CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2023] SCCC .1.
MA 230/2022
(arising in CP 7 of 2022)

In the matter between:

THE SEYCHELLES HUMAN RIGHTS COMMISSION	**1st Petitioner**
THE OMBUDSMAN	**2nd Petitioner**
THE BAR ASSOCIATION OF SEYCHELLES (*rep by Lablache, Sabino, Robert*)	**3rd Petitioner**

and

THE SPEAKER OF THE NATIONAL ASSEMBLY OF SEYCHELLES	**1st Respondent**
THE PRESIDENT OF THE REPUBLIC OF SEYCHELLES	**2nd Respondent**
THE ATTORNEY GENERAL REPRESENTING THE GOVERNMENT OF SEYCHELLES	**3rd Respondent**
THE ATTORNEY GENERAL (*rep by Mohammed Saleh*)	**4th Respondent**

Neutral Citation:	*Seychelles Human Rights Commission & Ors v Speaker of the National Assembly of Seychelles & Ors* (MA 230/2022 (arising in CP 7 of 2022)) [2023] SCSC 1 (24 January 2023)
Before:	Govinden CJ, Burhan J, Adeline J
Summary:	Application for recusal
Heard:	8th November 2022, 6th December 2022
Delivered:	24th January 2023

RULING

PGOVINDEN CJ (BURHAN J & ADELINE J concurring)

Introduction & Background

[1] The Petitioners, Applicants in the present Motion, have filed the Constitutional Petition seeking a review of the constitutionality of the Constitution of the Republic of Seychelles (Tenth Amendment) Act 2022 (the "Tenth Amendment"). The Tenth Amendment[1] introduced new powers to the members of the Seychelles Defence Forces, namely: *"(c) to enforce any written law in relation to public security, environmental protection, maritime security or maritime zones, and any other matters as may be specified in an Act"*.

[2] The Petitioners further filed a Notice of Motion for (i) recusal of the Honourable Judges, pursuant to Rule 10 of the Guidelines of the Court of Appeal in *Government of Seychelles & Anor v Seychelles National Party & Ors,* SCA 4 of 2014 and (ii) such further or other order as may be just and necessary in the circumstances.

[3] As stated by the Petitioners, the Motion was filed consequent to the decisions of the Honourable Judges of the Constitutional Court and the Chief Justice refusing the request made by the Petitioners' Counsel in chambers for the Judges to consider recusing themselves from the hearing of the Petition.

[4] The Attorney General has raised a procedural issue, which during the proceedings of 8th November 2022 the Court stated that this should be decided first. The main issue being, who should hear the application for recusal considering that the Notice of Motion avers that the entire Judiciary was involved in the Tenth Amendment. The Court stated that prior to coming to the decision on the substantive matters raised in the Notice of Motion, the procedural point specifically addressed by the Attorney General in paragraphs 15-18 of the Affidavit in Support should be determined.

[1] https://www.gazette.sc/sites/default/files/2022-06/Act%2013%20-%202022%20-%20Constitution%20of%20the%20Republic%20of%20Seychelles%20%28Tenth%20Amendment%29%20Act%202022_0.pdf

Submissions of the Parties

Petitioners' Joint Affidavit in Support of the Motion

[5] The Petitioners state in their Joint Affidavit dated 10th October 2022 that the Tenth Amendment empowers members of the Defence Forces to carry out domestic law enforcement outside the context of a public emergency. It is further stated that the involvement of the military in law enforcement in Seychelles has been notoriously controversial since 1977 (reference made to Truth, Reconciliation and National Unity Commission investigation of human rights violations relating to the *coup d'etat* of 1977; copy of Judgments delivered in Supreme Court proceedings enclosed with the Petition as Exhibit P1-G). The Petitioners state that naturally the proposal for Tenth Amendment publicized in March 2022 was controversial and contentious attracting adverse comments in the press and social media including concerns as to the constitutionality of the proposed amendment. The 1st and 2nd Petitioners published their adverse views, which were also submitted to the Attorney General (Exhibits P1-K, P1-M, and P2-D).

