CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2023] SCCC 6
CP 08/2022

In the matter between:

BARRY LAINE — **1st Petitioner**
(self-represented)

DEROTHY LARUE — **2nd Petitioner**

AMANDA CHANG WAYE — **3rd Petitioner**

and

SUPREME COURT OF SEYCHELLES — **1st Respondent**
(Mr Saley)

COURT OF APPEAL SEYCHELLES — **2nd Respondent**
(Mr Saley)

ATTORNEY GENERAL — **3rd Respondent**
(Mr Saley)

Neutral Citation:	*Laine & Ors v Supreme Court & Ors* (CP 08/2022) [2023] SCCC 6 (19 July 2023).
Before:	Burhan J (Presiding) Dodin, Carolus JJ
Summary:	Alleged contravention of fundamental rights under the Constitution by the Supreme Court Trial Judge, the Supreme Court Chief Justice and the Court of Appeal Justices - Whether Constitutional Court can review Court of Appeal Judgments
Heard:	09 May 2023
Delivered:	19 July 2023

RULING

RULING OF THE COURT

[1] The Petitioners, Barry Laine, Derothy Melisa Laine and Amanda Chang-Waye (collectively referred to as the Petitioners) filed this Constitutional Petition alleging contravention of their fundamental rights under the Constitution by the Supreme Court Trial Judge, the Supreme Court Chief Justice at the time of the alleged contravention, by the Court of Appeal Justices in the hearing of Civil Case No.3 of 2018 Barry Laine & Ors v Lisa Bastienne & Ors and Civil Appeals SCA No. 67, 74 of 2019 Barry Laine & Ors v Lisa Bastienne & Ors (Laine & Others v Bastienne & Others (SCA 67 & 74 of 2019) [2022] SCCA 51 (Arising in CS 03/2018) (19 August 2022)).

[2] The 2nd and 3rd Petitioners filed individual Special Powers of Attorney dated 1st December 2022, giving consent for the 1st Petitioner, Mr Barry Laine, to speak on their behalf and take all steps necessary in respect of this case.

[3] The Respondent cited in the amended Petition is the Attorney General. Learned Counsel for the Attorney General filed Preliminary Objections. The Petitioners were granted time to reply. The Objections comprise of Substantive and Procedural issues. The Substantive objections raised issues in respect of "Collateral attacks on decisions of the Court of Appeal", "Any claim against the decision of the Supreme Court is time-barred and/or an abuse of process", and "Petition raises no reasonable cause of action or arguable grounds in law".

[4] Under the Procedural issues, the learned Counsel for the Respondent submits that the Petitioners have incorrectly named the Attorney General as the sole Respondent and further addresses "deficiencies in the Petition". The Petitioners in reply amended the Caption of the Petition and included the Supreme Court and Court of Appeal as the 1st and 2nd Respondents respectively. Mr. Barry Laine thereafter filed his reply to the Preliminary Objections dated 23 January 2023 and both parties tendered Written Submissions in respect of same. The reply of the Petitioners is

also contained in Volume 4 page 137. On the 09 May 2023 both parties made their oral submissions.

[5] It appears that after the hearing of Submissions by both parties learned Counsel for the Respondents took objection to the filing of further Written Submissions by the Petitioners. Mr. Laine countered that this was in reply to the speaking note submitted by learned Counsel for the Respondents. Only matters in the speaking note relevant to the oral submissions of learned Counsel for the Respondent will be taken note of by the Court, the same applies to the further Written Submissions filed by the Petitioners.

Collateral attacks on decisions of the Court of Appeal

[6] Under the "Collateral attacks on decisions of the Court of Appeal" heading the learned Counsel for the Respondents submits that its primary position is that the Petition should be dismissed in its entirety as it essentially challenges the Court of Appeal's judgment dated 19th August 2022. The Respondents rely on *Simeon v R* CR App 22/2022 where the Court of Appeal held that the Constitutional Court should not entertain challenges to the Court of Appeal decisions. Respondenst further rely on the recent decision of the Court of Appeal in *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited)* (MA 35 of 2022) [2022] SCCA 56 (21 October 2022) *(EEEL)* where the Court of Appeal clearly stated that it has repeatedly held that the litigant cannot seek to set aside the Court of Appeal's decision in the Constitutional Court. Reference was made to decisions in *Simeon v R* Cr App 26/2002, *D'Offray v Louise* SCA 34/2007, *Mellie v Government of Seychelles & Anor* (SCA 3 of 2019) [2019] SCCA 40 (16 December 2019), *Chokolingo v Attorney-General* [1981] 1 WLR 106 and *Hinds v Attorney General & Ors (Barbados)* [2002] 1 AC 854. The Court of Appeal held at paragraph [56] that it is not appropriate or proper *"to have the Constitutional Court determine the constitutionality of the action of the apex Court of Appeal especially in circumstances where the decision of the Constitutional Court could then be appealed to the Court of Appeal"*.

