

## SUPREME COURT OF SEYCHELLES

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### **Reportable**

[2022] SCSC ...  
CS 108/2018

In the matter between:

### **LAFORS SOCIAL DEMOKRATIK**

a registered political party represented by its  
Secretary Charles Jimmy Gabriel  
(*rep. by S. Rajasundaram*)

Plaintiff

and

### **LINYON DEMOKRATIK SESELWA**

represented by Mr. Roger Mancienne  
(*rep. by A. Derjacques*)

1<sup>st</sup> Defendant

### **ELECTORAL COMMISSION OF SEYCHELLES**

represented by its Chairman  
(*rep. by J. Chinnasamy*)

2<sup>nd</sup> Defendant

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**Neutral Citation:** *Lafors Social Demokratik v Linyon Demokratik Seselwa & Anor* (CS 108/2018) [2020] SCSC 793 (09 September 2022).

**Before:** Carolus J

**Summary:** Delictual Claim for faute and abuse of right. Article 1382 of the Seychelles Code of Civil Procedure 1976.

**Delivered:** 09 September 2022

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### **ORDER**

[1] The plea in limine litis raised by the 2<sup>nd</sup> Defendant that the plaint does not disclose any reasonable cause of action against it is upheld and the Electoral Commission is struck out as a defendant to the plaint.

[2] On the merits, I find that faute has not been proved against the 1<sup>st</sup> defendant (LDS) in that the plaintiff (LSD) has not discharged the burden of proving that LDS, in filing the case for Judicial Review in MC87/2016, did so with the dominant purpose of causing harm to LSD, on a balance of probabilities.

[3] The plaint is dismissed.

[4] I make no order as to costs

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## JUDGMENT

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### Carolus J

#### Background

##### *The Parties*

[5] The plaintiff, Linyon Social Demokratik (“LSD”) and 1<sup>st</sup> defendant, Linyon Demokratik Seselwa (“LDS”) were at the material time both political parties registered under the provisions of the Political Parties (Registration and Regulation) Act, Cap 173. The 2<sup>nd</sup> defendant is the Electoral Commission established under Article 115 of the Constitution.

##### *The Plaintiff*

[6] The plaintiff avers that as a registered political party it took preliminary steps to contest the National Assembly elections held on 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> September 2016. Such steps included nominating candidates for twenty three districts which was accepted by the Electoral Commission, and conducting electioneering and campaigning activities at district and national level.

[7] The crux of the plaintiff’s claim as stated at paragraph 5 of the plaint is that the LDS “*out of ulterior motive and with a view of avoiding any rival contest from other political parties*” purposely filed applications for judicial review against decisions of the Electoral Commission (in MC86/16 and MC87/16), thereby seeking to remove the plaintiff and another political party Linyon Sanzman from the register of political parties (“the register”). The application concerning the plaintiff was filed against the 2<sup>nd</sup> defendant without plaintiff being made a party thereto, and the Supreme Court granted the application by order dated 17<sup>th</sup> August 2016. Consequent to the Court’s Order of 17<sup>th</sup> August 2017 the Electoral Commission by order dated 23<sup>rd</sup> August 2016, removed the

plaintiff from the register. The plaintiff further avers that it attempted unsuccessfully to intervene in the matter before the Supreme Court.

[8] The plaintiff appealed against the Supreme Court's decision and the Court of Appeal by a judgment delivered on 9<sup>th</sup> December 2016, in SCA 24/2016, allowed the appeal quashing the order of the Supreme Court of 17<sup>th</sup> August 2016, resulting in the re-registration of the plaintiff as a political party.

[9] The plaintiff claims that it has suffered severe prejudice as a result of LDS's wilful and wanton conduct, in that the plaintiff was deprived of its constitutional right to contest the election and lost the opportunity to represent itself through the potentially elected members of its party in the said election. This, it claims, amounts to a *faute* for which the defendants are jointly and severally liable. The plaintiff further avers that by letter dated 21<sup>st</sup> December 2016, it claimed damages from "*the 2<sup>nd</sup> defendant at the time*" in the sum of Seychelles Rupees two million four hundred thousand (SR2,400,000/-) but neither received a reply nor was any settlement made. The loss and damage alleged to have been suffered by the plaintiff are particularised as follows:

1. *Plaintiff's deprivation of its rights from contesting the National Assembly Elections*
2. *Plaintiff's deprivation of the potential election of its candidates for National Assembly*
3. *Plaintiff's anxiety, stress and other moral damage caused to it*
4. *Plaintiff's sufferings of shame, disrepute and being the subject of severe criticism*

[10] The plaintiff prays for judgment against the defendants jointly and severally and for damages in the sum of Seychelles Rupees two million four hundred thousand (SR2,400,000/-), exemplary costs, and such other relief as the Court deems fit.

#### *Defence of 1<sup>st</sup> Defendant*

[11] The 1<sup>st</sup> defendant denies all the averments in the plaint. It even denied that the plaintiff was a registered political party or that Jimmy Gabriel is its registered secretary as averred. It averred that the plaintiff is a false and sham alleged political party, has never functioned as a bona fide one and ever engaged in politics in Seychelles. Further that it

never officially nominated candidates for elections nor were any received by the authorities. However this line of defence was abandoned at the hearing and the 1<sup>st</sup> defendant proceeded only on the defence that it had filed the cases against the Electoral Commission in the exercise of its Constitutional rights under Articles 19 and 27 of the Constitution which gives it a right of access to the Courts.

[12] In regards to the filing of judicial review proceedings seeking the removal of the plaintiff and another political party from the register of political parties, allegedly to “*avoid any rival contest from other political parties*”, the 1<sup>st</sup> defendant avers that all civil actions including the petitions for judicial review were appropriately and lawfully filed before the Courts in exercise of 1<sup>st</sup> defendant’s constitutional right to seek redress before the Supreme Court against the plaintiff and the Electoral Commission, pursuant to which the Court granted appropriate remedies to the 1<sup>st</sup> defendant.

[13] With respect to plaintiff’s claim that the applications before the Supreme Court were made, heard and determined *ex-parte*, the 1<sup>st</sup> defendant claims that appropriate applications were lawfully filed, dealt with, heard and ordered by a lawful Court with an appropriate constitutional mandate which it exercised appropriately, lawfully and constitutionally.

[14] As to the Court of Appeal quashing the Supreme Court’s Order, the first defendant avers that the Courts including the Court of Appeal properly exercised their lawful and constitutional functions and rendered lawful redress to the parties. Further that in a timely, ordinary and lawful manner, appellate courts do in deserving cases reverse the findings of lesser courts exercising original functions fulfilling the constitutional scheme as the judiciary.

[15] The 1<sup>st</sup> defendant denies that the plaintiff was deprived of its Constitutional right to contest the election and lost the opportunity of being represented through its candidates in the National Assembly by the 1<sup>st</sup> defendant’s conduct amounting to a *faute*, or that the plaintiff suffered any prejudice. The first defendant avers that these averments do not disclose any reasonable cause of action, that it exercised its lawful, and constitutional rights to seek redress from the Supreme Court which lawfully received, heard and made

orders in its considered judgment while lawfully and constitutionally fulfilling its mandates.

[16] The 1<sup>st</sup> defendant also denies that it is liable in law to the plaintiff for any *faute* and avers that the exercise of legal and constitutional rights is not actionable in a Constitutional and Rule of Law State. It further denies that the plaintiff suffered any loss or damages or that it is liable for the same.

#### *Defence of 2<sup>nd</sup> Defendant – Electoral Commission*

[17] In its statement of defence, the 2<sup>nd</sup> Defendant raises three preliminary objections, which are as follows. Firstly, that the plaint does not disclose any reasonable cause of action against it. Secondly that the plaint is not maintainable since the same plaint was filed in CS18/1 which was dismissed by the Court, and that the plaintiff instead of seeking reinstatement of its case is re-filing the plaint without sanction of the Court. Finally the 2<sup>nd</sup> defendant avers that the plaintiff alleges the violation of its constitutional rights by the defendants in paragraph 9 of the plaint, and the proper forum to determine such matters is the Constitutional Court and not by way of a civil suit before the Supreme Court, but this third objection was subsequently withdrawn.

