

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2019] SCCC .8
CP8/2019

In the matter between:

PRESIDENT DANNY FAURE
Acting in the capacity of Minister responsible for
Public Administration
(rep. by Miss Madeleine along with Mrs Aglae)

Petitioner

and

MR NICHOLAS PREA
In the capacity of Speaker of the National
Assembly
(rep. by Mr Camille along with Mr Andre)

1st Respondent

ATTORNEY GENERAL
(rep. by Mr Kumar)

2nd Respondent

Neutral Citation: Faure v Prea & Anor CP 8/2019) [2019] SCCC ([judgment date]

Before: Govinden J, Dodin J, Pillay J

Summary: Preliminary objections against Constitutional Petition dismissed. The 1st Respondent is properly sued in his capacity as Speaker of the National Assembly; the Petition complies with Rule 3 (3) of the Constitutional Court Rules; the fact that the Petitioner filed a judicial review action and a Constitutional Petition does not amount to an abuse of process as no redress has been obtained in the judicial review action and the President being the Minister responsible for the Department of Administration was not obliged to file an affidavit as Minister.

Heard: 23rd July 2019

Delivered: 17th September 2019

RULING

The Petition

- [1] A Petition has been filed by the Petitioner against the Respondents in pursuant to article 130 (1) of the Constitution. It is brought by the President of the Republic of Seychelles as the Minister responsible for Public Administration by virtue of Article 66 (3A) of the Constitution and having responsibility for administration and implementation of the Public Service Salary Act, 2013 (hereinafter also referred to as “*the PSSA*”). As the Minister responsible under this Act, the Petitioner is endowed with power to make regulations for all matters required or necessary to be provided for in giving effect to it. He is also empowered to amend any provisions of this Act by way of an amending Act approved by the National Assembly.
- [2] The 1st Respondent is the Speaker of the National Assembly elected in office in terms of article 83 of the Constitution. The National Assembly is an independent arm of the Republic that has been constitutionally entrusted with legislative powers by virtue of articles 85 and 86 of the Constitution.
- [3] The 2nd Respondent is the Attorney General, who has been joined as an *amicus curie* by virtue of Rule 3 (3) of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules 1994, hereinafter also referred to as the Constitutional Court Rules.
- [4] As the responsible Minister under the PSSA, the Petitioner is under a statutory obligation to, every five years, revise the 1st schedule of this Act and change the salary structure of public servants found in that schedule. The revision fell due on the 1st of April 2019. The first attempt to effect the revision to the schedule came by way of a Bill proposing its amendment. However, the proponent of the Bill later sought to withdraw it from the Assembly. The motion for the withdrawal of the Amendment Bill from the Assembly was defeated through a vote of the National Assembly.

- [5] Whilst this Bill was still tabled before the National Assembly, the Petitioner in exercise of the powers conferred on him by virtue of section 13 read with section 7 of the PSSA, made and published the Public Salary (Amendment of First Schedule) Regulations, 2019, (SI 18 of 2019). It came into operation on the 2nd of April 2019, the day it was published in the Gazette
- [6] In accordance with the provision of section 64 (1) of the Interpretation and General Clauses Act, (hereinafter referred to as "*the IGPA*"), this statutory instrument was laid before the National Assembly on the 3rd of April 2019. On the same day the Leader of the Opposition tabled a motion before the Assembly and demand that it resolve to quash SI 18 of 2019 in pursuant to the provision of section 64 (2) of the IGPA. On the 4th of April 2019, by a resolution in favour of this motion, the National Assembly voted and purported to annul this statutory instrument.
- [7] Based on these facts the Petitioner avers that the National Assembly, as represented by the Speaker of the National Assembly, has contravened the provisions of article 66 (1) and 66 (3A) of the Constitution. The Petitioner has made the following submissions. First, in annulling the statutory instrument, his interest is likely to be affected in that the National Assembly has prevented the Petitioner from discharging his responsibility to ensure the execution and maintenance of the laws of Seychelles and that this is contrary to the functions of the Assembly. Second, that the National Assembly has interfered with the obligations of the Petitioner in the administration and implementation of the Act; Third, that it has interfered with authority delegated to the Petitioner to effect the review of the Salary Table under the Act. Fourth, that the National Assembly has acted *ultra vires* the function of the Assembly and finally, it has contravened the doctrine of separation of powers.
- [8] The Petition is supported by an affidavit sworn by Jessie Esparon, the Chief Secretary of the Public Administration Department.
- [9] The 2nd Respondent in his Reply to the Petition, as sworn by the Learned Deputy Attorney General, supported the Petition and averred that the action of the National Assembly prevented the Petitioner from exercising the executive authority delegated to him under

article 66(1) and 66 (3A) of the Constitution required for the execution and maintenance of the Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has powers to make laws.

