

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 374
MA 126/2019
(Arising in MC 30/2019)

PRESIDENT DANNY FAURE

Petitioner

ACTING IN THE CAPACITY OF MINISTER

RESPONSIBLE FOR PUBLIC ADMINISTRATION

(rep. by Alexandra Madeleine and Samantha Aglae)

and

NICHOLAS PREA

Respondent

IN THE CAPACITY OF SPEAKER OF THE

NATIONAL ASSEMBLY.

(rep. by Joel Camille)

Neutral Citation: *President Danny Faure acting in the capacity of Minister Responsible for Public Administration v Nicholas Prea in the capacity of Speaker of The National Assembly* (MA 126/2019) [2019] SCSC 374 (10 May 2019).

Before: Vidot J

Summary: Judicial Review ; Leave to Proceed in terms with the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules, Article 130(6) of Constitution

Heard: 06 May 2019

Delivered: 10 May 2019

RULING

VIDOT J

- [1] The Petitioner is the President of Seychelles, but prosecutes this case in the capacity as Minister responsible for Public Administration in the Executive arm of Government. The Respondent is the Speaker of the National Assembly, the Legislative branch of Government. He is being sued in the capacity as Speaker.
- [2] The Petitioner prays to this Court to exercise its supervisory jurisdiction granted under the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, (The Rules) over the decision of the National Assembly to annul a Statutory Instrument (S.I 18 of 2019) of the Public Service Salary Act 2013, (“the Act”) which the Petitioner claims he is empowered under section 13 of that Act to make and that such Statutory Instrument is necessary to give effect to the Act. S.I 18 of 2019 is said to have come into effect upon its publication in the Official Gazette of the 2nd April 2019.
- [3] On 04rd April 2019, by a majority vote, the National Assembly resolved to annul the Statutory Instrument on the ground inter alia, that the Petitioner does not have power to amend the Schedule of the Act by way of Regulations. Once the vote to annul the Statutory Instrument was passed, the Statutory Instrument ceased to have effect forthwith. It is averred that in so doing the National Assembly acted ultra vires, in excess of its jurisdiction and the Petitioner seeks a writ of certiorari to quash the annulment resolution of the 04rd April 2019.
- [4] The Petitioner claims to have sufficient interest in the matter as he is the Minister responsible for Public Administration, as pursuant to section 2 of the Act, he has delegated legislative power to make regulations for the implementation of the Act under section 13, and he made and signed S.I 18 of 2019 in that capacity. He claims further that he had acted promptly and makes the application in good faith. He alleges that the annulment of S.I 18 of 2019 of the Public Service (First Schedule) Regulations 2019

causes prejudice to the Minister in the performance of his obligations as conferred under the Act.

[5] The Petitioner has filed application for leave to proceed with the Petition in terms with Rule 2 of the Rules. It is this application that I address in this Ruling.

[6] The Respondent opposed the Application and raises four grounds of objection. They are canvassed on the grounds of procedural irregularity, the lack of good faith and sufficient interest on behalf of the Petitioner. They are;

(i) That the Petition is bad in law as it is not made in conformity with the provisions contained in Rule 2(2) of the Rules;

(ii) That the affidavits in support of the Motion seeking leave to proceed on the Petition, are defective and/or bad in law and accordingly cannot be relied upon by the Petitioner before the Court, in as far as the affidavits seek to be evidence in support of the Petition;

(iii) That the Motion does not disclose that the Petition is made in good faith other than a mere averment contained in a line at paragraph 10 of the affidavit in support of the Motion; and

(iv) That the interests of the Petitioner are not sufficiently disclosed before the Court in seeking an order for leave proceed.