[6] The Petitioners state that the State House website published the following news report on 15 June 2022 in relation to the Tenth Amendment Bill by the President:

> *"During his statement before assenting to the Constitution of the Republic of Seychelles (Tenth Amendment) Bill, 2022, the President thanked everyone who has been involved in the amendments of this new Bill. Namely, the Seychelles Defence Forces, the Police Force of Seychelles, the Judiciary (both the Supreme Court and the Court of Appeal), the Honourable Leader of the Opposition, the Human Rights Commission, the Ombudsman, the media, the Defence and Security Committee of the National Assembly, the Bar Association of Seychelles and other persons and organizations."*

[7] The Petitioners state that any involvement of the Judiciary in preparation of the Tenth Amendment was acknowledge by the said statement and that such involvement is not constitutionally permitted, warranted or desirable given the controversial and contentious nature of the proposed amendment.

[8] The Petitioners state the said averred involvement of the Judiciary in the preparation of the Tenth Amendment has compromised the ability of the Judges and Justices to impartially adjudicate the constitutionality of the Tenth Amendment and that the Petitioners are deeply

apprehensive that the Honorable Judges of the Constitutional Court will not bring an impartial mind to bear on the adjudication of the Petition.

[9] It is further averred that the publications in the national media relating to sale of further plot of State land for lesser consideration than valued to the Chief Justice is in breach of the Government's policy was described by the minister responsible for lands as an act of "compassion" towards the Chief Justice on SBC Television and the National Assembly; and that such transaction may be perceived as favourism or an undue advantage in the mind of a reasonable fair-minded and informed person. Therefore, it is averred that it compromises the ability of the Honourable Chief Justice to impartially adjudicate disputes involving the interests of the Government.

[10] It is further averred that the involvement of the Judiciary in the Tenth Amendment and the action of the Government as set out in the Affidavit are contrary to and/or undermine the Seychelles Code of Judicial Conduct.

[11] The Petitioners state that they are guided by Rule 10 of Guidelines set out by the Court of Appeal in *Government of Seychelles & Anor v Seychelles National Party & Ors,* SCA 4 of 2014 and move that this Motion for recusal be referred to a judge unconnected with this matter for a determination.

Second Affidavit of the 3rd Petitioner (the Bar Association of Seychelles)

[12] Mr Jean-Marc Lablanche, incumbent Treasurer of the Bar Association of Seychelles ("BAS") filed the Second Affidavit on behalf of BAS, the 3rd Petitioner. It is averred that on 11th October 2022, the Constitutional Court proprio motu ordered BAS to produce a resolution of its mandate to file this petition in court and a certificate of compliance. The Petitioner enclosed copy of the Amended and Restated Constitution of BAS as Exhibit P3-1. It is averred that the Management Committee is the executive organ of BAS and under paragraph 6 (a) (ii) of the Constitution of BAS is empowered to represent BAS and deal with all matters except those reserved for the members at an Annual General Meeting. It is further averred that the resolutions to file proceedings for a judicial review of the 10th Amendment to the Constitution were adopted by electronic mail correspondence among Management

Committee members (summaries of which are produced as Exhibit P3-2) in accordance with paragraph 6 (f) of the Constitution of BAS.

[13] It is further averred that as advised by the Registrar General, the current law does not make provision for issuance of a Compliance Certificate for BAS; and the law which provides for issuance of a Certificate of Standing is not yet in force. Correspondence with the Registrar General is produced as Exhibit P3-3.

[14] The 3rd Petitioner avers that as advised by the Registrar General, BAS was compliant with its filing obligation under the Registration of Association Act for the year 2021 (copy of letter produced as Exhibit P3-4) and filing for 2022 will take place in due course (at the end of November or early December).

Respondents' Affidavit in Reply

[15] As noted earlier, the focus is on the procedural issue at this stage and therefore Respondents' averments in relation to procedural points only will be considered below.

[16] The Attorney General states in paragraphs 10-15 of the Affidavit that the Notice of Motion and the Affidavit are *"not the model of clarity"* in relation to understanding whose recusal the Applicants seek. The Attorney General specifies that the Notice Motion can be understood that the Applicants seek recusal of Judges that have been empanelled to hear the Petition. Paragraph 12 of the Applicants' Affidavit where reference is made to involvement of Judiciary can be understood that they expand the scope of Application to judges of the Supreme Court, the Constitutional Court and the Court of Appeal. The Attorney General further states that at paragraph 14 the Applicants have raised issues in relation to the Honourable Chief Justice's ability to hear the Petition. It is further stated that paragraph 14 appears to confine the scope of the application to the judges of the Constitutional Court given that the Applicants aver that they are "*deeply apprehensive that the Honourable Judges of the Constitutional Court will not bring an impartial mind to bear on their adjudication of the Petition*". The Attorney General further states that conclusion with the prayer asks that the motion be determined by a judge that is *"unconnected with this matter"*.

