

CONSTITUTIONAL COURT OF SEYCHELLES

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Reportable  
[2019] SCCC ..<sup>6</sup>  
CP5/2018

In the matter between

**JOSEPH FRANCE ALBERT**  
*(rep. by Mr Anthony Derjacques )*

**Petitioner**

and

**THE GOVERNMENT OF THE REPUBLIC**

**OF SEYCHELLES**  
*(rep. by Mr Georges Thachet)*

**1<sup>st</sup> Respondent**

**ATTORNEY GENERAL**  
*(rep. by Mr Georges Thachet)*

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** Joseph Albert v *The Government of Seychelles* [CP5/2018] SCCC .....<sup>6</sup> (9<sup>th</sup> July 2019)

**Before:** Burhan, Govinden, Carolus

**Summary:** Summary; Petition under article 26 ( 1) of the Constitution ; whether a policy statement can consist of a permissible derogation of right to property; petition granted on the basis that the policy is not a law prescribed in a democratic society.

**Heard:** 26 March 2019

**Delivered:** 9 July 2019

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**JUDGMENT OF THE COURT**

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**Govinden J (Burhan, Carolus JJ, concurring)**

## **Introduction**

- [1] According to the Merriam Webster's Dictionary, in microeconomic and management terms, vertical integration is; "*The combination of manufacturing operations with sources of material and or channels of distribution under a single ownership or management especially to maximize profit*".
- [2] This is admittedly the subject matter prohibited in the 1st Respondent's *Tourism Department Policy Statement on Vertical Integration*, herein after also referred to as "*the policy*". The policy which is found in a written document, a copy of which is attached to the Petition, is the bone of contention in this case. The content; existence and objectives sought to be achieved by the policy are not being contested. What is being disputed are the effects and consequences of the application and enforcement of this policy on the Petitioner's constitutional rights. It is the Petitioner's case that the said policy infringes on the protection of his constitutional right to property under article 26 (1) of the Constitution. The Respondents on the other hand aver that the policy is in the public interest and formulated by the 1<sup>st</sup> Respondent, the executive arm of the state, within the existing constitutional parameters and therefore falls within a permissible limitation to the exercise of this right under the Constitution.
- [3] There being no dispute on the facts of the case in this matter, the task of this court is a straight forward one, we are here to simply scrutinize the content of the 1<sup>st</sup> Respondent vertical integration policy, as produced in court, in the light of the provisions of article 26 of the Constitution and determine its constitutionality.

## **The pleadings.**

- [4] The Petitioner is a Seychellois businessman, landowner and investor from Anse Boileau, Mahe. He brings this constitutional petition against the two respondents alleging the infringement of his constitutional right under article 26 (1) of the Constitution in relation to several companies, in which he is a majority shareholder and director; incorporated within the jurisdiction of Seychelles and operating and investing within the Republic.

- [5] The 1st Respondent is the Government of the Republic of Seychelles. It operates the executive arm of the state through various ministries; departments and statutory bodies and is responsible for the enactment and enforcement of laws and policies of the Republic
- [6] The 2<sup>nd</sup> Respondent is the Attorney General of the Republic of Seychelles and is joined as a party in this case in accordance with rule 3 (3) of the *Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994*.
- [7] The Petitioner contends that in June 2018, the 1<sup>st</sup> Respondent published and brought into effect a policy known as the *Tourism Department Policy Statement on Vertical Integration*. The said policy according to the Petitioner has been confirmed and endorsed by the Cabinet of Ministers and the President of the Republic of Seychelles.
- [8] According to the Petitioner, the policy, as far as it is relevant to this case contains, inter alia, the following provisions;
- a) A tour operator or a person with ultimate beneficial interest as a tour operator, can only own or operate a hotel provided that the aggregate number of rooms is not more than 150 rooms; a tour operator cannot own or have interest in a car hire at the same time; it may only be allowed to own a maximum of 5 boats and it may only own an inter island ferry service, provided that it does not exceed the maximum capacity of 1450 seats in total in its fleet.
  - b) A hotel, or a person with ultimate beneficial interest in a hotel, may be allowed to own or operate only one boat as a hire craft with a maximum of 12 seats and vice versa.
- [9] This being the case, the Petitioner avers that he is a majority shareholder and Director of the following businesses;
- [10] *Travel Services (Seychelles Ltd)*, a tour operator; *Severe Investment Pty Ltd*, which owns and has an ultimate beneficial interest in a hotel known as *Le Domaine De L'Orangerie (La Digue)*, that operates and includes therein 62 villas; *Petit Cour Investment (Pty) Ltd*, that owns and has an ultimate beneficial interest in a hotel situated on Praslin, known as *Le Domain De La Reserve* which operates and includes therein 42 rooms; *United Concrete*

