

IN THE SUPREME COURT

Reportable

[2021] SCSC ...
CA 26/ 2020 and CA 28/2020
(Appeal from EMT 85/2019)

In the matter between:

SEYCHELLES POSTAL SERVICES
(rep. by Serge Rouillon)

Appellant

and

MILENA NOURRICE
(rep. by Frank Elizabeth and Olivia Vel)

Respondent

and in the matter between:

MILENA NOURRICE
(rep. by Frank Elisabeth)

Appellant

and

SEYCHELLES POSTAL SERVICES
(rep. by Serge Rouillon)

Respondent

Neutral Citation: *Seychelles Postal Services v Nourrice* (CA26/2020) and *Nourrice v Seychelles Postal Services* (CA28/2020) [2021] SCSC(1 December 2021)

Before: Dodin J.

Summary: Request for referral to constitutional court – article 46(7) of the Constitution

Heard: Written submissions

Delivered: 1 December 2021

ORDER

On Application for referral of a question to the Constitutional Court ...

RULING

DODIN J.

[1] In case EMT/85/19, judgment was entered in favour of Milena Nourrice in the total sum of SCR 40,255.53 on the 5th of November, 2020. Out of the total award, she was paid salary for 1st to 15th July 2019. The Postal Services appealed the judgment raising 4 main grounds of appeal in case CA 26/2020. Milena Nourrice also appealed the judgment but only in respect of the award for salaries in CA 28/2020. It was agreed that the cases would be consolidated for determination on the merits.

[2] On the date of hearing of the appeal, learned counsel for Milena Nourrice moved the Court for a reference to be made to the Constitutional Court pursuant to Article 46(7) of the Constitution as the determination of the question put to the Constitutional Court would address the core of the appeal by Mrs Nourrice.

[3] The ground of appeal advanced by Mrs Nourrice states:

The Learned Chairperson of the Employment Tribunal erred in not allowing the Appellant's claim in respect to payment of her salary up to the date of termination which is the date of the present Judgment and in accordance with the provisions of Section 61(2) (a) (iii) of the Employment Act 1995 as amended.

[4] Learned counsel for Mrs Nourrice submitted that section 61(2) (a) (iii) of the Employment Act provides for the Seychellois workers to receive salaries as part of their compensations after an unjustified termination of employment whereas foreigners can apply for salaries for the unexpired portion of their contract in the case of an unjustified termination. Learned counsel moved the Court to request the Constitutional Court to determine article 27 (1) of the Constitution which provides equal protection of the law and the enjoyment and the rights and freedom set out in this charter.

- [5] Learned counsel submitted that there is discrimination between a Seychellois worker and a foreign worker because if you are a foreigner you are allowed to claim salaries as part of your compensation for the unexpired portion of your contract when there is an unjustified termination but if you are a Seychellois you can only claim your dues but not salaries.
- [6] Learned counsel for Postal Services objected to the motion for referral on the grounds that it is frivolous and vexatious. Learned counsel referred the Court to the case of Elizabeth v President of the Court of Appeal SLR 382 of 2010 in support of his submission. Learned counsel further referred the Court to the definitions of frivolous and vexatious as set down by the Court of Appeal and also referred the Court to the case of Chow v Bossy (SCA 11/2014) [2016] SCCA 20. In that case, the Seychelles Court of Appeal stressed that the raising of a constitutional issue does not require the immediate referral of the issue to the Constitutional Court. The Judge must 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 of a decision of the Constitutional Court of Appeal. Learned counsel further submitted that in R v Agathine (CO 38/2005) [2007] SCSC 128 the Court of Appeal stated that the “terms “frivolous” and “vexatious,” in their legal connotations mean, cases or issues that are obviously unsustainable.”
- [7] Learned counsel further submitted that the legislature has recognised that foreign workers make sacrifices to leave their homes and families to come and work here under strict fixed term contracts subject of GOP approvals and each contract has to be approved by the competent officer. The whole law concerning allowing foreign workers to come and work here is because, theoretically there is no Seychellois that can do this work. See section 18 of the Act. Section 59 expressly refers to the notice period for termination to be governed by the contract of employment. Section 60 follows the same pattern. Most importantly section 67 provides for non-Seychellois to be allowed special concessions where the competent officer believes they are justified.

