

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2023] SCCC 596
CP 12/2022)

In the matter between

MUKESH VALABHJI
(rep. by F. Bonte & S. Aglae)

Petitioner

and

THE REPUBLIC
represented by the Attorney General

1st Respondent

THE SEYCHELLES DEFENCE FORCES
represented by its Commander in Chief

2nd Respondent

THE SEYCHELLES POLICE FORCE
represented by the Commissioner of Police
(rep. by Mr. Mohammad Saley)

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral Citation: *Valabhji v The Republic & (CP 12/2022)* [2023] SCCC 596.. (1st August 2023).

Before: Carolus J

Summary: Preliminary Objections to Constitutional Petition involving issues of law and facts – Representation of respondents by same counsel, and representation of respondents by the Attorney General while also acting as *amicus curiae* given potential conflict of interest - Whether issue of representation can be raised in submissions.

Delivered: 1st August 2023

ORDER

RULING

CAROLUS J

Preliminary Objections

[1] The petitioner has filed a petition under Articles 46(1) and 130 of the Constitution of

Seychelles (“the Constitution”) alleging the infringement of his rights under Articles 16 (Right to Dignity) and 27 (Right to Equal Protection of the Law) of the Constitution, and in breach of Seychelles international obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) pursuant to Article 48 of the Constitution. The alleged infringements arise from his arrest in November 2021 and subsequent detention.

- [2] He has filed this petition against the Republic of Seychelles (“the Republic”) as the 1st respondent, the Seychelles Defence Forces established under Article 162(1) of the Constitution (“the SDF”) as the 2nd respondent, the Seychelles Police Force established under Article 159(1) of the Constitution (“the Police Force”) as the 3rd respondent and the Attorney General as the 4th respondent who has been joined in terms of Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement, or Interpretation of the Constitution) Rules (“the Rules”).
- [3] The 1st, 2nd and 3rd respondents to the Constitutional Petition CP 12/2022 (“the petition”) have filed preliminary objections to the petition pursuant to Rule 9 of the Constitutional Court (Application, Contraventions, Enforcement, or Interpretation of the Constitution) Rules 1994 (“the Rules”), reserving the right to file a defense on the merits.
- [4] Counsel for the 1st, 2nd and 3rd respondents makes it clear in the preliminary objections that although at present a single State Counsel from the Attorney General’s office represents all the respondents (1st, 2nd, 3rd, and 4th respondents) the preliminary objections are filed only on behalf of the 1st, 2nd, and 3rd respondents. He specifies that the preliminary objections are not filed on behalf of the 4th Respondent, namely the Attorney General in his role as *amicus curiae* under Rule 3 (3) of the Rules.
- [5] The 1st, 2nd and 3rd respondents have in their preliminary objections raised the issue of the Constitutional violations alleged by the petitioner being time-barred as they were filed outside the time limit of three months prescribed by Rule 4(1)(a) of the Rules and no

application has been made by the petitioner to extend the time for filing of the petition. They contend that even if an application for extension of time were to be made under Rule 4 (3) and (4) at this stage, it would, in any event, be bound to fail, and that furthermore the Petitioner would not be able to demonstrate any “*sufficient reason*” to explain the delay.

- [6] The respondents further contend that should the Court not consider the petition to be time barred, it should be dismissed on the basis that (1) it does not properly particularise the alleged contraventions of the Constitution and/or (2) it fails to disclose an arguable claim against any or all of the respondents.
- [7] This Court holds the view that these preliminary objections raise issues of mixed law and facts so that a determination on such objections can only properly be made after hearing the matter on the merits.
- [8] The respondents are therefore allowed time to file their defense on the merits.
- [9] For the avoidance of doubt this Court states that after having heard the matter on the merits, it will first consider the preliminary objections. If it finds merit in such preliminary objections, and consequently no necessity to make a determination on the merits of the petition, it will decline to make a determination.