Application for Leave

[7] An application for judicial review undergoes a process comprising of 2 stages; the leave stage and the merits stage. There are rules governing that procedure. In this jurisdiction these are couched in the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995. The rules applicable to the Leave stage are in Rules 2 to 6. The application is by way of a Petition supported by affidavit and all material documents being relied upon. An application for leave is made ex-parte to a Judge who may determine whether or not to grant leave. Therefore, it is necessary that the court filters the application to satisfy itself that prima facie reasons

exist. Normally the Judge should grant it forthwith if it is arguable. If not it is rejected and it falls in between, an inter partes hearing is held. In fact the leave stage is the stage whereby the court weeds out any unarguable case. It makes no allowance for applications from busy bodies. It assesses whether the petitioner is of good faith and has locus standi, i.e sufficient interest in the matter. The concept of arguability also serves as a filter against useless and frivolous applications. Leave will not be granted unless the petitioner demonstrates an arguable point. In **R v Secretary of State for Home Department, ex-parte Cheblak [1991] 1WLR 980** Lord Donaldson MR stated that;

“the requirement that leave is obtained before substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases that are unarguable. Accordingly an application for leave is normally dealt with on the basis of summary submissions. If an arguable point emerges, leave is granted and extended argument ensues upon the hearing of substantive application”

[8] Here since the Notice of Motion was served on the Respondent, we moved straight to hearing inter partes without the Court first making assessment if there is an arguable case or not. However, it is settled that though listed ex-parte, that does not mean that the case has to be decided in the absence of the Respondent, vide **Duraikannu Karunakaran v CAA SCA 33 of 2016**.

[9] An application for leave is made pursuant to Rule 2 of the Rules. Rule 2(1) provides that such an application shall be made by petition accompanied by an affidavit and Rule 2(2) states that *“that 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.”*The Petitioner did not attach certified copies as required by that provision and the Respondent raised strenuous objections to the same. This is a matter I shall address below.

[10] Leave is not granted merely as a matter of course. In fact Rule 7(1) provides;

“Upon application being registered under Rule 5, the respondent or each of the respondents may take notice of it at any time and object to the grant of leave to

proceed, or if leave to proceed had been granted, object to the application at any time before the time fixed by Rule 12 for filing objections and the Supreme Court may make such order on the objections as it may deem fit.”

[11] Rule 6 lays down the requirement of sufficient interest by the Petitioner before the application is allowed. Indeed Rule 6(1) provides that unless the court is satisfied that the Petitioner has sufficient interest in the subject matter and that the petition is instituted in good faith leave will not be granted.

[12] Leave should also not be granted unless the Petitioner demonstrates an arguable case. This is designed as already stated to operate as a filter to exclude cases that are unarguable. If an arguable point surfaces, leave normally would be granted and extended argument ensues upon the hearing of the substantive application. In **R v Inland Revenue Commissioners, Ex-parte National Federation of Self employed and Small Businesses Ltd [1982] AC 617**, Lord Diplock said;

“If a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought to exercise its judicial discretion, to give him leave to apply for that relief.”

Failure to attached certified copy of materials or originals of documents.

[13] The first objection of the Respondent is that the application is in breach of Rule 2(2). Counsel for the Respondent made very forceful argument to plead that the Petition be dismissed because of such deficiency. He pressed that such rule is mandatory and not discretionary. He relied on **Choppy v Choppy [1959] SLR No.24**.

[14] The copy of the impugned decision was indeed a certified by the National Assembly. It is dated the 04th April 2019. That is definitely in conformity with Rule 2(2). However the other documents being relied upon were not originals and neither were they certified copies. That indeed is contrary to Rule 2(2).

