

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2018] SCCC 6

CP 2/2017, CP 6/2017, CP 7/2017

In the matter between

PATRICK HERMINIE

(Rep. A Aglae)

1st Petitioner

MARTIN AGLAE

(Rep. A Madeleine)

2nd Petitioner

and

HON. PATRICK PILLAR

1st Respondent

HON. CLIFFORD ANDRE

2nd Respondent

HON. WAVEL WOODCOCK

3rd Respondent

HON. JENNY DE LETOURDIE

4th Respondent

HON. BASIL HOAREAU

5th Respondent

HON. SIMON GILL

6th Respondent

HON. EGBERT AGLAE

7th Respondent

HON. CLIVE ROUCOU

(Rep. Clifford Andre)

8th Respondent

ATTORNEY GENERAL

(Rep. David Esparon)

9th Respondent

Neutral Citation: *Herminie & Anor v Pillay & Ors* (CP 2/2017, CP 6/2017, CP 7/2017) [2018] SCSC 6

Before: Govinden, Dodin and Vidot JJ

Heard: 16 January 2018

Delivered: 13 March 2018

RULING

[1] Introduction

Three Constitutional Petitions have been filed against the Honourable Speaker of the National Assembly and other members of the National Assembly. The Speaker and members are being sued as members of a Committee of the National Assembly called the “*Anti Victimization Committee*”. The Committee was set up under Article 104(1) of the Constitution of the Republic of Seychelles. It is a Non Standing Committee of the National Assembly. The National Assembly created the Committee as it considered it necessary for the efficient discharge of its functions. The Attorney General has also been sued in the three cases as “*amicus curie*” in pursuant to Rule 3(3) of the Constitutional Court Rules (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994, hereinafter, also referred to as the Constitutional Court Rules. The Speaker appears as the first Respondent and the other members of the National Assembly are listed as the second to eight Respondents. The Attorney General is the ninth Respondent in all three Petitions.

The first Petition, CC 2 of 2017 is a Petition filed by the Ex-Speaker National Assembly, Mr Patrick Herminie.

The second Petition, CC 6 of 2017, is filed by Mr Martin Aglae, trading as Marpol Security.

The third Petition, CC 7 of 2017, is again filed by the Ex-Speaker of the National Assembly.

[2] The Petitions

All the three Petitions contain similar and common averments in regards to their prayers and causes of actions but differ on the facts that have led to the Petitioners petitioning this Court.

The common averments in the Petitions are:

- (1) That the first to eight Respondents are members of the committee of the National Assembly known as the “*Anti Victimization Committee*”.

- (2) That the first to eighth Respondents are being sued on their personal behalf as members of the “*Anti Victimization Committee*”; as members of the National Assembly; and on behalf of all other members of the National Assembly in terms of section 111 of the Seychelles Code of Civil Procedure, which is applicable in terms of Rule 2(2) of the Constitutional Court Rules.
- (3) That the first Respondent is the Speaker of the National Assembly and the Chairperson of the “*Anti Victimization Committee*”.
- (4) That the eighth Respondent is the Attorney General brought in the Petition as “*Amicus Curie*” in accordance with Rule 3(3) the Constitutional Court Rules.
- (5) That on the 1st of October 2016, the National Assembly approved a motion for the establishment of the “*Anti victimization Committee*”, which, inter alia, allowed the said Committee to hear and determine victimization complaints.
- (6) That the three Petitioners aver that they were each served with summons requiring them to appear on different dates before the “*Anti Victimization Committee*”.
- (7) That it is averred by the Petitioners that in the summons and documents annexed to the summons it appeared that the Petitioners had been named as Respondents in applications filed by complainants. The complaints filed with the “*Anti Victimization Committee*” aver victimization on the part of the Petitioners. In the summons the Petitioners has been summoned to appear for a hearing of the complaints and the parties had been requested to ensure the attendance of any witnesses that the Petitioner wished to call and to produce any relevant documents.
- (8) The Petitioners averred that Article 19(7) of the Constitution is likely to be contravened in relation to the Petitioners by the acts of all members of the National Assembly, including that of the first to eighth Respondents.
- (9) The Petitioners particularized the likely contravention of Article 19(7), they aver that Article 102(1) of the Constitution only gives power to the National Assembly to set up Standing Committees and other Committees necessary for the efficient discharge of its functions. According to the Petitioners the functions of the National Assembly are to (1) legislate; (2) act as an oversight over the functions of the executive and other activities and bodies as provided for by the Constitution; and (3) to participate in budgetary allocations.