[17] At paragraph 15 of the Affidavit, the Attorney General states that the application is not particularly clear on its face as to what the Applicants are seeking and identifies their position in his understanding. The Attorney General states that as appears, firstly, the Applicants are not seeking recusal of any judges on the basis of *actual* bias. Secondly, that recusal of all the judges of the Constitutional Court (those being judges of the Supreme Court) is sought based on *apparent* bias due to the press release published by the State House on 15 June 2022. Thirdly, recusal of Chief Justice is also sought, in the alternative as seems, due to his recent purchase of land, which gives rise to a risk of apparent bias. Finally, the Applicants ask for recusal motion to be heard by a judge *unconnected* with this matter, albeit the Applicants do not indicate whether the motion could be heard by another judge of the Constitutional Court or a Justice of Appeal, or whether that would, in their view, give rise to similar issues of alleged bias. The Attorney General states that with regards to the fourth point, the Applicants should be required to clarify their application so as to allow the Court to be able to properly determine the application before it.

[18] At paragraph 18 the Attorney General avers that as he understands from the Counsel with conduct of this matter that, if the position is that neither the Constitutional Court judges nor any of the Justices of Appeal can hear the recusal motion, *"this would lead to an impasse in the Judiciary, which could only then be remedied by the empanelling of an ad hoc panel of either (i) retired (or non-sitting) judges of either the Supreme Court or Court of Appeal, or (ii) foreign judges (as was the case in the recent Court of Appeal matter of Vijay Construction (Pty) Ltd v Easterm European Engineeing Limited), to hear the recusal application."*

Petitioners' Submissions on points of procedure

[19] As stated in the Submissions, Petitioners filed submissions pursuant to Directions of the Court made on 8th November 2022. Submissions address points of procedure raised in the paragraphs 15 to 17 of the affidavit made by the Attorney General.

[20] It is submitted that the evidence adduced by the Petitioners are not "mere assertions" as argued by the Respondents and that the existence of the news report citing the President acknowledging the involvement of the Judiciary in the preparation of the 10th Amendment

was acknowledged in the Attorney General's Affidavit. It is further submitted that, *"In any event, the Petitioners cannot reasonably be expected to investigate the impugned correspondence or transaction between Government and the members of Judiciary beyond what is in the public domain"*.

[21] It is submitted by the Petitioners that involvement of the judges in preparation of legislation is outside of the scope of their constitutional function and is sufficient to cast doubt on judges' impartiality or independence if they were to adjudicate the constitutionality of those laws. Therefore, the Petitioners submit that recusal motion cannot be heard by the learned Chief Justice or any other judges in office at the time of the preparation of the 10th Amendment.

[22] The Petitioners thereafter refers to the "Recusal Rules" from decision in *Government of Seychelles & Anor v Seychelles National Party & Ors*, SCA 4 of 2014 and cites Rules 8-11, which will be reproduced below. It is further submitted that the Recusal Rules are prefaced with the comment: *"[The rules] have to be used with imagination rather than dogmatically"*. It is submitted that this preface acknowledges that the Recusal Rules need to be applied with flexibility as they might not foresee every possible fact situation.

[23] It is submitted that the recusal proceedings are presently at the stage of Rule 10. The Petitioners argue that the recusal motion must be referred to a temporary or *ad hoc* judge of the Supreme Court, whose appointment is to be made in accordance with and subject to the Constitution.

[24] The Petitioners submit that, *"there is ample precedent for the appointment of temporary and ad hoc judges to the Seychelles Judiciary"*. They rely on decisions in *Bar Association of Seychelles and Anor v President of the Republic of Seychelles and Ors* SCA 7 of 2004 and *Vijay Construction v Eastern European Engineering* SCA 28 of 2022 [SCCA 58 of 21 October 2022]. It is submitted that in both cases an *ad hoc* panel of three justices was appointed to hear an appeal. It is also further submitted by the Petitioners that there was no contention of bias regarding the justices in these two cases and that there was an adequate number of substantive justices to constitute an appeal's panel, however, the Judiciary decided that it would be undesirable to do so and recommended the appointment of three

ad hoc justices to hear the appeal. The Petitioners submit that the instant case is distinctively more compelling for an *ad hoc* or temporary judicial appointment.

