IN THE SUPREME COURT OF SEYCHELLES

Miscellaneous Cause 111 of 2016

[2016] SCSC 995

DURAIKARAN KARUNAKARAN

Versus

THE CONSTITUTIONAL APPOINTMENT AUTHORITY

Heard: 7th of December 2016

Counsel: Mr. P. Boulle for Petitioner

Ms. A. Madeleine for the Respondent

Delivered: 7th of December 2016

JUDGMENT

Seegobin Nunkoo J

[1] I have before me an application for leave to proceed with judicial review of a decision taken by the Respondent, the Constitutional Appointments Authority (CAA).

[2] By virtue of the powers vested in it, under Article134(2) of the Constitution, the CAA appointed a Tribunal to inquire into complaints it had received against the Petitioner (a Judge of the Supreme Court) before making any recommendation to the President of the Republic, if at all.

[3] Now this decision is being challenged by way of judicial review by the Petitioner, on the following grounds:-

(a) that the Respondent's decision that the complaint ought to be investigated by a tribunal was made arbitrarily, without due process and with procedural impropriety in breach of the principles of natural justice, in that, the Petitioner was not given an opportunity to be heard by the Respondent or to respond in any manner to the allegation made by the complainant.(Para 9 of Petition)

(b) the decision of Respondent that the complaints ought to be investigated and a tribunal appointed is an abuse of right and unreasonable and irrational, in that there was no proper assessment of the complaints to arrive at a judicious decision. (Para10)

(c) there has been failure on the part of the Respondent to respect the Petitioner's entitlement to due process, also the failure to embark on an assessment of the complaints of misbehaviour, resulted in a contradictory decision that it was necessary to inquire into Petitioner's ability to perform the function of judge , which is unconstitutional and thus an illegal decision whereby the Respondent misinterpreted the law and confused a complaint for misbehaviour with one regarding a Judges inability to perform the functions of a judge. (Para 10 of Petition)

[4] When the matter came for hearing on the first occasion, Learned Counsel submitted that he relied on Rule 2 and Rule 6 of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals Adjudicating Bodies) Rules 1995 (Hereinafter referred to as the "Rules").

[5] Rule 2 reads as follows:

(1) An application to the Supreme Court for the purposes of Rule 1 (2) shall be made by petition accompanied by an affidavit in support of the averments set out in the

petition,

(2) The petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof in the form of exhibits.

[6] Rule 5 provides:

Every petition made under rule 2 shall be listed ex parte for the granting of leave to proceed.

[7] Rule 6 lays down the requirements of good faith and sufficient interest in the subject matter as conditions to be satisfied by the Petitioner.

[8] However, Counsel took very strong objection to the fact that the petition and affidavit were served upon the Respondent. He said that the Rules specify *that the application shall be* exparte *and should not have been served on the CAA. He referred to Rule 5 and made the following passioned submission: that the case was being "completely derailed" and he "wished in the most serious manner to place* [*his*] *objections on record". Earlier he stated that the case was being treated with "utmost frivolity".*

[9] Such rhetoric was not warranted by Counsel. As a Judge I have taken the oath to do justice without fear or favour and with no ill will. My short answer is that: the Court has an inherent duty to order service. In cases as this one, service helps to save time. Ultimately the Respondent who has notice of an application of this nature has a right"at any time"to appear and object(Rule 9)and if he comes and objects one has to ask oneself what difference does it make if he has come to court following receipt of service, or notice. The service in such cases does not cause any prejudice. To say that the Court is acting frivolously and being derailed reflects upon the good faith of the Petitioner as if he has things to hide.

[10] I find it most relevant to refer here to the case of *Exp Fonseka*SCA 28/2012 by the Court of Appeal, as it sheds enough light on the application and scope of these rules.

[11] The Court held:

"Thus, the proper petition in compliance with Rule 3 is registered under Rule 5 and forthwith listed under the same Rule 5 for hearing on terms of Rule 6. At the leave stage, the applicant has to satisfy the judge that he has sufficient interest and that he is in good faith: see Rule 6 (1). This is what the learned Judge referred to as the hearing stage. It is the initial hearing that is ex parte, not the petition or the application. If there is celerity and vigilance on the part of the respondent, he may appear at this stage on mere notice or registry inquiry, under Rule 7, to raise his objection to leave. Otherwise, his right of appearance to defend the petition is ensured to him later in the day in the normal course of things, under Rule 12".

[12] Be that as it may, Respondent had the right to be present and make objections which was indeed recognized by Learned Counsel for Petitioner.