Representation of Respondents

- [10] A further matter arises from the petitioner’s submissions on the preliminary objections and the 1st, 2nd and 3rd respondents reply to the petitioner’s submissions.
- [11] The Petitioner has, in his submissions, objected to a single counsel representing the 1st, 2nd and 3rd respondents on the ground that the 1st, 2nd and 3rd respondents will *most probably* have separate defences which *could* conflict with each other. He has also objected to the Attorney General representing the 1st, 2nd and 3rd respondents while also acting as *amicus curiae* as the 4th respondent under Rule 3(3), on the basis that there is a real likelihood of conflict between the impartial stance and unbiased opinion required of him as the 4th respondent as *amicus curiae* and the defences that the 1st, 2nd and 3rd respondents will be

raising.

- [12] In his reply filed on behalf of the 1st, 2nd and 3rd respondents, Principal State Counsel Mr. Saley objects to the procedure followed by the Petitioner to raise such objections and states that it should have been done by way of notice of motion supported by affidavit in accordance with Rule 2(2) of the Rules.
- [13] The purpose of the Rules as stated in Rule 2(1) is to “*provide for the practice and procedure of the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution*”. Rule 3 provides for the filing of Constitutional petitions in matters relating to the application, contravention, enforcement, or interpretation of the Constitution. Rule 9 makes provision for the respondent(s) to raise preliminary objections to such Constitutional petitions and for the Constitutional Court to hear the parties before making an order on the preliminary objections, and if the preliminary objections are dismissed for the respondent(s) to file a defence to the petition.
- [14] In the present case, the petitioner has filed his petition and the 1st, 2nd and 3rd respondents have filed their preliminary objections. Counsel for the petitioner thereafter filed written submissions in which it raised the issue of representation of the four respondents by the Attorney General, and by the same counsel. Given that the issue of representation was raised for the first time in the petitioner’s submissions, Counsel for the 1st, 2nd and 3rd respondents was given the opportunity to reply thereto. The parties opted not to have an oral hearing on the preliminary objections and instead to rely on their submissions.
- [15] The question which arises for this Court’s determination is whether it was proper for the petitioner to raise the issue of representation in submissions. It is to be noted that written submissions are not provided for in our law, but that as a matter of practice in civil proceedings before the Supreme Court where a point of law is raised in pleadings (for example a plea in *limine litis* is raised in a statement of defence) in regards to which evidence is not required to be led and which is heard prior to the hearing of the principal suit (see sections 90 and 91 of the Seychelles Code of Civil Procedure (“SCCP”)), the Court allows the parties, should they so wish, to file written submissions in lieu of an oral hearing.

It is to be noted that neither at such oral hearings nor in written submissions should the parties normally raise new points of law or lead evidence. They simply address the applicable law, its application to the case in hand and how this supports the points of law raised in their pleadings. If any evidence is required for the determination of a point of law in such proceedings it is heard together with the principal suit on the merits, and a determination in regards to the point of law made at the end of the hearing.

[16] The practice of parties filing submissions in lieu of a hearing of preliminary objections is also followed in the Constitutional Court.

[17] By analogy, preliminary objections to a Constitutional Petition can be assimilated to points of law raised in a Statement of Defence i.e. in pleadings in ordinary civil proceedings before the Supreme Court, which are heard and dealt with prior to the matter on the merits. The issue of representation could obviously not have been raised in the petition which are pleadings, as at that stage the petitioner could not have known who was going to represent the respondents. He only found out the same once the matter was called in Court. However, given that submissions are not pleadings, it would seem that the petitioner was not entitled to raise the issue of representation which is essentially a point of law, in his submissions. I am therefore inclined to agree with counsel for the 1st, 2nd and 3rd respondents that he should have done so by way of Notice of Motion and affidavit pursuant to Rule 2 (2) of the Rules. This provision provides that –

(2) Where any matter is not provided for in these Rules, the Seychelles Code of Civil Procedure shall apply to the practice and procedure of the Constitutional Court as they apply to civil proceedings before the Supreme Court.

