

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
CP10/2022

In the matter between:

UNITED SEYCHELLES
(*rep. by France Bonte*)

Petitioner

and

THE REPUBLIC OF SEYCHELLES

1st Respondent

THE ATTORNEY GENERAL
(*rep. by Ms Corrine Rose*)

2nd Respondent

SEYCHELLES BROADCASTING CORPORATION
(*rep. by Mr Kieran Shah*)

3rd Respondent

Neutral Citation: *US v Republic & Ors* (CP10/2022) (05 December 2023).

Before: Burhan J (Presiding), Carolus and Esparon JJ

Summary: Preliminary objection that Petition is time-barred

Heard: (written submissions)

Delivered: 05 December 2023

ORDER

The preliminary objection that the Petition is out of time is sustained. The Petition stands dismissed. The parties are to bear their own costs.

JUDGMENT OF THE COURT

BURHAN J (Presiding), CAROLUS, ESPARON JJ

[1] The Petitioner, United Seychelles (US), represented by Patrick Herminie, filed a Constitutional Petition dated 29th November 2022 against the 1st Respondent, the Republic of Seychelles, the 2nd Respondent, the Attorney General, and the 3rd Respondent the Seychelles Broadcasting Corporation (SBC).

[2] The Petitioner alleges that the 1st Respondent violated Article 22 of the Constitution of Seychelles (the Constitution) by not providing the necessary legal requirements to protect the right to freedom of opinion and the rights to freedom of expression of the Petitioner under the Seychelles Broadcasting Corporation Act (SBC Act). Further, the Petitioner alleges that the 3rd Respondent violated the right to freedom of expression and the right to freedom of opinion by the removal of the recording of the press conference from their digital platforms and blurring of the banner entitled ‘Tir li 2025.’

[3] The Petitioner seeks the following reliefs:

- a) *A declaration that the policy and editorial guidelines issued by the 3rd Respondent contravenes Article 22 of the Constitution.*
- b) *A declaration that the Petitioner’s rights above mentioned has been contravened.*
- c) *A declaration that the acts and omissions of Respondents above-mentioned contravened the Petitioner’s rights.*
- d) *Make such declaration, issue such writs and give such directions as the court may consider appropriate for the purpose of enforcing or securing the enforcement of the Constitution and disposing of all the issues relating to the application.*
- e) *Make such additional order under this Constitution or as may be prescribed by law to give effect and to enforce the Petitioner’s fundamental rights.*
- f) *To order cost of this application.*

[4] The 1st Respondents filed preliminary objections, dated 07th March 2023; and the 3rd Respondent filed a response to the Application, dated 03rd March 2023.

[5] The 1st Respondents’ principal objection is that Petition is time-barred under the Constitutional Court (Application, Contravention, Enforcement, or Interpretation of the Constitution) Rules (the Rules) and as the Petitioner has failed to seek leave to proceed out of time prior to filing the Petition, the Petition should be dismissed. The 1st Respondents further contend in their preliminary objections that the Petition should be dismissed on the basis that the Petition is misconceived and unarguable against the 1st Respondent. The 1st Respondent avers that the Petitioner failed to demonstrate how the 1st

Respondent failed to safeguard the rights of the Petitioner under Article 22 of the Constitution.

[6] The 3rd Respondent adopts the submission filed on behalf of the 1st and 2nd Respondents.

[7] This Court will first proceed to determine whether the Petition is time-barred.

Objections/Submissions of the 1st Respondents

[8] The 1st Respondent submits that under Rule 4 (1) of the Rules a petition must be brought within three months of the date of the alleged contravention and further the Petition is misconceived and unarguable against the 1st Respondent and the Petitioner has failed to demonstrate how the 1st Respondent has failed to safeguard the rights of the Petitioner under Article 22 of the Constitution.

[9] The 1st Respondent submits that the Petitioner did not obtain leave of the Court to file a fresh petition out of time. The Petition was filed more than three months after the decision by the 3rd Respondent dated the 28th March 2022 and as there is no ongoing contravention as alleged by the Petitioner by the 1st Respondent, and as a result, the permission of court was required to proceed.

[10] The 1st Respondent states that the decision that is under challenge in this petition is the censure of the Petitioner's live broadcast as communicated to them by the 3rd Respondent in the letter dated 28th March 2022. The attempt by the Petitioner to make this petition an ongoing contravention by the 1st Respondent is inherently weak on the merits.

[11] The 1st Respondent further avers that the Petitioner first filed a defective petition without an affidavit in support on the 25th July 2022 and the Court suggested that the Petitioner withdraw the application and file a fresh application with an affidavit in support, to adhere with the Rules of the Court.