*Products (Seychelles) Ltd* , that owns and has an ultimate beneficial interest in *Brilliant Resident Project*, comprising of 3 blocks of 32 apartments and 3 commercial units; *Inter Island Boats Ltd and United Boats Charter ( Pty) Ltd* that owns and has ultimate beneficial interest in a number companies owning inter island ferries and ocean going vessels.

[11] As a result of the policy the Petitioner avers that his request for permission for additional hotel rooms has been approved by the 1<sup>st</sup> Respondent, but only for 26 rooms instead of 62 as a result of the 150 rooms limit. That further he is obligated to sell off at least 18 sea going vessels within 12 months from the 1<sup>st</sup> of June 2018, which includes boat charters, yachts and deep bottom or glass bottom boats and that he cannot increase the seat capacity of his inter island ferry services as it has already reached the 1450 capacity. Finally, the Petitioner also avers that his negotiation regarding the *St Joseph Atoll Development Hotel and Marinas* project, being a project that he intended to undertake on a piece of land to be reclaimed off the east coast of Mahe, has also stalled as a result of the coming into effect of the policy.

[12] The Petitioner, therefore, avers that his right to property as protected by article 26 (1) of the Constitution of Seychelles has been contravened and is likely to be contravened as only a law as prescribed and felt to be necessary in a democratic society may limit his right to property under the said article and not a policy as it is in this case.

[13] The Petitioner, accordingly, seeks the following declarations from this court;

- (1) A declaration that the Policy Statement on Vertical Integration contravenes Article 26 (1) of the Constitution of Seychelles
- (2) To issue a Writ of Certiorari to declare unconstitutional the decision of the Ministry of Tourism, Civil Aviation and Marine, through its tourism Department, of the 26<sup>th</sup> of July 2018, with respect to the Brilliant Residential Project as null and void.
- (3) To issue a Writ of Mandamus to compel the Ministry of Tourism , Civil Aviation and Port and Marine to grant the Petitioner's company namely the United Concrete Products (Seychelles)Ltd a tourism license and consent for the entire 62 rooms Brilliant Residential Project as a tourism establishment and for Costs.

- [14] The petition of the Petitioner is supported by the affidavit of the Petitioner.
- [15] On the other hand, the Respondents in their Defence to the Petition admits the existence of the policy and avers that it is there to ensure that everyone fully participates and benefits in the tourism industry and that the entire economy gains from tourism and that the consumer is best served through competition and diversity. It is averred further that the objective of the policy is also to ensure that no one has a monopoly or dominant market position and unfair advantage and that everyone can operate and compete fairly, notwithstanding situations where it may not be in the best interest of the country to prevent cross-ownership or integration.
- [16] It is averred further by the Respondents that there are 18 active tour operators in Seychelles and if all of them were to be allowed to have 150 rooms, tour operators will have 43 percent of the market share, which is very significant.
- [17] As regards the restriction on the number of boats operated by tour operators, the Respondents aver that this stems from the need for tour operators to use the services of small boat operators, which will ensure equitable distribution within the market.
- [18] The restrictions in respect on the number of seats on ferry services is averred to be in favour of reduction of market dominance in that sector.
- [19] The Respondents deny any averments in the petition regarding unconstitutionality and aver that the Government is not breaching or violating any of the Petitioner's rights under the Constitution as there is no absolute restrictions on the right to property of the Petitioner. The policy aiming at only putting certain ceilings on specified categories of businesses by a judicious use and management of the available resources and for paving room for each and everyone to participate in and benefit from the tourism industry.
- [20] As a result the Respondents seek this court to dismiss the petition with cost in their favour.