- (10) The Petitioners aver further that it is not the function of the National Assembly to exercise judicial or quasi-judicial functions to hear disputes between different parties and to determine the existence or extent of the existence of any civil rights or obligations between the different parties. Hence, they aver that on the basis of the above the “*Anti Victimization Committee*”, to the extent that it is hearing and determining complaints of victimization between the complainants and the Petitioner, is not a Standing Committee which is necessary for the discharge of the functions of the National Assembly.
- (11) It is averred in the Petitions that the hearing and determination of the complaints by the first to eighth Respondents falls outside the functions of the National Assembly and that the said Committee is not a Court or an authority established by law in terms of Article 19(7) of the Constitution and as a result that this would be a breach of their Constitutional right to fair hearing.
- (12) The Petitioners also aver that the acts of the first to eighth Respondents have contravened Article 119(1) and 137 of the Constitution in that the Constitution vests judicial powers solely in the Judiciary.
- (13) As a result, the three Petitioners pray to this court to declare the establishment of the “*Anti Victimization Committee*” to have been set up in contravention of the Constitution as it cannot hear and determine complaints.
- (14) The Petitioners also pray to this Court to order that the Committee is not a Court or authority established in pursuant to Article 19(7) of the Constitution and hence it would be a breach of their right to fair hearing and finally to declare that the acts of the first to eighth Respondents, if they hear and determine the complaints, would be exercising judicial powers in breach of Articles 119 and 137 of the Constitution.

[3] Interlocutory Injunctions

All the three Petitioners have filed Applications for Interlocutory Interim Injunctions before this Court pursuant to Section 304 of the Seychelles Code of Civil Procedure in order to prohibit the 1st to 8th Respondents from hearing and determining the complaints. This Court, after considering the applications held that it would be just and convenient that an Interlocutory Injunction be issued against the National Assembly and against the 1st to 8th Respondents and accordingly the hearing of the three complaints were suspended

until the full and final determination of the Petitions. Pursuant to this order, no hearings and determination were effected by the “*Anti Victimisation Committee*” in the three different instances.

[4] Consolidation

Given that more than one suit has been entered by different Petitioners against the same Respondents in respect of claims arising out of the same series of transactions, and the parties are sued in the same capacities, this Court on its own motion ordered that the three Petitions be tried as one suit pursuant to Section 106 of the Civil Procedure Code as read with Rule 2 (2) of the Constitutional Court Rules.

Mr Clifford Andre, the second Respondent, appeared for the 1st to 8th Respondents in all of the three Petitions and undertook to file a common defence to the Petitions.

By the time the preliminary objections were raised by the 1st to 8th Respondents the Attorney General had filed its defence on the merits to the Petition.

[5] Constitutional liabilities of the 1st to 8th Respondents

Article 111 of the Seychelles Code of Civil Procedure relates to the institution and defence of proceedings against numerous persons having common interest in a suit.

It provides that:

“Where there are numerous person having same interest in one cause or matter, one or more of such persons may be authorized by the Court to sue or defend such cause or matter for the benefit of all the other interested persons, subject to notice being served on all the interested persons as the Court may direct”

This Article is applicable in this case by virtue of Rule 2(2) of the Constitutional Court Rules.

Section 111 allows for representative action in all civil matters, provided that the persons to be represented are notified and the Court authorises such kind of representations. In

this suit such kind of representative action is not required. There was no requirement for the Petitioners to have brought all members of the National Assembly in the Petition. We find that bringing the 1st to 8th Respondents in their capacity as members of the National Assembly and members of the “*Anti Victimization Committee*” was sufficient.

Accordingly, this Petition shall be construed by this Court as one brought against the 1st to 8th Respondents in their capacity as members of the “*Anti Victimization Committee*” and in their capacity as members of the National Assembly.