[25] It is further submitted that the principle issue in dispute in the Petition is not any legal question, but the constitutionality of an amendment to the Constitution that has attracted significant public interest and interest of institutions of State (all parties to the Petition other than 3rd Petitioner being institutions of State).

[26] The Petitioners submit that the factual basis for the recusal motion has not been traversed or otherwise controverted by the evidence from the Respondents. It is further submitted that the Respondents' affidavit sets out extended argumentation, which could only be properly made by way of submissions before a recusal judge that is unconnected with this matter. The Petitioners conclude that it is imperative and in the public interest that the recusal motion be referred to an *ad hoc* or temporary judge of the Supreme Court pursuant to Rule 10 of the Recusal Rules.

Applicable Law & Analysis

[27] This Ruling is not a Ruling on the merits of the motion for recusal, that is whether or not based on the facts presented by the Petitioners the present members of the judiciary of Seychelles must recuse themselves, but on whether procedurally the motion is sustainable given certain strong procedural difficulties that it entails. The court is conscious that in the spirit of our laws on recusal we cannot be a judge in our own cause.

[28] Recusal Rules from decision in *Government of Seychelles & Anor v Seychelles National Party & Ors,* SCA 4 of 2014 are as follows:

> *"**Rule 1***
> *Where a party to a case has reasonable grounds to believe that a particular Judge should be spared the embarrassment of sitting in his case on account of a bias, he should so inform his counsel and instruct him to consider making a recusal request to the judge in question.*
>
> ***Rule 2***
> *On receiving such instruction, counsel should satisfy himself that the facts put forward by his client are not frivolous but sufficiently cogent for the purposes of making a recusal request.*
>
> ***Rule 3***

On being so satisfied, he should approach the opposing Counsel to indicate his stand and may seek his views on the matter before taking an informed decision whether or not to proceed with a recusal request.

Rule 4
Where he has decided to proceed with a recusal request, learned Counsel should seek an appointment with the Judge in question, see him in presence of opposing counsel and place before him the facts on which his client relies to seek a recusal.

Rule 5
On being apprised of the facts, the learned Judge should refrain from being his own judge in his case but submit them to the administrative consideration of the Chief Justice, after giving his own view on the facts and their relevance to the recusal request.

Rule 6
It will be for the Chief Justice to decide in his best judgment whether the recusal request should be granted or not. In arriving at his decision, the Chief Justice may or may not invite Counsel who are parties to the case for further information in presence of the learned Judge.

Rule 7
Irrespective of his own view on the matter, the learned Judge should abide by the decision of the Chief Justice, following which a communication should be addressed to both Counsel.

Rule 8
Where the Chief Justice maintains his decision for the same Bench to hear or continue with the matter, and learned counsel is not satisfied with the outcome for any good reason, he should make a formal recusal motion in open court at the next hearing date, with notice to the other party.

Rule 9
On such a motion being made, the Bench assigned the case should not proceed to take any decision on the challenge but refer the matter to the Chief Justice.

Rule 10
On taking cognizance of the formal motion, the Chief Justice shall assign another Judge who is not concerned with the case to hear and determine the recusal motion of the Judge in question.

Rule 11
The procedure and the hearing shall be summary identical with what obtains in a civil suit based on affidavit evidence."

[29] The Affidavit of the Petitioners in support of the Application was not entirely clear on whose recusal was sought. The submissions clarified that recusal is sought against the learned Chief Justice and any other judges in office at the time of the preparation of the 10th Amendment and that the recusal motion must be referred to a temporary or *ad hoc*

judge of the Supreme Court, whose appointment is to be made in accordance with and subject to the Constitution.

[30] Such application would mean that none of the current Judges and Justices can determine neither the Petition nor the recusal motion. In *Government of Seychelles & Anor v Seychelles National Party & Ors; Michel & Ors v Dhanjee* (SCA CP 4/2014) [2014] SCCA 33 (12 December 2014) the Court of Appeal clearly explained that the Judge whose recusal is being sought cannot determine motion in relation to his own recusal, neither can the remaining Judges on the bench. However, views of the impugned Judge are sought for and a determination is made by a non-impugned Judge.

