CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2021] SCCC 2
CP 07/2020

In the matter between:

ROSITA PARCOU — **Petitioner**
(rep. by Serge Rouillon)

and

JILL LAPORTE — **1st Respondent**
(rep. by Bernard Georges)

ATTORNEY GENERAL — **2nd Respondent**
(rep. by Evelyn Almeida)

Neutral Citation: *Parcou v Laporte & Anor* (CP 07/2020) [2021] SCCC 2 27 April 2021.

Before: Govinden CJ, Burhan J and Pillay J.

Summary: Objections upheld: the first objection - petition filed out of time without any application requesting leave to file the petition out of time: the court is not empowered to grant leave where none has been sought: the second objection- constitutional law: procedure after a request for a referral under Article 46(7) has been refused by the Supreme Court: petitioner may not have recourse to direct access in terms of Article 46(1), petitioner either has to appeal refusal to refer if refusal was on merits or request another referral if refusal was only on form: petition dismissed for failure by petitioner to follow appropriate route of appeal or fresh request for referral.

Heard: 3 November 2020

Delivered: 27th April 2021.

ORDER

Petition dismissed no order made in respect of costs.

RULING

BURHAN J (Govinden CJ and Pillay J concurring)

[1] The petitioner filed a petition dated 30th June 2020 and a further amended petition dated 10th August 2020. The following reliefs are claimed in in her petition dated 10th August 2020 where she seeks the following declarations:

(a) *that Articles 19 and 27 (1) of the Constitution, the right to equality before the law without discrimination; the right to a full and fair hearing respectively have been contravened in relation to petitioner by a judgment based , inter-alia, on subjective evidence and outside of the limit set by established precedents;*

(b) that Article 32(1) of the Constitution, has been contravened in relation to the Petitioner by the Civil Code; and trial judge and Carolus J for the reasons stated above including, inter alia a failure to make a necessary proper referral to this honourable court on the matters discussed herein:

(c) that the Civil Code of Seychelles Articles 340, 324, 321 and 323 regarding claims to paternity are a contravention of the Constitution because they infringe the protection of the family unit as provided under Article 32 of the Constitution

(d) that the court has inherent powers to request a DNA test in the case of disputed paternity cases when the need arises and where it is possible for such a test to be conducted, justice of the case requires it:

(e) Make any such declaration or orders , issue such writs and give such directions as may be appropriate for the purpose of enforcing or securing the enforcement of the right of the Petitioner under Articles 16,19,26,27(1) and 32(1) and any other applicable provisions of the Constitution and disposing of all the issues relating to this Petition and

(f) to have the judgment in Supreme Court suit CS 128 of 2018 by her Ladyship M. Twomey CJ , in favour of the 1st respondent on 11 November 2019 be set aside; and

(g) using the inherent jurisdiction of the court or such other powers to either order;

i. petitioner and the Respondent to arrange for DNA tests to be organised and carried out and the findings to be used for a final definitive conclusion of this suit, where failure to abide by such order will lead to adverse inferences being drawn against the refusing party in further proceedings: or

ii. a new trial on the merits be ordered accordingly on the basis of ;

a. new evidence just discovered by the Petitioner ;and
b. in the interest of justice; and
c. on the basis that the said judgment is generally unsafe and unsatisfactory ; and
d. with a directive that it would be in the interests of the parties (especially the 1st Respondent , who would bear the burden of proof of her claim) to make arrangements for DNA evidence to be used to prove her claim using the appropriate medical facilities normally accepted by the courts of Seychelles.

(h) the whole with costs of this petition..

[2] The petitioner, Mrs Rosita Parcou and the first respondent, Jill Laporte were the parties to proceedings before the Supreme Court. Ms Jill Laporte had brought an action simultaneously *en recherche de paternité* and *en desaveu de paternité*, claiming that she was the biological daughter of the late Mr Julien Kaven Parcou. The petitioner, the widow of the late Mr Parcou, defended that action in her capacity as the executrix of the deceased estate. In a judgment dated 11 November 2019, the Supreme Court per Twomey CJ (as she then was) declared Ms Laporte to be the child of Mr Parcou, thus deciding the action in her

favour. This judgment is reported as ***Laporte v Estate of Parcou*** **(CS 128/2018) [2019] SCSC 969 (11 November 2019).**

[3] Following this outcome, the petitioner filed a petition in the Supreme Court, before Carolus J, for a new trial under section 194 of the Seychelles Code of Civil Procedure ("SCCP") on several grounds, including that new and important evidence had come to her knowledge after the trial. In the process of this petition for a retrial, counsel for the petitioner raised the point that there was a constitutional issue arising from this petition that ought to be referred to the Constitutional Court in terms of Article 46(7) of the Constitution. The crux of the referral, which was made orally, was that there were a number of judgments where the court determined paternity without DNA evidence which the petitioner's counsel believes were legally flawed and violated Article 32 of the Constitution, i.e. the right to protect families.