Moreover, we are further of the view that it is an act of the National Assembly, acting as such, through one of its constitutive committees which is in issue in this matter. Therefore, it would have been sufficient if the first Respondent, in his capacity as Speaker of The National Assembly was listed as the Respondent. The Speaker is the head of the National Assembly and he is the representative of the National Assembly and is legally responsible for all acts and omissions of the National Assembly, whilst the latter is purporting to discharge its Constitutional functions.

There is a well settled case law of this Court and that of the Court of Appeal that the first Respondent can be properly suited as the sole representative of the National Assembly in a Constitutional Petition; vide *Mathew Servina vs Speaker of the National Assembly SCA 13/95*; *Prea and Andre vs Speaker of the National Assembly, CC 5 of 2011*; and *Frank Elizabeth v/s Speaker of the National Assembly, SCA 2 of 2009*.

Accordingly, to the extent that this Ruling refers to and relates to the Constitutional liability of the National Assembly as an arm of the state or that of the official acts of members of the National Assembly or that of the “*Anti Victimization Committee*” purporting to act as a committee of the National Assembly; the 1st Respondent can legally represent all of them.

We are however aware that the person holding the office of the Speaker of the National Assembly at the time of the averments of the material facts of the petition has resigned from office and another person has now been voted in office. However, this would not affect the official liability of the Office of the Speaker of the National Assembly.

Accordingly, for all intent and purposes the Speaker of the National Assembly shall remain for the purpose of this Petition as the 1st Respondent.

(5) The Preliminary Objections

Mr Andre raised two preliminary objections in pursuant to Rule 9 of the Constitutional Court Rules 1994 on behalf of the first to eight Respondents.

The plea in limines are as follows:

- (1) Article 130(1) of the Constitution states: “ *A person who alleges that any provision 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 is no provision of the Constitution that has been alleged to have been contravened by the 1st to 8th Respondents in relation to the Petitioners in both Petitions. Therefore, the Court will have no jurisdiction over a non-contravention as this is the primary issue that the Court will have to attend to.

- (2) It is also contended by the 1st to 8th Respondents that as member of the National Assembly they enjoy certain privileges and immunities which is as detailed below.

Article 102(1) of the Constitution of Seychelles states: “ *There shall be freedom of speech and debate in the National Assembly and a member shall not be subject to the jurisdiction of any Court or to any proceedings whatsoever other than in proceedings in the Assembly , when exercising those freedoms or performing the functions of a member in the Assembly.*

Article 102(5) states:”*A member or other person or authority is not liable to civil or criminal proceedings, arrest or civil imprisonment, fine, damages or compensation by reason of:*

- (a) *An act done under the authority or an order of the Assembly or*
- (b) *Words spoken or used, or a document or writing made or produced under an order made under the authority of the Assembly”.*

From the situation alleged, it is clear that what has been done was in conformity with the Constitution. The work being done by the members are all being done in conformity with the Constitution and the Petitioner has not stated how the 1st to 8th Respondent has done their work in contravention of Article 102 of the Constitution.

- (3) There is no plausible cause of action against the 1st to 8th Respondent.
- (4) On the basis of all the above, the 1st to 8th Respondent prays that the Court dismiss this Petition with costs and interests.

Counsel for the Petitioners, Ms Samantha Aglae, who appears in the two Petitions of Mr William Herminie and Counsel for Mrs Alexandra Madeleine, representing Marpol Security, chose to respond *viva voce* to the written preliminary objections of the 1st to 8th Respondents.

The Attorney General, as represented by the Principal State Counsel, Mr David Esparon, also chose to make *viva voce* submissions in answer to the written preliminary objections of the Petitioner.

[6] Submissions on Preliminary Objections

In grounding his Preliminary Objections regarding the wrongful application of Article 130 of the Constitution, counsel for the 1st to 8th Respondents submitted that on page 5 of the Petition no 2 of 2017, at paragraph 12, the Petitioner had averred that Article 19(7) of the Constitution “*is likely to be contravened*”, whereas Article 130 of the Constitution states “*a person who alleges that any provision of chapter III has been contravened*”. He further submitted that there is a difference in terms of “*likely contravention*” and “*contravention*”. Mr Andre submitted that as the Petitioner is coming under Article 130 he needs to show an actual contravention.

