

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 375
CS 79 of 2018

In the matter between:

THONY CLEMENT ADELINE
ACTING THROUGH HIS CURATOR
SYDNA LAVIGNE
(rep. by Kieran Shah)

Plaintiff

and

ALWYN P. TALMA
(rep. by Frank Elizabeth)

Defendant

Neutral Citation: *Adeline v Talma* (CS 79/2018) [2020] SCSC 375 (... March 2020)
Before: Pillay J
Summary: Article of the Constitution – Referral to the Constitutional Court
Heard:
Delivered: 9th June 2020

ORDER

The motion for referral is frivolous and I accordingly decline to refer the matter to the Constitutional Court.

RULING

PILLAY J

[1] After the Defendant had deponed and before he closed the Defence’s case Mr. Elizabeth moved the Court to transfer the matter before the Constitutional Court on the basis that his client’s right to property was being infringed.

[2] By way of submissions dated 8th February 2020 Mr. Elizabeth submitted that the Court should make a constitutional reference in terms of Article 46 (7) of the Constitution putting the following question forward for determination by the Constitutional Court:

“Would the orders sought by the Plaintiff, if granted, is likely to contravene the Defendant’s constitutional right to property under article 26 of the Constitution.”

[3] The issues for this Court to consider in order to come to a conclusion whether or not the said question should be referred were listed as follows by Mr. Elizabeth:

(1) Is the question posed by the Defendant frivolous and vexatious in law?

(2) Has the said question been the subject matter of a decision of the Constitutional Court or the Court of Appeal?

[4] It was counsel’s submissions that “Article 46 (7) is couched in mandatory language, using the word “shall” to make it abundantly clear, that once a party raises a constitutional point, in the course of proceedings before the Supreme, the Supreme Court, after going through the two stage process, [as noted above at paragraph 3] must refer to the Constitutional Court, if the two questions are answered in the negative.”

[5] Counsel referred to the case of **Bossy v Chow (SCA 11/2014) [2016] SCCA 20 (12th August 2016)** as illustration of consideration for a referral:

“[W]hether there is at all a constitutional issue involved. He or she needs to be satisfied that the application for reference to the Constitutional Court is (a) neither frivolous; (b) nor vexatious; (c) nor is it one that has already been the subject matter of a decision of the Constitutional Court or the Court of Appeal. The referral Court does not play the role of automatic transmission gear but one of judicious judicial screening.”

[6] Counsel further made reference to the cases of **Lizianne Reddy and Michea Bernard Selwyn Gouffe v Wavel Ramkalawn CS 97/2013 [2019] SCSC 41 (30th January 2019)** to support his argument that “the order being sought by the Plaintiff constitutes a likely contravention of the Defendant’s right to property under Article 26 of the Constitution as if granted, it would dispossess the Defendant of his rightful property permanently.”

- [7] With regards to whether or not the question was frivolous and vexatious in law, counsel relied on the case of **Frank Elizabeth v The President of the Court of Appeal (2010) 382** to support his position that the constitutional question raised is not frivolous and vexatious but is one which ought to be referred to the Constitutional Court for determination.
- [8] Counsel further relied on the cases of **Verlaque v Seychelles International Mercantile Banking Corporation (Nouvobanq) (2011 of 2003) [2009] SCSC 9 (20th January 2009)** to further illustrate his motion.
- [9] By way of submissions filed 10th March 2020 and further submissions dated 24th March 2020, Mr. Shah for the Plaintiff submitted that the action in the present matter is one in contract with the Plaintiff seeking a declaration that the purported transfer is null and void on the basis that the deed of transfer is defective or in the alternative seeks an order from the Court rescinding the sale document. It was Mr. Shah's submission that a defective deed of transfer of property and/or breach of a fundamental term of a sale of the property are lawful grounds for setting aside the transfer and would not be a breach of the Defendant's constitutional right to property.
- [10] It was further his submission that a defective deed, and/or breach of a condition of sale and/or absence of consent cannot lawfully confer title to the Defendant and cannot preclude the Plaintiff from seeking appropriate relief from the Supreme Court, and for the Defendant to aver that such would contravene the Defendant's right to property is frivolous and vexatious.
- [11] Counsel submitted that that he request that the case be referred to the Constitutional Court should be refused. It was his contention that Article 26 (1) is qualified. It was his submission that both the Plaintiff and the Defendant have a right to acquire, own, peacefully enjoy and dispose of property. It was counsel's position that the Defendant has in this instance deprived Plaintiff of his right to property having failed to pay the consideration for the sale of property.