[7] It is submitted by the Learned Counsel for the Respondents that the Court of Appeal in *EEEL (supra)* has upheld its position in *Simeon* and it is submitted that a party who is seeking to challenge the decision of the Court of Appeal on the constitutional grounds, should complain directly to the Court of Appeal rather than going to the Constitutional Court. Learned Counsel for the Respondents further submitted that the Court of Appeal has jurisdiction to reopen its own cases citing *EEEL* where the Court of Appeal held that it has such power, although it is *"an extraordinary one which can only be properly exercised in the most extreme, rare, and exceptional circumstances where the interest of justice clearly demands that this be done"*. The Court of Appeal further considered two circumstances, in which the Court of Appeal has power to reopen its own case, i.e. a) where there is fresh evidence, which satisfies the regime for the admission of fresh evidence and b) where fair hearing has been denied; but such application should be made to the Court of Appeal and not the Constitutional Court.

[8] Learned Counsel for the Respondents further submits that the Constitutional Court should not be used as a forum for parties aggrieved by the Court of Appeal decision to raise new issues that should have been raised before the Court of Appeal or re-argue issues already decided on by the Court of Appeal thereby having a *'second bite of the cherry'*. It is the submission of the learned Counsel for the Respondents that it was open to the Petitioners to either raise their issues before the Court of Appeal ahead of or during the proceedings before the Court of Appeal or subsequently use the approach set out in *Simeon*, which the Petitioners failed to do, and therefore should be precluded from seeking to use the Constitutional Court to seek further redress.

[9] The Petitioners in their Response to the Respondents' Preliminary Objections in relation to the above issue submit that the primary role of the Constitutional Court is to protect the civil rights of the people while the Court of Appeal (s primary role is to hear cases from lower courts. The Petitioners submits that it is *"a misnomer that the Court of Appeal is the highest court ... and there is no other authority that can judge them...."*.

[10] The Petitioners address the case law relied on by the Respondents at paragraph 6-10 of their Submissions stating that the circumstances of some of the cited cases are different to their Petition and therefore not applicable. Mr Barry Laine submits that the circumstances in *Attorney General v Joseph Marzochi & Anor* (Civil Appeal No of 1966) are more applicable to the circumstances and alleged violations in their Petition in that there was a denial of the right to a fair hearing as one Counsel was not allowed to offer any submissions during appeal. At paragraphs 11-14 the Petitioners go into further details in relation to the circumstances of their case and the alleged violations.

Analysis

[11] In our analysis of the Preliminary Objections, we are of the view that Article 129 of the Constitution of the Republic of Seychelles establishes the jurisdiction of the Constitutional Court providing that the jurisdiction and powers of the Supreme Court in respect of matters relating to the Constitution shall be exercised by not less than two judges sitting together. Essentially, this means that considering the hierarchy of the courts, the Constitutional Court is not the apex court in Seychelles as it is a division of the Supreme Court sitting in its capacity as the Constitutional Court (minimum two judges). Article 129 states:

> *129. Supreme Court as Constitutional Court*
> *(1) The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two Judges sitting together.*
> *(2) Where two or more Judges sit together for the purposes of clause (1), the most senior of the Judges shall preside.*
> *(3) Any reference to the Constitutional Court in this Constitution shall be a reference to the Court sitting under clause (1).*

[12] The recent Court of Appeal decision in *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited)* (supra) further confirmed that a Court of Appeal decision cannot be overruled by the Constitutional Court.