- [8] Learned counsel submitted that the state philosophy behind any concessions made for foreign workers in the Act is because they are subject to different rules and they are governed by specific fixed term contract terms rather than general terms under the Act and one can, see that a non-Seychellois can bring up similar points concerning discrimination against them, inter alia, since they have only 7 days to file a grievance compared to others who have 14 days; they are not entitled to pension payments or compensation outside of their contracts; they have to make their own arrangements for accommodation on termination if they have a problem with the employer and often they are forced to leave the jurisdiction on uncertain terms if the Tribunal and court processes are not completed on time.
- [9] Learned counsel submitted that the Supreme Court is equipped to hear and has heard numerous employment disputes. This is a simple case of termination of a contract of employment to which the usual conditions apply under the Act whereby one party fails to honour the terms of contract and for such a case to be referred to the Constitutional Court would open the floodgates where everyone will claim that their right in accordance with Article 27 is being infringed upon that the matter should be referred to the Constitutional Court. This is specifically treated differently because of the clear specific differences in their contracts and terms of employment.
- [10] Therefore the Application of the Respondent reveals no grounds for this Court to reasonably make a finding that a question arises with regard to whether there has been or is likely to be a contravention” of the Constitutional right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society enshrined in Article 27 of the Constitution, and refer the matter to the Constitution, and to refer the matter to the Constitutional Court under Article 46(7) of the Constitution. Learned counsel moves the Court to find that the motion is frivolous and vexatious and to dismiss the same.
- [11] Article 46(7) of the Constitution provides:

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 it's 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.

[12] Article 27 of the Constitution provides:

27. (1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society.

(2) Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.

[13] Section 61 of the Employment Act provides:

61. (1) A worker-

(a) whose contract of employment is terminated-

(i) pursuant to section 57(2)(a) or (b);

(ii) for a serious disciplinary offence pursuant to section 57(4);

(c) who terminates his contract under section 60(2)(a) or (b),

may initiate the grievance procedure.

(1A)...to ...(1E)...(not relevant)

(2) Upon conclusion of a case before the Tribunal initiated under subsection (1), the Tribunal may determine as follows-

(a) in the case of subsection (1)(a)-

(i) that termination is justified;

(ii) that termination is not justified and that the worker is reinstated in the post or offered other suitable employment and that, where applicable, some disciplinary measure or non be taken in lieu of termination;

(iii) that termination is not justified but, as it would be impractical or inconvenient to reinstate the worker in the post or offer the worker other suitable employment, allow the termination subject, in the case of subsection (1)(a)(ii), to the payment in lieu of notice of one month's wages or, where an amount is specified in the worker's contract of employment in the case of a non-Seychellois worker referred to in section 59(c), that amount and in any other case subject to the termination taking effect on the date of the competent officer's determination;

(b) in the case of subsection (1)(b)-

(i) that termination is justified, in which case the worker is entitled to the payment of one month's salary in addition to any benefits or compensation the worker may have earned;

(ii) that termination is not justified, in which case the worker is liable to pay the employer a sum equal to one month's salary or, where an amount specified in the contract of employment in the case of a non-Seychellois worker referred to in section 60(1)(d), that amount and the employer may deduct the sum or the amount from any payments owed by him to the worker in accordance with section 33(2). [All emphasis mine].

[14] The parties do not dispute that there is a difference in treatment of a Seychellois and a foreign worker upon termination of employment in respect of calculation and payment of terminal dues. This discrepancy is more pronounced in the calculation of salaries due.

[15] The appeal by Mrs Nourrice is on the only ground that the Employment Tribunal has determined that she should be entitled to salaries until 15th July 2019. This

determination was given on 5th November, 2020. Whether the Appellant, Mrs Nourrice is entitled to salaries until the determination by the competent officer that the termination of her employment was not justified is what this Court has to determine in respect of her appeal. The question raised by the Appellant refers to the different treatment the Employment Act provides for Seychellois and foreign workers. Applying section 61(2) (a) (iii), it cannot be said that at all times a foreign worker would be better compensated than a Seychellois worker. It would depend on the date of the termination the competent officer determines to be applicable.

- [16] Pursuant to Article 46 of the Constitution, a question should be referred to the Constitutional Court if it is not frivolous or vexatious or has not been determined by the Constitutional Court or the Court of Appeal. In determining whether the question is not frivolous or vexatious, this Court has to also consider whether the question is fundamental and essential in order to determine the current appeal before the Court.
- [17] I am in agreement with learned counsel for the Postal Services that although the question is an interesting one, it does not address the determination of award of end of employment dues, namely salaries to a Seychellois worker as this is specifically provided for by a law, the Employment Act. The Legislature has seen it fit to treat Seychellois and foreign workers differently for various reasons. The provisions of the Employment Act can be challenged before the Constitutional Court but any declaration by the Constitutional Court would not affect the determination of the ground of appeal raised by Mrs Nourrice.
- [18] Consequently, I am not persuaded that there is necessity for the Constitutional Court to make a determination on the ground raised in the motion in order to determine the appeals in CA 26/2020 and CA28/2020.
- [19] The Motion for referral is therefore declined accordingly.

Signed, dated and delivered at Ile du Port on 14th December 2021.

Dodin J.