

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

MA 196/2023

(Arising in CP3/2023)

In the matter between

GIANNI BORDINO
(rep. by Frank Elizabeth)

1st Applicant

DEBORAH BORDINO
(rep. by Frank Elizabeth)

2nd Applicant

And

GOVERNMENT OF SEYCHELLES
(rep. by Nissa Thompson)

1st Respondent

ATTORNEY GENERAL
(rep. by Nissa Thompson)

2nd Respondent

Neutral Citation: *Gianni Bordino & Anor v Government of Seychelles & Anor* (MA196/2023)
(Arising in CP 3/2023) (28 May 2024).

Before: Vidot J, Pillay J and Carolus J

Summary: Application for leave to file petition out of time in terms of Rule 4(3) of the Constitutional Court (Application, Enforcement or Interpretation of the Constitution) Rules. Applicants filed Application only after filing of the Petition which was prescribed.

Heard: 30th January 2024

Delivered: 28 May 2024

ORDER

Application is denied and dismissed.

RULING

VIDOT J (presiding), PILLAY and CAROLUS JJ

Background

- [1] This is an application for leave to file a petition before the Constitutional Court out of time. The main reason averred for filing of the petition out of time is because Counsel representing the applicants was on the date set for mention of the case, which was the 04th April 2023, engaged in another case before the Court of Appeal. On that aforementioned date, the Constitutional Court dismissed that case for non-appearance of counsel and the applicants were not present in court either.
- [2] Following that dismissal, on the 05th April 2023, counsel filed another petition. The petition is supported with affidavits sworn by the applicants. In that petition, the applicants (petitioners) allege breaches of their constitutional rights. The Petition appears to arise out of dissatisfaction with a decision of the Court of Appeal upholding a decision of the Supreme Court in case MA18/2019. The applicants' bone of contention is that the refusal of the Court of Appeal to grant them leave to file additional written submissions amounted to a violation of their right to a fair hearing under article 19(7) of the Constitution of Seychelles. Further the applicants argue that the refusal of the Court of Appeal to grant them leave to file the additional submission constitutes a denial of natural justice.
- [3] However, when the applicants filed the petition of the 05th April 2023, they were already out of time. On 18th April 2023, the applicants filed an application for leave to file the petition out of time in terms with Rule 4(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (hereafter "the Rules")
- [4] On 23rd October 2023, Counsel for the respondents filed objection to that application in terms with Rule 9 of the Constitutional Court Rules. The grounds of objections are that;

- (i) The application is bad in law as the application seeking leave to file the petition out of time should have been made before or at the same time the petition was filed and not after the petition was filed. The granting of the application would essentially mean granting retrospective approval by Court; and
- (ii) The application is bad in law as the affidavits are not supported by any documents to support the applicants' averment that Counsel was not present because of the Court of Appeal matter.

[5] In response to the second objection, Counsel for the applicants filed a further Notice of Motion on 07th November 2023 seeking further leave to file documents in support of averments made in the affidavits attached to the application of the 18th April 2023.

Applicants Submission

[6] In respect of the Notice of Motion for the application for leave from the Court, the applicants each attached an affidavit in support thereof. The applicants aver that after their case was dismissed by the Court of Appeal, they filed a petition to the Constitutional Court, alleging that their right to a fair trial had been violated.

[7] The Constitutional Court case was called on the 4th April 2023 at 9am and was promptly dismissed for non-appearance of the applicants Counsel. The applicants further aver that on the day in question, Counsel was present in a Court of Appeal case. Counsel was not consulted by the Court of Appeal regarding the date of the hearing and was "*unexpectedly and out of the blue*" required to attend to the case in the Court of Appeal. Counsel then went to the Constitutional Court at 9:15 am on the same day and was advised that the Constitutional Court case had been dismissed.