Preliminary Objections

[10] The 1st Respondent, whilst reserving his right to reply to the Petition on the merits, has raised a number of Preliminary Objections in terms of Rule 9 of the Constitutional Court Rules and has moved this court to dismiss the Petition with costs in favour of the 1st Respondent. These objections are as follows:

- (1) That the 1st Respondent is wrongly suited in the Petition in that the 1st Respondent, being sued in his capacity as the Speaker of the National Assembly, is not vested with legislative powers by virtue of article 85, as read with article 86 of the Constitution as alleged in paragraph 3 of the Petition. By virtue of article 85 the legislative power is vested solely in the National Assembly.*
- (2) That the Petition is bad in law and must be dismissed, as the same Petition is not made in conformity to the provisions contained in Rule 5(2) of the Constitutional Court (Application, Enforcement or Interpretation of the Constitution) Rules, in as far as the Petition discloses no alleged contravention*
- (3) That the Petition of the Petitioner, filed before this Honourable Court, amounts to an abuse of process in that the Petitioner has, prior to filing this petition, filed case CS no 30/2019 before the Supreme Court requesting for an order of certiorari against the decision of the National Assembly in annulling SI 18 of 2019. The same decision of the National Assembly is the basis of the present petition before this Honourable Court.*
- (4) That the Petitioner is precluded under article 130 (2) of the Constitution to present the present petition before the Honourable Court, as the Petitioner has already sought for redress by way of a judicial review before the Supreme Court of Seychelles.*
- (5) That the Affidavit in support of the Petition, deposed by Jessie Esparon, is defective and/or is bad in law and accordingly cannot be relied upon by the Petitioner before the Honourable Court, in as far as same affidavit seek to be evidence in support of the Petition before the Court , this for the following reasons;*

- a. *Ms Jessie Esparon is not capacitated in law , and /or is at least ex facia the pleadings , not capacitated in law , to swear this affidavit on behalf of the Petitioner; and*
- b. *Ms Esparon is not authorised to depone the averments contained in the affidavit, for and in behalf of the Petitioner.*

Submissions on Preliminary Objections

- [11] The learned counsel for the Petitioner filed two written submissions in answer to the Preliminary Objections. These are the following documents; the “WRITTEN SUBMISSION ON PRELIMINARY OBJECTIONS ON BEHALF OF THE PETITIONER:” dated the 16th of July 2019; the “FURTHER SUBMISSIONS ON BEHALF OF THE PETITIONER, dated the 22nd day of July 2019. They strenuously objected to the Preliminary Objections in both submissions. These submissions can be summarised as follows;
- [12] In reply to the first Preliminary Objection learned counsel submitted that the Speaker could have properly been sued in his capacity as the head and the representative of the Assembly by virtue of the decision of this court in the case of *Patrick Herminie v Hon. Patrick Pillay and ors CP02;06 and 07 of 2017*.
- [13] In answer to the objection that the Petition discloses no alleged contravention made by the 1st Respondent, counsel submitted that the Petition conforms to Rule 5 (2) of the Constitutional Court Rules and that in compliance to this Rule the Petition contains the name and particulars of the person alleged to have contravened or to be likely to contravene the different provisions of the Constitution in relation to the Petitioner and that further that it also states the date of the alleged contravention. They also submitted that the particulars of the alleged contravention against the National Assembly are clearly stated ex facie the Petition and affidavit.
- [14] In response to the 3rd and 4th Preliminary Objections, it is the submissions of learned counsel that these objections are inter linked and to the extent that they are proposing that the Petition amounts to an abuse of process, they are devoid of merits. Counsel submitted that the case before this court and that of case no 30 of 2019, being a judicial review action,

are two separately justifiable rights of action. It is their argument that they consist of two separate cases which are seeking two distinct types of relief and on the basis of established case law this objection should be dismissed. Counsel argued further that it has not been proved that the filing of two suits is oppressive or vexatious.