[18] On the merits the 2<sup>nd</sup> defendant denies mostly all averments of the plaintiff, the only admissions being that the Supreme Court in MC 86/2016 against the 2<sup>nd</sup> defendant, granted an ex-parte order dated 17<sup>th</sup> August 2018 directing the 2<sup>nd</sup> defendant to deregister the plaintiff from the register which the 2<sup>nd</sup> defendant complied with. The 2<sup>nd</sup> defendant also admits that pursuant to the order of the Court of Appeal it effected the re-registration of the plaintiff. It further denies being liable to the plaintiff for any *faute* or loss and damages and avers that it had merely abided by the orders of the Supreme Court and Court of Appeal respectively to deregister and later on to re-register the plaintiff.

#### **The Evidence**

[19] On the date of the hearing the parties agreed to confine the issue for the court's determination to whether any fault was committed by the defendants and their liability therefore established. If the Court determined that the defendants were liable, it would then decide on the issue of quantum at a later stage after hearing evidence pertaining

thereto. For that purpose, counsel for 1<sup>st</sup> defendant stated that he accepted that the plaintiff was a registered political party whose nominated candidates had been accepted by the Electoral Commission to contest the 2016 elections, although the same had been denied in the statement of defence. Mr. Charles Jimmy Gabriel, Secretary of the plaintiff political party was the only witness who testified at that stage.

- [20] He testified that he was representing Lafors Social Demokratik a political party registered with the Electoral Commission. He stated that the LSD had attempted to participate in the 2016 National Assembly Elections and had nominated candidates for 23 districts but was unable to participate in the elections because it was struck off the register of political parties by Order of the Supreme Court of 17<sup>th</sup> August 2016 granting an interim injunction pursuant to a case filed by LDS claiming that the names LDS and LSD would confuse the voters because of their similarity. Following the said Order, LSD unsuccessfully attempted to intervene in the matter. Mr. Gabriel was informed by the Electoral Commission by letter dated 23<sup>rd</sup> August 2016 that LSD had been struck off the Register of Political Parties and nominations of all candidates submitted by LSD for the National Assembly Election 2016 had been cancelled in compliance with the Supreme Court Order of 17<sup>th</sup> August 2016. The Order dated 17<sup>th</sup> August 2016 was confirmed by a further Order dated 25<sup>th</sup> August 2016. LSD had to cease all election campaigning and electioneering activities otherwise they would have been in breach of the Court Orders. By letter dated 29<sup>th</sup> August 2016, LSD complained to the Chief Justice that its rights to participate in the election had been breached by the Order of 25<sup>th</sup> August 2016. By letter dated 30<sup>th</sup> August 2016, the Chief Justice advised them to appeal against the decision. LSD appealed to the Court of Appeal in SCA24/2016 arising out of MC87 of 2016 challenging the decision of the Supreme Court dated 25<sup>th</sup> August 2016 (which was heard together with the appeal in SCA23/2016 arising out of MC86 of 2016 also challenging the Supreme Court's judgment of 25<sup>th</sup> August 2016). The appeal was heard on 29<sup>th</sup> November 2016 and by judgment dated 9<sup>th</sup> December 2016, the Court of Appeal allowed the appeal, quashed the decision of the Supreme Court dated 25<sup>th</sup> August 2016, and maintained and confirmed the decision of the Electoral Commission to register the name LSD in the register of political parties. However by the time the judgment was delivered on 9<sup>th</sup> December 2016, the elections had already taken place on 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> September and it was too late for the

plaintiff to participate therein. Mr Gabriel stated that he did not file any applications to Court to stop or postpone the elections because LSD was complying with the Order of the Supreme Court dated 25<sup>th</sup> August 2016. LSD was subsequently re-registered as a political party and informed of the same by letter dated 13<sup>th</sup> July 2018 from the Office of the Electoral Commission, and the party is still in existence.

[21] The following documents were produced and admitted as exhibits in support of LSD's case with no objections from the defendants:

- (a) **Exhibit P1** - A copy of LSD's Constitution approved on 15<sup>th</sup> August 2016 and bearing on each page two signatures and the stamp of the Electoral Commission, together with a "Certification of Constitution" dated 3<sup>rd</sup> August 2016, signed by Charles Jimmy Gabriel and bearing a stamp of the Office of the Electoral Commission dated 5<sup>th</sup> August 2016.
- (b) **Exhibit P2** - A copy of LSD's Rules and Regulations approved on 15<sup>th</sup> August 2016 and bearing on each page two signatures and the stamp of the Electoral Commission, and on the first page the stamp of the Office of the Electoral Commission dated 5<sup>th</sup> August 2016, together with a "Certification of Rules and Regulations" dated 3<sup>rd</sup> August 2016, signed by Charles Jimmy Gabriel.
- (c) **Exhibit P3** - A copy of LSD's Party Manifesto bearing the stamp of the Office of the Electoral Commission dated 5<sup>th</sup> August 2016 and two signatures on each page, together with a "Certification of Party Manifesto" dated 3<sup>rd</sup> August 2016, signed by Charles Jimmy Gabriel and bearing a stamp of the Office of the Electoral Commission dated 5<sup>th</sup> August 2016.
- (d) **Exhibit P4** – Application form for registration of LSD as a political party dated 5<sup>th</sup> August 2016 bearing the stamp of the Office of the Electoral Commission also dated 5<sup>th</sup> August 2016. In that document the name Mr. Charles Jimmy Gabriel is entered as the "Leader of the Political Party".

- (e) **Exhibit P5** – Acknowledgement of nomination of James Port-Louis as candidate for LSD for Port-Glaud electoral area dated 17<sup>th</sup> August 2016 bearing the stamp of the Electoral Commission.
- (f) **Exhibit P6** – Copy of Certificate of compliance with the Political Parties (Registration and Regulation) Act 1991, and registration of LSD as a political party under section 6(1) of the same Act, dated 15<sup>th</sup> August 2016, signed by the Registrar of Political Parties and bearing the stamp of the Electoral Commission.
- (g) **Exhibit P7** – Ruling by D. Karunakaran J in MA 258/2016 arising in MC87/2016 SCSC 597 delivered on 17<sup>th</sup> August 2016 (Granting leave for Judicial Review/ ex-parte interim injunction prohibiting allocation of name LSD to any party and registration of candidates nominated by LSD).
- (h) **Exhibit P8** – Ruling by D. Karunakaran J in CS87/2016 SCSC 617 delivered on 25<sup>th</sup> August 2016 (Quashing decision of Electoral Commission to register a political party in the name of LSD/ Confirming and making permanent the interim injunction prohibiting allocation of name LSD to any party and registration of candidates nominated by LSD in Exhibit 7).
- (i) **Exhibit P9** – Notification to Mr, Charles Jimmy Gabriel of date (21<sup>st</sup> September 2016) for calling of MA 258/2016 arising in MC87/2016 in court, dated 18<sup>th</sup> August 2016 and signed by the Deputy Registrar of the Supreme Court. Counsel for the plaintiff claims that a copy of Exhibit 7 (granting leave for Judicial Review and the Interim Injunction) was attached to Exhibit P9 and served on the plaintiff by Order of the presiding Judge.
- (j) **Exhibit P10** – Ruling by D. Karunakaran J in MA 263/2016 & 264/2016 (intervention by LSD) and MA267/2016 & MA 268/2016 (recusal) arising in MC86/206 and MC87/2016 (consolidated) SCSC614/2016 delivered on 23<sup>rd</sup> August 2016 (Dismissing both applications for intervention of LSD and recusal of trial judge).