[12] Counsel further submitted that the Supreme Court is equipped to her and has heard numerous land disputes. This being a simple case of rescission of contract, to allow a case where by one party fails to honour the terms of contract to be referred to the Constitutional Court would open the floodgates where everyone will claim that their right to property in accordance with Article 26 (1) is being infringed upon and that the matter should be referred to the Constitutional Court.

[13] The considerations for a referral to the Constitutional Court are to be found in Article 46 (7) of the Constitution which reads as follows:

Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has 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.

[14] The three elements for considerations are as follows:

- (1) In the course of any proceedings in any court, other than the Constitutional Court of the Court of Appeal,*
- (2) A question arises with regard to whether there has been or is likely to be a contravention of the Charter,*
- (3) The Court shall immediately adjourn the proceedings and refer the question for determination by the Constitutional Court if:
 - (a) It is satisfied that the question is not frivolous*
 - (b) or vexatious*
 - (c) or has already been the subject of a decision of the Constitutional Court or the Court of Appeal.**

[15] The first element can be answered in the affirmative right of the bat since we are still at the stage of the Defence case on the basis of the Chief Justice's findings in the case of **Lizianne Reddy & Anor v Wavel Ramkalawan** that "The question of constitutionality of a legal provision could arise at any stage in the case: the pleadings, the evidence or the submissions."

[16] The second element can also be answered in the affirmative with the Defendant alleging that the remedies sought by the Plaintiff breaches Article 26 of the Constitution, being his right to property

[17] The main point of contention is whether the question is frivolous or vexatious or has already been the subject of a decision of the Constitutional Court.

[18] Article 26 of the Constitution reads as follows:

(1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

(2) The exercise of this right under clause (1) may be subject to such limitations as may be as may be prescribed by law and necessary in a democratic society

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(a) in the public interest;

(b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;

(c) in satisfaction of any penalty, tax, rate, duty or due;

(d) in the case of property reasonably suspected of being acquire by the proceeds of drug trafficking or serious crime;

(e) in respect of animals found trespassing or straying;

(f) in consequence of a law with respect to limitation of actions or acquisitive prescription;

(g) with respect to property of citizens of a country at war with Seychelles;

(h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or

(i) for vesting in the Republic ownership of underground water or unexpected oil or minerals of any kind or description.

[19] ‘Frivolous and vexatious’ is defined in **Elizabeth v President of the Court of Appeal**, above, as follows:

“Turning to the question of whether a mater is ‘frivolous or vexatious’ we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact, we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary

and Thesaurus (at page 600) frivolous is defined as ‘adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.’ We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.

Vexatious is defined at page 1750 of the Oxford Dictionary (supra) as ‘adj. 1 such as to cause vexation. 2 Law not having sufficient grounds for action and seeking only to annoy the defendant.’ Vexatious therefore relates to the effect on a defendant. It is vexatious if an adverse party is made to defend something that would not succeed.

It appears from the wording of section 92 of the Seychelles Code of Civil Procedure that a finding of any of these, frivolous or vexatious, would be sufficient to trigger an order for stay of the action, or dismissal of the same on such terms as may be just.

In light of binding case law as shown above, in this jurisdiction the present petition has no chance of success. It is frivolous. The defence is being made to labour to defend something that has no chance of success. This action is therefore vexatious too.”

- [20] In the case of **Larue v Court Martial SCC 01/1996, 17 September 1996**, held that “a court can determine whether a question on a contravention of the constitution is frivolous and vexatious. The question whether a contravention actually occurred must be referred to the Constitutional Court.”
- [21] In accordance with the case of **Hackl v Financial Intelligence Unit (2010) SLR 98**, the right to property protected under the Constitution extends only to property lawfully acquired. The case of the Plaintiff is exactly that, the Plaintiff alleges that the Defendant acquired the property unlawfully. It is for the Plaintiff to show that the Defendant acquired the property unlawfully and for the Defendant to show that the Defendant acquired the property lawfully.
- [22] On that basis the motion for referral is frivolous and I accordingly decline to refer the matter to the Constitutional Court.

Signed, dated and delivered at Ile du Port on 9th June 2020

Pillay J