[12] It is further averred that the Petitioner 'sat on its rights' when it failed to file a fresh petition immediately, nor did they seek the permission of this Court to file the revised petition out of time, as required under the rules of the court. The Petitioner also did not file a notice of motion with the petition to seek the permission of the Court to file the

petition out of time and therefore the Court cannot grant the permission to file out of time to the Petitioner on its own accord.

- [13] The Respondent cited the case of *Darrel Green vs The Government of Seychelles & Ors Civil Appeal 43 of 1997*, the Court stated 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.”

Objections/Submissions of the 3rd Respondent

- [14] The 3rd Respondent adopts the submission filed on behalf of the 1st and 2nd Respondents. The 3rd Respondent had issued a Policy and Procedure for Press Conferences covering *inter alia*, live Political Press Conferences, whereby the Political Party and their nominated speakers have the *“legal and moral responsibility to speak the truth, to avoid hate speech, not to incite hatred and discord, and not to cause undue offence or harm to others.”*
- [15] In terms of the abovementioned Policy, where a Political Party breaches the editorial and ethical principles, the 3rd Respondent would not approve further live broadcasts but would permit delayed broadcasts with offending materials removed.
- [16] The 3rd Respondent avers that when the country enters the official political campaign period, the Policy for political campaigns will become applicable and followed. Until then, all political parties must adhere to the present policy.
- [17] The 3rd Respondent avers that it was correct in the decision it made against the Petitioner, and it did not violate any Constitutional principle or law. The 3rd Respondent prays that the Constitutional Court dismiss the Petition with costs.

Petitioner’s submissions on the Preliminary Objections

- [18] The Petitioner claims that they obtained the leave of the court to file an amended Petition to comply with the Rules, as per the direction of the court. The Petitioner further claims that the Petition is not time-barred as the breaches are continuous. There have been no

laws enacted dealing with the right to freedom of expression for broadcasting and television.

[19] The Petitioner stated that the policy of the 3rd Respondent, which is not law and is still in place and the 3rd Respondent does not allow the Petitioner to hold a live press conference based on the same policy.

[20] The Petitioner avers that the 1st and 3rd Respondents have engaged themselves in a series of unlawful actions which are connected and continue to violate the right to freedom of expression and the right to freedom of opinion of the Petitioner.

[21] It is further submitted, that an application to file out of time as per Rule 4 (1)(a) of the Rules does not apply to the Petition as there is a continuing violation against the Petitioner.

[22] The Petitioner cited the case of *Assemblies of God and Elke Talma v Michel & ors CC 2 of 2010* that held as follows:

“for a long as it inhibits that person from the enjoyment to his right, that contravention is continuing”

[23] The Petitioner avers that the 1st Respondent's preliminary objections seeking an order for dismissal of the Petition even before it is heard on merits are what the Court of Appeal held in *Chow v Gappy & Ors (3 of 2007) [2007] SCCC 1 (2 April 2007)* as the “*tail wagging the dog*”. The Petitioner avers that the 1st Respondent is not taking into account that the Petitioner is seeking a remedy for the alleged contraventions of the Petitioner's Constitutional rights and the Petitioner has a right to be heard.

[24] Based on the abovementioned, the Petitioner avers that the preliminary objections are frivolous and vexatious and are aiming to deprive the Petitioner of its rights under Article 46 (1) of the Constitution.

[25] The Petitioner prays for the dismissal of the preliminary objections raised by the 1st Respondent and for the court to proceed to hear the petition on its merits.

Analysis – Whether Petition is out of Time

[26] It is pertinent at this stage to refer to the relevant Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (the Rules) relied upon by the parties:

“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 3 months of the contravention;

(b) in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;

(c) in a case where the likely contravention arises in consequence of any law, within 3 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 sub rules (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.

6. (1) *Where a petition which has been presented fails to comply to with the Rules, the Registrar of the Supreme Court shall submit the petition for an order of the Constitutional Court.*

(2) *The Constitutional Court shall hear the petitioner before making an order under sub rule (1).*

...

9. *The respondent may before filing a defence to the petition raise any preliminary objection to the petition and the Constitutional Court shall hear the parties before making an order on the objection.”*

[27] From the timeline of the alleged contravention and Petitioner’s own submissions, it is clear to this Court that the Petition was not filed within the prescribed three months period from the alleged contravention. The decision being challenged is that of the 3rd Respondent when the letter that was sent on the 28th March 2022, imposed a censure on the Petitioner. Any challenge to this decision should have been brought on or before the 28th June 2022. The current petition was brought before the court on the 29th November 2022.