[4] The Supreme Court refused to refer the issue to this Court, and Carolus J delivered a ruling to that effect dated 22nd May 2020. The learned Judge found that the manner in which the issue was raised did not sustain a referral to the Constitutional Court, and stated that litigants who believed that a constitutional issue arises in the course of their case must ensure that their request for a referral is sufficiently argued, to enable the Court to engage in "judicious judicial screening" of a constitutional questions. The court concluded that the request revealed no grounds upon which it could reasonably make a finding that "a question arises with regard to whether there has been or is likely to be a contravention" of the Constitutional right to protection of families enshrined in Article 32 of the Constitution, and declined to refer the matter to this Court under Article 46(7) of the Constitution. That ruling is reported as ***Parcou v Laporte*** **(MC 109/2019) [2020] SCSC 287 (22 May 2020).**

[5] The petitioner was displeased with this result. Instead of making out a fresh referral if the refusal was only based on the form of the referral, or appealing the decision of the Supreme Court if she thought it was wrong, the petitioner filed the present petition in terms of Article 46(1), which is an application for direct access to the Constitutional Court.

[6] The petitioner alleged that the subjective evidence used to disprove paternity as provided for under Articles 340, 321, 323 and 324 of the Civil Code contravene her right to protection of family under Article 32 of the Constitution, and that those provisions were unconstitutional as a result. Further, she claimed that the State had breached the latter right by failing to specifically legislate for DNA testing to facilitate proof of paternity. She alleged that her right to equality before the law, which is guaranteed by Article 27, had been violated, as well as her right to property under Article 26. The petitioner also claimed a violation of her right to dignity under Article 16, and her right to a fair hearing under Article 19. In respect of the latter, she stated that the Court of Appeal would be restricted in that in that without DNA evidence, it would have insufficient evidence to make a proper decision.

[7] The first and second respondents both raised objections to the petition, which included that the petition was time barred; that there were adequate means of redress available before the Court of Appeal; that the petition and affidavit were unclear and convoluted in that the affidavit contained among other things, grounds of appeal personal opinions, hearsay statements rather than factual averments; that the petition lacked specificity and was vague in so far as the petitioner alleged contravention of Articles 16, 27 and 32. The petitioner answered to these objections.

Analysis

[8] Since the Attorney General and the respondent have raised preliminary objections, it is incumbent on this court to address these objections. As mentioned above, in the first objection was that the petition is time barred on account of Rule 4 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (hereinafter Constitutional Court Rules) and that the petitioner has not sought leave of the court for filing the petition out of time. Rule 4 reads:

"**Time for making application**

4. (1) *Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court* –

(a) *in a case of an alleged contravention, within three months of the contravention*;

(b) in a case where the likely contravention is the result of an act or omission, within three months of the act or omission;

(c) in a case where the likely contravention arises in consequence of any law, within three months of the enactment of such law

(2) *Where a petition under rule 3 relates to the application enforcement or interpretation of any provisions of the Constitution, the petition shall be filed in the Registry of the Supreme Court within 3 months of the occurrence of the event that requires such application, enforcement or interpretation.*

(3) *Notwithstanding subrules (1)* and (2), *a petition under rule 3 may, with the leave of the Constitutional Court, be filed out of time*.

(4) *The Constitutional Court may, for sufficient reason, extend the time for filing a petition under rule 3*."

(own emphasis.)

[9] In ***Darrel Green v Seychelles Licensing Authority and Government of Seychelles* CA 43/1997,** Ayoola JA explained the workings of the erstwhile Rule 4 as follows:

"Rule 4(3) permits a petition under rule 3, with leave of the Constitutional Court to be filed out of time; and, rule 4(3) empowers the Constitutional Court, for sufficient reason, to extend the time for filing a petition under rule 3. These provisions are straight forward and unambiguous in their terms. A person who alleges a contravention of a provision of the Constitution is as of right entitled to file his petition within 30 days of the contravention.

He is permitted to do so outside the prescribed period only if he obtains leave of the Constitutional Court.