[21] We have carefully scrutinized the pleadings in this case in the light of the arguments of learned Counsel for the Petitioner and the Respondents and having done so we are of the view that the following issues arises for our determination in this case.

### **Issues for determination**

[22] (1) Whether there is interference with the Petitioner's "**property**" right protected under article 26 (1) of the Constitution.

[23] (2) What are the permissible limitations to the right to property under article 26 (1).

[24] (3) Whether the limitations imposed by the policy fall under the permissible limitations under Article 26 (2) of the Constitution.

### **Discussions of issues for determination**

#### **Interference with property right**

[25] The Petitioner is claiming that he is a businessman; landowner and investor and that he is the majority shareholder and a Director of several companies that own and operate businesses as tour operators; hotels; residential projects; and sea going vessels, including an inter island ferry service. The Petitioner further argues that under the 1<sup>st</sup> Respondent's policy he is unable to increase his hotel room capacity; compelled to dispose of some of his sea going vessels; not to exceed the existing seat limit for the inter island ferry service vessels and further cannot as planned proceed with a major hotel and residential development. The Petitioner is therefore not making a case that his properties are being acquired or confiscated by the 1<sup>st</sup> Respondent. His case is that the policy in constraining the capacity of his business to grow and in calling for downsizing in other areas is an abrogation of his right to property under article 26 (1) of the Constitution.

[26] On this basis learned counsel for the Respondents has argued that the right that should have been alleged to have been breached by the Petitioner should have been that found under article 35 of the Constitution, which relates to the Right to work and to a just and favourable

condition of work given that the businesses of the Petitioner are licensable and not article 26 and therefore the Petitioner has no cause of action.

[27] We would, therefore, need to make a finding as to whether there has been any breach of article 26 (1). If on a plain reading of the Petition, no breach of such right arises prima facie, it speaks for itself that the Petitioner will not be able to go further and there would be no need for the Respondents to prove that there has been a constitutionally permissible limitation of that right by the executive. Under article 46 (8) of the Constitution the Petitioner needs to first establish the contravention or likely contravention on a prima facie basis before the burden shifts on the state to prove that there has been no contravention .

[28] Article 26 (1) of the Constitution enshrines our constitutional right to property, this right is expressed as follows, ***“Everyone has a right to property and for the purpose of this article this includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others”***.

[29] Article 26 (2) of the Constitution, on the other hand, creates limitations or derogations to the exercise of this right as set out under article 26 (1). It provides that, ***“The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society”***. The said article, thereafter, exhaustively sets out nine limitations, being instances in which such a law in a democratic society may prescribe limitations. They are set out in article 26 (2) (a) to ( i ).

[30] These instances of permissible limitations are ones that are promulgated by a law;

- (a) In the public interest;
- (b) For the enforcement of an order or an order or judgment of a court in civil or criminal proceedings;
- (c) In satisfaction of any penalty , tax, rate, duty or due ;
- (d) In the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
- (e) In respect of animals found trespassing or straying;
- (f) In consequence of a law with respect to limitation of action or acquisitive prescription;

- (g) With respect to property of citizens of a country at war with Seychelles;
- (h) With regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
- (i) For vesting in the Republic of the ownership of underground water or un-extracted oil or minerals of any kind or description.