[18] The Rules do not provide for the manner of making incidental demands in Constitutional Petitions and it is therefore the SCCP which applies by virtue of Rule 2 (2). Sections 121 and 122 of the SCCP provide as follows in regards to incidental demands -

121. Either party to a suit may, in the course of such suit, apply to the court by way of motion to make an incidental demand.

122. *The motion shall be accompanied by an affidavit of the facts in support thereof and shall be served upon the adverse party.*

[19] Having said that I also take note that our courts have held that a court or tribunal should not ignore a point of law *even if not raised by the parties*, if to ignore it would mean a failure to act fairly or to err in law. See *Banane v Lefevre* (1986) SLR 110. Here the point of law was raised, but in the petitioner's submissions and in my view the Court is therefore entitled to consider it. In that regard I note that Mr. Saley had the opportunity to respond to it.

[20] Counsel Mr. Saley however submits that such an application, even if made in accordance with the correct procedure under Rule 2(2) of the Rules and sections 121 and 122 of the SCCP, would be misconceived both in fact and law and premature given that –

- (i) *it is for the 4th Respondent to decide who should represent him in this matter; and*
- (ii) *the Petitioner has been made aware that the 4th respondent will keep under review whether separate counsel should be instructed, having regard to the ruling in Umarji & Sons (Pty) Ltd v Government of Seychelles & Ors (CP 04/2016) [2017] SCCC3 (30 March 2017).*

[21] Both parties have relied on the case of *Umarji & Sons (Pty) Ltd v Government of Seychelles & Ors* (CP 04/2016) [2017] SCSC3 (30 March 2017, in support of their respective positions. In that case, the petitioner Umarji & Sons (Pty) Ltd filed a Constitutional Petition against the Government represented by the Attorney General (1st respondent), Parti Lepep a political party (2nd respondent) and the Attorney General as *amicus curiae* (3rd respondent), seeking the return of compulsorily acquired property. The Court made reference to Rule 11(1) of the Legal Practitioner's (Professional Conduct) Rules, 2013, which provides as follows –

A legal practitioner has a continuing responsibility to avoid conflicts of interests with or between his or her clients and shall ensure that all potential conflicts of interest are promptly identified, disclosed and addressed.

and went on to express the opinion that since the respondents had filed the same defence and adopted the same objections the issue of conflict of interest did not have any relevance on the case.

- [22] On the issue of conflict of interest arising from the Attorney General representing the Government and acting as *amicus curiae*, the Court went on to state that –

Further, we are convinced that the position of the Third Respondent under rule 3 (3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules is that of an amicus curiae. However, as the principal legal adviser to the Government of Seychelles he has the right to defend the Government of Seychelles when there is no conflict of interest between the position he will be taking up as amicus curiae and in relation to the defence he will be raising for the Government

- [23] Had the Court been dealing solely with the preliminary objections and not made the decision to hear the matter on the merits before dealing with such preliminary objections, I agree with Counsel for the 1st, 2nd and 3rd respondents that the objection of the petitioner would have been premature. However given this Court’s decision to first hear the matter on the merits, we find the petitioner’s objection justified, if there is a “*conflict of interest between the position [the Attorney General] will be taking up as amicus curiae and in relation to the defence he will be raising for the Government*” and if the defences of the 1st, 2nd and 3rd respondents conflict with each other.

- [24] I note that at paragraphs 2 and 3 of the preliminary objections, counsel has averred that although at present a single State Counsel from the Attorney General’s office represents all the four defendants in this matter the Attorney General will keep under review whether a separate State Counsel should act as *amicus curiae* in light of the Court’s statement in *Umarji* (supra). He states that to the extent that any conflict may be said to arise, the Attorney General may take the decision that separate counsel should act as *amicus curiae* in this case.


- [25] If in taking a position on the merits, any such conflict arises between the defences of the

1st, 2nd and 3rd respondents, or their defences and that of the Attorney General as *amicus curiae*, then separate counsels ought to represent them in line with *Umarji*.

Signed, dated and delivered at Ile du Port on 1st November 2023



E. Carolus J



B. Adeline J



Esparon J