[31] It is submitted that the current motion is at the stage of Rule 10. Procedure under Rule 10 follows after the recusal request has been made to the Judge in question (Rule 4); the Judge submitted the facts in relation to the recusal for administrative consideration of the Chief Justice, after giving Judge's own views (Rule 5); and in cases where the Chief Justice maintains the decision that the same Bench should hear the matter and formal recusal motion is made (Rule 8). Thereafter, the Bench should not determine the matter but refer it to the Chief Justice (Rule 9) and the Chief Justice shall assign another Judge to hear the recusal motion under Rule 10.

[32] Under the Rules therefore, prior to the formal motion, the judges whose recusal is being sought need to have an opportunity to give their own view on the facts and their relevance to the recusal request for the administrative consideration of the Chief Justice. We reiterate Rule 5:

> ***Rule 5***
> *On being apprised of the facts, the learned Judge should refrain from being his own judge in his case but submit them to the administrative consideration of the Chief Justice, after giving his own view on the facts and their relevance to the recusal request.*

[33] This means that in the present case all the Judges and the Justices of the Judiciary need to be given such opportunity and their views on the facts and their relevance to the recusal request need to be heard. This has not yet occurred and cannot occur given the content of the Petition and Application which has impugned all current judges of the Judiciary. Seemingly, any of the judges of the Supreme Court including the members of this panel of

the Constitutional Court could have effectively been able to refute any of these strong allegations that go to the heart of their oaths of office and their integrity as Judges at the stage of Rule 5. The right to be heard is an essential aspect of our democracy and the Recusal Rules. This blatant denial clearly amounts to an abuse of the process of this court as set out under the Recusal Rules. Moreover, it also entails a denial of the basic right to a fair hearing as set out under Article 19 (7) of the Constitution. The new *ad hoc* judge that the Petitioners are proposing to be appointed to hear the recusal motion only comes at the stage of Rule 10, long after the respondent judges should have been heard. To emphasise even more, with no response from the respondent judges on record under Rule 5, it is clear that the newly appointed *ad hoc* judge would have only one part of the story, that is that of the Petitioners, as the impugned judges' views would not have been heard.

[34] It is good sense to note that judges too, as individual persons, enjoy all the Rights in the Bill of Rights. They too enjoy the protection provided by Article 19 of the Constitution to be heard especially when attacks are made on them that goes against their oaths of office. Denying them that right to be heard before a full inter-partes forum is a violation of right Court. A person does not waive the protection of Article 19(7) when he/she becomes a Judge.

[35] At any rate, it is clear that the existing rules for recusal of judges is limited to the recusal of the presiding judge or the bench hearing the case. Reading the case of *Government of Seychelles & Anor v Seychelles National Party & Ors*, SCA 4 of 2014 as a whole, it limits the application of the rules to this particular process. It can only work fairly if it is so limited. The Seychelles Court of Appeal did not intend to create the procedural framework for the recusal of an entire court in the ratio decidendi of this case. That is why it is unworkable in the context of the Petitioners' Application.

[36] It is clear, reading the Petition as a whole, that the cause of action is that the Judiciary as a whole is alleged to have breached Article 119 (2) by not being independent and being subject only to the Constitution and the laws of Seychelles by allegedly assisting the executive to draft a Constitutional amendment, when the court itself sits as the Constitutional Court. This cause of action might have been a better avenue for the

Petitioners. However, instead, the Petitioners chose to recuse all the judges including non-sitting judges and in so doing brought about all these fundamental Constitutional issues into being.

[37] The procedural problem caused by the recusal of the Chief Justice being sought is not as challenging as the seeking of the recusal of the entire court. The rules has to be used with "some imagination" as the Court of Appeal has stated. In the event that the Chief Justice is asked to recuse himself, it is clear that good imagination means that the administrative direction that is sought for under Rule 5 can be sought by the impugned Chief Justice from the next most Senior Judge of the Supreme Court. This would be in line with the spirit of the Rules. However, in this case this feasible solution is unworkable given that the Chief Justice himself have been asked to recuse together with all the current Judges and Justices of the Judiciary.

[38] The decisions cited by the Petitioners in their submissions are helpful to illustrate that *ad hoc* panel was indeed appointed in other cases, however, decisions do not give insight for the reasons of appointment of *ad hoc* panel and both decisions were at the stage of the appeal. At any rate, it appears that in those cases the merits of the case called for the appointment of an *ad hoc* panel as most judges had interacted with the facts of the case that finally ended up on appeal. In this case, on the other hand, no single judge has had any interaction with the facts of the case yet. The only allegation lies in an assertion of the Petitioners that could be factually refuted if the opportunity is given.