Mr Andre further argued that even if it is found that there was a likely contravention, the particularization of this aspect is still left wanting in the Petitions. He submitted that as far as the Petitions are coming to the Constitutional Court under Article 46(1) of the Constitution; the acts or omissions that are alleged to have consisted of the likely contravention by the 1st to 8th Respondents is not clearly set out in the particularization of the essential aspects of the Petitions.

In regards to the second Preliminary Objection raised, Mr Andre submitted that Article 102 of the Constitution provides that, “ *there shall be freedom of speech and debate in the National Assembly a member shall not be subject to the jurisdiction of any Court or to any proceedings whatsoever*”. According to counsel, the National Assembly has hence an absolute freedom to debate and propose the terms of reference in respect of the “*Anti Victimization Committee*”, and in so doing to give to that Committee the powers to address issues which would - pursuant to the Constitution - allow it to discharge its function as it feels fit. According to counsel, Article 102 grants to the National Assembly, including any of its Committees that it seeks to create, total immunity from any suits. And that as the Committee was created by the National Assembly through a vote and that vote was carried out whilst members were performing their functions and exercising their freedom of speech and debate, any end product of this process attracts and is protected by the privileges and immunities under Article 102 . This would include the “*Anti Victimization Committee*” and its terms of reference.

[7] Response to the Preliminary Objections

Ms Aglae replied to Mr Andre’s submission regarding Article 102 of the Constitution.

According to Learned Counsel, Mr Andre has wrongly interpreted Article 102 of the Constitution. She submitted that the freedom of speech and debate under the said Article are given to the members of the National Assembly when they are deliberating on any motions, bills, and presentation. According to Counsel, in these instances they are free to say whatever they want to say as they are free to represent their constituencies. The Counsel submitted that this freedom even extends to the Committee. She submitted that the freedom of speech does not extend beyond this. According to Counsel, when a

fundamental right of an individual is breached this is where the line is drawn. Hence, as in this case, the Court can step in and inform the Assembly that it has certain limit. Learned Counsel submitted further that the separation of powers that is set out in the Constitution has given specific powers to the Court to protect the rights of the citizen and that includes a breach of Article 102 of the Constitution by the National Assembly or by one of its Committees.

Ms Madeleine responded to the objection raised in respect of Article 130 of the Constitution. The Learned Counsel submitted that Mr Andre was wrong to limit the right of action in the several petitions to Article 130(1) only. She submitted that the Petitions are also founded on Article 46(1) and that under Article 46(1) a person can petition the Constitutional Court and claim that a provision “*has been or is likely to be contravened in relation to the person*”. Accordingly, she argued that there is no need to prove actual contravention and particularization of such.

Furthermore, Learned Counsel, submitted that the Petitions conform to Rule 5 of the Constitutional Court Rules in that “*it contain a concise statement of material facts and refer to the provision of the constitution that has been allegedly contravened or is likely to be contravened*”. She further submitted that the Petitioners complied with Rule 5(2) as the petitions “*contain[] the name and particulars of the person alleged to have contravened that provision or likely to contravene that provision and in the case of an alleged contravention also to state the date and place of the alleged contravention*”. Accordingly, Counsel submitted that contrary to the submission of the 1st to 8th Respondents, the Petitions are sufficiently particularized.

Finally, Counsel submitted that the Preliminary Objections raised by Counsel for the 1st to 8th Respondents are without merit and is a delaying tactic.

Mr Esparon, Learned Principal State Counsel, adopted the submissions of the Petitioners. As Amicus Curie, the representative of the Attorney General, also submitted on several relevant cases regarding immunity of parliament and separation of powers in the Republic of Mauritius.

We have carefully listened to the submissions of the all of the Counsels in this case. We have scrutinized the Petitions and affidavits in the light of the Preliminary objections raised by the 1st to 8th Respondents and we have made the following determinations.

