

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC05/2014

[2016] SCSC 487

ARTHUR SERVINA

Petitioner

Versus

**SEYCHELLES INTERNATIONAL BUSINESS AUTHORITY
(HEREIN REPRESENTED BY MRS WENDY PIERRE)**

Respondent

Heard: 7th day of April 2016

Counsel: Mr. G. Ferley for Petitioner

Mr. E. Chetty for the Respondent

Delivered: 11th day of July 2016

JUDGMENT

Govinden J[1] This is an application for Judicial Review in pursuance to Article 125 (1) (c) of the Constitution as read together with section 123 of the Insurance Act (Cap 98) (hereinafter referred to as “the Insurance Act”).

The Authority’s decision being impugned is that of the Respondent’s , which has replaced the Seychelles International Business

Authority (hereinafter referred to as “SIBA”), by virtue of the repeal of the International Business Authority Act, 1994 by the Financial Services Authority Act of 2014 (hereinafter referred to as the “FSA Act”). It is clearly provided at section 46 (2) (c) and (e) of the FSA Act that, ‘any proceedings in respect of acquired rights under SIBA Act continues as if the Act had not been passed.’

[2] The Petitioner being the registered owner of a motor vehicle, Registration Number S 8093, has petitioned this Court for the Judicial Review of the decision of the Respondent dated the 13th day of January 2014 whereby the Respondent refused to entertain the claim of the Petitioner for compensation under the Policy Owners Protection Fund, being a statutory Fund established under the Insurance Act 2008, (hereinafter referred to as the “POPF”), *‘for making of payments for compensation to eligible persons who suffer losses and/or damages as a result of accidents caused by ‘uninsured drivers on the roads in the Republic of Seychelles’.*

[3] The Petitioner claimed for compensation from the Respondent for damages sustained to his said vehicle in a road accident which occurred on the 13th day of January 2013.

[4] The Petitioner, as per the averments at paragraph 5 of his Petition, prays for reliefs of a writ of certiorari to quash the decision of the Respondent and a writ of mandamus compelling the Respondent to pay to the Petitioner compensation which he is entitled to under the POPF.

[5] The grounds on which the reliefs are sought are as follows:

- (i) *Firstly, that the Respondent acted illegally in the light of the fact that the Respondent failed to determine and to compensate the Petitioner’s claim as the Respondent is required and bound to do pursuant to section 88 (1) (b) as read with section 91 (1) of the*

Insurance Act but instead determined, considered and assessed the Petitioner's claim based on matters extraneous to the requirements of the afore-mentioned section 88 (1) (b) as read with section 91 (1) namely, that, "the Petitioner failed to show that his person/or his business has suffered substantial financial adversity due to the loss of use of his vehicle which would justify compensation under the POPF, in view that the Petitioner had independently been able to meet the full cost of reparation for his vehicle."

(ii) Secondly, that the Respondent's decision was unreasonable as the decision was so outrageous that no sensible Authority acting with due appreciation on its responsibilities would have decided to adopt.

(iii) Thirdly, that the Respondent's decision was an abuse of power in that it exercised its power for an unauthorised purpose disregarding relevant considerations and taking into account irrelevant considerations; and

(iv) Fourthly, that the Respondent acted in breach of the rule of natural justice.

- [6] The Respondent denies those averments and avers that there were reasonable grounds to reject the claim more particularly, in that the purpose of the POPF as set out in section 88 (1) of the Insurance Act provides that *'the authority shall establish and maintain in accordance with this section, a Policy Owners' Protection Fund for the purposes of:*
- (a) Indemnifying and compensating in whole or in part or otherwise assisting or protecting policy owners and others who have been prejudiced in consequence of the inability of registered insurers to meet their*

liabilities under life policies and compulsory insurance policies issued by them’.

[7] It is thus argued by the Respondent that in line with section 88 (1) (a) of the Insurance Act, the Respondent acted in their lawful capacity in rejecting the Petitioner’s claim and was not as alleged, acting outside the scope of its powers and abusing its process and that the considerations it took were legitimate and valid.