[13] Respondents were given time to file their objections under Rule 7 of the Supreme Court Supervisory Jurisdiction Rules 1995.

I shall now summarise those objections:

a. The application has not been made in good faith contrary to Rule 6(1)

b. That the Petitioner does not have an arguable case

c. That there is no requirement for the Respondent to call upon the Judge (or to enter a show cause action) prior to appointing the Tribunal under Article 134(2) of the Constitution.

d. Since the challenge is about the constitutionality of the appointment of the

Tribunal to investigate the question of removing the Petitioner, the application should have been made to the Constitutional Court.

e. The application is premature and made with the intention not to allow the proceedings before the appointed tribunal to take its course.

[14] The matter was adjourned to 1st of December to enable Counsel to reply to the objections. On that day, Learned Counsel for the Petitioner submitted his skeleton arguments in reply to Respondent's arguments and objections.

a. He maintained that the application was made in good faith and it was for Respondent to prove that Petitioner was bad of faith. He referred the Court to Cannock Chase District Council V Kelly (1978)I WLR 1, Araullo vs Benigno Simeon C Aquito III, and Aria Carolina P. Webster vs Lord Chancellor (2015) EWCA Civ 742.

b. He also argued that by raising the issue of an 'arguable case' the Respondent had gone into the merits of the case.

c. On the need to have a preliminary enquiry before the CAA could appoint the Tribunal, he referred the Court to a document entitled 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles. A compendium and analysis of Best Practice on the Appointment, Tenure and Removal of Judge under Commonwealth Principles.

d. On the issue of whether the Petition and affidavit contain adequate averments to show that the decision of the Respondent to appoint a Tribunal was unreasonable and irrational he simply said he considered this to be vexatious.

e. On the argument that the Petitioner is challenging the constitutionality of the appointment of the Tribunal for the purpose of a removing Judge preventing it to commence its work and the issue that the application is premature. To both these issues the answers given do not carry any substance, but are rather adhomimem.

[15] The objections of Counsel for Respondent may be summarized as follows-

a. that the application was not made in good faith;

b. that Petitioner does not have an arguable case;

c. that the affidavit is vague as to how the decision of the Respondent is irrational and unreasonable and lacks specific averments to support this and also the averment made by Petitioner that the appointment of the Tribunal is an abuse of right;

d. that there is no requirement for the Respondent to have a preliminary hearing;

e. that the challenge is to the constitutionality of the appointment of the Tribunal to investigate the question of removing the Petitioner and therefore the application should have been made to the Constitutional Court;

f. that the application before this Court praying for the exercise of its supervisory jurisdiction is premature and is done with the intention not to allow the proceedings to take its course.

[16] In deciding whether or not to grant this application I need to consider the following issues:

Whether the application was made in good faith, whether the Petitioner has an arguable case and whether I have jurisdiction.

[17] I will treat the issue of good faith and arguability together.

[18] Learned Counsel has strenuously argued that the petitioner is of good faith and stated that it is for the Respondent to disprove this and essentially this means that Respondent must show that Petitioner is of bad faith and referred the Court to a Supreme Court judgment from Philippines (*AugustoL.Syjuco Jr. Phd and Petioners vs The Honorable Executive Secretary Paquito NOchoa Jr and Respondents*, 2015).The elements of bad faith are also adequately specified in the relevant para which I reproduce here:

"For sure, the Court cannot jettison the presumption of good faith in this or in any other

case. The presumption is a matter of law.

Well settled is the rule that good faith is always presumed and the chapter on Human Relations of the civil code directs every person inter alia, to observe good faith" Bad faith" does not simply or connote bad moral judgment or negligence. There must be some dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of a sworn duty through some motive or intent or ill will. It partakes the nature of a fraud. It contemplates a state of mind affirmatively operating with furtive design or some motive of self-interest or ill will for ulterior purposes."

[19] It is also important to read an earlier paragraph on this very page which says:

"It is equally important to stress that the ascertainment of good faith, or the lack of it, and the determination of whether or not due diligence and prudence were exercised, are questions of fact.

[20] However, one must note that they were stated in a case where the facts were totally different from what we have here. How far the same criteria for good faith or bad faith enunciated in that case can serve the present case is not too clear. Everything must be taken in its context I refer to the Steyn maxim, "*In law context is everything*" *Rv Secretary of State for the Home Department ex p Daly* [2000] UKHL 26.(2001)

[21] On the matter of citation out of context, I would better quote **Lord Greene**, who stated that "the desire for simplification is a perennial weakness of the mind, even the mind of judges; and the temptation to take a statement of principle out of its context of fact is one always to be resisted by those who fully understand the proper use of precedent in the judicial method."