[8] Determinations

First of all, we are of the view that the Preliminary Objections raised by the 1st to 8th Respondents has to be considered strictly. The Constitutional Court Rules allow the Respondents to, before filing a defence to the Petition, to raise any preliminary objections to the Petition. The Preliminary Objections are raised in writing and served upon the Petitioner. As part of the Right to Fair Hearing under Article 19(7), sufficient time and opportunity has to be given to both parties in order to keep them at arm's length. In this case, Counsel for the 1st to 8th Respondents raised written Preliminary Objections to the Petition. However, during the course of the hearing, Counsel attempted to raise new Preliminary Objections bordering on the merits of the case of which written notice had not been given to the Petitioner. The Court gave learned Counsel certain latitude in that respect. However, it would be totally inequitable and unfair to allow the impromptu submissions not raised in writing by the 1st to 8th Respondents to be considered as valid Preliminary Objections. Therefore, the Court will totally disregard any pleas or submissions connected with any Preliminary Objections which has not been given in writing with advance notice given to the other side.

The matter for determination by this Court, as a result of the Preliminary Objections, are threefold: the first one, which relates to the first objection, is whether the petition is brought both under Article 130(1) or Article 46(1) and if the latter be the case whether the cause of action or constitutional contravention is sufficiently particularized so as to make it compatible with the Constitution and the Constitutional Court Rules.

The second issue for determination is the proper interpretation to be given to Article 102(1) of the Constitution. It has been argued by the 1st to 8th Respondents that this article grants to the National Assembly and any of its Committees total immunity from judicial proceedings. The Petitioners submitted that though this immunity exist, they are of the view that the immunity offered by the said article is not absolute. It would not protect the

National Assembly; its Committees or any of its members if there is a contravention of any rights and freedoms of a citizen.

The third issue would be whether the balance of powers principle as enshrined in the Constitution would prohibit this Court from considering the constitutionality of the decision of the National Assembly to set up the “*Anti Victimisation Committee*”.

The second and third issue relates to the second Preliminary Objection.

(a) First Preliminary Objection

Application of Article 130(1) of the Constitution.

The 1st to 8th Respondents averred that the Petitioners relied solely on Article 130(1) and as a result it needs to establish that there has been an actual contravention of the Constitution. There being no averments of actual contravention; the Petitions must therefore fail.

We are of the view that this Preliminary Objection is not properly made out as the Petitioners in this matter rely on *actual contravention* pursuant to Article 130(1) and *likely contravention* of a fundamental right and freedom pursuant to Article 46(1) of the Constitution.

This is clearly demonstrated by the following averments in Petition 2 of 2017; paragraph 12, where it is averred: “*The Petitioner avers that article 19(7) of the Constitution is likely to be contravened in relation to the Petitioner by the acts of all members of the National Assembly including that of 1st to 8th Respondents.*”

And at paragraph 13 of the same Petition: “*Further and in the alternative to paragraph 12 , the Petitioner avers that the members of National Assembly includes the 1st; 2nd;3rd;4th;5th 6th;7th;and 8th Respondents have contravened article 104 of the Constitution and the Petitioners interest is likely to be affected.*”

Further at paragraph 14 , the Petitioners aver that the: “*members of the National Assembly including the 1st to 8th Respondents have contravened Article 119 and Article*

137 of the constitution are the Petitioner's interest is likely to be affected by the contravention".

Paragraph 12, 13 and 14 of CC6 and CC7 of 2017 are similar in substance to that found in paragraph 12, 13 and 14 of CC 2 of 2017, referred to above.

Accordingly, the fact that the Petitioners have also relied on Article 46(1) leads us to one conclusion, that even if we are to hold in favour of the 1st to 8th Respondents on their first Preliminary Objection, the Petitions would survive in respect of other paragraphs of the Petitions, such as paragraph 12.

This as it may, it is also apparent that the Petitioners have averred in detail the provisions of the Constitution that have been alleged to have been contravened by the Respondents in relation to the Petition. In all three petitions at paragraph 13(i) and (ii) and at paragraph and 14 (i) to (v) the Petitioners particularized in detail the contraventions.

The prayer of each Petition also contained sufficient particulars of the alleged contravention of Article 130(1).