- [15] As regards the fifth objection, learned counsel submitted that Ms Esparon swore to the affidavit in respect of facts within her knowledge and that she participated actively on the policy behind and in the drafting of the PSSA, as such, there was no need for a special authorisation in order for Ms Esparon to swear her affidavit. It is their submission that this affidavit fits all the requirements of the provisions of section 170 of the Seychelles Code of Civil Procedure.
- [16] In his written submissions supporting the Preliminary Objections of the 1st Respondent, learned counsel for the 1st Respondent submitted that as far as his first Preliminary Objection is concerned there are no averments in the Petition that the Speaker is liable for the acts of the National Assembly and that at any rate the only occasion when the 1st Respondent can be legally sued for such acts are in Constitutional Petitions brought against the National Assembly. In the same vein learned counsel argued that as a result of the lack of averments in respect to specific wrongdoings against the 1st Respondent there is a breach of rule 5 (2) of the Constitutional Court Rules and hence the second Preliminary Objection. In respect of the second Preliminary Objection counsel submitted on averments in the Petition that he says failed to meet the requirements of article 130 (1) of the Constitution. As far as the third and fourth objection is concerned learned counsel relied on the principle of prohibition of multiplicity of claims based on the same facts as set down in the case of *Buckland vs Palmer [1984] 1 WLR 1109*. Finally, in support of the last objection, learned counsel submitted that the Petition in the present form is lacking as it is not supported by an affidavit of the Petitioner before the Court and that furthermore there is no proof of authority given to the deponent of the Petitioner's affidavit to show she has been authorised to swear to the affidavit.
- [17] Learned counsel for the 1st Respondent, during the course of the hearing of oral submissions laid emphasis on his 1st objection. In an attempt to counter counsels response

to this objection, the learned counsel submitted that the case of *Patrick Herminie vs Speaker of the National Assembly* can be distinguished with the one before the Court in that in the former case there was a material allegation of contravention against the Speaker of the National Assembly, whilst in this case there is none. The learned counsel, otherwise expanded on his written submissions.

- [18] Learned counsel for the Petitioner on the other hand reiterated that the Speaker was rightly suited as representative of the National Assembly based both on the established legal principle and the facts of the case. As regards the objection to the affidavit in support of the Petition, learned counsel submitted that this very same argument was rejected by the Supreme Court when it granted leave for the judicial review to proceed. As far as the objection based on the abuse of process argument goes, learned counsel submitted that reliance upon article 130 (2) cannot be effected by the 1st Respondent in that this article applies where the Petitioner has obtained redress before another court and in this case no redress has been obtained by the Petitioner given that the judicial review action is still pending before the court.

Discussions and determination

- [19] In his first Preliminary Objection the 1st Respondent claims that he is wrongly suited in that as the Speaker of the National Assembly he, as the Speaker, is not vested with legislative powers by virtue of article 85 as read with article 86 of the Constitution as alleged in paragraph 3 of the Petition. That by virtue of article 85 of the Constitution, the legislative power is vested solely in the National Assembly.
- [20] Having scrutinised the Petition we find that the 1st Respondent is being sued as, “*Mr Nicholas Prea In the capacity of: Speaker of the National Assembly, of Ile du Port, Mahe, Seychelles*”. The 1st Respondent is therefore not being sued in his personal capacity, he is being sued in his capacity of the Speaker of the National Assembly of Seychelles. Furthermore, it is not being disputed that Mr Prea was the Speaker at the material time averred in the Petition. What is being disputed by the 1st Respondent is the ability of Mr Prea to represent the National Assembly before this Court for the act of the National Assembly in annulling a statutory instrument under section 64 (1) of the IGPA. According

to the 1st Respondent this is a purely legislative act, which makes the office of the Speaker instead of the Speaker being legally responsible. This court has therefore to make a finding on this issue.

[21] In the case of *Patrick Herminie and anor vs Hon Patrick Pillay and ors* the Speaker of the National Assembly together with seven member of the National Assembly were sued before this Court for the act of the National Assembly in setting up a committee of the National Assembly in pursuant to the provisions of the Constitution and that of the Standing Orders of the National Assembly. The setting up of the committee was meant to assist the Assembly to better carry out its function of government oversight in pursuant to article 104 (1) of the Constitution. In that case this Court had the opportunity do decide on the representative role of the Speaker of the National Assembly in a constitutional petition filed before the Constitutional Court for alleged breach of a constitutional obligation by the National Assembly. On this point the Court held:

“Moreover, we are 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 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, CC5 of 2011 and Frank Elizabeth vs Speaker of the National Assembly, SCA 2 OF 2009.***

Accordingly, to the extent that this annulling 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 committee of the National Assembly, the 1st Respondent can legally represent all of them.”

