

**CONSTITUTIONAL COURT OF SEYCHELLES**

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**Reportable**  
[2020] SCCC  
CP18/2019

In the matter between:

**DURAI KARUNAKARAN**  
*(rep. Mr Philip Boulle)*

**Petitioner**

and

**ATTORNEY GENERAL**  
*(rep. Mr George Thachett )*

**Respondent**

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**Neutral Citation:** *Karunakaran v Attorney General* (CP18/2019) [2020] SCCC (12 May 2020)

**Before:** Burhan J; Govinden J and Vidot J

**Summary:** Preliminary objections – Constitutional Petition – Alleged violation of the Constitution arising out of proceedings in the Court of Appeal – Right of Appeal under Article 120(2) of Constitution read with Seychelles Court of Appeal Rules – Composition of the Court of Appeal Bench – Constitution and Court of Appeal Rules permit Supreme Court Judges to sit on the Court of Appeal in the capacity of Justices of Appeal – Constitutional Petition dismissed with costs

**Heard:** 11 February 2020

**Delivered:** 12 May 2020

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**ORDER**

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The Constitutional Petition is dismissed with costs.

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**JUDGMENT**

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**GOVINDEN J (BURHAN J, VIDOT J CONCURRING)**

## Petition

- [1] The Petitioner, Mr Durai Karunakaran, is seeking constitutional redress under Article 130(1) of the Constitution of the Republic of Seychelles, hereinafter referred to as “*the Constitution*”. This Constitutional Petition avers that the composition of the Court of Appeal bench that heard the Petitioner’s unsuccessful appeal in *Karunakaran v The Tribunal & Anor* (Constitutional Appeal SCA CL 05/2018) [2019] SCCA 34, contravened the Seychelles Court of Appeal Rules, hereinafter referred to as “*the Rules*” or “*the Court of Appeal Rules*”. The Petitioner avers that because only two Justices of Appeal heard the appeal, instead of three, as allegedly required by the Court of Appeal Rules, his constitutionally protected right of appeal, provided for under Article 120(2) of the Constitution, was breached as no validly constituted Court of Appeal heard his appeal.
- [2] In the matter in question of *Karunakaran v The Tribunal & Anor* the bench that sat to hear the appeal comprised of his Lordship Francis Macgregor, President of the Court of Appeal; her Ladyship Fiona Robinson, Justice of Appeal; and his Lordship Gustave Dodin, Judge of the Supreme Court, sitting as a Justice of Appeal. The Court of Appeal Rules provide that in respect of any appeal the Court of Appeal shall consist of not less than three Justices of Appeal acting as such.
- [3] The Petitioner avers that the Court of Appeal that heard the above-mentioned appeal violated the Rules of the Court of Appeal made under the Constitution as there were only two Justices of Appeal on the bench. The Petitioner seeks the following redress from this Court:
- (1) Declaring that the Petitioner’s Constitutional right of Appeal has been violated as his appeal was not heard by a valid Court of Appeal;
  - (2) Declaring that the judgment in Constitutional Appeal SCA CC05/2018 D. Karunakaran v/s The Attorney General dated the 10th day of September 2019 is unconstitutional null and void;
  - (3) Ordering that the Appeal be heard de novo by a properly Constitutional Court of Appeal.

[4] An Affidavit in support of the Constitutional Petition was sworn by the Petitioner. The Affidavit adopts and repeats in substance the averments contained in the Constitutional Petition.

### **The Preliminary Objections**

[5] The Respondent in this matter raised a number of preliminary objections to the Petition in accordance with the provisions of Rule 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994, hereinafter referred to as “*the Constitutional Court Rules*”. These preliminary objections are as follows:

- (1) It is respectfully averred that there is no cause of action for the Petitioner for the Constitutional Petition.
- (2) It is respectfully averred that there is no violation or likely contravention to any of the Constitutional rights of the Petitioner and that there is no prima facie case of any alleged violation of the Constitutional rights of the Petitioner. The Petition is therefore frivolous and vexatious.
- (3) It is respectfully averred that it may amount to an abuse of process to challenge, a matter decided by the Court of Appeal, in the Constitutional Court.