[8] It was further submitted by the Respondent that upon an assessment of the Petitioner’s claim to the POPF, it was found that the Petitioner had failed to show that his person and/or business had suffered substantial financial adversity or difficulty due to the loss of use of his vehicle which would justify compensation under the POPF leading to the committees finding that the Petitioner was able to independently meet the full cost of reparations for his vehicle.

[9] It was further submitted that the FSA further, rightly refused to entertain the claim of the Petitioner under section 88 (1) (b) of the Insurance Act in that the FSA had a discretion as to whether to effect payment from the Fund and has a right to do so on any reasonable ground. Reference was made to the case of **(Moustache v Guardian Royal Exchange Ltd (1980))** in that regards enunciating the rule that, *‘as far as the insurer’s obligation is concerned, that the person injured by reason of another’s fault has a cause of action against the person who committed the fault.’*

[10] The Respondent adopted the above reasoning in arguing that same principle was to be and had been applied by the FSA in considering the Petitioner’s claim hence denying his claim.

[11] It was further submitted in the alternative, that the Respondent otherwise, had a discretion as to whether to effect payment from the POPF and has a right to refuse to do so on any reasonable ground.

[12] Now, a brief summary of the facts of the case giving rise to the claim of the Petitioner to the FSA is as follows:

(a) The Petitioner was insured with SACOS under a motor commercial third party insurance cover which was restricted to third party liabilities for repair cost of any damage to promptly not exceeding its value immediately prior to the loss and; death or bodily injury or in damages arising out of an accident caused by or in connection with the use of a motor vehicle or the loading of the motor vehicle.

(b) On the date of the accident as afore-mentioned, vehicle S 8093 was being driven by one Mr William Bibi, an employee of the Petitioner who was on his way to drop a client at the airport. According to the police report, Mr. Bibi claimed that he saw vehicle S 16208 overtaking him and colliding into vehicle S 14500 which was being driven in the opposite direction. Vehicle S 16208 was a stolen vehicle being driven by Mr. David Mousbe (as confirmed by the police). As a result of the impact between the two vehicles, vehicle S 16208 collided with vehicle S 8093.

(c) Petitioner lodged a claim for compensation for damage to his vehicle with SACOS Insurance Company Limited (hereinafter referred to as "SACOS"), against the policy of vehicle S 16208. SACOS refused the claim on the ground that vehicle S 16208 was at the time of the accident being

driven by an unauthorised person who had stolen the said vehicle. SACOS informed the Petitioner that the company was not in a position to entertain the claim since at the time of the accident, S 16208 was being driven by an unauthorised person and not covered by the policy of insurance, hence advising a civil matter as against the tortfeasor namely the 'unauthorised driver'.

(d) By way of a 'without prejudice' letter 28th day of May 2013, Learned Counsel Mr. G. Ferley wrote to FSA on behalf of the Petitioner as far as the result of the claim from SACOS was concerned and the latter being specific to terms of the Policy of Third Party Insurance Cover. Counsel Ferley by the same letter claimed on behalf of the Petitioner under section 88 (1) (b) as read subject to the provisos of section 91 (1) of the Insurance Act for compensation to the Petitioner in respect of the damage suffered by his said vehicle arising out of the use of the motor vehicle on the road, whether or not such use is required to be covered by a policy of insurance in respect of third party risks under the Motor Vehicle Insurance (Third Party Risks) Act.

It was further specified in the same letter that the Petitioner was precluded **(and rightly so)** from claiming compensation under the Motor Insurance (Third Party Risks) Act, in that the damages suffered were not covered under the policy of insurance more particularly in not being *"death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road.."*

It was emphasized in the claim that albeit the driver and owner of the said vehicle being identified and residents of Seychelles and on a balance of probability an action may be successful against the driver, because the liability of the driver in any event is not covered by the policy of insurance as stated in the letter of repudiation by SACOS, the word 'and' used in the said latter mentioned section 91 (1) of the Insurance Act, emphasizes that all the four limbs, (a) (b) (c) (d) of the said section of the Insurance Act must be met before the POPF can avoid liability to pay the claim.