[10] It was further held that the Constitutional Court may grant such leave not as of course but only if the applicant shows sufficient reasons to justify an extension of time. Nothing in these provisions empowers the Constitutional Court to act suo motu and grant leave where none has been sought and where facts have not been deponed to before it showing "sufficient reasons" to extend time . . . . Throughout the proceedings the jurisdiction of the Constitutional Court to grant leave had not been invoked by any application duly made." (own emphasis)

[11] The relevant date for the commencement of the three month time period for filing an application under Rule 4 (1) of the Constitutional Court Rules is the date on which the Petitioner acquired knowledge of the alleged contravention and not the date of the alleged contravention itself. See ***Mellie v Government of Seychelles & Ano.*** **(CP 4/2018) [2019] SCCC 05 (25 June 2019)** para 35 citing ***Hoareau v Government of Seychelles*** **SCCC 3/1998.**

[12] In the context of leave to appeal filed out of time, the Court of Appeal in ***Tarnecki v R*** **SCA 4/1996 LC 89** stated that:

"Before a Court would allow an extension of time for leave to appeal it must be satisfied that there is good and sufficient cause for the delay. The longer is the delay the more onerous is the burden on an applicant."

[13] The above is equally applicable to constitutional petitions. See ***Mellie v Government of Seychelles & Ano*** supra, paras 31-32. Also ***Assemblies of God v the Government of Seychelles & Ors*** **[2019] SCCC 12.**

[14] From the above, the following is clear. A petitioner has three months within which to file a petition in this court for any contravention of rights. The relevant date for the commencement of the three month time period for filing an application is the date on which the petitioner acquired knowledge of the alleged contravention, and not the date of the alleged contravention itself. Should a petitioner miss the three month period, and file a

petition outside the three month period, they have to seek the court's permission to do so. In other words, they have to obtain leave of the Constitutional Court. The Constitutional Court may grant such leave if the applicant shows sufficient reasons to justify an extension of time: the court must be satisfied that there is good and sufficient cause for the delay. The longer the delay the more onerous is the burden on an applicant. The court is not empowered to act on its own and grant leave where none has been sought and where facts have not been deponed to before it showing sufficient reasons to extend time.

[15] The petition seeks to challenge constitutionality of the judgement given by Twomey CJ on the 11th November 2019. The petition has been filed on the 30th June 2020. The question is whether the petitioner has lodged the petition within three months of the last decision as is required by Rule 4(1) of the Constitutional Court Rules. It is clear that the petitioner would have been aware of the judgment decision on the 11th November 2019 when it was read out in open court. There is nothing before us to indicate that she was not made aware of the said decision. Therefore if a constitutional challenge was forthcoming it should have been filed within 3 months of the said date of giving the decision. Instead the petition against the said judgment has only been brought to this court on the 30th June 2020 more than seven months and out of time. This is clearly an excessive delay.

[16] Further, the petition was filed without seeking any leave from the court to condone the late filing as is required by Rule 4(3) of the Constitutional Court Rules. As stated in ***Darrel Green v Seychelles Licensing Authority and Government of Seychelles*** supra, there is nothing in Rule 4 which empowers the Constitutional Court to act *suo motu* and grant leave where none has been sought and where facts have not been deponed to before it showing "sufficient reasons" to extend time.

[17] The petition has clearly been filed out of the three month period provided for, and since the petitioner did not seek leave to extend the period, this court may not of its own accord grant it. Accordingly, the objection raised in regards the time bar in Rule 4 is upheld.

[18] Learned Counsel for the petitioner in his submissions referred to the case of ***Chow v Michel* (2011) SLR 1.** In the Chow case it was held that the failure of the State to perform a duty mandated by the Constitution within a prescribed time set down in the Constitution was a

continuing breach of the provision of the Constitution. It cannot be argued that the findings of a trial court after considering the evidence in a case, even if the findings be incorrect, amount to the same type of breach as referred to in the Chow case. There is no mandated duty by the Constitution that a DNA test should be carried out within a prescribed time. Had learned Counsel for the petitioner felt that the trial court was infringing any constitutional rights by way of procedure as in ***Georgie Larue v Court Martial*** **CC 1 of 1996,** he should have brought it to the notice of the Trial Judge first, **(*R v Khan* 2001 SCC 86)** and then sought a referral. His application to this court seven months after the judgment was given for all the aforementioned reasons is clearly time barred.

[19] In addition it is admitted by learned counsel for the petitioner that there is an appeal pending in the Seychelles Court of Appeal concerning the said judgment. It would be pertinent at this stage to refer to Article 46 (4) of the Constitution that reads as follows:

"Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other Court under any other law, the Court may hear the application or transfer the application to the appropriate Court for grant of redress in accordance with law.