- [15] I am one who believes in strict application of rules of procedure. I feel that rules are there to be observed and that litigants should be sanctioned for failure to follow them. In the case of **Ex-parte Tornado Trading & Enterprise EST. XP 150 of 2018** (decided on 04th July 2018) this Court applied the rules of procedure strictly. That was on an application for leave to proceed in a case of Judicial Review. I decided to reject leave to proceed inter alia because of procedural irregularity similar to the present case. I cited **Viral Dhanjee v James Alix Michel SCSC CP 03/2014** wherein it was held that “*applicants might be hurt when petitions or applications are dismissed due to legal technicality. But in the long run, rule of law will be hurt, if we allow procedural irregularities to be continued.*” I also cited **Ratnam v Cumarasamy [1964] 3 ALL ER 933** where it was held that “*rules of court must prima facie, be obeyed, and in order to justify a court extending the time which some step in procedure require to be taken, there must be some material on which the court can exercise its discretion*”.
- [16] On appeal in **Tornado Trading & Enterprise EST v PUC and Procurement Review Panel CA SCA 35/2018** (delivered on 28th November 2018) the Court of Appeal did not hold with me and exercised their discretion to admit the impugned decision which had not been certified. Therefore jurisprudence has been established which even if only persuasive, under the present circumstances I observe the findings made in that judgment albeit with some reservations, since as aforementioned, the objections were on similar point as in the present case.
- [17] I also I find further merit in argument from Counsels for the Petitioner that the Respondent has not been prejudiced as these documents and materials are within the knowledge of the Respondents as they emanate from the National Assembly or otherwise are within the public domain. They submitted that there has been full and frank disclosure of the Petitioner’s documents. They note that many of the documents being relied upon are the Bills, the Public Service Salary Act and S.I 18 of 2019. They draw the Court attention to sections 59(1) and 63(1) of the Interpretation and General Provisions Act. Section 59(1) states that “*A copy of the Gazette containing an Act is evidence of the due making of the Act and its tenor*” and section 63(1) provides that “*A statutory instrument*

made after the commencement of this act – (a) shall be published and judicially noticed”.
In effect they were inviting court to take judicially notice of these pieces of legislation.

Affidavits being defective and bad in law

- [18] Counsel for the Respondent was most vociferous in his attack of the attached affidavit. He argued that the affidavit did not comply with the law and he referred to the White Book of 1998. First he submitted that affidavits as per the White Book should bear the title of proceedings where proceedings are between several parties. He referred to Rule 3.2 which provides matters that are to be included in the title. As correctly pointed out by Counsels for the Petitioner, the Civil Code does not make provisions for such. I believe that the adopted practice in this jurisdiction is that the affidavit does not necessarily have to comply with the requirement laid down in the White Book. I have also known affidavits not to comply with the White Book requirement being accepted before the Courts of England where the White Book has applicability. The affidavit is an affidavit in support of the Notice of Motion on which all necessary particulars are entered in the heading.
- [19] Counsel for the Respondent also suggested that according to the White Book all averments contained in an affidavit should be on the same page and noted that the affidavit is made up of several pages. That is a lame argument especially when in the same breath Counsel argues that the affidavit is not explicit enough and that it fails to provide necessary information in support of averments made therein. Again that is not the position being followed in England.
- [20] There were also a lot of arguments from Counsel for the Respondent of the affidavit not disclosing sufficient averments as regards the Petitioner’s interest in the matter and his good faith in bringing the application. I agree with him that there were limited averments. Nonetheless, reference was made to those issues albeit not in much detail but as I have noted below, I have also considered the documents and materials filed in support in deciding these issues. I will however not sanction the affidavit as being bad in law and

that it cannot be relied upon based on that argument. To the contrary I took note of averments made in regards those issues and complimented them with declarations made in the attached documents.