[6] As a result, the Respondent prays to this Court to dismiss the Constitutional Petition with costs in his favour.

### **Respondent’s Submissions**

[7] In the Respondent’s submissions in support of the preliminary objections, Mr Thachett, Learned Principal State Counsel in his opening argument, pointed to the fact that Learned Counsel for the Petitioner, though, present before the Court of Appeal, when this matter went through the Roll Call and when it was heard, did not object to the composition of the bench and that he apparently wholeheartedly proceeded with the appeal without raising any arguments as to composition of the bench.

[8] Learned Counsel went on to submit that this case appears to have originated only in hindsight and that it was an afterthought. According to the Petitioner, having received judgment against him and being dissatisfied with it, is now attempting to overturn a

legally final judgment before this Court. As such he argues that the case is frivolous, vexatious and amounts to an abuse of process.

- [9] Learned Counsel for the Respondent also made reference to Article 121 of the Constitution and submitted that this very Article makes reference to the fact that Judges of the Supreme Court are ex officio Justices of Appeal. According to him, therefore, Rule 4 of the Court of Appeal Rules has to be interpreted in accordance with this Article. He submits that a Justice of Appeal in the Rules can only be a reference to Justice of Appeal as defined in the Constitution and not vice versa. He further submitted that the Court of Appeal Rules cannot be interpreted in isolation, but within and according to its Constitutional context.
- [10] Learned Counsel for the Respondent also made reference to the decisions of the Courts regarding the finality of Court of Appeal decisions. According to his submissions, these decisions firmly establish the Constitutional principle that once the Court of Appeal has delivered a judgment, it cannot be challenged before any other Courts thereafter. There is finality of Court of Appeal decisions. In this regard he made reference to the decisions of *Elizabeth v President Court of Appeal & Anor* (SCA 2/2009) [2010] SCCC 2, *Julita D'Offay v F Louise* (SCA 34/2007) (unreported) and *Franky Simeon v Republic* (SCA 26/2002) [2003] SCCA 20. According to the Counsel, as per these authorities, the grievance that the Petitioner had with the composition of the Court of Appeal should have been brought to that Court's attention by way of a notice of motion and a remedy sought before that very Court and not before the Constitutional Court as it has been done in this case.
- [11] Learned Counsel also placed emphasis on the wordings of Rule 2 of the Court of Appeal Rules. According to him, the term "acting as such" in the definition of a Justice of Appeal in Rule 2 of the Court of Appeal Rules is meant to cover ex officio Justices of Appeal, being the judges because according to him only those officers could be "acting as such" in the capacity of a Justice of Appeal and not Justices of Appeal per se. According to his submission if the definition of Justice of Appeal was not to include non ex officio Justices of Appeal there would have been no need of putting that expression in the

definition because the latter cannot “*act as such*” when they have been formally appointed to the office of Justice of Appeal.

[12] In his submission, for these reasons, the Constitutional Petition must be dismissed with cost in favour of the Respondent.

### **Petitioner’s submissions**

[13] Learned Counsel for the Petitioner sought to counter the submissions of the Respondent.

[14] In respect of the argument that he failed to raise an objection to the constitutionality of the bench when he had the time and opportunity, Learned Counsel submitted that he met an almost similar situation in a previous case where there were three judges of the Supreme Court sitting at the Court of Appeal. Counsel submitted that he objected to the composition of that bench and had applied for their recusal and, according to him, he was asked to carry on with his case expecting that the Court would make a determination thereon thereafter. He proceeded with the hearing, however, according to him, the constitutional point was not even considered in the final judgment of the Court. Apparently, this deterred him from making a similar objection in this case.

[15] As regards the fundamental right underpinning the Constitutional Petition, Learned Counsel for the Petitioner submitted that the Petition is not founded on a right found in the Charter of Fundamental Rights and Freedoms but on the Constitutional right to appeal to the Court of Appeal, which his client was denied by the unconstitutionally constituted Court of Appeal bench.