- (k) **Exhibit P11** – Letter dated 23<sup>rd</sup> August 2016 to Mr. Charles Jimmy Gabriel from Mr. H. Gappy, Chairman Electoral Commission informing him of striking out of registration of LSD from Register of Political Parties and cancellation of nominations of all candidates submitted by LSD for the National Election Assembly 2016 in compliance with Supreme Court Ruling MC587/2016 dated 17<sup>th</sup> August 2016 (Exhibit 7).
- (l) **Exhibit P12** – Court of Appeal judgment in Civil Appeals SCA 23 & 24/2016 delivered on 09<sup>th</sup> December 2016 (Quashing decision of D. Karunakaran in MC 86/2016 and MC87/2016 delivered on 25<sup>th</sup> August 2016 and in regards to MC 87/2016 maintaining and confirming the decision of the Electoral Commission to register the name Lafors Sosial Demokratik (LSD).
- (m) **Exhibit P13** – Letter dated 30<sup>th</sup> August 2016 from Dr. Mathilda Twomey, then Chief Justice to Mr. Gabriel in reply to his letter dated 29<sup>th</sup> August 2016 “RE: Professional Misconduct Complaint against Justice Durai Karunakaran”, informing him that his only recourse was to appeal against the decision of the Supreme Court to the Court of Appeal.
- (n) **Exhibit P14** – Letter dated 13<sup>th</sup> July 2018 signed by Bernard Elizabeth for Registrar of Political Parties informing Mr Gabriel that the Electoral Commission had approved the re-registration of LSD as a political party as the application complied with the requirements of the Political Parties (Registration and Regulation) Act.

[22] Mr Gabriel stated that LDS and the 2<sup>nd</sup> defendant are liable to it in damages primarily because LDS prevented it from contesting the elections and secondly because the 2<sup>nd</sup> defendant struck it off the Register of Political Parties. He states that the LSD candidates suffered as a result of the same in that they got bullied, some of them had to leave the country and some of them even turned to drugs, all of which he was blamed for. He did not agree that LDS filed the Judicial Review application in the exercise of its constitutional right and stated that it did so out of malice.

- [23] He further stated that he read in a letter that LDS had stated that LSD was affiliated with another political party “Parti Lepep” which he denied, stating that LSD was a genuine political party in its own right . He further denied that LSD’s registration as a political party and its intended participation in the National Assembly elections was intended in any way to jeopardise the chances of LDS at the elections. He stated that LSD only wished to participate in the elections and if it had done so would have won in several districts so that LDS would not have won the fifteen out of twenty five seats that it did.
- [24] In cross-examination by counsel for the 1<sup>st</sup> defendant (LDS), Mr. Gabriel confirmed that LSD was registered on 15<sup>th</sup> August 2016 and that the National Assembly elections were held on the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> September 2016, but stated that they had already started campaigning even before registration.
- [25] As to why he did not file an application for a stay of execution of the Supreme Court judgment in MC87/2016 after it was delivered on 25<sup>th</sup> August 2022, pending the appeal, which if granted would have permitted LSD to participate in the elections, Mr. Gabriel replied that LSD was not financially ready to so. He maintained that LSD did not have the money at the time despite it being put to him that it would only have cost about SCR2000.00 as filing fees in addition to hiring a lawyer, but could have allowed LSD to take part in the elections.
- [26] He was asked why, after he received the letter from the Chief Justice dated 30<sup>th</sup> August 2016, advising him that his only recourse was to appeal against the Supreme Court decision, he had not gone to see a lawyer who might have advised him that he could have sued as a pauper and been granted legal aid. He replied that at the time they were not thinking of legal aid. He admitted that after he was served with the Supreme Court Ruling in MA258/2016 delivered on 17<sup>th</sup> August 2016 granting the ex-parte interim injunction, he retained the services of a lawyer to file a motion for intervention who represented LSD at the hearing of the motion which was ultimately denied, and that the same lawyer represented LSD for the appeal, but stated that following the Chief Justice’s advice “at that time we did not go see a lawyer. We just let everything happen”. However he denied that he slept on his rights and cannot now blame anyone for what happened, by not filing

a stay of execution, and maintained that LSD was not financially ready to pay for a lawyer.

[27] Mt. Gabriel also agreed with counsel that every Seychellois has a right to a fair hearing in accordance with Article 19 of the Constitution and that therefore LDS just like LSD has the right to have recourse to a court of law if it has a problem. He admitted that LDS commenced court proceedings on the basis that the acronyms LDS and LSD are too similar and likely to confuse the voters, but when he was asked where LDS should seek for this matter to be resolved if it is prevented from bringing it before the Courts, he replied that “I do not have any option for where LDS should go, if LDS thinks that they should bring it to Court, this is their option. As to whether LDS only avenue was to come to Court he stated that LDS could have approached LSD first. As to whether other than asking LSD not to take the name, coming to Court was the only option, he replied “I cannot tell you that they did not have any other option but if they brought it to Court I think it was their only option.

[28] Mr. Gabriel was also cross-examined by counsel for 2<sup>nd</sup> defendant (Electoral Commission). He confirmed that after application was made for LSD to be registered as a political party, it was duly registered as such by the Electoral Commission; that it was LDS who filed the court case before the Supreme Court challenging the Electoral Commission’s decision and seeking the cancellation of LSD’s registration; and that pursuant to the case, it was the Court that ordered LSD to be struck off the register and for the cancellation of the nominations of its candidates. He admitted that hence the de-registration of LSD and cancellation of the nominations of its candidates was due to the court order and that the Electoral Commission only acted in compliance with such order.

[29] Mr. Gabriel also confirmed that pursuant to its appeal against the Supreme Court decision, the Court of Appeal quashed the decision of the Supreme Court and confirmed the Electoral Commission’s decision to register LSD as a political party, after which the Electoral Commission informed him that LSD had been re-registered as a political party.

[30] He confirmed that at no point in time did the Electoral Commission refuse to register LSD as a political party and agreed that it had to comply with court orders generally. He

admitted that the Electoral Commission had only acted in compliance with the court orders in MC87/2016 and stated that it was not complaining about any act of the Electoral Commission in regard to LSD's registration. He also accepted that there were no allegations of ulterior motive on the part of the Electoral Commission in the plaint but that such ulterior motive was only attributed to LDS. Mr. Gabriel therefore conceded that LSD's grievance was only with regards to the acts of LDS and that the Electoral Commission had not caused any harm to LSD or committed any fault against it.

[31] Following the testimony of Mr. Gabriel, counsels for all three parties made written submissions which will be referred to as appropriate in the analysis below.

## **Analysis**

### *Preliminary Objections*

[32] Before dealing with the matter on the merits, this Court will first consider the preliminary objections raised by the 2<sup>nd</sup> Defendant namely the Electoral Commission, the first of which is that the plaint does not disclose any reasonable cause of action against it. A reading of the plaint reveals that what is reproached of the Electoral Commission, as stated at paragraph 7 thereof, is that "*consequent to the order of the Supreme Court dated 17<sup>th</sup> August 2016 [it] it removed the Plaintiff from the Register of Political parties by virtue of its Order dated 23<sup>rd</sup> August 2016.*".

[33] It is further stated at paragraphs 9 and 10 of the plaint that:

9. *The Plaintiff has thus suffered severe prejudice as a result of 1<sup>st</sup> defendant's wilful and wanton conduct in that the Plaintiff was deprived of its Constitutional rights from contesting the National Assembly elections and lost its opportunity to represent itself through the potentially elected members of its party in the National Assembly of Seychelles. This in law amounts to faute.*

10. *The first and second defendant are thus jointly and severally liable for such faute in depriving the rights of the Plaintiff.*

[34] As seen from the above there is no *faute* alleged against the Electoral Commission although the plaintiff holds it jointly and severally liable for LDS's "*wilful and wanton conduct*" which resulted in LSD being deprived of its Constitutional right to participate

in the National Assembly elections thereby losing the opportunity to be represented in the National Assembly through potentially elected members of its party. Such “*wilful and wanton conduct*” consisted in the LDS filing a petition before the Court for the Judicial Review of the Electoral Commission’s decision to register LSD as a political party, which LSD alleges the LDS did “*out of ulterior motive and with a view to avoid any rival contest from other political parties*” (paragraph 5 of plaint).