[28] The argument by the Petitioner that it had obtained leave from the court is incorrect. The Petitioner withdrew the previous application due to failing to attach an affidavit to the notice of motion. The Court indicated that the Petitioner should refile the application and attach the required affidavit to the notice of motion. The current application is the subsequent application that was previously withdrawn for want of an affidavit. This by no means is synonymous with an application for leave of the Court to file the Petition out of time.

[29] A clear distinction must be made concerning a policy and a law regarding the rule that governs the current petition before the court. The Petitioner is alleging that the Policy and editorial guidelines of the 2nd Respondent violated their rights under Article 22 of the Constitution. It is important to note that a policy and/or guideline is considered a ‘soft

law’ and has no legal force on its own and is itself rarely the subject of litigation (unless it is ultra vires, meaning without legal foundation).

[30] In the United Kingdom case, *R (on the application of A) (Appellant) v Secretary of State for the Home Department (Respondent) [2021] UKSC 37*, the court held the following:

“Policies are different from law. They do not create legal rights as such. In the case of policies in relation to the exercise of statutory discretionary powers, it is unlawful for a public authority to fetter the discretion conferred on it by statute by applying a policy rigidly and without being willing to consider whether it should not be followed in the particular case.”

[31] Due to the above, the Petitioner can only approach the Court in respect of how the policy violated their rights and not the policy itself. The date the policy was enforced would be the date the alleged contravention had occurred and therefore the Petition is out of the 3-month time limit as provided for by Rule 4 (1)(a).

[32] With regards to the submission of a continuing violation, this Court agrees with the submissions of the Respondents that this is not a continuing violation and that the Petitioner had 3 months from receiving the letter regarding the censorship to approach the court to remedy any alleged violation.

[33] Furthermore, the present case can be distinguished from *Assemblies of God v Attorney General (CP 6 of 2019) [2020] SCCC 975 (22 December 2020)*, where a preliminary objection regarding the petition being out of time was dismissed as the Court found that violation was a continuing one. Firstly, the claim in *Assemblies of God* related to alleged infringement of right to freedom of conscience and religion, and right to property. The Court found the following in relation to the preliminary objection:

“[25] In the current matter, the last correspondence regarding the appeal was sent to the Petitioner on 25 August 2014. The Ministry of Land Use and Housing wrote to the Petitioner informing them that the appeal had been considered and forwarded to the Appeal's Advisory Committee for further processing. It is common cause that to date, the Petitioner has not received the outcome of that

appeal. The appeal process has therefore not been finalised yet, since there is no decision.

[26] Accordingly, the Petitioner was correct to rely on the reasoning in Talma. Since the decision in the appeal proceedings has not yet been given, the potential breach of their rights is still continuing. Thus, following Talma, the second objection is dismissed. The petition is not time barred.” (emphasis added)”

[34] We find that the circumstances of the present Petition are different from the circumstances of *Assemblies of God* case in that since the alleged offence was not continuous, the alleged contravention stopped being a continuing one and the Petitioner was not deprived of the right to file the Petition on time or apply for the leave of court to file it out of time.

[35] This Court refers to *Poole v The Government of Seychelles & Ors (SCA 42 of 2013) [2015] SCCA 10* which held that the time limit set out in Rule 4 is a mandatory one. The court further cites the findings in *Esparon v Electoral Commission Seychelles & Anor (MA 29/2022 (Arising in CP 3/2021)) [2022] SCCC 1* regarding lack of diligence on the part of the Petitioner. Rule 4 gives the Petitioners an opportunity to file a petition out of time subject to them adhering to procedure and providing sufficient reasons. The choice of the petitioner not to do so indicates a lack of diligence. We note that this is not the first time we observed such lack of diligence refer paragraph [28] herein.

[36] The Court does have the discretion to extend the time for filing the Petition under Rule (4) (4). However, this Court agrees with the submissions of the Respondents that such extension is not given as of course. 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.***

*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).

[37] It is the view of this Court that such sufficient reasons supported by affidavit and annexures were necessary and the leave of the Court should have been sought before filing the Petition.

[38] For the abovementioned reasons, we find that the Petition was filed out of time; leave of the Court to file out of time was not sought and no reasons for not seeking leave were provided. The Court therefore cannot exercise its discretion to extend the time for filing of the Petition under Rule 4. The preliminary objection that the Petition is out of time is sustained. The Petition stands dismissed. The parties are to bear their own costs.

Signed, dated and delivered at Ile du Port on 05 December 2023.

M Burhan J

E Carolus J

D Esparon J