[8] The applicants further aver that under these circumstances, Counsel was not at fault and that there is "*sufficient reason*" why this Honourable Court should exercise its discretion under Rule 4(3) of the Constitutional Court Rules to grant leave to file the petition out of time. Further, their Attorney's failure to attend Court on the 4th April 2023 is excusable and justifiable and the applicants should not be penalized by the Court for the absence of

the Attorney. The applicants aver that the Counsel has provided the Court with sufficient reason, excuse and explanation to justify his absence.

- [9] The applicants also aver that the delay in filing the application is not inordinate or unreasonable, as it is only 6 days after the Court dismissed the petition on a technicality and that no prejudice will be caused to the respondents if leave is to be granted to file the petition out of time. Further, the applicants state that the case is not frivolous or vexatious, and that the application is filed in good faith and that it is necessary, just and expedient for the Court to grant this motion and failure to grant the motion would cause a grave injustice to the Applicants.

Respondent's submissions

- [10] Counsel for the respondents have filed preliminary objections in respect of the above notice of motion by the Applicant's seeking leave from the Court for filing late the Constitutional Court petition. The preliminary objections have already been listed in paragraph 4 above.

- [11] Counsel for the respondents submits that Rule 4 (3) of the Constitutional Court Rules provides that:

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

- [12] Further, Counsel for the respondents cited the case of **Onezime v Attorney General & Anor (CP 01/2021) [2021] SCCC 4** in which the court had cited the case of **Assemblies of God v The Attorney General and Others (2020) SCSC 976**, which explains the essence of Rule 4 as cited above and at paragraph 24 of the latter case which states the following:

“[24] 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.”

[13] The respondents aver that it is clear from authority that the applicants can only file a Petition outside of the period of 3 month's period with the leave of the Court and sufficient reason would have to be provided for the extension of time. The applicants should have sought leave prior to or at the same time of the filing of the Petition and as it stands this Application amounts to a procedural irregularity.

[14] The applicants contend that their Counsel was attending a matter before the Court of Appeal and therefore could not attend the initial Petition, which led to its dismissal, leading to the filing out of time of the of the current Petition. The applicants did not

provide any supporting documents to support this averment. In **Beau Vallon Properties Limited v Phillippe Cointy [2020] SCCA**, the Court held that any relevant document must be exhibited to the affidavit and that Counsel should be mindful that the affidavit stands in lieu of the testimony of the applicant. Nonetheless, the Court takes note that after the respondents raised such objections in their pleadings, Counsel for the applicants filed an application for leave to file such documents in case MA379 of 2023, namely proceedings of the Court of Appeal in court case SCA MA 03 of 2023 (arising in SCA 22 of 2021) which Counsel for the applicants is involved in. That was filed on the 07th November 2023, almost 7 months after the filing of the Application for Leave to file the petition out of time.

[15] The respondents therefore aver that the applicants’ affidavits cannot be admitted into evidence and considering the applicants had the opportunity to file further affidavits but failed to do so. Therefore, there are no sufficient reasons to extend this time limit. As a result of the above, the respondents pray to the Court to dismiss this Application.

The Law – Discussions

(A) Filing the Petition out of time

[16] The application for leave to file the petition out of time is done in terms of Rule 4 (3) of the Constitutional Court Rules. Rule 4 reads as follows:

“(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.*

[17] It is clear that the Applicants filed the petition of out of time. Counsel for the Applicants explained that the petition was initially filed within the prescribed time but the case was dismissed on 04th April 2023, after Counsel and the applicants failed to appear before the Constitutional Court. Counsel explains that this was because he had a matter before the Court of Appeal which was scheduled at same time as the Constitutional Court case. By the time he refiled the petition, time had lapsed. Therefore, that required that he file an application for leave to file out of time. 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.” (underline ours)

- [18] In **Jean v Inter Island Boats Limited (CS No. 44 of 2012 [2013] SCSC 6 (31 January 2013)** Chie Justice N'tende (as he then was) in establishing time standards as set out in the rules relied on the case of **Aglae v AG SCA No. 35 of 2010 (unreported)** wherein the Court of Appeal cited the words of the Privy Council in **Ratnam v Curamasamy [1964] All ER 933**, that