[35] On its face therefore, the plaint does not disclose any *faute* committed by the Electoral Commission which only complied with a valid Court Order not to register any political party under the name LSD, which it was bound to act upon, and failure of which would have amounted to contempt of court. Furthermore I note that under cross-examination by counsel for the Electoral Commission Mr Gabriel admitted that LSD’s grievance was against the actions of LDS and not those of the Electoral Commission and that the Electoral Commission caused no harm to LSD nor committed any fault against it, essentially exonerating the Electoral Commission of any liability in the present case.

[36] Section 92 of the Seychelles Code of Procedure allows the Court to strike out any pleading that discloses no reasonable cause of action. It provides:

*The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just.”*

[37] The preliminary objection of the 2<sup>nd</sup> defendant that the plaint does not disclose any reasonable cause of action against it is accordingly upheld and the Electoral Commission is struck out as a defendant to the plaint. Having so determined there is no necessity for the Court to consider the other preliminary objections raised by the 2<sup>nd</sup> defendant.

#### *On the merits*

[38] The present case is a delictual claim as can be inferred from the pleadings. It is averred in the plaint that:

5. ***The first defendant out of ulterior motive and with a view to avoid any rival contest from other political parties had purposely filed civil cases in the form of Judicial review against the 2<sup>nd</sup> Defendant in that the Plaintiff and another political party namely Linyon Sanzman who is not a party to this cause were sought to be removed from the register of political parties.***
6. *The first defendant's civil case was filed before the Supreme Court of Seychelles in MC86/16 & MC87/16 (MA /16) against the 2<sup>nd</sup> defendant without the plaintiff being a Party to the said cause and the Supreme Court of Seychelles granted an ex-parte order dated*
7. *The 2<sup>nd</sup> Defendant consequent to the order of the Supreme Court dated 17<sup>th</sup> August 2016 removed the Plaintiff from the Register of Political parties by virtue of its Order dated 23<sup>rd</sup> August 2016.*
8. *... [T]he Seychelles Court of Appeal in an appeal filed by this Plaintiff in SCA 24/2016 rendered a judgment delivered on 9<sup>th</sup> December 2016 in that the de-registration of the Plaintiff from the political party was negated, nullified, reversed the judgment of the Supreme Court of Seychelles and resulted in the Re-Registration of the Plaintiff. Thus, the order of the Supreme Court dated 17<sup>th</sup> August 2016 was quashed.*
9. ***The Plaintiff has thus suffered severe prejudice as a result of 1<sup>st</sup> defendant's wilful and wanton conduct in that the Plaintiff was deprived of its Constitutional rights from contesting the National Assembly elections and lost its opportunity to represent itself through the potentially elected members of its party in the National Assembly of Seychelles. This in law amounts to faute.***
10. *The first and second defendant are thus jointly and severally liable for such faute in depriving the rights of the Plaintiff.*  
Emphasis added.

[39] Delicts are dealt with under Book III, Title IV, Chapter II of the Civil Code of Seychelles Act 1976 ("the Civil Code") – the applicable law at the time the cause of action arose. Articles 1382 and 1383 provide in relevant part as follows:

*Article 1382*

1. *Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
2. *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*
3. *Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.*
4. *A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.*
5. *Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.*

#### Article 1383

1. *Every person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence.*  
[...]

[40] Article 1382(1) which deals with *responsabilité délictuelle du fait personnel*, provides for liability of a person (the tortfeasor) for damage caused to another (the injured party) by an act or omission (i.e. fault) of the tortfeasor. Such act or omission (fault) may be negligent or intentional. Hence Article 1382(2) defines fault as “*an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused*”. Similarly Article 1383(1) imposes liability for damage caused by negligence or imprudence. On the other hand Article 1382(3) “*encompasses a deliberate and intentional cause of harm*” (Vide *Allain St. Ange v Attorney General* (CS940f 2018) [2019] SCSC1016 (18 November 2019)). Delictual liability is established by proving the *dommage*, the *faute* (act or omission which may be

negligent or intentional) of the person causing the *dommage* and a *lien de causalité* between the two.

[41] In light of the averments in the plaint, the principal issue for determination of this Court is whether the LDS committed a *faute* by filing case No. MC87/2016 against the Electoral Commission before the Supreme Court for the Judicial Review of the Electoral Commission's decision to register the plaintiff as a political party under the name Lafors Sosyal Demokratik (LSD), which resulted in the name of LSD being struck off the register of political parties thereby depriving it from contesting the 2016 National Assembly election and its candidates from potentially being elected to the National Assembly.

[42] It is LSD's case that LDS filed the case "*out of ulterior motive and with a view to avoid any rival contest from other political parties*". It also avers that LDS also filed a similar case – a petition for judicial review of the decision of the Electoral Commission in MC86/2016 - for another political party Linyon Sanzman to be removed from the register of political parties, for the same purpose.

[43] In its defence LDS contends that it lawfully and appropriately filed the petition for judicial review in the exercise of its constitutional right to seek redress before the Supreme Court pursuant to which appropriate remedies were granted to it by the Court in the lawful exercise of its constitutional mandate. It further avers that the exercise of legal and constitutional rights is not actionable in a constitutional and Rule of Law state and that it is therefore not liable in law to LSD.

[44] In support of this argument counsel for LDS submits that the recognition by the Republic of its obligation to "*uphold the rule of law*" in the Preamble to the Constitution means that "*the Courts will be available to all its citizens and all legal persons to adjudicate any and every legal dispute*". Further that Articles 19(7) and 27 of the Constitution afford every person including political parties the right to a fair hearing in a court of law and the right to equal protection under the law respectively.



[45] In essence LDS is claiming that pursuant to these Constitutional provisions, it legitimately and legally brought a petition for judicial review challenging the decision of the Electoral Commission to register a political party under a name, the acronym of which so closely resembles the acronym of its own name that it might lead to confusion among the voters, and that this cannot be a *faute* in law. It denies that it was motivated by malice.

[46] LDS further submits that “*this case is delictual (faute)*” and that on the face of the plaint no action for possible abuse of process is disclosed and can therefore be maintained. In my view this argument is misconceived because the principle of “abus de droit” is evident in Article 1382 itself more specifically in sub-article (3) which states that “[*f*]ault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest”. The Court of Appeal, in the case of *Seychelles Broadcasting Corporation v Beaufond and Anor* SCA 29/2013 [2015] (28 August 2015) acknowledged that there is a general delict of abuse of rights. The claim in that case was based on both the delict of defamation and an abuse on the defendant/appellant’s right to “report on [a] matter” under Articles 1382 and 1383(3) of the Civil Code. The Court found that there was a duplication of the cause of action and that it was not permissible to base a plaint on both defamation and abuse of right under the provisions of Article 1382 and 1383. It stated that the provisions of Article 1382 deal with damages arising from the abuse of rights in general while Article 1383(3) specifically deals with damages arising from the abuse of the right of freedom of speech and applied the rule of interpretation that the provisions of a general statute must yield to those of a special one.