(e) *By way of letter of the 13th day of January 2014, FSA informed the Petitioner in a gist that, 'based on the merits of the case, his claim for compensation under POPF for total loss of vehicle and total loss of earnings could not be entertained and that the Committee was of the opinion that he failed to show that his person/and/or his business had suffered substantial financial adversity or difficulty due to the loss of use of his vehicle which would justify compensation under the POPF , in view that he has independently been able to meet the full cost of reparations for his vehicle'.*

[13] On the basis of those facts, I shall now proceed to consider the grounds urged in this Petition.

[14] In considering the grounds I have also given due consideration to the submissions of both mentioned Learned Counsels' on their clients' behalf.

[15] It is trite but I deem it fit to be restated before embarking on the main issues involved in this matter that the system of Judicial Review is

radically different from the system of Appeals. When hearing an Appeal the Court is concerned with the merits of the decision under Appeal.

When entertaining a Judicial Review of an administrative act or decision, the Court is concerned only with three specific grounds of challenge. In the case of **(Council of Civil Service Union v/s Minister for the Civil Service (1985) AC 374)**, Lord Diplock identified and distinguished those as follows. The three grounds of challenge are illegality, irrationality and procedural impropriety. In considering those grounds, the Court should not pay a blind eye (so to speak), to the fact that the distinction between merits on appeal and grounds of challenge on Judicial Review is not rigid, in that can be remedied either on Appeal or on Judicial Review hence possibility of overlap in between the two systems.

[16] I will now treat the grounds on which the reliefs are sought as cited at paragraph 5 (i) to (iv) of this Judgment (supra).

[17] Firstly, on the issue of legality. The Petitioner avers that the Respondent acted illegally in the light of the fact that the Respondent failed to determine and to compensate the Petitioner's claim as the Respondent is required and bound to do so pursuant to section 88 (1) (b) as read with section 91 (1) of the Insurance Act but instead determined, considered and assessed the Petitioner's claim based on matters extraneous to the requirements of the afore-mentioned section 88 (1) (b) as read with section 91 (1) namely, that, *"the Petitioner failed to show that his person/or his business has suffered substantial financial adversity due to the loss of use of his vehicle which would justify compensation under the POPF, in view that the petitioner had independently been able to meet the full cost of reparation for his vehicle."*

[18] The entity of the law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the Court may determine the legality of any administrative decision, which indeed, includes the issue whether the decision maker had acted in accordance with the law, by applying the litmus test, based on an objective assessment of the facts involved in the case.

[19] It is to be noted that the relevant provisions of law in issue are as enumerated above namely, sections 88 (1) (b) as read subject to 91 (1) (a) to (d) of the Insurance Act as rightly recognised by FSA in their letter of the 13th day of January 2014 to the Petitioner 'repudiating the claim'.

[20] Now, *Section 88 (1) provides that:*

'The Authority shall establish and maintain in accordance with this section, a Policy Owners' Protection Fund for the purposes of-

Section 88 (1) (b) provides that:

'subject to section 91 (1), compensating persons in respect of damage arising out of the use of a motor vehicle on the road, whether or not such use is required to, be covered by a policy of insurance in respect of third party risks under the Motor Vehicles Insurance (Third Party Risks) Act.'

Section 99 (1) in turn provides that:

'No compensation shall be paid under section 88(1) (b) in relation to a motor vehicle the prescription use of which is covered by a policy of insurance in respect of third party risks under the Motor Vehicle or claims Insurance (Third Party Risks) Act, where the owner or driver of the motor vehicle at the time of such use-

(a) has been identified;

(b) is resident in Seychelles;

Would, on a balance of probability, be liable in damages in
(c) proceedings instituted against the owner or driver in a court of
law in respect of the damages arising out of such use; and
(d) would be covered in respect of the liability by the policy of
insurance’.

[21] A careful reading of section 88 (1) of the Insurance Act displays without any form of ambiguity that the FSA had the legal powers to make a decision on behalf of the POPF upon a claim being lodged under the said sections of the Insurance Act. However, what is important to be determined at the instance of the first ground on which the Judicial review is sought, is whether its decision was within the legal requirements as per considerations set out in section 91 (1) of the Insurance Act for the purpose of the claim in issue.

