

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MC38/2014**

[2017] SCSC 127

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**ALEXIA AMESBURY  
ROOM 104, PREMIER BUILDING  
VICTORIA, MAHE**

**PETITIONER**

**VERSUS**

**THE PRESIDENT OF THE REPUBLIC  
MR JAMES MICHEL**

**1<sup>ST</sup> RESPONDENT**

**AND  
THE CONSTITUTIONAL APPOINTMENTS AUTHORITY  
AARTHI CHAMBERS, MONT FLEURI**

**2<sup>ND</sup> RESPONDENT**

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Heard: 7 December 2016

Counsel: The Petitioner in person

Mr Ananth Subramanian, Assistant Principal State Counsel  
Mr Francis Chang-Sam for the Second Respondent

Delivered: 17 February 2017


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**JUDGMENT**

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**McKee J**

[1] This is an application by the Petitioner under the Supreme Court [Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities] Rules. The Adjudicating Authority whose decision has been brought into question is the Second Respondent, The Constitutional Appointment Authority.

- [2] In essence this is a judicial review into its decision to recommend to the First Respondent, The President of the Republic of Seychelles, that Mohan Niranjit Burhan [hereinafter referred to as "Mr Burhan"] be appointed as a Puisne Judge of the Supreme Court of Seychelles.
- [3] I have considered all the documents lodged by all three parties. I have considered the findings and judgment in the Constitutional Court dated 25<sup>th</sup> October 2016 in the case of Naddy Dubois and Others against the President of the Republic, The Constitutional Appointments Authority, the Attorney General and the said Mohan Niranjit ~~Mohan~~ <sup>Burhan</sup>  17/2/17
- [4] I am particularly indebted to the Petitioner [who is an Attorney of Seychelles but pursues this matter in her individual capacity] and the two Counsel representing the Respondents. In my view all the salient points for consideration are enumerated in the three submissions and I do not intend to repeat them at length here. Mr Chang-Sam in his submission at paragraphs 1[a] to 1[r] sets out a time table and sequence of events in this matter, which I adopt as correct.
- [5] Mr Burhan had been appointed as a Puisne Judge to the Supreme Court of Seychelles on 21<sup>st</sup> October 2008 on contractual terms. Some six months prior to the end of the contract, ie, in April 2013, the then Chief Justice wrote to the Chairman of The Constitutional Appointments Authority [hereinafter referred to as "the CAA"] requesting that the contract of Mr Burhan, then a non-Seychellois, be renewed in terms of Article 131[4] of The Constitution of the Republic of Seychelles on the grounds of exceptional circumstances, namely that he, Mr Burhan, was the Head of the Criminal Division and that there was a backlog of criminal cases which required attention. The CAA refused the application. There was a renewal of the application by the Chief Justice, supported by the Secretary of State for the Cabinet, but again this further application was refused by the CAA. Mr Burhan was so advised on 15<sup>th</sup> November 2013. Mr Burhan was however granted an extension of his existing contract for a period of three months to allow him to complete any part-heard cases.
- [6] Meanwhile on or around the same time, Mr Burhan had made a formal application for citizenship of Seychelles and was formally granted a Certificate of Registration of

Citizenship by the Citizenship Officer of Seychelles dated 26<sup>th</sup> November 2013 thus enabling Mr Burhan to be registered as a Citizen of Seychelles. This effectively changed his status from non-Seychellois to Seychelles Citizen while he continued to complete the extension to his contract. The extension of contract came to an end on or around 20<sup>th</sup> January 2014.

- [7] The Supreme Court was thus to be without the services of one full-time judge and the CAA sought to remedy this by placing an advertisement for the post of Puisne Judge in the Nation newspaper on 26<sup>th</sup> and 27<sup>th</sup> January 2014. On 27<sup>th</sup> January 2014 Mr Burhan made formal application for the post attaching his curriculum vitae and a copy of his citizenship certificate. On the same day the Secretary of the CAA made a file note that up to that date only one application had been received. As a result further advertisements were lodged in the Today newspaper on 28<sup>th</sup> and 29<sup>th</sup> January 2014 with a closing date for applications, according to information provided by the Petitioner, being 3<sup>rd</sup> February 2014. I am also informed that a Seychellois citizen and attorney, Mr Melchior Vidot made application by letter and mailed his application on 30<sup>th</sup> January 2014. The CAA already had the application by Mr Burhan but there is no evidence that the application by Mr Vidot had reached the CAA on or before 3<sup>rd</sup> February 2014. There was hence only the single application by Mr Burhan to consider. By 5<sup>th</sup> February 2014 the CAA was in a position to make a decision and wrote to the First Respondent, the President of Seychelles, advising that “The majority of the members of the Constitutional Appointments Authority have no objection to Mr Burhan’s appointment as Puisne Judge to the Supreme Court of Seychelles”. On 12<sup>th</sup> February 2014 Mr Burhan was appointed by the First Respondent, The President of the Republic of Seychelles, as a Puisne Judge.
- [8] It is against this background of facts that the Petitioner alleges impropriety on the part of the CAA in coming to the decision it did and hence seeks a judicial review on the procedure adopted by the CAA in formulating its decision. A judicial review is the vital procedure which allows the Court to look at the manner in which the CAA set about in coming to its decision. Judicial Review is not on the merits or justification of the decision-making but on the procedure adopted, the doctrine of natural justice and fairness.