[47] In regards to his argument that the plaint does not disclose any action for abuse of process, counsel, in his submissions, refers to Amos and Walton’s “Introduction to French Law (Clarendon Press, 3<sup>rd</sup> ed. P.219-220)” in which it is stated that;

*“... French writers have endeavoured to create an extensive and generalised theory of abuse of right... [L]aw is for the benefit of the community and not for the advantage of the individual and there is an abuse of rights whenever a right is exercised in a manner*

*contrary to the social interest. In contrast with this objective test, other writers favour a subjective one, based on the intention to inflict harm.., The courts have declined to consecrate categorically either the one theory or the other. In practice, they do not search for the subjective intention to do harm but infer from that the commission of acts consistent with no other intention.”*

[48] Relying on the above, counsel submitted that “*there is no allegation of “intention to inflict harm” disclosed in the Plaint*”. There is further no allegation that the 1<sup>st</sup> defendant was “*motivated by malice and intended an abuse.*””. In so saying he fails to take into account what is stated in the above quote namely that “[i]n practice, [the Courts] do not search for the subjective intention to do harm but infer from that the commission of acts consistent with no other intention.”. In my view therefore it was not strictly necessary for LSD to plead intention to inflict harm on the part of LDS or that LDS was motivated by malice or intended an abuse, as long as it pleaded the commission of acts consistent with no other intention than that of inflicting harm and from which such intention can be inferred. In my view the intention to inflict harm can be inferred from the averments in the plaint more particularly paragraphs 5 and 9 (reproduced at paragraph 38 hereof), and such averments are sufficient to disclose a cause of action of “abus de droit” under Article 1382. For the same reason I find no merit in counsel’s submissions that “no reasonable cause of action is disclosed against the first defendant” which moreover was never raised by LDS in its pleadings. I find what the Court stated in *Parcou v Bentley* (250 of 2002) [2004] SCSC 15 (16 May 2004) regarding a point of law that the plaint did not disclose a cause of action against the defendant, relevant in that regard;

*A cause of action arises when the wrong or imagined wrong for which a plaintiff is suing, is one for which the substantive law provides a remedy. If a claim is at all arguable, it should not be struck out as disclosing no reasonable cause of action.*

[49] The action in that case was founded on faute under Article 1382 and in setting aside the plea in *limine litis* as being premature at that stage, the Court went on to state that:

*the Plaintiff pleads that by the mere fact the Defendant wrote such a letter to the authorities concerned is a faute, as the effect of such a letter has caused damage*

*to the Plaintiff. How far such contention will subsist will be borne out by evidence.*

- [50] Similarly in this case not only has the commission of a faute actually been averred in the plaint but furthermore sufficient material facts to form the basis of a cause of action under Article 1382(3) have also been averred. Having pleaded these material facts the next step is to prove them, namely that LDS committed a faute and more specifically an abus de droit which caused damage to LSD.
- [51] I now return to the issue of whether the acts of LDS constituted a faute and more specifically an abus de droit. There is no doubt that a person is entitled to bring a petition for Judicial Review challenging an administrative decision in the exercise of its rights: Any person is entitled to seek redress from the Courts for any wrongs it may have suffered or to settle disputes, provided of course that their grievance is a genuine one and the right is not used abusively. Commencing an action before a court would constitute a faute where the dominant purpose of bringing such action is to cause harm to the defendant as opposed to if it was brought in the exercise of a legitimate interest. In other words the acts of LDS would constitute a faute if it was motivated by malice as opposed to filing the Judicial Review petition in good faith in the belief that it was founded on reasonable and probable cause. In order to make a determination on this issue it is important to look at the facts of the case, particularly the events giving rise to the present case.
- [52] These facts as they appear from the evidence adduced in this case including the exhibits which in turn include the various judgments, orders and rulings produced by LSD (Exhibits 7, 8, 10 and 12) are as follows:
- [53] On 14<sup>th</sup> July 2016, the Electoral Commission, announced the Nomination Date for the National Assembly Elections as 17<sup>th</sup> of August 2016 and the dates for the elections namely 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> of September 2016.
- [54] On 5<sup>th</sup> August 2016 Mr. Jimmy Gabriel as leader of a political party submitted an application (Exhibit P4) accompanied by other required documentation (Exhibits 1, 2,

and 3), to the Electoral Commission for the political party to be registered under the Political Parties (Registration and Regulation) Act under the name Lafors Sosyal Demokratik (LSD). Exhibit P6 is a certificate issued by the Registrar of Political Parties dated 15<sup>th</sup> August 2016 certifying that it had on that date, registered the said party under the Act.

[55] There is no clear evidence presented by any of the parties as to exactly when Linyon Demokratik Seselwa (LDS) was registered as a political party, and whether it was registered before or after LSD was registered. What I have been able to ascertain from the Court of Appeal judgment in SCA 23 & 24/2016 is that LDS (led by Mr. Roger Mancienne) was registered as a political party under that name after the Electoral Commission took a decision to register another party (led by Mr. Martin Aglae) under the name Linyon Sanzman – a name which Mr. Roger Mancienne’s party had also applied to be registered under. The Electoral Commission’s decision to register Mr. Martin Aglae’s party as Linyon Sanzman was taken on 5<sup>th</sup> April 2016 and communicated to the parties on the same date. According to the same judgment, thereafter Mr. Roger Mancienne sought to have his party registered as Sanzman 2015 but after his application was declined on the ground that the name resembled the name Linyon Sanzman too closely, he chose to register the party under the name Linyon Demokratik Seselwa. The judgment does not state the date when LDS was registered.

[56] It appears from Renaud J’s judgment in the ensuing petition for Judicial Review of the Electoral Commission’s decision to register Mr. Martin Aglae’s party as Linyon Sanzman, that Mr. Roger Mancienne’s party had already been registered under the name Linyon Demokratik Seselwa by the time the Judicial Review Petition was filed. This is because in his judgment the petitioner is cited as Linyon Demokratik Seselwa and further it is stated at paragraph [1] thereof that:

[1] *The Petitioner is a registered Political Party intending to participate in elections in Seychelles. It wanted to have its party registered by the Respondent under the name "Linyon Sanzman". Its application was not approved by the Respondent hence it adopted the present name "Linyon Demokratik Seychellois".*

[57] Further in the same judgment, in Renaud J’s review of the decision making process of the Electoral Commission, he states the following at paragraph [58]:

***Registration of “Linyon Demokratik Seselwa”***

[58] *Following a resolution taken by the Respondent by post, the Petitioner was accordingly registered as a political party on 7th April, 2016. That decision was ratified by the Respondent at its meeting held on 16th April, 2016 at 9.15 am.*

[58] LDS had therefore already been registered as a political party for almost four months by the time that Mr. Jimmy Gabriel applied to have LSD registered as a political party on 5<sup>th</sup> August 2016. As stated LSD was registered on 15<sup>th</sup> August 2016,

[59] Two days later on 17<sup>th</sup> August 2016, LDS filed a Judicial Review Petition in MC87/2016 challenging the decision of the Electoral Commission to register LSD as a political party on the following grounds as stated in paragraph [1] of the ruling in MA258/2016 arising in MC87/2016 dated 17<sup>th</sup> August 2016 (Exhibit 7) and the judgment dated 25<sup>th</sup> August 2016 in MC87/2016 (Exhibit 8):

[1] *... the said decision is irrational, unreasonable and above all, illegal. The Petitioner contends that the name “LSD” is identical or so nearly resembles the name of an existing registered political party “LDS”, or is so close and similar, or appears to be the same as, or is likely to be confused with, or mistaken for, the name of the petitioner “LDS”, which is an existing, recognised and registered political party. The impugned name “LSD” according to the petitioner is likely to deceive, mislead or to say the least confuse the members of the public, its party members and supporters, who are potential electorates and soon going to exercise their voting rights in the forthcoming election to elect the members of the National Assembly. Such deception, misleading and confusion would cause irreparable loss, hardship, prejudice and irreversible adverse consequences to the petitioner.*

[60] On the same date LDS also filed MA258/2016 for an ex-parte interim injunction “directing the Respondent (EC) that the name “LSD” is not allocated to the political party led by Mr. Charles Jimmy Gabriel and not to accept, approve or register any nomination of candidate/s nominated or submitted by “LSD” to contest in the

*forthcoming elections for the National Assembly*". See ruling in MA258/2016 arising in MC87/2016 dated 17<sup>th</sup> August 2016 (Exhibit 7). The ruling delivered on the same day in addition to granting leave to proceed with the Judicial Review petition ex parte also granted an interim injunction by way of the following orders at paragraph [11] thereof:

[11] [...]