[22] The relevant considerations are clearly set out at sub-sections 91 (1) (a);(b);(c); and (d) of the Insurance Act as above-referred and the purposive rule of interpretation is to be adopted towards its interpretation in view of mode in which the sub-sections have been drafted ‘by the use of semicolons’ and the word ‘and’ at the end of the third consideration connecting the inter dependent and or related clauses, hence, the need for a cumulative reading of the said considerations for the purpose of giving effect to its true meaning.

[23] It is abundantly clear that the consideration given by the FSA namely that, *“the committee is of the opinion that your client has failed to show that his person and/or his business has suffered substantial financial adversity or difficulty due to the loss of use of his vehicle which would justify compensation under the POPF, in view that your client has independently been able to meet the full cost of reparation for his vehicle”*, is but not one of the considerations cited in ‘mandatory terms’ at

section 91 (1) (a) to (d) for the purpose of payment of compensation under the said section as read with section 88 (1) (b) of the Insurance Act. It is also apparent that the proviso to section 91 (1) does not leave room for the discretion of the FSA to determine any additional considerations for the purpose of a claim under that relevant section.

[24] If at all a discretion based on prejudice, by the FSA, this could be argued in respect of the applicability of section 88 (1) (a) and not the current provisions of section 88 (1) (b) as read together with section 91 (1) of the Insurance Act.

[25] In that light, in view of the absence of any evidence in the bundle submitted to the Court for the purpose of this Judicial Review and especially noting the contents of paragraph 4 of the letter of communication of the FSA'S decision to the Petitioner of the 13th day of January 2014 to the above effect, this Court finds that contrary to the provisions of section 91 (1) of the Insurance Act, the FSA based its decision on irrelevant considerations as above cited hence its illegality.

[26] In that same light, it is to be restated, as clearly held in the case of **(Daniel Adeline versus Koko Cars (Cs No. 57 of 1995))**, in that cases of this nature are indeed sad cases where 'innocent victims' of accidents are deprived of compensation in respect of injury and in this case 'damage to property' in terms of total loss of vehicle' under the policy of third party insurance risks in view of the motor vehicle in issue having been 'stolen' at the time of the accident also giving rise to the very question as to 'custody' of the motor vehicle at the relevant time.

[27] As decided in the above-mentioned case, situations of this nature became covered by the Insurance (Compensation) Fund Act (Cap 98). This Act brought our law in line with the English 'Motor Insurers Bureau

Agreement of 1972', which provides for compensation to third party victims of road accidents in cases where the victim is deprived of compensation by the absence of insurance or effective insurance or where the driver cannot be found. That Act was replaced by the Insurance (Amendment) Act No. 24 of 1995. It made provision for the granting of similar relief under 'the policy Holders Protection Fund' created under section 45 of the Insurance Act No. 28 of 1994 at its section 45 (1) (8) of the said Act now replicated in section 81 (1) (b) and 91 (1) (a) to (d) of the Insurance Act.

[28] In the present case, as admitted by all parties, the considerations under subsections (a) and (b) are present. As regards (c) based on the Police Report as per bundle produced by FSA, an action brought against the driver of the motor vehicle in issue under article 1383 (2) should on a balance of probabilities succeed unless he is able to establish that the accident occurred due to the sole negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. However, the fourth element contained in (d) is not satisfied as neither the owner nor the driver would be covered in respect of the liability by the policy of insurance hence, no ground for the FSA to have refused to entertain the claim of the Petitioner at first instance based on the 'current provisions of the law as cited'.

[29] In the ultimate analysis therefore unless the Petitioner decides to sue the driver concerned being the thief as above-illustrated in his capacity as driver of the offending vehicle, this Court finds that the FSA established under the Insurance Act should consider granting adequate compensation to the Petitioner under the POPF.