[16] According to Learned Counsel, Article 121 of the Constitution, which provides for the composition of the Court of Appeal, and the Seychelles Court of Appeal Rules exist side by side with the law and must be read on par with the law, including the Constitution. It is his submission that they have to be read together as one. Accordingly, in his submission the Rules form part of the Constitution after they are promulgated. Learned Counsel submitted that under the Rules “Judge” as defined means “Justice of Appeal” and not Judge of the Supreme Court and that a Justice of Appeal is a completely different

judicial officer from a Judge of the Supreme Court, with different qualifications and conditions of appointment. It is his submission that the two officers cannot be assimilated into one.

[17] Learned Counsel made reference to and relied on a number of authorities on the issue of finality of decisions of the Court of Appeal. In addition to making reference to cases cited by the Respondent, Learned Counsel also cited the case of *Attorney General v Mazorchi and Another* SCA Civil Appeal 6 of 1996 and reference was made to the case of *Subaris & Ors v Perera & Anor* (CP 3/2008) [2011] SCCC 4.

[18] Learned Counsel insisted that as per the law the President of the Court of Appeal has the choice of putting not less than three Justices of Appeal on any bench of the Court of Appeal and that those judicial officers must be selected only from Justices of Appeal in accordance with the Rules.

### **The Law**

[19] The cause of action in this Constitutional Petition is founded upon the Court of Appeal Rules, more specifically the definition of “*Judges*” in Rule 2 and Rule 4 of the same Rules, and Articles 120, 121 and 130 of the Constitution. The following Articles of the Constitution and the Rules are, therefore, relevant to this Court’s determination.

[20] Rule 4 provides that:

*“In respect of any appeal, the Court shall consist of those Judges, not being less than three, whom the President shall select to sit for the purpose of hearing that appeal.”*

[21] Rule 2 which provides for the interpretation of the Rules states that:

*“Judge” means a Justice of Appeal acting as such;*

*“President” means the President of the Seychelles Court of Appeal appearing as such in terms of Article 123 of the Constitution;”*

[22] Article 120 of the Constitution provides that:

*“(1) There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine appeals from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.*

*(2) Except as this Constitution or an Act otherwise provides, there shall be a right of Appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court.*

*(3) The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought and such other authority, jurisdiction and power as may be conferred upon it by or under an Act.*

*(4) Subject to this Constitution and any other law, the authority, jurisdiction and power of the Court of Appeal may be exercised as provided in the Rules of the Court of Appeal.”*

[23] Article 121 provides that the Court of Appeal shall consist of:

*“(a) a President of the Court of Appeal and two or more other Justices of Appeal;  
and*

*(b) the Judges who shall be ex-officio members of the Court.”*

[24] Article 130 provides that:

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

...

*(4) Upon hearing an application under clause (1), the Constitutional Court may -*

*(a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;*

*(b) declare any law or the provision of any law which contravenes this Constitution to be void;*

*(c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court consider appropriate.*

...

*(6) Where in the course of any proceedings in any court, other than the Court of Appeal or the Supreme Court sitting as the Constitutional Court, or tribunal, a question arises with regards to whether there has been or is likely to be a contravention of this Constitution, other than Chapter III, the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”*

### **Analysis and determination**

[25] The preliminary objections are interrelated. Though, raised disjunctively by the Respondent, we are of the view that they are effectively one objection. The Attorney General argues that the Constitutional Petition contains no cause of action, does not reveal any violation of a Constitutional right on a prima facie basis, and is frivolous and vexatious and amounts to an abuse of process.

[26] These objections are closely interconnected both in fact and in law. They find their legal basis in Section 92 of the Seychelles Code of Civil Procedure, which, read together with the provisions of Rule 2(2) of the Constitutional Court Rules, allows this Court to strike out a Petition when it fails to reveal a prima facie case.

[27] The interconnection of the grounds are evident in the submissions of both Counsel before us, where they chose to consolidate their different arguments into one, when addressing us on the preliminary objections. However, for the sake of this Ruling we would treat each of the issues arising out of the objections separately and seriatim. It would stand to reason, therefore, that if we were to find that the Constitutional Petition reveals no cause of action this would effectively dispose of the case. It would stand to reason that if there is no cause of action, prima facie Petition, there would also be no prima facie violation or contravention of any Constitutional rights of the Petitioner – and, hence, the Petition



would necessarily be frivolous and vexatious and an abuse of process. We, therefore, turn to the question whether the Constitutional Petition reveals a cause of action.

