

## **Elizabeth v President Court of Appeal**

**(2010) SLR 382**

Frank ELIZABETH appearing in person  
Ronny GOVINDEN, Attorney-General appearing for both respondents

### **Ruling of the Constitutional Court delivered 29 July 2010**

#### **Before Egonda-Ntende CJ, Gaswaga, Burhan JJ**

This is a ruling in respect of a preliminary objection to the petition raised by counsel for the respondents, Mr Ronny Govinden. It is the contention of the respondents that the petition in this proceeding is 'frivolous and vexatious' and that it does not disclose a reasonable cause of action.

Before turning to the submission of the parties we shall provide the factual backdrop to these proceedings. The petitioner was a proportionate member of the National Assembly. He was recalled and replaced by another person by the party that nominated him to the National Assembly. He disputed the actions of the Speaker of the National Assembly, in relation to those events, in the Constitutional Court. He appealed the decision of the Constitutional Court to the Court of Appeal which rendered judgment on 7 August 2008, allowing the appeal in part, and making certain declarations.

The Speaker of the National Assembly following the decision of the Court of Appeal appeared to be uncertain as to what the decision was requiring him to do. He wrote personally to the President of the Court of Appeal for certain clarifications. The letter states in part -

I have perused the judgment dated 14<sup>th</sup> August 2009 given in the above mentioned case. In order to best execute the order given by the Court of Appeal, I need clarifications on what exactly I have to do with regards to Mr. Frank Elizabeth.

Paragraph 15 of the judgment speaks of prospective action, which to my understanding the Court of Appeal was being called upon to decide on the future conduct of all concerned. It is declared in paragraph 45 that, when required by a proportionately elected member, a Certificate of Vacancy should be issued so tha the latter may exercise his Article 82 right of challenge before the Constitutional Court.

My question is, do I have to give Mr. Frank Elizabeth a Certificate of Vacancy folowing this ruling or will it apply in future such occurences only?

Subsequently the President of the Court of Appeal called the parties before him on 29 September 2009. The petitioner appeared in person. The respondents were represented by the Attorney-General at that 'hearing'.

The petitioner stated that he was appearing under protest and that there was no application before the court upon which any hearing can proceed. The Attorney-General on the other hand stated that the Court, or the President, may, *mero motu*, rectify or clarify any issue arising out of a judgment.

The President of the Court of Appeal then made the following statement -

You've made your position clear on clarification of the particular point likewise you say, I think we agreed that this is the point before us. You have an opinion on that point: he (Appellant) has another view.

We are not rehearing the case. The judgment is already there. It is here for clarification. For me the judgment is clear. I've consulted my brothers. As stated in the judgment in principle you have dropped all the prayers in your appeal and sought only a declaration in principle.

I believe paragraph 15 of the judgment covers the essential of what it is. In principle there is no order from the court. What the court is saying is that it for prospective action. In the event in the future if the principles are not being regarded there will be consequences.

Clarification now there is no order.

There is a declaration in principle for the future, as stated in paragraph 15 of the judgment.

Court is adjourned.

Following this order the petitioner commenced fresh proceedings in the Constitutional Court for declarations that his right to a fair hearing had been contravened by the President, Court of Appeal, and that the ruling of the President, Court of Appeal, made on 2 September 2009 is null and void. The crux of his application can be gathered from the following paragraphs of his petition -

12. The Petitioner avers that there was no application from either party filed properly before the Court of Appeal and served on either of the parties to the case.

13 The Petitioner avers that the procedure adopted by the 1st Respondent contravened the constitutional right of the Petitioner to have a fair hearing.'

In their addresses to us, both Mr Ronny Govinden and Mr Frank Elizabeth concentrated on whether or not there was merit in this action which was unfortunately not helpful to the points in contention at this stage. Mr Govinden referred us to the case of *Julita D'Offay v F Louise* SCA No 34 of 2007 (unreported) to support the view that a court can clarify ambiguities in its judgment and in that regard would not be *functus officio*. We find this decision useful but on another point to which we shall revert.

In this ruling we are concerned only with two preliminary points that were raised in the answer to the petition. Firstly it was contended that this petition was frivolous and vexatious. Secondly that it did not disclose a reasonable cause of action. The two were lumped together but we take the view that they are different concepts and shall deal with them separately. This is clear in section 92 of the Seychelles Code of Civil Procedure, which states -

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 the case of the action or defence being shown by the pleading to be frivolous and vexatious, the court may order the action to be stayed or dismissed, or may give judgement, on such terms as may be just.

By virtue of rule 2(2) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994, the Seychelles Code of Civil Procedure is applicable, *casus omissus*, to constitutional litigation.