[30] Secondly, on the ground of unreasonableness/and breach of the rule of natural justice (inter alia, the '*audi alteram partem* rule'). The

Petitioner avers that the Respondent's decision was unreasonable as the decision was so outrageous that no sensible Authority acting with due appreciation on its responsibilities would have decided to adopt and that the Respondent acted in breach of the rule of natural justice (*it is to be noted that the second and fourth grounds on which Judicial Review is sought in this case is being treated together for the purpose of this Ruling, in view of its proximity in terms of contents and principles to be applied*).

[31] On the issue of unreasonableness of the Respondent's decision in question, the test to be applied by the Court in determining the rationality or reasonableness of the impugned decision in matters of Judicial Review, one has to invariably go into its merits, as formulated in the matter of **(Associated Provincial Picture Houses V/s Wednesbury Corporation [1948] 1 KB 223)**, '*Where Judicial Review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merits and the legality of the decision are interrelated. Unreasonableness is a stringent test which leaves the ultimate discretion with the Judge hearing the review Application.*' To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing, it is one outside the limit of reason **(In that light refer to the 3rd Edition, 2001 of Michael Molan, Administrative Law)**. Applying this test thus, leads the Court to examine whether the decision in question is unreasonable or not, bearing in mind however, that 'Judicial Review is not concerned with the merits of a decision but with the manner in which the decision is made. Thus the Judicial Review is made effective by the Court quashing an administrative decision without substituting its own decision and is to be contrasted with an Appeal where the Appellate Court substitutes its own

decision on the merits for that of the administrative officer. **(Vide Lord Fraser RE: Amin [1983 2 All ER 864 at 868.**

[32] In the determination of the reasonableness of the current impugned decision of the Respondent, the Court has to make a 'subjective assessment' of the entire facts and circumstances of the case and consider whether the decision of the Respondent is reasonable or not.

[33] In considering reasonableness, the duty of the decision-maker ought to have been simply, to take into account all relevant circumstances as they exist at the date of the hearing including the objective of the Insurance Act that he must do in what may be simply termed as "broad common sense' and come to a conclusion giving such weight as he thinks right to the various factors in the situation. Some factors obviously may have little weight and others may be more decisive but it is quite wrong for the decision maker to disregard and or exclude from his consideration matters, which he ought to take into consideration **(Per Lord Green in Cumming v/s Jansen [1942] All ER at page 656).**

[34] Now as clearly dealt with in the analysis of the first ground of contention on the legality of the decision of the FSA, it is repeated that four considerations ought to have been taken by the FSA in the current circumstances of the case of the Petitioner under section 91 (1) (a) to (d) of the Insurance Act.

[35] It is evident upon a very careful scrutiny of the bundle submitted to Court for the purpose of this hearing, by FSA, that there is no evidence in the bundle save for the mention of the above provision of the law in the determination of the claim of the Petitioner which shows evidently that the Respondent knew that it ought to take into consideration the provisos as above-referred (supra) succinctly.

[36] On the contrary, what transpires, is that the Respondent, albeit noting what are the relevant considerations under section 91(1) (a) to (d) as read with section 88 of the Insurance Act, goes on to completely disregard the said provisions, I would venture to say '*in toto*' "relying rather on a proviso which does not exist under the relevant section and to the defence taken by the insurance company in the alternative when the very insurance company referred the Petitioner in view of the non-coverage of the liability of the claim under the third party insurance policy to the FSA under the Insurance Act. In other words, I will even go on to state that this is not only an unreasonable decision of the FSA but also 'a dereliction of its statutory duty' under the Insurance Act in the circumstances.

[37] To argue failure of financial loss and or lack of prejudice to the Petitioner as per the provisions of section 88 (1) (a) is not only unreasonable given the specific nature of the Petitioner's claim but also contrary to the spirit of the provisions of both sub-sections of section 88 of the Insurance Act. Subsection 1 of the section 88 caters for "inability of registered insurers to meet their liabilities issued by them" and subsection (b) caters for the specific circumstance for 'policy of insurance in respect of the third party risks under the Motor Vehicles Insurance (Third Party Risks) Act.