[22] The English Courts from which Seychelles law on judicial review is inspired does not lack authorities on good faith.

[23] I will turn to the case of OMAGHOMI BELIEVE vs THE GOVERNMENT OF SEYCHELLES AND THE IMMIGRATION OFFICE (141 OF 2003) where the following can be read :

[24] The concept of "good faith" is not to be considered in contradistinction with the concept of bad faith. It involves the notion of "ubberimae fides" to the extent that the petitioner when filing the petition *should have had an arguable case.* That is an objective consideration which has to be assessed by the Court in deciding whether leave to proceed should be granted or refused. In the case of R v Secretary of State for the Home Office, exparte Dooga, (1990) C O D 109, Lord Donaldson of Lymington MR suggested that there were three categories of leave:

(a) Those in which there are prima facie reasons for granting judicial review

(b) Cases that are wholly unarguable and so leave must be refused

(c) An intermediary category where it was not clear and so it might be appropriate to adjourn the application and hold a hearing between the parties.

[25] Learned Counsel for the Petitioner is suggesting that the requirement of arguabilty is to be decided upon the merits. This is erroneous and totally against the established principles as to why leave must be obtained first. In the field of public administration the overriding purpose has been to ensure efficiency and this implies that decisions taken by administrators are not obstructed or impeded by unmeritorious and futile challenges in courts. Arguability is a threshold issue.

[26] I am not persuaded that this application passes the test of either "good faith" or "arguability" as explained in the above quoted case .

[27] Learned Counsel for the Petitioner has tried to impress upon the Court that The CAA should have given a preliminary hearing to assess the evidence and to decide whether the complaints were well founded. It is argued that by not taking those steps, the CAA has deprived the Petitioner of his right to due process and has acted unreasonably; it has been irrational and has not observed the rules of natural justice.

Learned Counsel for the Petitioner referred to a document from the Commonwealth titled "Appointment, Tenure and Removal of Judges under Commonwealth Principles"

[28] He drew my attention to the following at 3.4.6 which reads as follows:

> *'The UN Basic Principles clearly envisage that prior to any official commencement of removal proceedings there should be some form of investigation of the allegations.*
> *This is also recommended by The Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region.*
> *"….there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them'.*

[29] But I also note from that very document that a large majority of the Commonwealth countries have the same procedure as obtains in Seychelles where there is no requirement for a prior hearing either under any law or as an accepted practice in accordance with the rules of Natural Justice.The Commonwealth Principles are aiming to set out standards for practice across multiple jurisdictions with varying legal systems. These are not intended to be blindly adopted in contravention of the existing legal mechanisms in the specific countries. It was for the Petitioner to convince the Court that these principles should be followed in Seychelles and the reasons therefore. Baldly pointing to the principles is not sufficient.

[30] It is relevant to refer to this passage from the Court Appeal judgment in case of *Seychelles International Business Authority vs Jouaneau and another SCA 40 and 41 of 2011*where it was said:

> *"Ordinarily, where the legislature has provided for a statutory scheme for review of the decisions of an Authority, that statutory scheme should be preferred to the supervisory jurisdiction of the Supreme Court which is in any case discretionary. (see* R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475.R(G) v Immigration Tribunal [2005] 1 WLR 1445).*This is consistent with the principle that Courts so far as consistent with the rule of law must have regard to legislative policy. We bear in mind that the judicial review process established in England after the independence of Seychelles in 1976 has no application. Hence the administrative review procedure and remedies as contained in the new Rule 54.19 (Civil Procedure Rules) UK (White Book) and section 31 of Senior Courts Act 1981 cannot apply in Seychelles. It may well be time for our own legislature to enact legislation to regulate judicial review bearing in mind the development of such principles in the common law. Our courts however are not precluded from looking at precedents that have application in terms of the pre-reform writs and rules of civil procedure. Also, decisions given by the courts of England after 1976 continue to have strong precedential value as long as they do not concern English statutory amendments to the procedural rules after that date. Clearly, this would result in the delegation of the legislative power of Seychelles which cannot be possible'.*

[31] It is my view that there is no arguable case that the CAA has a duty to hold a pre-hearing and that the failure to hold such hearing caused any prejudice to Mr Justice Karunakaran.

[32] It is my considered view that this application must be dealt with in accordance with the provisions of the Constitution. I now turn to the relevant constitutional provisions.These are sub-paragraph (a), (b) and (c) of Article 134(2).