The averments, we are of the view, comply with Rules 5 (1) and 5 (2) of the Constitutional Court Rules as they contained a concise statement of the material facts of the provisions of the Constitution that have been allegedly contravened or is likely to be contravened. And further, the Petitions contained the name and particulars of the person alleged to have contravened that provision and in the case of an alleged contravention; the date and place of the contravention.

Accordingly, we find no merits in the first Preliminary Objection.

(b) Second Preliminary Objection

Application of Article 102 of the Constitution.

This Article reads as follows: *"There shall be freedom of speech and debate in the National Assembly and a member shall not be subject to the jurisdiction of any court or*

to any proceedings whatsoever, other than in proceedings in the Assembly, when exercising those freedom or performing the functions of a member of the Assembly”.

The two parties before the Court have clearly two opposing views as to what meaning is to be attached or attributed to Article 102. The scope of this article therefore needs to be determined by this Court. In that regard, we are conscious that we need to be circumspect and take a balanced and purposive approach bearing in mind that this Article is clearly dealing with rights and freedoms of speech of members of the National Assembly, which is a pivotal aspect of our burgeoning democracy.

We live in a country where there is supremacy of the Constitution. Article 5 of the Constitution proclaims its supremacy in the following terms: *“This Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is to the extent of the inconsistency void.”*

A person has a right to come to the Constitutional Court and claim that a law or an act or omission has violated their rights and freedoms in Chapter III pursuant to Article 46(1) of the Constitution, or that an act or omission has violated of any other article of the Constitution pursuant to Article 130 (1) of the Constitution.

As far as Article 46(1) is concerned it provides as follows: *A person who claims that a provision of this charter has been or is likely to be contravened in relation to the person by any law, act or omission, may, subject to this article, apply to the Constitutional Court for redress”.*

Article 46(2) to Article 46(10), thereafter, provides for different procedural requirements for the institution of actions under Article 46(1), including the making of Rules of Court by the Chief Justice under Article 46(10).

The first thing that we see upon reading Article 46(1) is that it gives an absolute right to petition the Constitutional Court for a breach of a Constitutional right and freedom and this is not subject to any other provision of the Constitution. Article 46(1) is subject to the very article itself. The Constitution does not further curtail or limit the absolutism of this right of action. Accordingly, we find that a person is capable of petitioning the

Constitutional Court pursuant to Article 46(1) against any person, including a member of the National Assembly or the National Assembly as a whole. It would be up to this Court to subsequently determine whether or not there was a breach of a right or freedom or any other provision, including Article 102. The supremacy of the Constitution and that of the Rule of Law prohibits the denial of a right of action to a Petitioner under Article 46(1). This right is subject to the locus standi requirements only.

Article 102(1) has to be read as a whole, including its sub-articles. When one reads sub-article (5) with sub-article (1) and gives a liberal and purposive interpretation to the subsections, it is clear that the only immunity for the words spoken or used within the National Assembly would be from that of the civil or criminal court and not that of the Constitutional Jurisdiction of the Supreme Court that arises from Article 46 as read with Article 130 and read with Article 129 of the Constitution.

The Constitutional Court on the strength of Article 46 and Article 5 is free to adjudicate on the extent of the exercise of that right and freedom arising out of Article 102.

What we have said regarding the application of Article 46(1) previously would also apply when it comes to the application of Article 130(1). Any person who alleges that any provisions of the Constitution other than chapter III has been contravened, which includes Article 102, and that 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.

Again, we find an absolute right of action here; it remains unrestrained by the very Article 130 itself. If a person alleges that a non-chapter III provision has been breached – irrespective of whether it falls under the obligations of the Executives (Chapter IV and V) or the Legislature (Chapter VI) – that person has an entrenched right to petition the Constitutional Court. It would be up to this court to determine the existence or non-existence of such a right or the extent of its existence.