[13] In their analysis, Anderson JA with Singh JA concurring held that the Constitutional Court is a lower court than the Court of Appeal and cannot overrule the decision of the Court of Appeal:

> *"[41] . . . The Constitutional Court, as a division of the Supreme Court of Seychelles, cannot overrule the Court of Appeal, as the apex Court of the Republic of Seychelles, as to whether the Court of Appeal can or ought to hear an appeal de novo."*

[14] Further, Anderson JA held that the Court of Appeal was empowered to determine constitutional issues when they arise during the proceedings before it and once such issues has been determined by the Court of Appeal a party cannot go to the Constitutional Court for determination of the issues again:

> *"[49] It follows ineluctably, by clear and inescapable implication from the words emphasized in Article 46 (7) and 130 (6) of the Constitution, that where a question arises in proceedings before this Court of Appeal with regard to whether there has been or is likely to be a contravention of the Charter (in this case, Article 19 (7), and 27 (1)), or of the Constitution (in this case, Article 120)), then this Court is, by virtue of Article 46 (7) and 130 (6) of the Constitution, respectively, not obliged or required to refer the question for determination to the Constitutional Court but may consider and make the determination itself. Furthermore, by necessary implication, where the Court of Appeal decides to take up and determine a constitutional question that arises in proceedings before it, such a question cannot properly be simultaneously or thereafter be prosecuted in the Constitutional Court. The Constitutional Court has no jurisdiction to consider a constitutional question that has arisen in the Court of Appeal and which the Court of Appeal has decided to consider and determine. To the extent that the majority in Rosenbauer held to the contrary of this proposition, we would respectfully disagree and hold that that view ought not to be followed.*(emphasis ours)
>
> . . .
>
> *[51] The original jurisdiction of the Constitutional Court is further protected from another source. It is only if the constitutional question has arisen in proceedings before the Court of Appeal that it may be retained and determined by the Court of Appeal."*

[15] The Court of Appeal further emphasized the importance of the finality of litigation and held that *"it is not open to a litigant in the Constitutional Court to seek to have set aside as unconstitutional a decision of the Court of Appeal"*:

> *"[55] We are acutely aware that a corresponding motion was earlier filed in the Constitutional Court, albeit the fate of its progress depends on the grant of leave to extend the time for filing, which leave is opposed. We also took into*

consideration the matters suggested as relevant by the case-law considered above, including importantly, the issue of the prolongation of litigation. Finality of litigation is a critical consideration, although it must necessarily be balanced with considerations of justice.

[56] . . . Indeed, the Court of Appeal has held repeatedly that it is not open to a litigant in the Constitutional Court to seek to have set aside as unconstitutional a decision of the Court of Appeal: Simeon v R Cr App 26/2002, D'Offray v Louise SCA 34/2007, Mellie v Government of Seychelles & Anor (SCA 3 of 2019) [2019] SCCA 40 (16 December 2019). This reflects decisions of the Privy Council in Chokolingo v Attorney-General [1981] 1 WLR 106 and Hinds v Attorney General & Ors (Barbados) [2002] 1 AC 854. Similarly, we also do not consider it appropriate or proper to have the Constitutional Court determine the constitutionality of the action of the apex Court of Appeal especially in circumstances where the decision of the Constitutional Court could then be appealed to the Court of Appeal."

[16] Anderson JA further held the following with regards to inherent power of the Court of Appeal to re-open and reverse its own previous decisions:

"[59] First, we are of the considered view that an apex court such as the Seychelles Court of Appeal does have inherent power (we say nothing of inherent jurisdiction) to re-open and reverse its own previous decision as we did in Attorney-General v Marzorcchi Civ App 8/1996 (delivered on the 9 April 1998)), and as we held that we could do in Belmont & Anor v Belmont (SCA 19 of 2020) [2020] SCCA 44 (18 December 2020). This corresponds with the decision of other apex courts such the House of Lords in the famous R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2) [2000] 1 A.C. 147. Even courts established by statute have been said to have a "residual jurisdiction" to reopen an appeal: Taylor v Lawrence [2002] 2 All ER 353 and R v Smith [2003] 3 NZLR 617.

[60] . . . First, the power to re-open an appeal is an extraordinary one which can only be properly exercised in the most extreme, rare, and exceptional circumstances where the interest of justice clearly demands that this be done."

. . .