[21] The affidavit is sworn by Jessie Esparon Chief Secretary of the Department of Public Administration. Counsel for the Respondent seems to be adopting a contradictory position in regards to this affidavit. First he states that he is not challenging the capacity of Mrs Esparon to swear this affidavit and at other times challenges her for making the affidavit, stating effectively that such affidavit should not emanate from her. However, personally I would have preferred an affidavit sworn by the Petitioner as the application is made in his capacity as Minister for Public Administration. However, it is averred that the affidavit is made on his behalf as Minister for Public Administration. I agree with Counsel for the Respondent that she should have averred that she is authorized by the Minister to swear the affidavit. That would have been ideal. However, when Mrs. Esparon acts in her capacity as Chief Secretary, as she did in this case, not in her personal capacity, she does so in the name of the Minister. The Minister will always be answerable for actions taken by her Chief Secretary. In fact when a chief executive acts on anything as part of the functions of her office she is deemed to be authorized by the Minister to do so. Jessie Esparon was competent to make such affidavit. Therefore, I cannot agree with Counsel for the Respondent that the affidavit should be declared defective and bad in law and therefore rejected.

Good faith – Arguable Case

[22] In a an application for judicial review upon screening the application, the Court at the leave stage may allow or reject the application on consideration of 2 matters. The first is locus standi and once the Petitioner is found to have sufficient interest then the Court considers the second test which is good faith. When addressing good faith, the petitioner must show that the issue(s) it raises in the application is/are arguable. The Petitioner must demonstrate by his Notice of Motion and affidavit and materials he has attached thereto that the case he makes on the material produced is a genuine cause as opposed to

frivolous one. In **Omaghomi Belive v Government of Seychelles & Or [2003] SLR 140** good faith was described thus;

“the concept of “good faith’ is not to be considered in contra-distinction with the concept of “bad faith”. It involves the notion of “uberrima 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 court in deciding whether leave to proceed should be granted or refused.”

See also **Cable and Wireless (Seychelles) Ltd. v Minister of Finance and Communications & Ors CS377 of 1997.**

[23] I believe that in his submission Counsel for the Respondent was submitting that good faith is in contra-distinction of bad faith. He seems to suggest that at the leave stage the issue of the necessity to have an arguable case does not arise. He did not show to me in what way that the Petitioner lacked good faith. He attacked the affidavit of the Petitioner as not sufficiently disclosing good faith. The issue of good faith is not decided on the affidavit alone, but on the materials as well. I do appreciate that the affidavit was rather sparse in raising the issue of good faith, but it is included in the averments. However, the Petitioner has filed several documents to show that they have an arguable case.

[24] Therefore, as stated in **Duraikannu Karunakaran v CAA** (supra) *good faith is a statutory criterion and arguability is the judicial test for checking the seriousness or levity of an application for leave. If the issue raised in the application is arguable, it would follow that it has been made in good faith.*” It is for the Petitioner who should by way of material facts presented show the arguability of his case. Basically arguability is a question of fact based on materials. It should not be based on speculation at an inter partes hearing. It is at the time of filing the petition with accompanying documents that the petitioner demonstrates that the issue raised is arguable.

[25] Counsels for the Petitioner argue that there is an arguable case. Did the Petitioner have power to make S.I 18 of 2019 amending the Public Service Salary Table and if the Petitioner had power to make such regulations, did the Respondent have the power to

annul S.I 18 of 2019 as it did? Counsels further explained that the Petitioner held such power and as Minister responsible for Public Administration, the Minister is responsible for implementation of the Act. Counsel further argued that the Respondent overstepped its oversight role as provided for in the Constitution. That in itself would provide cause for an arguable case.

[26] I find that through the document attached to the Petition that the Petitioner raises an arguable case. The pertinent issue is whether the National Assembly could annul S.I 18 of 2019, which in exercise of powers granted by section 13 and read with section 7(4) of the Public Service Salary Act, the Petitioner made. Obviously the debate also centres on whether the Petitioner could exercise such power. The Petition further raises a Constitutional issue of separation of powers. The Petitioner raises such issue as a great proportion of the population is affected by the annulment of that Statutory Instrument. The application is not frivolous nor vexatious in any way or form.