This leads us to critically analyse Article 102 itself. To paraphrase it: *“There shall be freedom of speech and debate in the National Assembly ...a member shall not be subject to thewhen exercising theses freedoms”*. From a reading of Article 102, it is clear

that freedom of speech and debate are protected and the members are immune to court proceedings when they are exercising those freedoms. During the course of parliamentary deliberations they should be free to express themselves fully. Hence, they cannot be sued or prosecuted for what they say in the course of this process. However, this is where the immunity stops. It does not protect a member for acts done or omissions done by the National Assembly against the rights and freedoms of a person or a breach of the provisions of the Constitution. As for the freedom of speech and debate, even this basic right is limited as Article 102(6) allows a person aggrieved by the exercised of the freedom of speech and debate by a member to ask the Speaker for a right of reply, which if granted is read before the full house at the next sitting of the National Assembly.

(c) Separation of powers

The concept of separation of powers is an inherent concept of our democracy. Article 47 of the Constitution describes it as a balance of powers between the three arms of government: the executive; the legislature and the judiciary. In this sense, the powers being exercised separately – there arises the need to ensure that each branch provides a check and balance on the others, and in so doing limits the powers of each other and prevents one power from becoming supreme. A typical example of this would be the legislature approving a Bill and the Executive, through the President choosing not to assent it into law.

The judiciary is given powers under the Constitution to adjudicate on this balance of powers scheme. The Judiciary consists of, inter alia, the Supreme Court, which exercises its jurisdiction as the Constitutional Court pursuant to Article 129 (1) of the Constitution.

The Constitutional Court sitting as such makes determinations on claims brought before it pursuant to Article 46(1) and Article 130(1) of the Constitution. On the other hand, the legislature is established pursuant to Chapter VI of the Constitution. Its mandate as set out in Part I; II;III; IV;V and VII of the Constitution is to legislate; to check and balance the powers of the Executive arm of government; to act as the voice of the different constituencies and to maintain the financial accountability of government. It has no judicial functions.

Article 102 of the Constitution cannot give to the legislature judicial mandate, unless this is expressly vested by the Constitution itself. The Judiciary checks and balances the legislature in that sense. The legislature consists of the National Assembly, acting as such or through its other bodies such as Standing and Non-Standing Committees. These Committees can and do exercise different constitutional functions, however any citizen can approach the Courts, especially the Constitutional Court, in order to challenge the legality or constitutionality of their decisions. In this way the Judiciary is said to check and balance the powers of the Legislature.

This check and balance by the Judiciary over the Legislature is well established in many jurisdictions.

In the South African High Court case of *De Lille vs Speaker of the National Assembly* (1998/3) SA, the South African High Court held that the Courts may determine whether the internal procedure adopted by the National Assembly are consistent with the provisions of the Constitution. It was argued on behalf of the Speaker that insofar as internal proceedings are concerned it was a matter of privilege and that the Court's jurisdiction was excluded. The High Court and on appeal the Supreme Court of Appeal held that all acts and decisions of Parliament are subject to the Constitution and therefore to the review power of the Courts.

The High Court dealt with the issue of parliamentary privilege and found that such powers and privileges to the extent that they are inconsistent or incompatible with the Constitution are invalid. When the privilege breaches the provisions of the Constitution, the aggrieved party is entitled to seek redress from the Courts, to which is entrusted the task of ensuring the supremacy of the Constitution.

The Court further held that the certificate issued by the Speaker in terms of Section 5 of the Powers and Privilege of Parliament Act had the effect of undermining the independence of the Courts and interfering with the functioning of section 5 of the Act, and therefore was unconstitutional to the extent that it purported to place parliamentary privilege beyond the Court's scrutiny and then this beyond the Supreme Constitution on the mere *ipse dixit* of the Speaker.

In the recent South African case of *United Democratic Union Movement vs Speaker of the National Assembly and ors* CC76/ 2017, the South African Constitutional Court was called upon to decide whether the Speaker of the South African National Assembly has the Constitutional power to decide that a vote of no confidence in the Parliament of South Africa can be conducted by secret ballot. In so doing the Court had to determine whether the Constitution and the Rules of the National Assembly of South Africa permit or prohibit voting of a motion of no confidence in the President by secret ballot.