- [31] It is to be noted that our article 26 (1) and 26 (2) are similar to the provisions of article 1 of protocol no 1 of the *European Convention on Human Rights*, which guarantees the right to property in the European Union. The European Union being a democratic society that is itself composed of member states which are themselves shining examples of national democracies in Europe.
- [32] Article 1 of protocol no 1 provides that; *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided and by general principles of international law”*.
- [33] *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”*.
- [34] The apparent distinction between the Seychelles and the European Union’s constitutional property rights provisions are that whilst ours gives this right to everyone, the provision of the European protocol breaks this term down into natural or legal person. However, this distinction appears as purely academic as both provisions effectively achieve the same objective, that is both extend the right to natural and legal persons, given the generic and inclusive term of **“everyone”** in our article 26 (1).
- [35] Furthermore, it appears that article 26 (1) includes the right *“to acquire; own; peacefully enjoy and dispose of property”*, whilst the European Union protocol limits it to peaceful enjoyment of his possession. However, the concept of possession has been given a wide and autonomous meaning by the European Court of Human Rights and has been interpreted differently from the formal classification in their domestic law and member states. It has

been extended to include the right of ownership per se in the case of *Marckx v Belgium*, 1979 ECHR, 2. The court in *Marckx* has however limited the scope of the right to existing properties and had ruled that it does not guarantee the right to acquire possession.

[36] To this extent, therefore, our two rights are dissimilar, as Seychelles protection to the right to property includes the right to acquire property. This as it may, this do not take away the basic and fundamental similarities. It is because of these similitudes in our two supreme laws that we are inspired to use article 48 of the constitution and take judicial notice of the European Court of Human Rights in coming to our decision. Article 48 permits this court, when interpreting charter rights, such as article 26 of our Constitution, to amongst other things, take judicial notice of international instruments containing this obligation and the decisions or opinions of international and regional institutions administering or enforcing Convention on human rights and freedoms.

[37] Article 1 of protocol no 1 has been held by the European Court of Human Rights to contain three rules. In the case of *Sporrong and Lonroth v Sweden* (1983) 5, ECHR, 35, these rules were defined as follows; *“The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”*

[38] The case of *Sporrong* concerned some very valuable properties found in central Stockholm in Sweden, as a result of governmental administrative actions, through development restrictions, the properties could not be sold for many years. These restrictions were in the form of prohibition permits and prohibitions on construction. They were eventually lifted due to a change of policy. The owners of the properties complained to the *European Court of Human Rights* under Article 1 of Protocol no 1 as they had received no compensation from the state for the time when their properties were affected by the relevant measures.

- [39] The first question for the court was whether there was any interference with property right at all, within article 1. The Swedish Government argued that the expropriation permits and prohibitions on construction were an intrinsic part of town planning and did not impair the right to peaceful enjoyment of possession at all. But the court was quick to reject this argument. It held that although legally the owner's title to their property remained intact, in practice the possibility of exercising the right to property was significantly reduced. The court observed that by virtue of prohibition on the permits the applicants right became "*precarious and defeasible*". The court had no difficulty in viewing the permit as "*affecting the very substance of ownership*" because of the limitations they placed on the exercise of the rights of an owner. There was an interference with the Applicant's right to property.
- [40] Similarly, we are of the opinion that the case of the Petitioner as pleaded in the Petition before us alleges restrictions falling within the ambit of the right to property that is within the general rule which includes all situations which interfere with individual property rights instead of a deprivation of property or a measure of control of its use. We are of the view that the rights of the Petitioner consist of a bundle of claims regarding a mass of rights and interests relating to several of his properties and business interests that he says he cannot peacefully enjoy as a result of unreasonable limitations caused by the policy of the 1st Respondent. These rights became precarious and defeasible as a result of the publication of the policy. Hence, we hold that the Petitioner has an enforceable claim under article 26 (1). His claim can legitimately be said to be one that relates to an action that affects the exercise of his right to property. He has established a prima facie case.
- [41] We are hence of the view that the Petitioner has rightly come to this court under article 26 (1). Contrary to the arguments of the respondents we are of the opinion that article 35 has no application in this case. This article relates to the Right to work and to favourable conditions of work. The Petitioner is not alleging any interference by the 1<sup>st</sup> Respondent with his working conditions or with his right to work or engage in a trade or profession. Article 35 protects the right to employment and to just and favourable conditions of work. No such issue arises in this case. To the contrary, it is his case that his right to the peaceful enjoyment of his properties have been tampered with by the Government of Seychelles.