[33] Article 134 (2) of the Constitution provides:

Where the Constitutional Appointments Authority considers that the question of removing a Justice of Appeal or Judge from office under clause (1) ought to be investigated -

(a) the Authority shall appoint a tribunal consisting of a President and at least two other members, all selected from among persons who hold or have held office as a Judge of a court having unlimited original jurisdiction or a court having jurisdiction in appeals from such a court or from among persons who are eminent jurists of proven integrity.

(b) Section134 (2) b lays down the functions of the Tribunal. These are very important functions because it is duty bound to enquire; this is mandatory. Thereafter it must report on the facts to the Authority and also recommend to the President whether or not the Justice in Appeal or judge should be removed or not.

[34] I must also now draw attention to the heading of the Petition. The Petition is headed "Application for exercise of Supervisory Jurisdiction" and underneath this one can read*: (Under Article 125 (c) sic (ie 1 c.)* .

[35] Therefore, the Petitioner is attempting to invoke the supervisory jurisdiction of the Supreme Court over the CAA.

[36] Article125 (1) (c) of the Constitution reads as follows:

Section 125. (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –

(c) *supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate* for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction;….

[37] Before I can consider whether to exercise supervisory powers I must stress the following about the establishment of the CAA.

[38] The CAA is established under Article139 of the Constitution.

Article139 reads

(1) There shall be a Constitutional Appointments Authority which shall perform the functions conferred upon it by this Constitution and any other law.

(2) Subject to this Constitution, the Constitutional Appointments Authority shall not, in the performance of its functions, be subject to the direction or control of any person or authority.

[39] Whereas Article139 deals with the scope of its functions under the Constitution and the law Article 139(2) proclaims its independence.

[40] In regard to the CAA, one should note the very specific procedure that that has been laid down in the Constitution as regards the manner for its setting up. Article140 of the Constitution refers.

(1) The Constitutional Appointments Authority shall consist of three members appointed as follows-

(a) The President and the Leader of the Opposition shall each appoint one member;

(b) Subject to clause (3), the two members appointed under paragraph (a) shall, within twenty-one days of their appointment, by agreement, appoint the third member who shall also be the Chairman of the Authority.

[41] The framers of the Constitution placed high value on the independence of the Judiciary and also institutions having to do with the judiciary; these are not be at the mercy of party politics, but a multi-party approach has been prescribed, in line with democratic principles with regard to its setting up. Impartiality is the prime and underlying principle.

[42] The framers further showed their conviction in the above principle as concerns the appointment and removal of judges.

[43] The removal of a judge is not a common happening and that is the reason why the utmost attention must be paid to the legal procedures and the law prescribed by the Constitution when dealing with such a sensitive matter.

[44] Without going into the merits of the case it is necessary to have a close look at Article125(1)(c) (quoted above) and Article7 of the Constitution, which says that "adjudicating authority" includes a body or authority established by law which performs a judicial or *quasi judicial* function.

[45] Learned Counsel for Petitioner is arguing that this matter should be heard in terms of the Rules. It is my view that these rules are not applicable to this as the CAA does not fall in the class of bodies amenable to judicial review under these rules as it is an independent

body established by the Constitution directly, not subject to the direction or control of any person or authority (Article 139(2)) and therefore not similar to the "subordinate courts, tribunals and adjudicating authority" as mentioned in Article 125(1)(c). See in this regard*Doris v Constitutional Authority* (SCA 26/2007). Therefore, a single Judge of the Supreme Court cannot exercise any such jurisdiction over the CAA.

[46] The procedure for the appointment and removal of judges is governed strictly by the Constitution and it is not permissible to depart from the course prescribed by the Constitution.

[47] It is abundantly clear that no decision to remove the Petitioner has been taken as yet but only a process to initiate an inquiry to decide whether he should be removed or not.

[48] From that point of view, therefore, this application for judicial review lacks a sound basis. The Petitioner is challenging an initiation process of a matter yet to be heard as opposed to the completed procedure of a final decision already arrived at.

[49] As regards the right of the Petitioner to be heard, it is open for him to exercise it fully in the course of the hearing of the proceedings initiated. He also has a right to challenge the decision of the Tribunal later at the appropriate stage. This application is premature and misconceived.

[50] At this stage, I am not convinced that this matter has been brought to the correct forum, and even if it has, I remain unconvinced that the Petitioner has an arguable case. For these reasons given I decline to grant leave to proceed. Costs to follow the suit.

Signed, dated and delivered at Ile du Port on**7th of December 2016**.

Seegobin Nunkoo
Judge of the Supreme Court