“The Rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material on which the Court can exercise a discretion. If the law requires otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

[19] In **Revici v Prentice Hall Incorporated [1969] 1All ER 722, (at page 774)** Lord Denning M.R stated that courts insist on the rules as to time being observed. In the same case, Edmund Davies L.J was of the opinion that *“[O]n the contrary, the rules are there to be observed; and if there is non-compliance (other than of the minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted.”*

[20] As much as we appreciate that the Court has a discretion to allow non-compliance to the Rules, that discretion should not be exercised without sufficient cause. The Applicants have provided in both their written and oral submissions the reason for the late filing of that previous Constitutional Petition, which petition was dismissed due to Counsel not being present in Court on the day the petition was called. Counsel had indicated that the reason he was not present was because he had to attend to an unexpected matter in the Court of Appeal. These reasons were given in the Affidavits attached to the application and oral submissions given in Court. In the case of Darrel **Green v The Government of Seychelles & Ors Civil Appeal 43 of 1997**, 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.”

[21] Recently, in the case of **Payet v R (SCA CR08/2023 & SCA CR MA04/2024 [2024] (Arising in CR64/2018) (3 May 2023) [2024] SCCA 6 (3 May 2024)** the Court of Appeal reprimanded Counsel appearing for the respondent (in that case) on seeking leave to file heads of arguments outside the time limit prescribed by the Court of Appeal Rules. The Court explained circumstances where failure to follow rules of court would not be tolerated. The Court of Appeal referred to the case of **Commissioner of Police & Anor v Antonio Sullivan & Ors (SCA 26 of 2015) [2018] SCCA 2 (10 May 2018)** wherein the Court of Appeal referred to the English case of *Norwich and Peterborough Building Society v Steed CA ([1991] 2 AER 880*, *“in which Lord Guest stated that the matters the court should take into account in deciding whether to grant an extension of time are the following: 1. the length of the delay; 2. the reasons for the delay; 3. the chances of the appeal succeeding if the application is granted; and 4. the degree of prejudice to the respondent. Granted that the matters above in the Norwich and Peterborough Society case concerned an appellant, it is my view that they are still helpful in guiding this court as to when to exercise its discretion to condone the delay on the part of a respondent.”*

[22] The Court of Appeal further stated that in the case of *“Grootboom v NPA 2014 (1) BCLR 65 (CC)*, the Constitutional Court of South Africa was tasked with deciding an appeal concerning an application for the condonation in the Labour Court for the late delivery of a Statement of Claim. *Sass AJ stated:*

“It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

[23] After considering the above we find that the applicants did not provide sufficient cause. The main reason given being that Counsel was attending to an unexpected matter before the Court of Appeal. This Court acknowledges that at times the Court of Appeal notifies Counsels at short notice that a case would be called. However, Counsel had the opportunity to alert the Registrar or an orderly working with the Constitutional Court of such predicament. This is a practice that Counsels often resort to. Counsel could have on the day that the case was to be called come early to the Constitutional Court and requested a member staff of the court to inform Judges of that court of his predicament. Furthermore, once Counsel had received notice from the Court of Appeal, he could have alerted the Registrar by email or even by a phone call of his inability to attend the Constitutional Court due to commitment before the Court of Appeal. Counsel for the Applicants could otherwise have asked the applicants to be present before the Constitutional Court and explain the position to Court. Counsel had various options available to him but decided not to adopt such options. The rule is clear, Counsel needed to provide sufficient cause and the applicants needed to seek for leave before filing the Petition out of time.

[24] The position adopted by this Court is in agreement with that adopted in the case of **Auguste v Singh Construction (Commercial case 71 of 2022) [2022] SCCA 69 (16 December 2022)**. In that case, the court adopted strict rules of procedures (noted at paragraph 12) and stated that the necessity to follow rules of procedure cannot be overemphasized. It is most important that such rules are adhered to.