[42] Moreover, article 544 of the Civil Code of Seychelles Act defines ownership as, *“the widest right to enjoy and dispose freely of things to the exclusion of others, provided that no one use is made of them which is contrary to any laws or regulations”*. This article is inherited from the French Civil Code of which it is an exact replica, albeit in the French language. In the French law, the civilist concept of ownership is defined by the latin expression, *“Usus, fructus, abusus”*. This expression describes ownership in the sum of its parts or attributes. *“Usus”* is the right to use a thing, which is commonly described as the ability to put a thing to every use that may be made of it. Then there is *“fructus”* or the right to the fruits of a thing, which refers to the right to have the thing produced whatever it produces or to administer it. Finally, there is the *“abusus”* which corresponds to the right to dispose of a thing. *Jean Carbonier, Droit Civil, Les biens, t 3, 19eme edition, Paris Presses Universitaires de France, 2000, no 98 , p17.*

[43] Accordingly, ownership that is derived from property is an enumeration of the benefits that may be obtained from things. It is abundantly clear that our law permits owners of property to do whatever they wish with their property, subject to complying with the law. It is the widest right to enjoy and dispose freely of things to the exclusion of others, subject to compliance to the law. This would include investing of one’s properties in return for profits or dividends in any legitimate businesses, without unconstitutional or illegal hindrances. This is what is termed as the *“right to peacefully enjoy”* of property under article 26 (1). To the extent that the 1<sup>st</sup> Respondent and or its agents may constitutionally constrain or limit the Petitioner in doing so, it needs to show that its actions or omissions comes within the purview of article 26 (2) of the Constitution.

[44] For these reasons we are of the view that the right being prosecuted here falls within the ambit of article 26 (1) and not article 35.

#### **Conditions of Permissible limitations of the constitutional right**

[45] The next issue that we need to address is whether the policy consist of a permissible limitation to the exercise of that right under article 26 (2).

In Seychelles as in the case in the European Union the right to protection of property is not absolute. It is subject to limitations clearly set out in article 26 (2). A reading of this constitutional provision reveals that it is subject to clearly defined situations and interferences to the exercise of the right to protection of property would be constitutionally permissible when the following conditions are met;

1. If it falls within any of the nine heads of limitations set out in sub article 26 (2) (a) to (i).
2. If it is necessary in a democratic society
3. If it is prescribed by law.

[46] All of the above three conditions must be present simultaneously. They must all coexist in any given situation if there is to be a permissible limitation to the exercise of the right to property. The absence of any of those three conditions will lead to a constitutional contravention and a breach by a person, including the Executive, in complying to its constitutional obligation. These conditions must be met before an act or omission of any person or of the government can consist of a permissible limitation of the right to protection of property.

#### Condition 1

[47] **The acts and or omissions of the respondent must fall within one of the nine heads of permissible limitation of sub article 26 (2) (a) to (i).**

[48] There has been numerous Petitions brought before this court over the years in which petitioners have claimed that the actions of a person have breached article 26(1) as they did not fall within any one of the instances of permissible limitations and the Constitutional court has ruled invariably one way or another.

[49] In this matter the Respondent's case is that the policy is made by the government in the public interest. To quote paragraph 2 of the Reply of the Respondents, *"its stated purpose is to ensure that no one has a monopoly or dominant market position and unfair advantage and that everyone can operate and compete fairly , notwithstanding situations*

*where it may not be in the best interest of the country to prevent cross –ownership or integration. The policy tries to balance out all concerns so as to create an environment where all can benefit*". As we have stated above this fact is not being disputed by the two parties in this case. Accordingly, we find that the policy falls under the permissible limitation of sub article 26(2) (a) as it is made in the interest of the Seychellois public at large. This court and the Court of Appeal took a similar position in the case of *Hackl vs the Financial Intelligence Unit, CC 1 /2009 and Leite v Attorney General SCA 10/2002*, when it comes to the existence of the constitutionally permissible limitation under article 26 (2) (a).