[28] The Constitutional Petition has been framed under Article 130(1) of the Constitution. Pursuant to this Article, the Petitioner is alleging that a provision of the Constitution has been contravened in respect of his person. It is his averment that he has a right to appeal to the Court of Appeal from a decision of the Supreme Court sitting as the Constitutional Court by virtue of Article 120(1) and (2) of the Constitution and that this has been breached.

[29] Under Article 130(7) of the Constitution, a Petitioner making an allegation must establish a prima facie case that there is such a contravention, ex facie his Petition. This is the evidential threshold that all Constitutional Petitions must meet when made against the state. It is only when a Petitioner has managed to meet this threshold requirement that the burden of proof shifts to the Respondent, for the latter to show that there has been no such contravention.

[30] In raising the first preliminary objection the Respondent is making an allegation that no prima facie case exists on the face of the Constitutional Petition. The case before us, therefore, calls upon the Petitioner to prove that his Petition contains a properly constituted constitutional cause of action on a prima facie basis.

[31] The Constitutional Court Rules reiterate the need for a clear cause of action. Rule 5(1) prescribes that:

*“A petition under rule 3 shall contain a concise statement of the material facts and refer to the provisions of the Constitution that has been allegedly contravened or is likely to be contravened or in respect of which the application, enforcement or interpretation is sought.”*

[32] In the Petition before us those averments are found in paragraphs 4, 5 and 6 of the Constitutional Petition in which the Petitioner avers as follows:

*“(4) The Seychelles Court of Appeal Rules 2002 provides that in respect of any Appeal the Court of Appeal shall consist of not less than three justices of Appeal acting as such.*

*(5) The Court of Appeal that heard the abovementioned appeal violated the Rules of the Court of Appeal abovementioned made under the Constitution, as there were only two justices of Appeal on the bench.*

*(6) As a result of the violation mentioned in paragraph 5 above, the Petitioner’s Constitutional right of appeal was breached as no valid Court of Appeal heard his abovementioned appeal.”*

[33] The necessity to have a clearly defined cause of action in a Constitutional Petition is also confirmed in the provisions of the Code of Civil Procedure, which is applicable in this case by virtue of Rule 2 of the Constitutional Court Rules. On the issue of the existence of a cause of action, the Code has granted power to this Court under section 92 to order any pleadings to be struck out on the ground that it discloses no reasonable cause of action or where the pleadings are frivolous or vexatious. In such cases the Court may order the action to be stayed or dismissed or may give judgment on such terms as may be just.

[34] In *Elizabeth v President Court of Appeal & Anor* (SCA 2/2009) [2010] SCCC 2 the Court was invited to find whether the Petition disclosed a reasonable cause of action in a case where the Petitioner had petitioned the Constitutional Court for an alleged breach of his right to a fair hearing by the Court of Appeal. In coming to its determination this Court held as follows:-

*“In Bessin v Attorney-General [1950] SLR 208 a decision of the Court of Appeal of Mauritius, sitting on appeal from a decision of the Supreme Court of Seychelles, it was held that any such inquiry must be limited to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the court resort to the summary process of dismissing an action. In that particular case the court held it could not be said to be beyond doubt that no cause of action arose.”*

[35] The Court in *Elizabeth* also made reference to the case of *Auto Garage v/s Mototou* (No3) 1971 JEA 519, where the Court held at page 519:

*“the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarise the position and see by saying that if a Petition submits that the Plaintiff enjoyed a right, that right has been violated and that the defendant is liable then in my opinion, a cause of action has been disclosed and any omission or defect may be put right by the defendant. If on the other hand, one of these essentials is missing no cause of action has been shown and no amendment is permissible.”* (emphasis added)

[36] In this regard the Court notes that this decision was a decision of the East African Court of Appeal, considering the Civil Procedure Rules of East Africa, whose origin is the same English Rules of Procedures, as noted in *Bessin* cited in *Elizabeth*.

[37] Similarly, section 92 of the Seychelles Code of Civil Procedure has its origin in English Rules of Procedures. These remarks are therefore of persuasive value in defining the concept of a reasonable cause of action. In the matter before us, in order for the Petition to disclose a cause of action it must show that the Petitioner:

- a. Enjoyed a Constitutional right.
- b. The right has been violated; and
- c. The defendant is liable for the said violation.