(B) **Procedural Irregularity:- Filing Application for Leave subsequent to filing of Constitutional Petition.**

[25] It is important to note that the procedure followed by the applicants in filing the Motion for Leave to the court is not procedurally correct as the Petition was filed before the Court had granted leave in terms of Rule 4(3). The application should have been filed together with the Petition. Counsel for the applicants stated in his oral arguments on the 30th January 2024, that he had filed the Petition and also filed an application for leave to the Court and if leave was granted, he would then file the petition 'proper'. Counsel for the respondents in her oral submissions argued that it is a procedural irregularity as the Petition was filed before leave had been granted by the Court.

[26] In arguing against a dismissal of the application, Counsel for the applicants submitted that the matter should not be dismissed on legal technicality. In the case of **Sambhaji & Ors. v Gangabai & Ors. No. 6731 of 2008** (at para 9) held that *“All the rules of procedure are the handmaids of Justice. The language employed by the draftsman of the procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice.”*

[27] In **Gill & Ors v Film Asalt [2013] SLR 137**, Domah J advocated for a more relaxed approach to rules of procedures and stated that *“the court should not be a slave to procedure, “hand-maids” are meant to be of assistance and not necessarily for strict and unwavering compliance.”* However, in **Mondon v Mondon (MA181 of 2020) [2021] SCSC 296 (09 June 2011)** Dodin J differed from the position adopted by Domah J and opined that; *“some procedures are designed to assist the parties and the court.”* He further added; *“while it is not agreeable for “hand-maids” who aspire to be mistresses to be always accorded such ambition, it is not acceptable to reduce “mistresses” to the position of “hand-maids” and thus create uncertainty in what should otherwise be an organised state of affairs.”*

[28] This Court holds the position that rules of procedures are to be followed to ensure that justice and fairness is done. In fact that position is in agreement with the position adopted by the Court of Appeal in **Dhanjee v James Alix Michel SCCC CP03/2024** wherein it was stated that *“applicants might be hurt when petitions and applications are dismissed due to legal technicality. But in the long run, rule of law would be hurt, if we allow some procedural irregularities to continue.”* Therefore, it is felt that application of such rule of procedure should be strict and deviation from such strict application should be exceptional. Where there is non-compliance, sufficient cause has to be shown as to why the court should exercise its discretion and allow such non-compliance.

[29] We also note that Counsel for the applicants failed to attach supporting documents to his application. That lapse was only rectified after Counsel for the respondents took exception to failure to file such documents. It was only on the 07th November 2023 that Counsel for the applicants filed a Notice of Motion to grant him leave to file such documents. This again was a breach of procedure.

Determination

[30] Taking into consideration the facts before the Court and the relevant authorities cited by each party, it is clear that a procedural irregularity has occurred in respect of the filing of the leave in terms of Rule 4(3) of the Constitutional Court. The Court must take into consideration substantive justice as well as procedural fairness.

[31] Looking at the current case in isolation, the Court must also take into consideration the reason given by the applicants for the late filing and determine whether sufficient reasons exist for the leave to be granted. We do not feel that sufficient reason was provided by the applicants for the various failures that occurred. We explained the manner in which Counsel for the applicants should have dealt with the matter. We feel Counsel should have also observed procedure in the filing of the application for leave to file supporting documents. To allow such non-observance of the rules would amount to an abuse and will be totally unfair and prejudicial to the respondents. It will not be in the interest of justice to grant the application and this Court cannot allow wilful abuse of the rules of procedure to take place.

[31] In the circumstances, the Court finds that the Application cannot be maintained and therefore it is denied and dismissed. We make no order as to cost.

Signed, dated and delivered at Ile Du Port on 28 May 2024

Vidot J

Pillay J

Carolus J