Sufficient Interest

[27] Rule 6(1) of the Rules states that the Court shall not grant leave to proceed unless the Petitioner satisfies court that he has sufficient interest in the subject matter and obviously that the petition is being made in good faith. I have dealt with the issue of good faith above. Rule 6(2) provides that “*Where interest of the petitioner in the subject matter of the petition is not direct or personal but in a general or public interest, the Supreme Court in determining whether the petitioner has sufficient interest in the subject matter may consider whether the petitioner has the requisite standing to make the petition*”. In a nutshell the court must satisfy itself that the Petitioner has locus standi. This as I have mentioned above is the test that has to be met followed by the test of good faith.

[28] In the affidavit attached to the Notice of Motion, the averment is that the Petitioner as Minister responsible for Public Administration that he has sufficient interest in the matter because as Minister, pursuant to section 2 of the Act, he has delegated legislative power to make regulations for the implementation of the Act under section 13, and that he made and signed S.I 18 of 2019 in that capacity.

[29] Counsel for the Respondent took issue with the averment stated above. He contended that the affidavit did not particularize the interest the Petitioner alleges to have in this matter. He argues that the Petitioner needed to establish whether he has personal or private interest as provided under Rule 6(2). He adds that it was necessary for the Petitioner to be specific as to whether it was a personal or public interest that he was seeking to protect. Even if Counsel was arguing this point with gusto, I disagree with him. In deciding the same I have not limited myself solely to the affidavit but to supporting documents, though I want to reinforce that the affidavit did make mention of the Petitioner having sufficient interest in the matter.

[30] I find that Petitioner as Minister responsible for the Public Service Salary Act in a personal capacity has a personal and equally as the public service being part of the Executive branch of Government, bears a public interest in the matter. It is to be remembered that the annulment of SI 18 of 2019 has an effect on public service employees. I find that he has locus standi to bring forth the application. Therefore, I hold that the Petitioner has sufficient interest in the matter

[31] In the circumstances I grant leave for the matter to proceed and order the Respondent to serve on Counsels for the Petitioner and the Court certified copies of all documents and /or materials pertaining to the annulment of S.I 18 of 2019 within a week from today.

Constitutional Issue

[32] However, I find that at the heart of this case is the question of whether an action taken by the National Assembly, carried out pursuant to a statute (the Interpretation and General Provisions Act) is amenable to some form of judicial review, and particularly review by a single judge of the Supreme Court. After careful perusal of the Petition before the Court and having heard the application for leave to proceed on judicial review, I agree with Counsels when they alluded to the fact that this decision concerns the doctrine of the separation of power. This is a constitutional doctrine, inherent in the very design of our constitution, relating to the functional division of public powers between arms of state; the Executive, the Legislative and the Judiciary. Under this doctrine each branch of state plays an important role in checking and balancing the use of public power of the other

branches. The separation of power recognises the functional independence of these three branches of Government. In terms with the Constitution, Executive power is vested in the President (Article 66), legislative power in the National Assembly (Article 85) and judicial power is vested in the Judiciary (Article 119). If this case proceeds to hearing, the Court will be required to determine the lawfulness of an action of one branch of state against another. It is likely that this decision will directly or indirectly affect our constitutional doctrine of the separation of powers.

[33] Article 129(1) of the Constitution provides that "*the jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two Judges sitting together.*" This arrangement is what we call the Constitutional Court.

[34] Article 130(6) provides further that "*Where in the course of any proceedings in any court other than the Court of Appeal or the Supreme Court sitting as the Constitutional Court, or tribunal a question arises with regard to whether there has been or it likely to be a contravention of this Constitution, other than Chapter III the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.*"

[35] In the current circumstances, I believe that a constitutional question has arisen, which is whether a Supreme Court judge may, sitting alone, determine the lawfulness of an action of the National Assembly carried out pursuant to an Act of the National Assembly.

[36] I find that I am compelled in terms of Article 130(6) to refer this matter to the Constitutional Court for determination.

[37] Therefore, the present case shall be stayed until determination by the Constitutional Court on these constitutional questions.

Signed, dated and delivered at Ile du Port on 10th May 2019

Vidot J