[38] It is thus clear that contrary to the section 88 (b) as read with section 91 (1) (a) to (d) of the Insurance Act, the Respondent based its entire decision on irrelevant considerations in that the "petitioner failed to show that his person and/or his business has suffered substantial financial adversity or difficulty due to the loss of use of his vehicle which would justify compensation under POPF , in view that the petitioner has

independently been able to meet the full cost of reparation of his vehicle’.

[39] Further, to make matters worse and leading to the ‘*absurdity*’ of the decision of the FSA, it did not even consider it fit to call upon the Respondent to make any representation to the FSA when considering an issue foreign to the relevant legislation under which the claim was petitioned and not within the knowledge of the FSA, simply based on documentations provided to it for the purpose of the claim, hence leading to a decision based on mere assumptions on irrelevant considerations not covered by section 91 of the Insurance Act in any way whatsoever.

[40] Albeit the Insurance Act not conferring any condition for the ‘hearing procedure’ perse under section 91, it is only reasonable and in view of the principles of natural justice that if a decision is to be considered other than in accordance with the provisions of the law and or non-observance of conditions set under the law, the other party ought to be heard at least at a ‘mandatory’ level. But in this case total disregard by the FSA to that basic principle, hence unreasonableness and irrationality of the decision.

[41] Based on the above analysis of the specific circumstances of the decision of the FSA applying the defined subjective test, I find and it is my considered view that the Respondent in this matter failed to consider the claim of the Petitioner in wrongly considering the evidence on record and considering irrelevant facts and the entire circumstances of this case inclusive of erroneously taking into account the advice of SACOS to its clients as to personal liability of the driver and or owner and ultimately disregarding the objective and rationale of the Insurance Act hence arriving at an unreasonable decision.

[42] It is thus obvious that the Petitioner's contention that the Respondent acted unreasonably and without relevant evidence if well-founded and I find that the decision of the Respondent was unreasonable and the Respondent was not afforded with a fair process of adjudication hence leading to major issues not being raised.

[43] Thirdly, on the issue of abuse of power. The Petitioner avers that the Respondent's decision was an abuse of power in that it exercised its power for an unauthorised purpose disregarding relevant considerations and taking into account irrelevant considerations.

[44] Did the Respondent act in excess of jurisdiction? Is the basic question to be answered at this juncture. I do not find the need to expatiate too much on this point but suffice to refer back to the analysis of the first ground of contention of the Petitioner on the "illegality of the decision".

[45] It is abundantly clear from the records that the Respondent acted in flagrant disregard to the relevant provisions of section 91 (1) (a) to (d) of the Insurance Act hence rendering its decision in itself illegal and unreasonable and further in taking into account irrelevant considerations and not abiding to the basic principle of the right to be heard rule further complicates the use of its powers leading it if not to total absurdity but to an obvious abuse of exercise of its power as a whole.

[46] Hence, since the discretion of the FSA was to be only specific and guided by the 'mandatory provisions' of the provisos to section 91 (1) (a) to (d) of the Insurance Act and which discretion was used in excess of jurisdiction as permitted under the Insurance Act, I find that the

decision of the FSA was clearly unreasonable and ultra vires the cited section of the law and in fact, the rationale of the Insurance Act relevant to compensation payment as I see it in this matter, hence leading to procedural impropriety.

[47] In view of all the above, I hold that the decision of the FSA is unreasonable and ultra vires section 91 (1) (a) to (d) of the Insurance Act as read with section 88 (1) (b) of the same Act and further than in arriving at its decision, the FSA breached the rules of natural justice particularly, that of, 'Audi alterum partum'.

[48] For the reasons stated hereinbefore, I hold that the decision of the Respondent dated the 13th day of January 2014 in this matter, is illegal and ultra vires. I therefore grant the writs of certiorari and mandamus as prayed for accordingly in that the impugned decision of the Respondent is hereby quashed and a writ of mandamus is hereby issued, compelling the Respondent to pay compensation to the Petitioner as he is entitled to under the Insurance Act and as claimed in his letter of claim dated the 28th May 2013. Further, costs of the suit is awarded in favour of the Petitioner.

Govinden J
Judge of the Supreme Court