evidence tendered by the 2nd to 5th respondents, sometimes seems to bebordering on inflammatory opinions. Such views could affect the standing of the Petitioner to the extent that it renders the Petition without reasonable and probable cause and malicious, hence frivolous and vexatious .This is however not a foregone conclusion , the petition needs to be scrutinized in terms of its content in order to root out its perverness and malicious intent . A person who is not necessarily on good terms with another should not be prevented from petitioning this court against the other in a genuine case, just because of the existence of bad blood between the two of them.

Upon reading the petition we are of the view that ex facie there exists no ill intent or intent to cause harm to the respondents in the petition. It appears that the Petitioner is seeking to question the appointment of certain members of the Constitutional appointment Authority on the ground that the said appointment breached certain provisions of the constitution. It might be that the Petitioner is not necessarily on good terms both politically and personally with the respondents and has had occasions in the past to virulently criticize the 2nd to 5threspondents. However, this has to be shown to have affected the substance and form of his petition. In this case it does not.

This court is called upon to transcend personal disputes or political differences and look at the case in the context of the pleadings. The Petition raised a genuine dispute, not one based on malice or personal animosity but based on facts that present a legitimate concerned, accordingly we find that the Petition is filed on reasonable and probable cause and without malice or ill intent.

1. Application of the ordinary test
2. Whether there is a contravention or likely contravention of the constitution?

Applying the ordinary test in the Michel case to this case we find that ex facie the petition, without visiting the merits of the Petition, there appears to be a contravention or likely contravention of the constitution in the averments set out in the petition. It is not a petition that is “a shot in the dark” or based on a hypothetical scenarios .The facts upon which the petition is based as reflected by the affidavit of the Petitioner, coupled with the constitutional issues raised, show that the petitioner is concerned that the 4th respondent, a constitutional body established under article 139 of the constitution, has been wrongly constituted. He avers that it is his case that the 2nd and 3rd respondent are not qualified to have been appointed as members of the 4th respondent, as they are not of proven integrity and impartiality and cannot be seen to be impartial and independent , given the facts averred in his affidavit. It is the case of the petitioner that both the 2nd and 3rd respondent have been appointed in violation of article 141 of the constitution.

We, therefore, find that the petition past the first condition of the ordinary test for locus standi of the Michel’s case. In the same breath we also find that the contravention presented by the petition is not frivolous and neither vexatious and accordingly pass the 4Th condition of the ordinary test.

1. Whether the petitioner has a personal interest that is being or likely to be affected by the contravention and whether he cannot obtain redress under any other law?

The second condition of the ordinary test of the Michel case is for the petitioner to prove that he has personal interest that is being or is likely to be affected by the contravention. It is essential that second condition be met in order for the petitioner to be able to pass the third one, which is that the petitioner having to show that as a result of the contravention he cannot obtain redress he cannot obtain redress under any other law .Accordingly, if the petitioner fails to establish his locus standi the issue of whether he cannot obtain redress under any other law will not arise.

In her submissions, learned counsel for the petitioner submits that she is linking the test of personal interest being or likely to be affected with that of the liberal locus standi test of exceptional circumstances. She submit that the petitioner’s interests as a concerned citizen has raised a matter of exceptional public importance similar to the facts and issues raised in the Michel case. She submits therefore, that though strictly speaking the petitioner has no personal interest that is being or likely to be affected by the contravention. The Petitioners interest is likely to be affected by the alleged unconstitutional appointment to the 4th respondent of the 2ndt and 3rd respondent having regards to the constitutional mandate of the 4th respondent. She submit that the constitutional requirement for the composition of the 4th respondent by persons of proven integrity and impartiality, article 141 (b) , of the constitution and for the independence of the 4th respondent from the direction and control of any person or authority, article 139 (2). is indispensable for the independence of the 3rd respondent in the discharge of its functions . Any unconstitutional appointment to the 4th respondent will therefore have an overall unconstitutional effect or is likely to affect the interest of any citizen of this country.

1. Application of the exceptional test

In other words the petitioner is saying that his case for establishing his locus lies squarely on the exceptional test of the Michel case , though she attempts to make a link, it is clear that it is not counsel’s submission that Mr Volcere has a personal interest in the matter.