[38] A cause of action would not be reasonably disclosed if any of the above-mentioned elements are absent or non-existent. This Court does not intend to depart from the methods used by this Court to come to the determination as to whether there exists a reasonable cause of action in the case of *Elizabeth* and we apply the same test here.

Does the Petitioner enjoy a Constitutional right?

[39] The Petitioner had an appeal before the Court of Appeal in *Karunakaran v The Tribunal & Anor* (Constitutional Appeal SCA CL 05/2018) [2019] SCCA 34. The case was fixed for hearing on the 13th of August 2019. The Appeal was heard and judgment thereon was delivered on the 10th of September 2019. The right that was being exercised by the Appellant was the constitutional right to appeal to the Court of Appeal under Article 120(1) and (2) of the Constitution. This right applies to appeals to that Court from the

Supreme Court or from the Supreme Court sitting as the Constitutional Court under Article 129(1) of the Constitution.

[40] The Petitioner (the Appellant in *Karunakaran v The Tribunal & Anor*) was appealing against the judgment in Constitutional Court case CP09/17. In this matter he was contesting a judgment of the Constitutional Court consisting of two or more judges of the Supreme Court sitting as the Constitutional Court under Article 129(1) of the Constitution. Therefore, he enjoyed a Constitutional right. Indeed, it is not being disputed in this case that the Petitioner was exercising a valid right of appeal before the Court of Appeal. We, therefore, conclude that the Petitioner has a Constitutional right on the facts averred to in his Petition.

Does the Constitutional Petition reveal on a prima facie basis that a violation of the Petitioner's right of appeal has occurred so as to invite a defence on the merits?

[41] The existence of a constitutional right is not sufficient to sustain a cause of action. The Petitioner must also demonstrate that this right was violated.

[42] In the present matter the alleged constitutional violation occurred during the proceedings before the Court of Appeal stemming from a procedural irregularity, which, if proven, would be contrary to the Constitution. The Petitioner is challenging before the Constitutional Court a procedural irregularity on constitutional grounds that arose in proceedings before the Court of Appeal after it handed down its decision. This course of action, although not common, has been the subject of litigation before Seychelles' Courts in the past, albeit in different legal and factual contexts.

[43] By way of summary, and elaborated below, these matters have come to the Constitutional Court by way of Article 46(1) in which litigants allege that the Court of Appeal violated their right to a fair hearing. The constitutional challenges were all raised after the Court of Appeal handed down judgment. In all these cases the Constitutional Court dismissed these Constitutional Petitions and these decisions, when appealed, were confirmed by the Court of Appeal.

- [44] The Respondent argues that the case law supports its arguments in his preliminary objections, whereas, the Petitioner seeks to differentiate its case from those that have come before the Courts in the past.
- [45] In support of his grounds of preliminary objections Learned Counsel for the Respondent has submitted and made reference to a number of authorities of this Court and the Court of Appeal. The authorities cited have made pronouncements on the issue of finality of decisions of the Court of Appeal and that litigants cannot initiate collateral constitutional challenges in the Constitutional Court in an attempt to have their unsuccessful appeal reheard.
- [46] In the case of *Julita D’offay and Ors v F.Louise and Ors*, SCA No 34/07 (unreported), the Court of Appeal, in considering an appeal from the Constitutional Court, in which the Constitutional Court dismissed a constitutional challenge against a Court of Appeal decision, reviewed a number of decisions of Commonwealth jurisdictions on this issue and held that “*the Constitutional Court was right in holding as untenable the Appellant’s intention of obtaining a declaration from the Constitutional Court that the decision of the Court of Appeal is wrong through an allegation of contravention of Articles 19 and 21 of the Constitution*”.
- [47] This position was recently endorsed in the decision of *Mellie v Government of Seychelles & Anor* (SCA CP 03/2019 (appeal from CS 04/2018)) [2019] SCCA 40. It is important to highlight the salient features of these decisions, which differentiate them from the present matter. In *Julita D’Offay and Others* and *Mellie* the refusal of the Constitutional Court to hear the Constitutional Petition was because the litigants were attempting to have the Court of Appeal decisions reviewed on the merits by raising constitutional arguments not raised in the Court of Appeal. In the present matter we are concerned with a procedural irregularity prescribed by the Constitution. The Petitioner is not questioning the merits of the Court of Appeal decision in question.
- [48] In the case of *Elizabeth* the Constitutional Court confirmed the ratio found in the case of *Julita D’offay and Ors* and held that the case did not disclose any cause of action against any of the Justices of Appeal listed as Respondents in the Petition.