Condition 2

**Necessary in a democratic society.**

[50] Democratic society under article 49 of our constitution means, *"a pluralistic society in which there is tolerance, proper regard for fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary."* What is necessary in a democracy and where do we get our democratic standards? Against what yardstick do we measure our democratic credential? In answering these questions our courts have applied a test. It is called the proportionality test. In the case of *Bernard Sullivan Vs Ag and or SCA 25/02*, the Court of Appeal, upheld this test as applied by the Supreme Court of Zimbabwe in the case of *Nyambirai vs National Social Security Authority [1996] 1 LRC 64, 75* . It decided that the test for determining whether a limitation on freedom is arbitrary, excessive or not permissible in a democracy to be as follows,

*"(i) Whether the legislative object is sufficiently important to justify limiting a fundamental right; (ii) the measure designed to meet the legislative objective are rationally connected to it; and (ii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective* . The court applied this test whilst bearing in mind that the European Court of Human Rights places extra emphasis on the third limb of this test by considering whether the restrictions are

proportionate to the legitimate aim pursued by the legislation. We also adopt this test here.

[51] Having done so, we find that many modern day democracies to which we seek and obtained our democratic values and inspiration in pursuance to article 48 of our constitution have laws which reflects the vertical integration policy as set out in the Petition. These countries have found that the limitation is not arbitrary and excessive. They include the European Union; South Africa and the United States.

[52] The European Union have their comparative limitations set out in article 102 of the treaty on the functioning of the European Union (formerly Article 82 of the Treaty establishing the European Community). This article is aimed at preventing undertaking who hold a dominant position in a market from abusing that position. Its core role is the regulation of monopolies, which restrict competition in private industry and produce worse outcomes for consumers and society. It is the second key provision, after Article 101, in the Treaty on the Functioning of the European Union competition law.

[53] The text of Article 102 provides the following;

*“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*

[54] *Such abuse may, in particular, consist in;*

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) Limiting production, markets or technical development to the prejudice of consumers;*
- (c) Applying dissimilar conditions*
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.*

- [55] In South Africa the relevant provision is contained in the *South African Competition Act (Act 89/98)*, section 5(1) of this Act is entitled “**Restrictive Vertical practices prohibited.**” The provision reads, “*An Agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain, resulting from that agreement outweighs that effect*”.
- [56] Similar provisions are also contained in three United States anti Competition legislations. These are *the Sherman Anti Trust Act 1890; the Clayton Act 1914 and the Federal Trade Commission Act.*
- [57] We find therefore that the vertical integration policy is a policy that may be necessary in a democratic society. In all those countries the legislative objectives arising under the mechanism of vertical integration restrictions is seen to accomplish the objective of the obligation without encroaching unnecessarily on the fundamental rights and freedoms and that the means used to impair the right or freedom are no more than is necessary to accomplish the objective. Though vertical integration and expansion is desired because it secures the supplies needed by the firm to produce its product and the market needed to sell the product, they can become undesirable when its actions become anti-competitive and impede free competition in an open market place, hence some democratic societies with similar constitutional set up as ours have deemed it fit, to introduce legislations so as to regulate and curb their use in the public interest. The means used to impair the right to property are no more necessary to achieve the objectives of the different statutes, the objectives being the allowing free open market forces to prevail over business monopolies in the public interest and the means by which to do so being through a duly promulgated enactments.

### Condition 3

#### ***Prescription by law.***

- [58] Interference with the exercise of the right to property must thirdly meet the requirement of legality. This rule is based on the principle of legal certainty and the Rule of law. A person

must know with clarity and total certainty about what are the legal rules that he has to follow as a matter of legal obligation so that he or she can adjust and modify his or her conduct and hence ensure his or her legal compliance. The way that a democratic society can ensure that this obligation of its citizen is dutifully carried out is for the state to promulgate and publish clear and unambiguous legislations. In the case of *Bernard Sullivan vs the Attorney General*, (*supra*), the Court of Appeal stressed on the fact, “*The accepted requirement of a prescribed law are that it be certain, clear and precise and framed so that its legal implication are foreseeable*”.