- [22] This bench does not wish to depart from the determination of the Constitutional Court in that case regarding the representation of the National Assembly, as we hold similar views. The Petition in this matter is brought against an official act of the National Assembly. That is whether the purported annulment of the statutory instrument was properly effected in pursuant to a statutory power. We are hence of the view that the Speaker of the National Assembly was rightly suited in his capacity as Speaker of the National Assembly and brought into the Petition as representing the National Assembly as a whole. The alternative to bringing the Petition against the Speaker of the National Assembly would have been to file it against all the members of the National Assembly. This scenario would have been totally impracticable, given the sheer number of members involved. Furthermore, this alternative would also have cause another practical difficulty given that not all members voted in favour of the impugned motion and bringing the case against members who voted in favour of the motion this would have meant bringing the petition against a political division of the Assembly instead of the National Assembly itself. This would not have been representative of the National Assembly of Seychelles.
- [23] Pressed by this Court on the difficulties of getting somebody else other than the Speaker to represent the National Assembly, the learned counsel for the 1st Respondent submitted that “*the office of the speaker*” could have been sued as the Petitioner instead of the Speaker himself. We cannot accept this proposition as being feasible as we do not find the office of the Speaker of the National Assembly to be a legal entity known to the Constitution and neither can we divide the office of the Speaker of the National Assembly from the Speaker himself.
- [24] The second objection is based on alleged contravention of rule 5 (2) of the Constitutional Court Rules. According to this rule, the Petition must contain ‘*the name and the particulars of the person alleged to have contravened or to be likely to contravene the different provisions of the Constitution*’ in relation to the Petition and “*the date and place of the alleged contravention*”.
- [25] We have scrutinised the provisions of the Petition in the light of this submission. Having done so we find it particularised the name of the person alleged to have contravened or to

likely contravene the different provisions of the Constitution. This person is the National Assembly of Seychelles as represented by the 1st Respondent in his capacity as Speaker of the National Assembly. We also find that the provisions of the Constitution that have been allegedly contravened have been properly set out. These provisions of the Constitution are, firstly: that the Assembly is alleged to have contravened are article 66 (1) and 66 (3A) of the Constitution, these alleged breaches are particularised in paragraph 15.1 of the Petition. Secondly, that the Assembly has contravened the doctrine of separation of powers, these alleged breaches are particularised in paragraph 17 of the Petition. Thirdly, that the Assembly has contravened article 35 (d) of the Constitution, these alleged breaches are particularised in paragraph 17.1 and 17.2 of the Constitution. The place of contravention is in the National Assembly and the date of contravention is the 4th of April 2019.

- [26] We are therefore of the view that the Petition fully complies with the requirements of Rule 5 (2) of the Constitutional Court Rules 1994.
- [27] The third objection of the 1st Respondent is one based on “*abuse of process*”. The factual basis for this objection is uncontested by the parties. The Petitioner filed civil side no 30 of 2019, before the Supreme Court requesting that the Supreme Court uses its judicial review powers under the provisions of articles 125 (1) (c) of the Constitution and make an order of certiorari against the decision of the National Assembly annulling SI 18 of 2019. Thereafter, the same Petitioner filed this Constitutional Petition. The facts of this case therefore run on all fours with the one before the Supreme Court. It is on this basis that the 1st Respondent is raising the abuse of process objection. His argument being that there is a general public interest in avoiding a multiplicity of legal claims and that here there is duplicate sets of proceedings, based on the same facts, in which the same remedy is being requested before two different courts.
- [28] The issue which comes for our determination, given this objection, is whether there being two different actions based on the same facts before the Supreme Court and this Court, calls for the Constitutional Petition before us to be dismissed on the ground of abuse of process.

- [29] Upon granting leave to proceed in the judicial review action, the learned trial judge had forwarded a question for the determination by the Constitutional Court under article 130 (6) of the Constitution. The question is whether the Supreme Court, consisting of a judge sitting alone, may, determine an act of the National Assembly carried out under an Act of the said Assembly. The Constitutional Court has made a determination on this question and has answered it in the negative, it has determined that the Supreme Court, consisting of a judge sitting alone cannot determine the lawfulness of the act of the National Assembly of annulling SI 18 of 2019. In arriving at its determination the Constitutional Court has held that an action before the Constitutional Court under article 130 (1) and an action of judicial review under article 125 (1) (d) consist of two independent rights of action provided for in the Constitution, that can be pursued separately and independently by a claimant. In so doing the Court has also highlighted the different constitutional hurdles in filing judicial review proceedings against the National Assembly.
- [30] We again do not wish to depart from the view of the Constitutional Court in that regards. We are of the view that the Petitioner could have elected to pursue the two separate legal remedies independently of one another without abusing the process of the Court. The only constitutional provision that could have restricted the exercise of this right is found in article 130 (2) of the Constitution, which reads as follows, "*The Constitutional Court may decline to entertain an application under clause 1 where the Court is satisfied that the applicant has obtained redress for the contravention under any law and where the applicant has obtained redress in the Constitutional Court for any matter for which an application may be made under clause 1, a court shall not entertain any application for redress for such matter except on appeal from a decision of such court*".
- [31] Under article 130 (2) the impediment lies in the applicant having obtained redress for the contravention under any other law or before the Constitutional Court. In this case the Petitioner did seek to obtain redress under article 125 (1) (d) of the Constitution, however, as we have stated there is little prospect of redress being obtained in the judicial review Petition as a result of the determination of the Constitutional Court on the question referred for determination. Accordingly, on this basis this court should not decline to entertain an application on the ground of redress being sought by the Petitioner under a law other than