- (3) *I order an interim injunction prohibiting the Election Commission from allocating the name "LSD" to any political party led by Mr. Charles Jimmy Gabriel or by any other person for that matter, and also prohibiting the EC from accepting, approving or registering any nomination of candidate/s submitted by "LSD" to contest in the forthcoming elections, for the National Assembly, until further order of the Court.*
- (4) *For the avoidance of doubt, if any nomination of candidate/s submitted by the political party "LSD" has already been accepted, approved or registered, I direct the Election Commission to strike off and cancel such acceptance, approval or registration in this respect, in order to give effect to the interim injunction ordered herein until further order of the Court.*
- (5) *I direct the Registrar of the Supreme Court to serve forthwith, a copy of this order and the petition, on the Electoral Commission. In the interest of justice, I further direct the Registrar to serve copies of this petition and the interim order on Mr. Charles Jimmy Gabriel or the President or the Secretary or any fit and proper person representing the political party "LSD".*

[61] On 19<sup>th</sup> August LSD filed MA 264/2016 an application for intervention in the Judicial Review Petition in MC87/2016 on the ground that it was an interested party and the decision with respect to it had been given without a hearing and that as a result of the interim orders made its right to participate in the National Assembly elections had been curtailed.

[62] On 21<sup>st</sup> August LDS filed MA266/2016 against the Chairperson and members of the Electoral Commission, the party leader of and other people concerned with LSD for contempt of Court for not having abided by the Judge's orders. It is to be noted that by

letter dated 23<sup>rd</sup> August 2016 (Exhibit P11) the Electoral Commission informed Mr Charles Jimmy Gabriel that it was complying with the Supreme Court's Ruling dated 17<sup>th</sup> August 2016 in MA258/2016 with immediate effect. The contempt proceedings were set aside since there had been compliance at the earliest and on the first opportunity.

[63] On 22<sup>nd</sup> August LSD filed an application MA268/2016 for the recusal of the trial judge in the Judicial Review Petition in MC87/2016 on the ground that it strongly believed that *“the orders dated 17<sup>th</sup> August 2016 in passing restraining order directing the Electoral Commissioner from registering our party and even to cancel the registration if already registered is biased and prejudicial not only to the party Lafors Sosyal Democratic and also to the principles of democracy enshrined in the Constitution of the Republic of Seychelles.”*

[64] By a ruling dated 23<sup>rd</sup> August 2016 (Exhibit P10) MA264/2016 for intervention and MA268/2016 for recusal were both dismissed. The Court found that LSD did not have locus standi to intervene or to make any applications as it did not exist legally. It stated:

*It is evident that by virtue of the order made by this Court on the 17<sup>th</sup> of August in Miscellaneous Application 258/2016 ... arising out of Miscellaneous Cause 87/2016 that at the time of filing these applications there were no longer legal entities as they had been ordered to be struck off the register by a lawful order of the Supreme Court. Hence all applications filed by the so-called “proposed interveners” or (sic) null and void ab initio for having geminated (sic) from non-entities unknown to our laws, and annulled by the order of the Court. Therefore, in my judgment all applications made by the so called ... LDS are not maintainable in law. They are incompetent and stillborn in the eyes of the law and so liable to be dismissed in limine.*

[65] In regards to the intervention application it further stated that the proposed interveners were third parties. In that regard it stated that the jurisdiction of the Court in Judicial Review matters is conferred by the Constitution and that it is the Constitutional prerogative of the Court to issue writs primarily intended to quash administrative decisions vitiated by illegality, irrationality or unreasonableness regardless of whether

such writs eventually affect or are likely to affect the interest of any third parties to the judicial review proceedings. It expressed the view that such third parties have no legal right or locus standi to intervene in these proceedings, and that it is evident from the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules which govern judicial proceedings in Judicial Review matters, that such Rules neither provide for nor permit any such intervention from third parties to the proceedings. Accordingly it decided that no such third party shall be allowed in breach of the said Rules.

[66] On the issue of recusal, the Court found that the procedure for recusal had not been followed and the application was procedurally wrong, irregular and improper. It also found that no material facts to substantiate that the trial judge was biased had been brought forth by LSD. On the issue of bias by the making of the ex parte interim injunction it stated that:

*It is common knowledge in civil proceedings the Courts, particularly the Supreme Courts have jurisdiction and powers to issue ex parte interim injunctions pending the final determination of the petition. This is very normal practice, this happens every day in civil proceedings. If a person alleges that making such an ex parte order amounts to bias by a Judge, such allegation is absurd and to say the least, baseless and unsubstantiated, conjunctive and surmise.”*

[67] On 25<sup>th</sup> August after hearing the Judicial Review petition in MC87/2016 the Court confirmed the decision it had made on 17<sup>th</sup> August 2016. (Vide Exhibit P8). At paragraph 4 of its judgment the Court stated that “*any reasonable man with average intelligence or the man on the Clapham omnibus would obviously find that that the name/acronym “LSD” does appear to be very similar or the same as, or is likely to be confused with, or mistaken for, the name/ acronym of “LDS” which is the name of an existing, registered and recognized political party”.*”

[68] The court also relied on section 7 of the Political Parties (Registration and Regulation) Act which sets out the circumstances in which the Electoral Commission may refuse to register a political party which include “where the name of the party (i) is identical to the



name of a registered political party; (ii) so nearly resembles the name of a registered political party ... as to be likely to deceive the members of the party or the public". In that regard it observed that;

[7] *It is interesting to note that the Election Commission was well-versed with this provision on 5<sup>th</sup> April 2016, in its letter to the Petitioner, when the Petitioner had sought to register a party under the name "Linyon 2015" stating that it resembled that of "Linyon Sanzman". However, this very same provision was seemingly forgotten on the 11<sup>th</sup> August 2016, when the EC decided to allow the registration of "LSD" as a political party, when the Petitioner had already registered its political party under the name "LDS". This selective application of the law in such a manner only strengthens my view that the decision of the Respondent was ill-conceived and arbitrary.*

[69] The Court found that in the circumstances *"the impugned decision of the [Electoral Commission] in this matter is grossly illegal, improper, irrational and unreasonable"* and made the following orders:

[8] ...

- (1) *I allow the petition and issue a writ of certiorari quashing the said impugned decision of the [Electoral Commission].*
- (2) *I confirm and hereby make permanent, the ex parte interim injunction granted in this petition in respect of the relevant and operative part of the final orders made therein, to form mutatis mutandis, part of the orders made hereof in this judgment*

[70] Dissatisfied with the judgment of the Supreme Court, LSD appealed to the Court of Appeal. The appeal was heard on 30<sup>th</sup> November 2016 and judgment delivered on 9<sup>th</sup> December 2016, quashing the decision appealed against.

[71] It is to be noted that one judgment was rendered by the Court of Appeal in respect of two appeals: the appeal in SCA23/2016 against the Supreme Court judgment in the Judicial Review petition challenging the decision of the Electoral Commission concerning registration of Linyon Sanzman i.e. MC86/2016 and SCA24/2016 against the Supreme Court judgment in the Judicial Review petition challenging the decision of the Electoral Commission concerning registration of LSD i.e. MC87/2016. In its judgement the Court

of Appeal therefore addressed matters and issues relevant to the registration of both Linyon Sanzman and LSD. The latter is most relevant to the present case, although I note that in paragraph 5 of the plaint reference was made to the filing of the Judicial Review petition to remove Linyon Sanzman from the register of political parties, presumably to show the “ulterior motive” of the 1<sup>st</sup> defendant in attempting to eliminate not only the plaintiff but all competition in the National Assembly elections. The Court of Appeal at paragraph [4] of its judgment stated that the facts in MC86/2016 and MC87/2016 are inextricably linked. The facts giving rise to both cases are explained in great detail in the said judgment.

[72] It is also important to note as explained in the Court of Appeal judgment that MC86/2016 which concerned the Judicial Review of the decision of the Electoral Commission allowing registration of Linyon Sanzman and which gave rise to the appeal in SCA23/2016 was the second Judicial Review petition filed in regards to the registration of Linyon Sanzman. The first petition MC59/2016, was heard by Renaud J and by a ruling delivered on 1<sup>st</sup> August 2016 he had issued a writ of certiorari quashing the decision of the Electoral Commission to register Mr. Martin Aglae’s political party using the name of "Linyon Sanzman" given that Mr. Roger Mancienne had applied for his political party to be registered under the same name on the same day as Mr. Aglae albeit later during the day. Renaud J, further gave the following directions at paragraph 88 of its ruling essentially putting the ball back in the Electoral Commission’s Court.