In coming to its determination the Court addressed the issue of balance of powers and found that it is the Constitutional Court that has the last say in whether there exists such a power in the Speaker, for Section 34 of the South African Constitution has prescribed that everyone has the right to have a dispute that can be resolved by the application of the law decided through a public hearing before a Court of law.

The Constitutional Court concluded the case as follows: “*Our interpretation of the relevant provisions of the Constitution and the rules make it clear that the Speaker does have the power to authorize a vote by secret ballot in a motion of no confidence proceedings against the President, in appropriate circumstances.*”

In Seychelles there have been a few cases brought before our Courts by Petitioners against actions taken by the legislature that stood to affect their rights and freedoms or the powers of the National Assembly under the Constitution. In all cases the Constitutional Court has assumed jurisdiction.

In the case of *Ramkalawan vs R and or* CC1/01, the Petitioner being a member of the National Assembly claimed that the dissolution of the assembly in pursuant to Article 114 of the Constitution was wrongly framed and was an incompetent motion for presentation to a vote in the Assembly. This Court rejected the Petition and held that the dissolution of the National Assembly was valid and in accordance with the Constitution.

In the case of *Jane Carpin vs SNP* CP8 /11 the Petitioner brought by an ex-member of the National Assembly petitioned this Court, alleging that the Assembly was wrongly dissolved under Article 111 of the Constitution in that there were no summons issued for

that purpose by the Assembly in accordance with the said Article. The Court granted the petition and held that dissolution could have been effected at a meeting called for that purpose.

We are further grateful for the list of Mauritian Supreme Court authorities, produced by the representative of the Attorney General. These cases show that even in Mauritius, a constitutional democracy, Parliament's internal procedures are scrutinized by the Supreme Court, notwithstanding the immunity and privileged of the members of the National Assembly.

In the case of *Attorney General vs Ramgoolam SCJ 198 OF 1993*, the Mauritian Supreme Court held that that: *“Where parliament exercise sovereign powers under the Constitution and the Courts are empowered to exercise a consideration which requires enquiry into the exercise of parliament's powers then the Court's jurisdiction must be exercised to the extent applicable to enable it to determine the particular question.”*

In the case of *Utchman vs Beranger and Ors*, the Supreme Court of Mauritius had to decide whether a Select Committee of the Mauritius National Assembly was null and void for a number of reasons. Part of the Court's determination was whether the Select Committee workings or findings were amenable to the jurisdiction of the Court or whether they constituted the internal proceedings of parliament stricto sensu and therefore fell outside the control of the Courts. On this point the Court held: *“we are of the view that parliament may hide neither behind the cloak of privilege or immunity nor behind ouster jurisdiction in order to foul the Constitution which is the very essence of its existence. This Court possess jurisdiction to determine whether the parliament's action is actually within the boundaries set by the Constitution. There is no doubt in our mind that if any members either in the assembly or in a committee commits a breach of the Constitution and more particularly tramples on fundamental rights of individuals, the Court will have jurisdiction to give redress to an aggrieved party”.*

In the case of *Mahboob vs Government of Mauritius MR 198 P 135*, the Plaintiff sold an immovable. The sale was null and void. The Supreme Court held that the Plaintiff was

the legal owner of the immovable. Subsequently, Parliament passed an Act which deemed that the sale was valid and that the alien had valid title to the immovable.

The Plaintiff went back to the Constitutional Court and the court held that *“it was a fundamental disposition of the Constitution that there should be a separation of powers between the legislature; the executive and the judiciary. Parliament has no more right to pronounce judgment than the Supreme Court has a right to make laws. The enactment was a usurpation of judicial power and must be struck down. In spite of the Act, the Plaintiff remained the legal owner of the immovable”*.

For these reasons we also, therefore, find in favour of the Petitioners on the second Preliminary Objection raised. Article 102 of the Constitution does not prevent, curtail or hinder this Court from exercising its jurisdiction over the internal acts of the National Assembly if those acts breach a Constitutional obligation.

In our final determination we rule against the Preliminary Objections raised by the 1st to 8th Respondents and dismiss those Preliminary Objections and order that the Respondents file their defence on the merits.

Signed, dated and delivered at Ile Du Port on 20 March 2018

Govinden J

Dodin J

Vidot J