Accordingly, this court, in determining the issues, have to scrutinize the Petition and see whether this case is one which presents an exceptional circumstances given the facts and issue it raises and if it is presented by a concerned citizen . We note that this is not an easy task, as first of all, all constitutional petitions are brought under exceptional circumstances after a concerned citizen may have exhausted all other possible administrative and judicial remedies. Secondly, our task is further difficult as the Court of Appeal haS not given any indications as to what may consist “exceptional circumstances” in order to allow this court to take a liberal approach. As to whether the petitioner is a bona fide citizen this we have concluded that he is. It is the test of exceptional circumstances that is a challenge.

In the circumstances “exceptional circumstances “ and what it consist of should lead us to examine the Michel’s and see what was so exceptional in terms of elements in this case that had led the court of appeal to open door to the Petitioner based on the liberal approach . We are conscious of the fact that we need to act with caution here so that we do not make the exception the Rule and allow citizens to bypass the ordinary test, as stringently set out by the Court of Appeal in the ordinary test, and consequently allow busy bodies to abuse this important judicial process.

The Michel case concerns an appeal against the unanimous judgment of the constitutional court, which found the appointment of Domah J to be ultra vires and unconstitutional and therefore null and void ab initio. Domah J had applied to the Constitutional Appointment Authority for the renewal of his office. The President of the Court of Appeal wrote to the constitutional Appointment Authority recommending the reappointment of Domah J on the basis of exceptional circumstances under article 131 (4) of the constitution . The Constitutional Appointment Authority then wrote to the President of Seychelles recommending “for approval the extension of the contract of Justice S.B.Domah for an additional two year term”. The President of Seychelles appointed Domah J for a further term of five years.

The Court of Appeal, based on this set of facts, found that Mr Dhanjee had brought this case under exceptional circumstances as a concerned citizen. What this court found as exceptional in this case is however not clear. It can be argued that it was because it relatedto the appointment of a Justice of Appeal and the impact that a possible unconstitutional appointment to such an office can have on society at large. However, the same arguments can be raised regarding all Constitutional Appointees and other Judicial Appointees; including judges of the Supreme Court; the Attorney General; the Ombudsman; the Chairman and Members of the Electoral Commission, as they are all important constitutional appointments. The effect of those appointments would carry with them huge consequences upon the public at large. The Members of the 4threspondent would also fall in those categories. We therefore assume that the post that Domah J was appointed to would not have been the determining factor in the Court Of Appeal determination of what consisted of exceptional circumstances. To hold otherwise would mean that all constitutional appointments would allow a concerned citizen to petition this court.

It can also be argued that it was exceptional due to the facts of the case, however the facts does not show exceptions so as to make it fall out of the ordinary.

It can also be argued that exceptional circumstances may be instances where those prejudicially affected may not be in a position to assert their rights adequately; or in time; or if the impugned provisions of the law or an act or omission is directed against a group of individuals with whom the petitioner share**s** a common liability, again this is not shown in this case.

We further note that the wordings of article 130(1) of the Constitution is also pertinent in determining locus standi of a petitioner for constitutional redress;

According to 130 (1) A person who alleges that any provisions of this constitution, other than a provision of Chapter iii , has been contravened and that the person’s interest is being or is likely to be affected by the contravention may , subject to this article , apply to the Constitutional Court for redress.

There must be at least a connection between the Petitioner or the Petitioner’s right to the contravention or likely contravention.

This as it may, applying the ordinary test we are of the view that the petitioner has not been able to demonstrate that his personal interest is being or is likely to be affected by the contravention. The petitioner is a concerned citizen. However, he needs to show that his personal interest is being or likely to be affected. His personal interest here is contrasted with the public interest being or likely to be affected. Upon scrutinising the petition, the objections and the submissions of the parties we find that the petitioner has been unable to show that his personal interest has been affected or is likely to be affected by the appointment of the 2nd and 3rd respondent. The Petitioner has not managed to show and it is at any rate not his case that he was a person that could potentially have been appointed to the 4th respondent and that he was unconstitutionally denied this chance and/or that in view of the fact the 2nd and 3rd respondent has failed the test of article 134 (1) and that he fulfils same. This could have been evidence of personal interest. Further, we find that though the petitioner seems to be a concerned citizen he has failed to demonstrate that this is a case that has exceptional circumstances so as to enable him to meet the exceptional test of the Michel case.

We therefore find in favour of the Respondents Preliminary objections to the extent that the petitioner has failed to demonstrate his locus standi before this court in his amended petition.

The petition is therefore dismissed with cost in favour of the respondents.

Signed, dated and delivered at Ile du Port on 30 January 2018

G. DODIN R. GOVINDEN L. PILLAY

**JUDGE JUDGE JUDGE**