[39] Further procedural difficulty caused by this Application for recusal of every current Judge and Justice lies in the way of how Judges and Justices are appointed under Articles 123 and 127 of the Constitution. The President of the Republic, who is also the Respondent in the Petition, appoints Judges, Masters and Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.[2] Therefore, an *ad hoc* judge or panel of judges

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[2] *"123. Appointment of Justices of Appeal*
The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.
127. Appointment of Judges and Masters
The President shall, by instrument under the Public Seal, appoint the Judges and Masters of the Supreme Court from candidates proposed by the Constitutional Appointments Authority."

will still need to be appointed by the President, whether an *ad hoc* judge to hear the recusal motion, an *ad hoc* panel of the Constitutional Court or an *ad hoc* panel of the Seychelles Court of Appeal. There is no other way around this. Hence the very President that the Petitioners are saying has interfered with the Judiciary and breached their independence would be the very same President that would be appointing new Judges and Justices to decide as to whether there were any interferences by him in the first place. This will lead to an impasse. Moreover, this Court is concerned that granting a motion where the Petitioners effectively impugn all the judges and justices being part of the Judiciary and the President of the Republic will give the Petitioners a potential opportunity to apply for further recusal of any other Judge appointed by the President. This will allow the possibility of forum shopping. Further, it will give a potential opportunity to appeal the decision, if dissatisfied, purely on the basis that a judge was appointed by the President, a Respondent in the same matter, which may give rise to an abuse of judicial process.

[40] We wish to reiterate that there is only one Judiciary of Seychelles as set up under article 119 (1) of the Constitution. Which is presently consisted of Justices of the Court of Appeal and Judges of the Supreme Court, and we as Judges of the Supreme Court sitting as the Constitutional Court, pursuant to article 129(2) of the Constitution in this case and members of subordinate Court and Tribunals. All Justices and Judges have taken their oaths of office is accordance with the Constitution. We do not take our oaths lightly. This application is practically asking for the suppression of the upper judiciary of Seychelles in favour of another one to be appointed at the behest of the Petitioners. Together with the judge who would hear the recusal application three new judges of the Supreme Court and if there is an appeal, three Justices of Appeal. Hence seven new judges would have to be recruited and appointed to hear this case only, with all the challenges that this would entail. Hence we are of the view that this is a case in which the doctrine of necessity and the judges' duty to sit and hear the case would apply.

[41] The doctrines were considered in *Michel & Ors v Dhanjee & Ors [Recusal]* (SCA 5 and 6 of 2012) [2012] SCCA 23 (31 August 2012), where the Court of Appeal stated that, *"A judge is not obliged to recuse himself or herself simply because he or she is asked to. Judges are appointed to hear and decide cases; indeed they have a duty to do so."* Reference was

made to decision in *Charles v Charles (unreported)* SCA 1/2003 in relation to challenge of independence of the judiciary:

> *"In the case of Charles v Charles (unreported) SCA 1/2003, where the independence of the judiciary was challenged, Ramodibedi J felt it necessary "to rule on the point once and for all" and reminded counsel of constitutional provisions that ensure the impartiality and independence of judges. We join ourselves in this reminder to counsel. Judges do not take their constitutional oaths lightly; their tenure and salary are guaranteed despite their decisions. Any misbehaviour on their part is sanctioned by article 134 of the Constitution. An application for recusal based on bias against a litigant before them cannot be made lightly."*

[42] The Court of Appeal further referred to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999):

> *"A landmark case on recusal is President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999). In that case the judges of the Constitutional Court of South Africa were asked to recuse themselves from the hearing of a case instituted against Nelson Mandela, the then President of South Africa on the grounds that there was a reasonable apprehension that every member of the court would be biased against the applicant since they had been appointed by him to be judges and that they had political and personal links with him. Even in that case, the application for recusal was refused."*

[43] The Court of Appeal concluded by making reference to 'exception of necessity' or 'rule of necessity', especially in the context of Seychelles being a small jurisdiction:

> *In any case, Seychelles is a small jurisdiction. The exception of necessity in judicial disqualification cases is even more meaningful in these circumstances. In such a small community as ours, judges invariably are related to parties, friendly with one or both parties, know the parties or are perceived to have certain political and other affiliations whether these perceptions are accurate or not. The rule of necessity was recognized as early as the 15th century in English common law and has been followed in all common law countries. It is expressed as the rule "that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case" (Atkins v United States 214 Ct Cl 186 (1977), and reaffirmed in Ignacio v Judges of US Court of appeals for Ninth circuit 453F.3d 1160 (9thcir. 2006)). The rule of necessity is crucial for the administration of justice, especially in a country like Seychelles with a small bench and a small population. As expressed by Trott J in Pilla v American Bar Association 542F.2d 56, 59 (8th Cir 1976) "the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified".*

[44] The 'exception of necessity' was heavily criticized in Ruling of Karunakaran, J and Renaud, J in *Dhanjee vs Mr. James Alix Michel & Ors* (CP 03.2014) [2014] SCCC 6 (15 July 2014) concerning recusal of Burhan J. It was emphasised that the Constitution provides solution for appointing Acting Judges under Article 128 in cases of alleged bias and that Seychelles being a small jurisdiction might not be the best reason to apply the narrow concept of the 'exception of necessity'.

[45] The Ruling was later set aside by the Court of Appeal in *Government of Seychelles & Anor v Seychelles National Party & Ors; Michel & Ors v Dhanjee* (SCA CP 4/2014) [2014] SCCA 33 (12 December 2014). The Court of Appeal did not precisely set it aside because incorrect law was applied, but instead held that the two Judges should not have determined recusal motion of their fellow Judge on the Bench:

> *[6] . . . At the end of the hearing, the two judges produced a majority Ruling deciding that Burhan J. should recuse himself. They made an order that he should not sit. And they directed him not to. In so doing, the Court afforded the parties the right law but throwing overboard all the fundamentals on which the court system rests. We shall state why.*
>
> *[33] With regard to the Ag Chief Justice and Renaud J., they went astray where they put to trial a member of their own Bench. Each member of a Bench is an independent judge. Two components make a Judge a Judge: impartiality and independence. They looked at the impartiality component and not at the independence component of the judicial function."*

[46] As it was not determined that Judges erred in law, the observations regarding the "exception of necessity" may still be useful:

> *"Exception of Necessity v. Constitutional Provisions*
>
> *Submit that the James Alix Michel case above, cited with approval the 15th century common laws rule "that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." . . .*
>
> *Submit that it is precisely because Seychelles is a small jurisdiction with a small judiciary, that when a situation arises which would "show that the judge is biased" rather than invoke the rule of necessity" which would "dictate" that the case is heard by a biased judge the constitution provides for the President to appoint a person(s) from candidates proposed by the Constitutional Authority to act as a judge, Article 128 (2) (a) (b) or (c) and if that Article was invoked there would be an unlimited number of potential candidates amongst the local Bar from which the CAA could choose, to sit as "ad hoc" judges. And under Article 128 (3) "An appointment under clause 2 (c) may be made without reference to any numerical limit imposed under article 125 (6).*

Since Seychelles is a small jurisdiction would the "exception of necessity" permit a doctor to perform surgery on a close family member despite the presence of a pool of readily available and equally qualified doctors?

I also submit that the "defence" of necessity or "exception of necessity" can be used for a multiplicity, of situations, it has even used as justification for cannibalism! The decision in James Alix Michel v. Viral Dhanjee sounds like a death knell to challenges for recusal because "in any case even if we had been shown to be biased, which is not the case, the rule of necessity would dictate that we hear the appeals." One therefore has to look no further than the Constitution, if hope is to be restored, beyond the narrow "exception of necessity" concept.

. . . because Seychelles is a small jurisdiction and the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified?"

[47] Article 128, Acting appointment of Judges, however, does not provide solution to the current problem as the Acting Judge is still appointed by the President.