[61] . . . Where there is fresh evidence that satisfies the regime for the admission of fresh evidence, such that an earlier/original decision of the Court of Appeal is likely to be unjust, that decision may be set aside.

. . .

[62] . . . A fair hearing is denied where there is a refusal to listen to what a party has to say regarding his case before the court. Where there is, serious and credible evidence of a substantial contravention of the constitutional right to a fair hearing, such that a party was not heard, the Court may, if it considers the breach to be consequential, review and nullify its previous decision tainted by the lack of fair hearing.

[63] The contravention of the right to a fair hearing may be because a party was not heard at all in the sense that the party was not allowed to put his case to the Court. This happened in Attorney-General v Marzorcchi Civ App 8/1996 (delivered on the 9 April 1998). But the same thing may also happen where a party is ostensibly able to make submissions before the Court but the Court, or at least one of its members, has made clear beforehand that he or they will not consider the submissions in arriving at his or their decision in the case. In these latter circumstances, the party cannot properly be said to have had a fair hearing."

[17] It follows that if the Petitioners are of the firm view that they have not been given a fair hearing in the Seychelles Court of Appeal, an application should be made to the Seychelles Court of Appeal who may grant an opportunity to reopen the appeal subject to the very stringent conditions. This Court has no jurisdiction to review the appeal.

[18] Young JA, concurring with the majority's decision for different reasons stated the following regarding hierarchy of the Constitutional Court and the Court of Appeal and whether the Court of Appeal decision can be challenged in the Constitutional Court:

"[10] . . . I have difficulty seeing how the Constitutional Court, which is a division of the Supreme Court and thus lower in the hierarchy than this Court, could be expected to conclude that this Court, in the March 2022 Court of Appeal judgment, reached the wrong conclusion as to the extent of its powers.

...

[13] . . . I recognize that there may sometimes be scope for challenges in the Constitutional Court in relation to process issues associated with the way an appeal has been dealt with by the Court of Appeal, an issue that was discussed in some detail in Karunakaran v A-G (SCA CL 1 of 2020) [2021] SCCA 8 (30 April 2021) and also relevant in the earlier case, Elizabeth v President of the Court of Appeal & Anor (2 of 2009) [2010] SCCC 2 (29 July 2010).

. . .

[16]. . . That the Court of Appeal may deal direct with constitutional issues is, as well, a fundamental premise of the judgments to which I have earlier referred to the effect that the Constitutional Court may not entertain collateral challenges, on constitutional grounds, to Court of Appeal judgments.

. . .

[18] For the reasons just given I am of the opinion that a challenge by Eastern to the conclusion of the Court of Appeal in the March 2022 judgment that it had

the power to re-open the October 2020 judgment: cannot be entertained by the Constitutional Court; but (b) can be determined by this Court." (Emphasis ours)

[19] With regards to the power of the Court of Appeal to re-open its own decisions, Young JA in *EEEL* (supra) held the following:

> *"[39] Attorney-General v Marzorcchi Civ App 8/1996 (9 April 1998) and Belmont & Anor v Belmont (SCA 19 of 2020) [2020] SCCA 44 (18 December 2020) this Court has either exercised (in Marzorcchi) or held that it has (in Belmont), power to re-open its own decisions."*

[20] Young JA further held that resort to the Constitutional Court in relation to the Court of Appeal judgments would not be a satisfactory response to the risk of injustice:

> *"[53] Such resort would, in any event, not be a satisfactory response to the risk of injustice and the lacuna just identified; this because: (a) the availability of such resort would be as destabilizing to the finality of judgments as a power for the Court of Appeal to re-open its own judgments; and (b) a requirement to go first to the Constitutional Court and then to the Court of Appeal would be a round-about way of addressing issues that can be more simply resolved by application direct to the Court of Appeal. In this respect, I consider that the desirability of a second appeal is outweighed by the importance of promoting finality."*

[21] We further refer to findings of Dingake JA in relation to the procedural irregularities in *Karunakaran v A-G* (SCA CL 1 of 2020) [2021] SCCA 8 (30 April 2021) where he stated:

> *"[19] In our respectful view it is settled law in this jurisdiction* [...], *that if there be any procedural irregularity arising in the Court of Appeal, the Court of Appeal is the appropriate court to deal with that irregularity not any lower court. This was made clear in such cases as Subaris Company Ltd and Others v Seychelles Court of Appeal and Another (007 of 2010) (CP 7/2010) [2011] SCCC 1 (31 January 2011) and Franky Simeon v Republic (SCA 26/2002) [2003] SCCA 20 (09 April 2003)."*

[22] The Petitioners submitted that the cases relied on by the Respondents do not have correlation with the present case. The cited cases, however, establish judicial precedent and the principle that the approach taken in *Simeon*, namely, that where there is an allegation that the Court of Appeal has denied a right to fair hearing, then, the proper procedure is to invoke the jurisdiction of the Court of Appeal and not that of the Constitutional Court.

[23] It would be pertinent to refer to Article 7 (1) of the Civil Code of Seychelles Act 2020 at this stage, which provides that judicial decisions are binding on all courts lower in the judicial hierarchy:

> *7.(1) A judicial decision is binding on all courts lower in the judicial hierarchy than the court which delivered the precedent decision.*

[24] This means that the decisions of the apex court, which is the Court of Appeal, are binding on all lower in hierarchy courts, which includes the Constitutional Court as it is not an apex court and as explained earlier herein the right of appeal exists to the Court of Appeal from the Constitutional Court.

[25] It is our considered view, therefore, that as per Article 7 (1) of the Civil Code of Seychelles Act 2020, the Constitutional Court is bound by the Judgment of the Seychelles Court of Appeal, which held that in terms the hierarchy of courts, it will be improper for the Constitutional Court to rehear, review and re-determine matters already heard and determined by the apex court of the country.

Any claim against the decision of the Supreme Court is time-barred and/or an abuse of process

[26] Another Preliminary Objection raised by learned Counsel for the Respondents is that any claim of violation of constitutional rights against the Supreme Court is time barred. It is further submitted that it is an abuse of process as the Petitioners could have raised such issues in the Seychelles Court of Appeal at the time of the hearing of the appeal but failed to do so.

[27] The main argument made by the Petitioners is that they did not wish to go back to the Seychelles Court of Appeal for the following reasons: a) they claim that their lawyer was not given a fair chance to put their case forward; b) their lawyer was abused; and c) the letter sent by the Petitioners was not replied to by the Seychelles Court of Appeal. Therefore, they argue that they cannot go back to the same place where they were not treated fairly. The Petitioners further allege bias on political grounds against the Chief Justice at the time and the Supreme Court Judge hearing

the case and deliberate delay in hearing the appeal. It is further alleged that a motion for recusal was put forward in the Court of Appeal however no answer was received. It is admitted that no recusal application was made against the Supreme Court Judge at any stage of proceedings whilst hearing the case, even though the Petitioners make many allegations against the said Judge in their Petition.

[28] We also observe that even though the Petitioners in their Submissions make many allegations of violation of the Constitution against the Supreme Court Judge and even the Chief Justice at that time, no attempt was ever made by the Petitioners to seek a referral to the Constitutional Court in respect of any orders given or to file a separate Constitutional case. The letter of complaint to the Chief Justice dated 3rd December 2019 referred to in further submissions of the Petitioners dated 26 June 2023 does not suffice.

[29] Mr Barry Laine states in his Submissions, he was advised by a named lawyer to go straight to the Seychelles Court of Appeal in respect of the Judgment given in the Supreme Court (refer pages 18 to 20 of the proceedings of 09th May 2023 at 9.00 am). It appears, the Petitioners have acted on legal advice and made their choice. They cannot now seek to blame the Courts for failure on their part to take the necessary steps and their failure in not taking such steps in the Constitutional Court within the prescribed times set down by law.

[30] We are of the view and in agreement with learned Counsel for the Respondents that the belated allegations of constitutional violations in respect of the procedure and decision of the Supreme Court is time-barred and an abuse of process as the Petitioners have already taken and concluded their opportunity to challenge same by way of appeal.

Determination

[31] Giving due consideration to the law set out in Article 7 of the Civil Code of Seychelles Act 2020 and to the relevant findings in case law and reasons stated

herein, the Preliminary Objections are upheld and the Petition stands dismissed. Each party shall bear their own costs.

Signed, dated and delivered at Ile du Port on 19th July 2023.

Burhan J (Presiding)	Dodin J	Carolus J