*(a) The Respondent is directed to hear both Applicants with the objective of resolving the contentious issues raised by the Petitioner in its letters of 10th and 11th March, 2016 as well as the response of Mr. Aglae as to why he used the name of "Linyon Sanzman".*

*(b) The Respondent is also directed not to register any political party under the name of "Linyon Sanzman" unless and until the contentious issues as to the use of that name has been objectively resolved and settled.*

*(c) The Respondent is further directed to give reasons for its decision when resolving the matter in issue.*

*(d) For the avoidance of doubt, no political entity or grouping is authorized to use the term 'Linyon Sanzman' as its name for any intent or purpose until the final determination of the contentious issue - referred to in para (a) and (b) above - by the Respondent.*

[73] The judgment rendered in MC86/2016 concerned the Electoral Commission's decision given after it had complied with Renaud J's directions in MC59/2016.

[74] In its judgment SCA24/2016 arising from MC87/2016 which concerned LSD, the Court of Appeal stated the following in regards to the Supreme Court judgment being appealed against:

[67] *The reasons [Karunakaran J] gave were that the decision was grossly illegal, improper, irrational and unreasonable. He reached that conclusion on the standard of the man on the Clapham omnibus:*

*“any reasonable man with average intelligence or the man on the Clapham omnibus would obviously find that the name/acronym “LSD” does appear to be very similar or the same as, or is likely to be confused with, or mistaken for, the name/acronym of LDS which is the name of an existing registered and recognized political party.”*

[68] *It is trite law that in applications for Judicial Review, a Court is incompetent to look at the reasonability or unreasonability of the decision from its point of view as the learned Judge did in this case. He gravely erred when he applied the standard of the man on the Clapham omnibus, which appertains to delict. He should have applied the Wednesbury principle which appertains to Judicial Review cases.*

[69] *This principle named after the case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223, was later articulated in Council of Civil Service Unions v Minister for the Civil Service 1983 UKHL 6 by Lord Diplock in that the decision should be shown to be –*

*“So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”*

[75] The Court of Appeal went on to say that:

[70] *The record shows that so bent was the learned Judge to give judgment according to his will rather than according to law that he brushed aside completely and did not answer the submission of learned counsel for the EC that the law spoke of name and not acronym. The learned Judge equated the name with the acronym. In using the comparison Linyon 2015 and Linyon Sanzman” it should not have escaped his mind that he was referring to names and not to acronyms.*

[76] It is to be noted that by the time the Court of appeal judgment was delivered on 9<sup>th</sup> December 2016 the National Assembly elections had already taken place and LSD had not been able to participate in them.

[77] The question which has to be answered is whether the facts recounted above disclose a *faute* or abuse of right on the part of LDS. As I have stated at paragraph [51] above the act of LDS in bringing a petition for Judicial Review challenging the decision of the Electoral Commission to register LSD as a political party can only constitute a *faute* where the dominant purpose of bringing such petition was to cause harm to LSD. To make a finding of *faute* this Court would have to find that LDS was motivated by malice and did not act in good faith in bringing the petition.

[78] In his submissions Counsel for LSD relies mainly on two points in support of his contention that LDS committed a *faute*. These are the filing of the cases against LSD ex-parte and the fact that the judgment of the Supreme Court in MC87/2016 was overturned by the Court of Appeal, both of which will be dealt with below.

Filing of MC87/2016 (Judicial Review) and MA258/2016 (Interim Injunction) ex-parte

[79] On 17<sup>th</sup> August 2016, LDS filed MC87/2016 against the Electoral Commission for Judicial Review of the latter’s decision. LSD was not put into cause or made a party to the petition. On the same day LDS filed an ex-parte application for interim injunction in MA258/2016 which was dealt with ex-parte on the same date by way of a ruling granting the injunction (Exhibit 7).

[80] It is an accepted practice before the Courts especially in urgent cases where time is of the essence for applications for interim injunctions to be made and dealt with exparte. However as rightly observed by the Court of Appeal, the trial judge simply granted the

interim order ex-parte but did not fix it for inter-partes hearing on a date earlier than the hearing of the main case with a view to discharging or enlarging the order, as would have been proper. The interim order was simply confirmed in the judgment dated 25<sup>th</sup> August 2016 given in the Judicial Review petition in MC87/2016, after hearing only LDS and the Electoral Commission. In between the granting of the interim order and its confirmation LSD did attempt to intervene in the proceedings but its application was dismissed.

[81] It is clear that not only was LSD not heard when the initial interim order made but it was further not heard before the final order was made. This was clearly in breach of the rules of natural justice and fair hearing according to which a person must be given an opportunity to be heard in proceedings directly affecting it. But does this mean that LDS committed a faute or abused its right?

[82] In court proceedings while parties have carriage of their cases and are bound to act ethically, the presiding judge has a duty to see that due process is followed and that the rights of the parties are safeguarded. LDS having brought an ex-parte application for an interim injunction which as I have stated is common practice in urgent cases, the presiding judge should have if it considered that an interim application should be granted for reasons of urgency, ensured that the affected persons, in this case LSD were afforded the opportunity to be heard. A close look at the Court of Appeal's judgment in paragraphs [36] to [45] concerning the interim ex-parte injunction in MA257/2016 and paragraphs [46] to [52] on the interim ex-parte injunction in MA257/2016 shows that the proceedings were affected by a number of procedural flaws the effect of which would have been negated if in the words of Domah JA, "the learned Judge had handled the application[s] judicially and judiciously". In my view no faute can be attributed to LDS in filing the interim injunction application ex-parte and for the fact that the presiding judge did not ensure that LSD's rights were respected. In those circumstances it was up to the judge to safeguard the rights of LSD.

[83] As for the filing of the Judicial Review petition ex parte, I find that LSD as a party which stood to be directly affected by a decision of the Court in such petition ought to have been made a party thereto. LDS not having done so when filing the petition, it was up to

the trial judge to rectify this anomaly and add LSD as a respondent thereto. However instead of adding LSD as a respondent to the proceedings he proceeded to wrongly dismiss its application for intervention on grounds that LSD had been annulled by a Court order and was therefore an entity unknown to our law, and further that it was a third party to the Judicial Review proceedings and to allow it to intervene therein would be against the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules. However although I find that LSD should have been made a party to the proceedings in MC87/2016, I find that the fact that it was not, without more, is not sufficient to make a finding of bad faith and consequently abuse of right on the part of the LDS, especially given that LSD could have been added as a respondent if the presiding judge had followed the correct procedure and taken into account the rules of natural justice and fair hearing thereby ensuring that LSD's rights were safeguarded.

- [84] Related to this point is counsel for LSD's submission that the Supreme Court in its determination of the cases before it was misled by LDS. In my view this claim is not substantiated by any evidence, and LDS cannot be made to shoulder the blame for the trial judge's failings in carrying out his duties.

Quashing of Supreme Court Judgment in MC87/2016 on appeal

- [85] I find it appropriate at this juncture to state that the fact that LDS filed cases which were determined in its favour by the trial Court and resulted in LSD not being able to participate in the elections is not of itself proof of bad faith, in the absence of circumstances giving rise to the inference of such bad faith on the part of LDS. It is also important to note that different considerations apply to Judicial Review cases which are concerned with the decision making process of the body whose decision is sought to be reviewed, and a claim for *faute*.

- [86] As stated, the Court of Appeal dealt with the appeals in MC 86/2016 and MC87/2016 together. As is also made clear in the Court of Appeal judgment, the applications for Judicial Review in these two cases emanated from two very different sets of facts.