[9] The Respondents took the preliminary point that the Petitioner had no *locus standi*. I accept that she had no personal interest in the matter. However, in my view, the Petitioner was acting in the public interest and was entitled to ask the Court to enquire into the matter. While it is true that certain constitutional aspects were explored in the *Naddy Dubois* case, the actual decision-making aspect of the CAA in coming to its determination was not substantially explored in the Constitutional Court. This Court now has all the relevant details. In my opinion, it is in the public interest that any doubts regarding the appointment of a Puisne Judge should be adequately and substantially aired. This preserves the integrity of the Supreme Court and the judiciary as a whole. It also assures the public that other governmental decision-making departments and authorities have to be seen to be acting fairly. For these reasons I dismiss the preliminary plea.

[10] I now look at the various issues raised by parties but not in any particular order.

1. The interest of the Petitioner. She has an interest as a member of the Seychellois public. She has no personal interest in this application. Her personal interest in the post of Puisne Judge was expressed in 2003. It is unreasonable to find that an interest expressed some thirteen years ago should be continued to the present application.
2. Any possible interest of the then counsel and attorney, Mr Melchior Vidot. There is absolutely no evidence to show that he endorsed this application by the Petitioner where certain averments were made in his name or on his behalf. On that ground alone the argument involving any involvement by Mr Vidot fails. However I go on. It was suggested by the Petitioner that the declared interest by Mr Vidot in a judicial post in the year of 2012 should continue on to include the present application and be included in the recommendation to the First Respondent by the CAA. I disagree. Mr Vidot clearly was not of a similar view to that expressed by the Petitioner. He submitted a fresh application when the present post was advertised. If he considered his earlier application was still extant he would simply have said so in his application. Mr Vidot submitted his fresh application by post on 30<sup>th</sup> January 2014. The Petitioner agrees that the closing date for applications was 3<sup>rd</sup> February 2014. I have looked at the calendar for the year 2014. The

30<sup>th</sup> of January is a Thursday. The 3<sup>rd</sup> February is the following Monday, with a weekend intervening. I feel that with hindsight it might have been considered slightly unwise to choose this method of delivery when a hand-delivered application to the CAA either on Thursday the 30<sup>th</sup> January, Friday the 31<sup>st</sup> January or even Monday the 3<sup>rd</sup> February might have been more reliable. In any event, I find no substance in this ground.

3. Grant of Seychellois citizenship to Mr Burhan.

I find that Mr Burhan submitted an application for citizenship in the latter part of 2013. As can be seen from the newspapers, numerous similar applications are made throughout any one year. Mr Burhan was granted citizenship on 26<sup>th</sup> November 2013. I accept that the Citizenship Officer would have followed established procedures in considering the application and making the grant. I find that the CAA is entitled to take the Certificate of Citizenship at face value and need not look further into the application.

4. The procedure adopted by the CAA.

By the end of December 2013 the post of Puisne Judge was vacant and it was clear that the CAA had to take steps to fill the vacancy. It initiated the procedure by advertising in the Nation newspaper on 25<sup>th</sup> January 2014 inviting applications. This resulted in a response from only one candidate, Mr Burhan, applying using his new status as a citizen of Seychelles. This application was recorded by a Ms Pragassen of CAA on 27<sup>th</sup> January. Great emphasis has been placed on this entry by the Petitioner alleging that from that early date the CAA had already decided that there was only one candidate, and that was Mr Burhan.. However the record shows that on 28<sup>th</sup> and 29<sup>th</sup> January further advertisements were placed in the Today newspaper. I infer from this fact that rather than making an early decision well before the closing date as alleged, the CAA were concerned that only one application had been received and again re-advertised in the hope that further interest would be formally expressed. Accordingly, I find that there is no substance to this complaint by the Petitioner. I have already dealt with any possible interest of Mr Vidot. By the end of the closing date there was only one application received, that of Mr Burhan. The CAA considered his application under his new status as a Seychellois citizen, his legal experience and knowledge of Seychelles and made its

determination, which was relayed to the President. The President acted upon the recommendation and Mr Burhan was duly appointed. In the light of the above I can find no impropriety in the procedure adopted by the CAA.