article 130 (1) of the Constitution as redress, though sought, has not been obtained before the Supreme Court. At any rate, in view of the wording of article 130 (2) our view would have been the same even though the matter was pending before the Supreme Court, provided no redress had been obtained at the time of delivering our judgment on the merits in this case.

- [32] Article 130 (2) delimits the scope of abuse of process applications before our Constitutional Court in an application under 130 (1). In our judgment the resort by an applicant to both the jurisdiction of the Supreme Court and the Constitutional Court is not in itself an abuse of process and indeed may sometimes be well justified when the second is invoked because of a possible obstacle to a claim that applies only in the first case. The question of abuse of process would arise only if the conduct of the applicant is shown to be prejudicial; oppressive or otherwise amounts to harassment of the Respondent, under the typical abuse of process principles, something which is not argued in this case.
- [33] What we have said in respect of the third Preliminary Objection also applies to the fourth objection, based on the above facts, as we do not see how the Petitioner could have been precluded by article 130 (2) to bring this Petition to the Constitutional Court.
- [34] The fourth Preliminary Objection relates to the capacity of the Petitioner's deponent to support the averments in the Petition. The Deponent, Ms Jessie Esparon swore to the affidavit in her capacity as the Chief Secretary of the Department of Administration.
- [35] Rule 3 (1) of the Constitutional Court Rules requires evidence to be given by an affidavit of facts in support thereof. Accordingly, in the Constitutional Petition before this court the deponent to the Petition must have factual knowledge of the content of the affidavit to which he or she swears. This principle was confirmed by the Constitutional Court in the MA13/2016 arising out of the election petition of *Wavel Ramkalawan vs the Electoral Commission and ors (CCI/2016)*. A deponent cannot swear to his or her belief. The latter is reserved only to interlocutory applications by virtue of section 170 of the Seychelles Code of Civil Procedure as read with Rule 2 (2) of the Constitutional Court Rules.

- [36] However, in this case, we note that Ms Esparon has sworn to her beliefs and has also sworn as to the truth of her knowledge. This knowledge according to her own affidavit consists of the fact that she was the person that was given the task by the Petitioner to revise the salary structure under the PSSA. Following the revision of the structure she was the person who recommended the new revised salary structure to the Petitioner. Based on her recommendation, the Petitioner caused to be drafted and later signed and published SI 18 of 2019, containing the proposed new salary structure. This court further takes judicial notice of the fact that the President, as the Minister, is only the political head of the Department of Administration and that the Chief Secretary, acting as such, is responsible for the day to day running of the department and is responsible for the technical services of the department, including the salary of public servants.
- [37] We are satisfied that Ms Esparon was totally acquainted with the facts contained in her affidavit and that she had full knowledge of its content.
- [38] Moreover, this court has to view the potential evidence of the President in the light of all his constitutional functions and responsibilities. In this jurisdiction other than being the President and a Minister, the President is also the Head of State. The dignity and decorum of this high office has to be respected and treated with caution. In the case of *the Bar Association vs the President of the Republic (SCA 7/04)* the issue of the necessity of the President leading evidence through his sworn testimony was considered by the court. The Court of Appeal on this issue held, *“It is difficult to conceive where it would be desirable, much less necessary for the President of the Republic of Seychelles to give evidence in a case as the present. The President of the Republic of Seychelles needs to be cited in his official capacity as a respondent (because of the provisions of Constitutional Court rule 3 (2). But the matter could and should be disposed of without his further involvement (barring, perhaps, exceptional circumstances, the nature of which I am unable to foresee.”* We share the same sentiment of the Justices in that case. In our opinion there arises no necessity to lead the evidence of the President of the Republic in this case. His evidence can be amply replicated by the evidence of the Chief Secretary responsible for public administration.

[39] For the above reasons we rule against all the five Preliminary Objections raised by the 1st Respondent and we dismiss those objections. The 1st Respondent shall file his defence on the merits.

Signed, dated and delivered at Ile du Port on the 17^h day of *September* 2019.



R.GOVINDEN J



G.DODIN J



L.PILLAY J