[49] The Court in *Elizabeth* did not, however, consider a constitutional challenge that sought to have the merits of a Court of Appeal decision reviewed; instead it was grounded in an alleged procedural irregularity made by the President of the Court of Appeal. The Court went on to opine that it was also their view that if any party was aggrieved by any alleged procedural irregularities or a decision in those proceedings, the proper recourse of such a party was to go to the full Court to challenge such procedural irregularity or decisions made by a single judge of the Court of Appeal rather than allege the contravention of the Constitutional right to a fair trial in the Constitutional Court after the decision was made.

[50] In *Subaris Company Ltd and Ors v/s the Seychelles Court of Appeal and Ors* [2011] SCCC 1 the Constitutional Court, in applying the same principle applied in the case of *Franky Simeon v Republic of Seychelles*, held that the Constitutional architecture does not permit a litigant to challenge a decision of the Court of Appeal in the Constitutional Court in another bout of litigation on the ground that the Court of Appeal did not act constitutionally in conducting a hearing or in its decision. To allow this to occur is to “*fatally damage the foundations of the hierarchy of courts created by the Constitution with the court of final resort not at all being a court of final resort, opening an endless and indeterminate stream of litigation, and consigning litigants to the Dickensian times*”.

[51] In the same case, making reference to Article 46(7) of the Constitution, the Court in *Subaris* held:

*“that if any questions of contravention of the fundamental rights and freedoms under the Charter were to arise in proceedings before the Court of Appeal these questions were not to be referred to the Constitutional Court. The Court of Appeal itself was competent to deal with them and answer those questions.”* (emphasis added)

[52] The Court went on to hold that by “*analogy it would follow in case the constitutional question arose with the conduct of the Court of Appeal itself in the hearing and determination of a matter that question had to be put to the Court of Appeal directly*”. The Court was of the view that the case of *Franky Simeon* provides a procedure as to how these questions should be raised and answered before the Court of Appeal. Although, citing *Franky Simeon* with approval, the Constitutional Court in *Subaris* was, like in

*Elizabeth*, concerned with a procedural challenge that should in the Courts view have been raised in the Court of Appeal.

[53] Learned Counsel for the Petitioner also made reference to those decided cases to highlight some salient features and circumstances in those cases that he argued favours his client.

[54] It is important for this Court to be mindful of subtle differences between the facts of the different cases cited, their procedural history and their legal reasoning and outcome. In *Julita D’offay and Ors, Franky Simeon and Mellie* the Courts were being asked to effectively rehear Court of Appeal decisions on the merits under the guise of a Constitutional challenge. In *Elizabeth* and *Subaris*, however, the constitutional challenges were based on procedural irregularities in the Court of Appeal, which were argued to have constitutional implications. Where the constitutional issue arises out of a procedural irregularity the Courts have suggested that these should be raised by way of motion in the Court of Appeal in the course of proceedings. Where a Constitutional Petition calls for a substantive review on the merits of a Court of Appeal decision the Courts have found that constitutional challenges will not be sustained because a litigant is unhappy with the outcome. Unless a separate constitutional issue is raised, a constitutional right is not engaged when a litigant disputes the findings of fact made by the Court of Appeal. This is not a violation of litigant’s right to a fair hearing.