Before leaving this aspect I will deal with the allegation, even if expressed generally, of bias on the part of the CAA in respect of Mr Burhan's application following his change of status. It is difficult to substantiate this allegation of bias since, when the opportunity was given to the CAA earlier to re-appoint Mr Burhan for a further contractual term on the invitation by the Chief Justice and a senior member of Government, the CAA declined and refused to apply the doctrine of exceptional circumstances. I reject any allegation of bias on the part of the CAA. I reject any suggestion of deception or bad faith.

5. The Petitioner seeks to deem material the wording of the letter emanating from the CAA to the President regarding the appointment and whether the term "the opinion of the majority of the CAA" or "the recommendation of the majority" is appropriate. She submits that doubt should be resolved in her favour with the result that the appointment is void *ab initio*. This is answered by the Second Respondent. Counsel refers to the case of *Michel v Dhangee SCA No 5 & 6 of 2012* and in particular the judgment of Twomey J.A. who states that the Court should not construe wording in a restrictive, literal or pedantic sense. I adopt this authority and find that there is nothing improper in the wording of the letter, which can be taken as a recommendation that Mr Burhan be appointed to the post of Puisne Judge. The First Respondent puts it in a simple way and that the Court should interpret the meaning on a plain reading of its terms. There is nothing in this line of argument by the Petitioner.
6. The Petitioner invites the Court to place a sinister connotation to the early meetings held by the Chief Justice regarding the possibility of a reappointment of Mr Burhan to the Supreme Court. Again, this topic has been explored in the case which is referred to by the First Respondent as "*the Justice Domah's case by the Court of Appeal*". There is nothing untoward about this since the meeting was in furtherance of the proper administration of


justice. In any event this meeting referred to the possible **re-appointment** of Mr Burhan as a contractual officer. This application for judicial review relates to consideration of his application for a new appointment based on his status as a Seychellois citizen. There is nothing in this ground of objection.

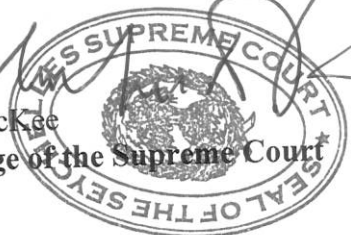
7. There seems to be some confusion as to the basis of the decision of the CAA to recommend the appointment of Mr Burhan following his application dated 27<sup>th</sup> January 2014. The Petitioner suggests that the appointment creates a “*hybrid category of judges which was not provided for in the Constitution*”. I consider that the expression “hybrid judge” is cursory and misleading and should be desisted in the future. In coming to its conclusion there was no need for the CAA to look for “exceptional circumstances”. The Constitution envisages only two classes of potential appointees, namely, citizens of Seychelles and persons who are not citizens but employed on contractual terms. Mr Burhan’s “first” application or declaration of interest was for **re-appointment** on contractual terms, the second application was based on his Seychelles citizenship. This is not contrary to the provisions of the Constitution.
8. At this stage I remind myself that this Judicial Review is to consider the procedure adopted and fairness of the CAA in coming to its decision to recommend the appointment of Mr Burhan as a Puisne Judge, which recommendation was acted upon by the President of The Republic of Seychelles. As far as the propriety of the procedure is concerned, I refer to my findings at paragraph 4 above. I have considered all the other contentious matters raised in the hearing and whether, in coming to its decision, the CAA has acted in a fair and equitable manner. I am reminded that the grounds of challenge in matters of judicial review may be divided basically into three categories, namely illegality, irrationality or unreasonableness and procedural impropriety. I have fully considered the submissions by all three Counsel relating thereto. I refer to my specific findings as stated above.

[11] I find that there was no procedural impropriety. I find that, in coming to its decision, the CAA acted legally, in good faith, rationally, reasonably, impartially and with fairness. The Petitioner's application fails.

[12] ACCORDINGLY, I DISMISS the Petition with Costs.

Signed, dated and delivered at Ile du Port on 17 February 2017

  
C McKee  
Judge of the Supreme Court

The seal of the Supreme Court of Seychelles is circular. It features a central emblem with a globe and a scale of justice. The text "SEYCHELLES SUPREME COURT" is written along the top inner edge, and "SEAL OF THE SEYCHELLES" is written along the bottom inner edge.