- [59] In this country the “*Rule of Law*” is an integral part of our democratic society. Without the existence of this concept our society will cease to be a democratic society. This is the dictate of article 48 of the Constitution. On the other hand in Schedule 2 of the Constitution “*law*” is defined to include any instrument that has the force of law and any unwritten rule of law. “*Law*” in Seychelles would, therefore, include Acts made by the National Assembly in pursuant to Chapter VI, PART II of the Constitution and Statutory Instrument made by a person or authority in pursuant to article 89.
- [60] These laws will fit the prescriptive test of “*prescribed*” only when they are accessible by the members of the public after their publication in the *Government Gazette* following, their assent by the President and signatures by persons or authorities when it comes to Statutory Instruments. Their provisions would have been drafted in clear english language and formulated in such a way so as to allow a person to foresee the consequences which his act or omissions may entail and to adjust their conduct accordingly.
- [61] We find that the policy of the 1<sup>st</sup> Respondent which is being impugned in this case is not a law as it does not fit the description of a law as set down in the 2<sup>nd</sup> schedule. It was a policy drafted by the Executive arm of the state, through the ministry responsible for tourism. Having done so the government sought to enforce it by compelling the different stake holders in the tourism industry, including the Petitioner, to comply with its provisions. This, they cannot do, as it will take a law and only a law to curtail or limit the exercise of the constitutional right to protection of property, there being no longer constitutional provisions for the Executive to rule by decree in our law. A policy drafted and promulgated

on the basis of a legal obligation arising out of an enabling provision of a law or as an explanatory memoranda of such a law would have been perfectly possible, however the policy in this case was not one of such a document.

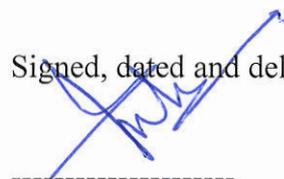
**Final determination.**

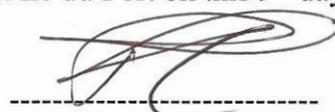
[62] We hold therefore that the limitation of the constitutional property right was not done in accordance with a law prescribed in a democratic society, we declare that the *Tourism Department Policy Statement on Vertical Integration* published in June 2018 in respect of the Seychelles tourism industry to be void and as such cannot be enforced against the Petitioner as it breaches article 26 (1) of the Constitution. The 1<sup>st</sup> Respondent must prescribe a law in the form of an Act or Statutory Instrument and promulgate the content of the policy in order to meet the test of legality under our Constitution.

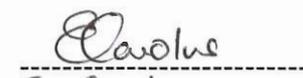
[63] We do not make any writ of Certiorari and Mandamus as prayed for in paragraph 17 (i) and (ii) of the Petition as we consider that the decision to issue licenses and consent to carry out licensable activities to be beyond the jurisdictions of this court. Such decisions are executive decisions that depends on administrative and legal considerations that are not necessarily within the ambit of the facts placed before this court. We therefore dismiss the relief claimed in prayer ii and iii of the Petition.

[64] We have noticed that there is a *Fair competition Act, (Act 15 of 2010)* on our statute book, the provisions of which can be employed by the 1<sup>st</sup> Respondent in order to achieve the same purpose being sought to be achieved in the policy. Part II of this Act relates to “*Restrictive Business Practices*” and sub part i and sub part ii relates to “*Agreements etc, Preventing, Restricting or Distorting Competition.*” To the extent that it is felt that this is not achievable, the 1<sup>st</sup> Respondent must legislate in any other form that it deems fit.

Signed, dated and delivered at Ile du Port on this 9<sup>th</sup> day of June 2019.

  
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Burhan J  
Judge

  
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R Govinden  
Judge

  
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E. Carolus  
H Carolus  
Judge