[55] Furthermore, all these cases do recognise that in exceptional circumstances a decision on appeal can be reviewed. We, therefore, agree with following dicta, endorsed by the Court of Appeal in *Mellie* and *Julita D’Offay and Others*, in *Chokolingo v. Attorney-General of Trinidad and Tobago* [1981] 1 WLR, where Lord Bingham stated:

*“It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor*

*an additional means where such a challenge, based on constitutional grounds, has been made and rejected.”*

- [56] The Constitutional Court, therefore, is mindful of the potential existence of these circumstances and when presented with a Constitutional Petition alleging contraventions of the Constitution the Constitutional Court will, as we have, determine the existence of a cause of action before granting leave to proceed or dismissing the matter.
- [57] These authorities relied on, therefore, do relate to different issues from those before us. The common denominator between them and the case before us is the acceptance of the principle of finality of the decision of the Court of Appeal.
- [58] Another difference between the authorities cited and the present matter is that those decisions concerned the issue of denial of a fundamental right found in the Seychelles Charter of Fundamental Rights and Freedoms, being the right to fair hearing under Article 19 of the Constitution. The litigants in those matters seized the jurisdiction of this Court under Article 46(7).
- [59] The case that comes up for our determination through the preliminary objections, is that the Petitioner’s constitutional right to appeal before a competent and properly constituted court has been affected through a breach of the Court of Appeal Rules. This right is not contained in the Charter, and is provided for under Article 120(2) of the Constitution. We are of the view therefore that the issues involved here can be distinguished from some of those found in the cited decisions by the parties. In the present matter our jurisdiction is seized under article 130(1) of the Constitution and the alleged contravention is that of a non-Charter right.
- [60] It is apparent that, although, the exact constitutional provision deliberated on in those decisions are not applicable here, the reasoning of the Court in the case of *Subaris* would still by deduction and analogy be relevant, albeit through the application of another constitutional provision.
- [61] In this case during the course of the proceedings in *Karunakaran v The Tribunal & Anor* a question arose, at least in the mind of the then Appellant, as to whether there was a



breach of Article 120(2) of the Constitution due to non-compliance with Article 121 and the Rules of Court. This question in the present circumstances was not to be referred to the Constitutional Court. The Court of Appeal itself was competent to deal with this procedural matter and give a determination on this question. We, therefore, hold similarly to the Court in *Subaris* that it would follow in the case of an Appellant, who is unsatisfied with the composition of the bench of the Court of Appeal to raise that matter before the Court of Appeal.

[62] In the case before this Court we asked Learned Counsel for the Petitioner for the reasons why he did not raise the question of the composition of the bench during the course of the proceedings before the Court of Appeal. The Counsel for the Petitioner himself admitted in his oral submissions that this issue was not raised, neither as a preliminary objection nor during any proceedings before the Court of Appeal. Had he considered this a serious irregularity by the Court of Appeal, he could have petitioned the Court as was done in *Attorney General v Mzorchi and Another* SCA Civil Appeal 6 of 1996 in order to quash the decision on the ground that serious irregularity occurred. In this regard the Court of Appeal in *Mzorchi* held:

*“We are here not concerned with the question of rectifying a clerical or incidental mistake, but are faced with what appears to be an irregularity which taints the validity of the proceedings and renders them a nullity. In such a situation, the doctrine of functus officio has no application and is therefore, of no consequence. Further, where a procedural irregularity of the nature complained of has occurred, as in this case, a judgment or an order given in these proceedings, must surely be treated as a nullity. In the circumstances, the Court must exercise its inherent jurisdiction to set aside the said judgment or order.”*

[63] In our determination, therefore, we find that the Petitioner failed to follow all the available avenues for redress that the Constitution had created for him. He has instead filed a petition alleging a breach, however this forum is not the proper one when it comes to allegations of constitutional contravention which is procedural in nature and that occurs in the course of the proceedings of the Court of Appeal. In these instances, as we have said, it would be the Court of Appeal that would be able to hear the procedural irregularity and grant a remedy.

[64] Despite our finding that adequate redress for the alleged contravention is or was available in another court, and was not pursued in that court, the Constitutional Court cannot refer a matter for rehearing to the Seychelles Court of Appeal. In the interests of justice, and in the spirit of the dicta of Lord Bingham cited above, we would not however, deny the Petitioner an opportunity to establish that the petition shows a cause of action therein and raises a prima facie case in respect of the violation of his right of appeal to the Seychelles Court of Appeal.