[20] On a reading of the petition, we observe that the prayer in the petitioner' application seeking relief is on the basis that the said judgment is generally unsafe and unsatisfactory and seeking that in the interest of justice and parties, a directive be given that DNA evidence be used to prove her claim using the appropriate medical facilities normally accepted by courts. It is apparent the petitioners' case is based more on issues to be considered by the appellate court and not by the Constitutional Court refer para g. of the prayer. We are satisfied that all these issues already ruled on by the Supreme Court could be dealt with by the appellate court, the Seychelles Court of Appeal.

[21] Considering the facts peculiar to this case and our findings, there is no doubt in our mind that the petitioners can move for relief by way of appeal and for reasons given herein, this court is of the view that the reliefs which centres round the trial court's judgment in our view are more appellate in nature than constitutional. We are of the view that for two

forums to hear the same issues is a waste of time and resources. Further as the petitioners' have also decided to appeal against the said judgment one must await the finality of the judgment decided on by the Court of Appeal. ***Colin Forte & Anr v Attorney General* [2019] SCCC 7.**

[22] Finally, as the petitioners on their own volition have already invoked the jurisdiction of the Seychelles Court of Appeal, the necessity to refer this matter to the Seychelles Court of Appeal does not arise.

[23] The other decision also challenged in this petition is the decision of Carolus J given in ***Parcou v Laporte* [2020] SCSC 287 (22 May 2020).** This was a decision refusing the application for a referral to the Constitutional Court under Article 46 (7) of the Constitution. The decision was given on the 22 May 2020. It would be pertinent at this stage to set down the provisions of Article 46 (7) of the Constitution which read as follows:

[24] Article 46 (7) of the Constitution:

"Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already 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."

[25] It is an undisputed fact that the application to refer the matter before Carolus J to the Constitutional Court was refused by the learned trial Judge. It is our considered view that the remedy available to the petitioner would be by way of appeal against the said decision and not to file a separate constitutional proceeding under Article 46 (1). It was recently reaffirmed in the matter *of* ***Rodomir Prus & Ors v Government of Seychelles &* Anor 2020 SCCC 885** that the implication of Article 46(7) read with Rule 10 of the Constitutional Court Rules, is that where a question of breach or possible breach arises in a tribunal or court other than the Constitutional Court or Court of Appeal, such a question

has to reach the Constitutional Court indirectly, by means of a referral from that court or tribunal.

[26] Litigants cannot have recourse to Article 46(1) where a matter is pending before a different forum, like the Supreme Court. The purpose of referrals is to prevent multiple proceedings on the same merits in different courts, since the Constitutional proceedings will impact upon the main proceedings. It discourages abuse of court processes. i.e. *rehashing the same issues in multifarious forms and rehashing of the same issues in multifarious forums*. See ***Prus & Ors v Government of Seychelles & Anor*** supra and ***Gomme v Maurel & Anor* (SCA 06 of 2010) [2012] SCCA 28 (07 December 2012)**, ***Brioche v Attorney-General* (2013) SLR 425** para 21; ***Platte Island Resort v EME Management Services* (2013) SLR 225**;

[27] Once the petitioner failed in her request for referral, she ought either to have appealed that refusal with the Court of Appeal if the refusal was based on the merits. The Court of Appeal is the appropriate court for appeals from the Supreme Court. The Constitutional Court does not have appellate jurisdiction over the Supreme Court. ***Mellie v Government of Seychelles & Anor*** supra.

[28] Alternatively, she should have made a fresh request for referral if the refusal was based on form, and not substance. Instead, the petitioner chose to approach this court in terms of Article 46(1), in circumstances where the court has no jurisdiction to hear her due to the fact that the article enables access to this court directly by a petitioner who does not have proceedings on that issue pending in another court. The petitioner does not fall in this category. Therefore the correctness of the decision of the learned judge not to refer the matter to the Constitutional Court in our view is now a matter for the Seychelles Court of Appeal to decide on.

[29] For the aforementioned reasons we proceed to dismiss the application. No order is made in respect of costs. In passing we would also mention that the Articles 340,321,323 and 324 in the Civil Code of Seychelles challenged in this petition as unconstitutional have already been repealed in the new Civil Code of Seychelles Act 2020 (Act No 1 of 2021) which has

been passed by the National Assembly and assented to and awaits a commencement date that is yet to be gazetted to come into operation.

Signed, dated and delivered at Ile du Port on 27th April 2021.

R. Govinden CJ

M. Burhan J

L. Pillay J