[48] Kenyan case *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR also considered the doctrine of necessity, judges' duty to sit and that while it is not without criticism, at the same time, it also protects the independence of judiciary from attempts by the parties to abuse the process by alleging bias. In that case recusal of most of the judges on the panel was sought as some of the judges were members of the Judicial Service Commission ("JSC") and the JSC was a party in the case. Other judges had pending litigation against JSC and pending disciplinary proceedings with JSC. The Court held that it *"had a special constitutional mandate which could not be delegated to any other forum in the entire governance set-up"*. The Court did not agree that the recusal of any judge was necessary, stating that, *"Committed to the judges' oaths of office, the Court would pronounce itself unbiased and ready and willing to own up to Kenya's constitutional mandate of dispensing justice in matters falling within its jurisdiction"*. The Court stated the following:

"[16] We have considered the above rival submissions. The Supreme Court has a special constitutional mandate which cannot be delegated to any other forum in the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment:

> *"[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson,* ***Laughing at the Gods: Great Judges and How they made the Common Law*** *(Cambridge: University Press, 2012), p.156.*
>
> *[17] Benefiting from such profound observations, we conscientiously take the stand that the instant matter is not one calling for the recusal of any Judge of the Supreme Court but the disqualification of our current judiciary. Committed to our oaths of office, we would pronounce ourselves unbiased, and ready and willing to own up to our constitutional mandate of dispensing justice in matters falling within our jurisdiction.*
>
> *[18] It is our conviction that the concept of fundamental rights, is a subject of constitutional safeguard, and a core pillar upon which the Supreme Court's mandate is founded. The rights in question are inherently and expressly attributed to citizens, as the legatees of good governance and democratic process. On this account, all rational and tenable perception of the question of access to the judicial dispute-resolution process, must be placed on balancing scale ensuring the entitlement of* ***the citizen*** *to justice, fair trial, and constitutional safeguard.*
>
> *[19] In the circumstances, we decline the applicant's call, and declare the undoubted principle that, in all cases of this nature, the cause of the individual who comes knocking on the doors of the Judiciary, is the very first consideration in determining whether or not a hearing falls due."*

[49] Justice M. K. Ibrahim in the Concurring Ruling also addressed judges' duty to sit to hear the matter, which is *"buttressed by the fact that every judge takes an oath of office"* and *"is capable of rising above any prejudices, save for those rare cases when he has to recuse himself*". Justice Ibrahim further stated that recusal should not be used to cripple a judge from exercising a duty to sit. It was acknowledged that the doctrine is not without the criticism, however, the doctrine also protects judicial independence against *"manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge" or "strategic advantages through delay or interruption to the proceedings"*. Justice M. K. Ibrahim stated:

> *"[25] Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.*

[26] In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

> *"**A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason**" (emphasis mine)*

[27] In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

> *"Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."*

[28] It is useful to refer to the case from the New Zealand Court of Appeal Muir -v- Commissioner of Inland Revenue [2007] 3 NZLR 495 in which the Court stated as follows:-

> *"the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 "it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion of appearance of bias encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

[29] From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. [. . .]"

[50] Justice Njoki Ndungu in the Concurring Judgment further stated that there is a presumption of impartiality of a judge by virtue of their training:

> *"[52]* [...] *In my view, it is undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted,* ***if there is no other Court to which he or she can go. The doctrine of necessity and the duty to sit would have to apply.***

> *[53] **It must always be remembered that there is a presumption of impartiality of a Judge.** In The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999] the South African Constitutional Court held that **there was a presumption of impartiality of judges by virtue of their training**. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters."*

[51] We take a similar view expressed by the Justices in *Gladys Boss Shollei v Judicial Service Commission & another* that in the present matter the Motion is effectively calling for disqualification of current Judiciary. Such disqualification is sought without any regard to the judges' oaths of office and as already stated without giving any opportunity to the judges and justices to provide their views regarding recusal sought. Furthermore, our concern regarding opportunity of forum shopping expressed earlier echoes in the findings of Justice M. K. Ibrahim and we consider that in the present matter it is appropriate to invoke a duty to sit.

[52] Therefore, this Court is of the view that the Recusal Rules were made for situations where recusal of a presiding Judge or a bench is sought not where the recusal of all current judges and justices in the Supreme Court and the Court of Appeal is sought. Otherwise, the issue of fair hearing arises as it is not possible to give the opportunity to all the judges and justices to give their views under Rule 5 prior to the recusal motion given that the Petition and Application has impugned all current judges of the Judiciary. Further, the appointment of an *ad hoc* or temporary judge will ultimately have to be made by the President, one of the Respondents, which will lead to procedural irregularity. Finally, we consider that this is an appropriate case to invoke doctrine of necessity and duty to sit for the aforementioned reasons.

[53] On this basis, the Motion appears to be frivolous and vexatious and an abuse of the process of this Court and it is dismissed on this basis.

Signed, dated and delivered at Ile du Port on 24th day of January 2023

Govinden CJ | Burhan J | Adeline J