[87] MC 86/2016 concerned the registration of Mr. Martin Aglae’s political party under the name Linyon Sanzman which had been contested by Mr. Roger Mancienne’s party on the ground that it had been using that name in its electioneering and campaigning activities since 2015 in the second round of the Presidential elections. Relying on section 7 of the Political Parties (Registration and Regulation) Act, the Court of Appeal found that Mr. Roger Mancienne’s party had no legal right to the name Linyon Sanzman for the 2016 National Assembly elections as Mr. Aglae’s application for registration preceded that of Mr. Mancienne. It stated at paragraph [16] of its judgment that

[16] *... The law is quite clear that the Commission may refuse to register a party after being satisfied that “the name of the party is identical to the name of a ... political party whose application precedes the present application.” Mr Martin Aglae’s application clearly preceded the application of Roger Mancienne. That is the long and the short of it under the law.*

[88] And further at paragraph [31] that:

[31] *... The Electoral Commission applied the law as it should have been in accordance with section 7(1)(b). If LDS had failed to register the name it had used before, it had itself to blame. It had no moral right to shift that blame upon any other party, let alone a legal right. Prior registration is the law against which later applications are tested, nor prior use of any name wherever used, however used, whenever used. Legitimacy is claimed by the registration and not by prior use.*

[89] Furthermore the Court of Appeal found that Mr. Roger Mancienne’s party having already been registered under the name Linyon Demokratik Sesel and campaigning under that name was no longer interested in using name Linyon Sanzman for the 2016 National Assembly election but for future use. In that regard it stated:

[30] *Linyon Demokratik Seselwa having been registered and campaigning as it was Linyon Demokratik Seselwa may have had an interest in the matter: namely for other elections. But it did not have “sufficient interest in the subject-matter.” The subject-matter was the use of the name for the forthcoming election, which LDS had abandoned. A speculative future interest is not a sufficient interest for the purposes of an Application in law. It must be a real interest in the subject-matter*

*of the action. The fact that, as Linyon Demokratk Seselwa, it wanted to preserve it for later elections was clearly irrelevant and immaterial to the case in hand.*

- [90] On those grounds it found that the application had no merit even for the leave stage and should have been rejected by the trial judge.
- [91] MC87/2016 on the other hand, arose because of the resemblance between the acronyms “LDS” for Linyon Demokratik Seselwa and “LSD” for Lafors Sosyal Demokratik. LDS claimed that they so nearly resembled each other that it could lead to confusion. Needless to say that such a situation would be of utmost concern to any political party about to venture into elections especially if such confusion were to affect the voters. In my view there is merit in this claim. The Court of Appeal stated at paragraph [34] of its judgment that “[a] cursory reading of the law should have alerted the Judge that the acronym of a political party is for nothing in the determination before the Electoral Commission. The law is with reference to the name not the acronym.” In my view this is just splitting hairs and it is important to follow the spirit of the legislation which is to avoid confusing or deceiving members of the party or the public, which is exactly what having two political parties with acronyms so closely resembling each other would lead to especially with the less discerning populace.
- [92] It is also to be noted that the Judicial Review petition in MC 87/2016 was filed two days after LSD was registered as a political party and the related ex-parte interim injunction application in MA258/2016 was filed on the same day. There was therefore no question of any delay in filing the Judicial Review petition in MC 87/2016 as was the case in the Judicial Review Petitions filed in relation to Linyon Sanzman the first being MC59/2016 which was heard by Renaud J and which was filed almost two months after the registration of Martin Aglae’s party by the Electoral Commission under that name. The second application MC 86/2016 was filed two weeks after the Electoral Commission’s decision to allow Martin Aglae’s party to use the name Linyon Sanzman. Similarly there was no delay in filing the injunction application in MA258/2016 arising in MC87/2016 and therefore no question as stated in relation to MA257/2016 arising in MC86/2016 in relation to Linyon Sanzman that “[t]o come on the last day to make such an application on the face of it carried an element of mischief and lack of good faith”.



- [93] The Court of Appeal in its judgment goes on to state at paragraph [34] that “[t]he application should also have failed on the question of “sufficient interest” as the two earlier applications.” namely MC 86/2016 and MC59/2016. Suffice it to say that sufficient interest of LDS in the name Linyon Sanzman was deemed to be speculative by the Court of Appeal because it had been already been registered under the name LDS and its interest was only for future use. The issue does not arise in MC87/2016 as Linyon Demokratik Seselwa was a registered a political party but was concerned that similarities between the acronym LDS and LSD could be detrimental to it in the forthcoming elections.
- [94] The Court of Appeal also stated at paragraph [34] that MC87/2016 should also have failed on the issue of good faith. It stated that MC87/2016 “*was more in the nature of settling a political score with a party which had stolen a march on it on the registration than anything else*”. It is obvious that this remark applies to MC 86/2016 and MC59/2016 in regards to Linyon Sanzman which had in effect beaten LDS to registering its party under that name. It does not apply to LDS which was in fact registered under that name almost four months before Lafors Sosial Demokratik made its application for registration. It is pertinent to point out that Lafors Sosial Demokratik and Linyon Sanzman are two distinct political parties under different leadership.
- [95] The Court of Appeal also states at paragraph [34] that “*[t]here was also no full and frank disclosure on the fact that all those events mentioned related to past events without registration*”. As stated previously MC86/2016 and MC59/2016 arose from different circumstances than those that gave rise to MC87/2016. Had the facts giving rise to the two cases been similar, the filing of the Judicial Review cases may well have given rise to an inference of bad faith on the part of LDS, as tending to show that it had done so to prevent LSD and Limyon Sanzman from contesting the 2016 elections in an attempt to avoid competition from other political parties but as stated, this is not the case. Without venturing to give an opinion as to what motivated the filing of MC86/2016 and MC59/2016 and whether or not it was done in good faith, as I am mindful that there is a

pending case before the Supreme Court in respect of MC 86/2016, I am not satisfied that LDS filed MC86/2016 and MC87/2016, in a concerted attempt to “*avoid any rival contest*” in the 2016 National Assembly elections. I find that the plaintiff has failed to prove to the satisfaction of this Court that this is so.

[96] It cannot be denied that the trial judge in the Supreme Court failed on many fronts as pointed out in the Court of Appeal judgment, but for the reasons given above, it cannot in my view be inferred therefrom that LDS committed a *faute* or abused its right. I am mindful of the statements of the Court of appeal at paragraph [3] of its judgment that “*a litigation-minded court user was able to use the court system to prevent two parties from exercising their rights under the Constitution*” and at paragraph [74] that “[*i*]n this case, parties have used the process of court to score political points”. Further at paragraph [75] it is stated that the learned Judge allowed litigants to abuse the process of court. However, in spite of such statements, I find that the facts of this case and the evidence do not support a finding of fault or abuse of right on the part of LDS.

[97] In the case of *Seychelles Broadcasting Corporation v Beaufond and Anor* (*supra*) Twomey JA speaking about the maxim ‘who avers must prove’ quoted Msoffe JA in *Gopal & Anor v Barclays Bank* (2013) Vol II SLR 553 with approval as follows:

[10] ...

*“This principle of law is supported by both French law and English law. It is a principle which is well cherished in both jurisprudences”.*

*He went on to add:*

*“Cross and Tapper on Evidence (12th ed) at 124 defines “evidential burden” as: ... the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue ....*

*Yet again, at page 18, paragraph 19 Halsbury’s [Laws of England (4th ed)] says something on the standard of proof to this effect:*

*“To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a Judge or Jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof.”*

[98] For the reasons given above I find that faute has not been proved in that LSD has not discharged the burden of proving, on a balance of probabilities, that LDS in filing the cases for Judicial Review in\_MC86/2016 and MC87/2016 did so with the dominant purpose of causing harm to LSD. In other words it has not proved bad faith on the part of LDS.

[99] I also find no merit in counsel for LSD’s submission that LDS not to call witnesses a tacit admission that it is liable to LSD in law. It was up to LSD to prove its case which it failed to do regardless of whether LSD brought any evidence or not.

[100] Accordingly I do not find LDS liable for damages suffered by LSD, if any.

**Decision**

[101] In view of the above findings I dismiss the plaint

[102] I make no order as to costs

Signed, dated and delivered at Ile du Port on 9<sup>th</sup> September 2022.

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Carolus J