[65] The facts raised in the Petition calls upon us to take a decision on the proper definition to be given to Rule 4 of the Seychelles Court of Appeal Rules. Learned Counsel for the Petitioner, reading Rules 4 and 2 together, argued that it excludes Judges of the Supreme Court, who are not Justices of Appeal. We are not convinced by this argument. According to Rule 2, Judge means a Justice of Appeal, acting as such. They are the same Judges that are selected by the President of the Court of Appeal for the purpose of hearing an Appeal under Rule 9. The composition of the Court of Appeal under Article 121 of the Constitution consists of the President of the Court of Appeal, Justices of Appeal and Judges who should be ex-officio members of the Court of Appeal. Ex-officio means by virtue of one's office. If a Judge of the Supreme Court is by virtue of his office is also a member of the Court of Appeal, it means that he can at any time be called upon to serve as a Justice of the Court of Appeal. The occasion, duration and circumstances would depend upon the President of the Court of Appeal – if and when he takes his decision under Rule 9 of the Court of Appeal Rules. Once selected and acting as such under Rule 4, the Supreme Court Judge would have all the powers of a Justice of Appeal under Article 120(1) of the Constitution.

[66] In the case of *Charles v Charles* (1 of 2003) [2005] SCCA 13, the President of the Court of Appeal had selected a bench to hear the Appeal. The bench was composed of the President of the Court of Appeal and two Judges of the Supreme Court. The Appellant applied for an “*adjournment of the appeal in question until all Court of Appeal Judges have been appointed by the Constitutional Appointments Authority*”.

[67] In the Affidavit in support of this Notice of Motion for an adjournment the Appellant had challenged the two ex-officio Justices of Appeal selected under Rule 4 on the ground that they are “subordinates of the Court Justice who handed down the judgment which is now on appeal and that accordingly not only is there a likelihood that justice may not be done but further Justice is not been seen to be done”.

[68] The Court of Appeal was of the view that the question underpinned the independence of the judiciary and that it raised an important question that deserved treatment in accordance with the Constitutional principles and the Court exercised its Constitutional powers on the Constitutional question.

[69] The Court made reference to Article a 121 and 136 of the Constitution and Rule 4 of the Court of Appeals Rule and held:

*“It follows from the foregoing considerations, in my judgment, that where a Supreme Court judge is selected by the President of the Court of Appeal to sit for the purposes of hearing any appeal, that judge is fully entitled to sit like any other Justice of Appeal and thus enjoys the same judicial independence in the discharge of his/her judicial functions as any other Justice of Appeal.”*

[70] The Court went on to hold that the “Constitution as the supreme law empowers a Supreme Court Judge to sit in the Court of Appeal ex officio members of the court. When they so sit, they are obviously not judges of the Supreme Court but Justices of Appeal”.

[71] This Court would not wish to make any departure from this determination of the Court of Appeal on the interpretation of Rule 4 and the constitutional implications that were addressed. Hence, we find that Judges of the Supreme Court when selected by the President of the Court of Appeal to sit for the purposes of hearing any appeal, are fully empowered as Justices of Appeal and would sit, hear and adjudicate cases as such. Applying the reasoning of the case of *Charles v Charles*, we are of the view that Justice Gustave Dodin was properly selected by the President of the Court of Appeal as a Justice of Appeal in the Court of Appeal in *Karunakaran v The Tribunal & Anor*.

[72] For these reasons we are of the opinion that the Petitioner has not been able to establish on a prima facie basis that his right to appeal to the Court of Appeal has been

contravened in this case. The Petitioner has failed to establish a cause of action in the Petition. The Petition is wrong both in procedure and substance. As to procedure, there were avenues available to the Petitioner that he could have taken to seek redress for the alleged grievance and he has failed to take it. As to its substance, the petition fails to show that the cause of action raised a prima facie case; the constitutional question raised has already been the subject matter of a decision of the Court of Appeal.

[73] The Ruling of this Court on the first preliminary object would substantially dispose of the case before the Court. As such we do not find any necessity for us to address and make determinations on the second and third preliminary objections, which at any rate we are of the view are very much interconnected with the first objection.

[74] This Court would accordingly dismiss the Petition with costs in favour of the Respondent.

Signed, dated and delivered at Ile du Port on

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Burhan J

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Govinden J

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Vidot J