The disjunctive comma after 'and in such case' and use of the word 'or' thereafter clearly establishes the two concepts as separate concepts. We shall take cause of action first. In *Bessin v Attorney-General* [1950] SLR 208 a decision of the Court of Appeal of Mauritius, sitting on appeal from a decision of the Supreme Court of Seychelles, it was held that any such inquiry must be limited to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the court resort to the summary process of dismissing an action. In that particular case the court held it could not be said to be beyond doubt that no cause of action arose.

In reviewing a number of English decisions which it decided would guide it as the rule was adopted from the English Rules of the Supreme Court, order 25 rule 4, the court stated at page 214 -

In *Worthington & Co Ltd v Belton & Ors* 18 T.L.R. 438, Lord Justice Romer recalled in *Hubbuck & Sons v Wilkinson, Heywood and Clark* (1899) 1 Q.B. 86, Lord Lindley, after pointing out "that there were two methods of raising points of law, one by raising the question as directed by Order 25 rule 2, and the others applying to strike out the Statement of Claim under Order 25, rule 4, said: "The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands *is insufficient, even if proved, to entitle the plaintiff to what he asks.*

Whether or not a pleading has established a cause of action was discussed in the case of *Auto Garage v Motokov (No 3)* [1971] J EA 514. Spry VP stated at page 519

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...the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize

the position as I see it by saying that if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.

It is to be noted that the above decision was a decision of the East Africa Court of Appeal, on appeal from Tanzania, considering the Civil Procedure Rules in East Africa, whose origin is in the same English rules of procedure, as noted in *Bessen v Attorney-General* (supra). Similarly section 92 of the Seychelles Code of Civil Procedure has its origins in English rules of procedures. These remarks are therefore of persuasive value in defining the concept of reasonable cause of action.

In the instant case before us in order for the petition to disclose a cause of action it must show that the petitioner -

- (a) enjoyed a constitutional right;
- (b) the right had been violated; and
- (c) the defendant is liable for the said violation.

A cause of action would not be reasonably disclosed if any of the above mentioned elements are absent or non-existent.

Although the allegation of a right enjoyed by the petitioner is established in the petition, the petitioner has failed to establish in his pleadings that the constitutional right he enjoyed has been violated. The alleged contravention of his constitutional right is asserted in paragraph 14 of the petition which reads as follows -

that by his action or omission in accepting to hear a case on a letter from the Speaker of the National Assembly, the 1<sup>st</sup> respondent contravened the constitutional right of the petitioner to have a fair hearing.

Even if one is to accept the petitioner's contention that the first respondent erroneously decided to hear a matter based on a letter from one of the parties, this certainly does not translate into a violation of a constitutional right but would be an error in procedure. In fact the petitioner himself at page 3 of the proceedings before the Court of Appeal dated 2 September 2009 states -

I have come here to register a protest about the procedure being adopted by the Seychelles Court of Appeal.

It is our view if any party thereto was aggrieved by any such alleged procedural irregularity or decision made in those proceedings, the proper recourse of such a party was to go to the full court to challenge such procedural irregularity or the decision made by a single judge of the Court of Appeal, rather than to allege contravention of a constitutional right to a fair trial.

Further the record clearly indicates the President Court of Appeal summoned all

parties to appear and participate in the proceedings before him. The record indicates that an opportunity was specifically provided to the petitioner to be heard and his response specifically called for by the President of the Court of Appeal in respect of the application made by the Speaker of the National Assembly. Therefore by being summoned to appear and participate in the said proceedings and an opportunity being specifically provided for him to be heard, we are of the view that the applicant's right to a fair hearing was clearly observed on the information he has put to us.

For the aforementioned reasons we are satisfied that the petitioner has failed to establish on the pleadings the second element necessary to disclose a cause of action.

Turning to the third element, on the authority of *Julita D'Offay v F Louise* and article 119(3) of the Constitution, it seems clear to us that no action can lie against judicial officers in respect of an act or omission allegedly committed by them in the performance of their official duties. In that case the Court of Appeal had made a decision in an appeal arising from the Constitutional Court. In the Constitutional Court it was challenged, inter alia, that there was a breach of the right to a fair trial. Three justices of appeal were named as respondents. The Constitutional Court declined the challenge and an appeal was made to the Court of Appeal.

The Court of Appeal held that a decision of the Court of Appeal could not be challenged thereafter in the Constitutional Court on claims that the decision breached constitutional rights. To allow such a challenge would be to undermine the whole structure of the administration of justice and the hierarchy of courts established by the Constitution. The Court of Appeal also further held in relation to naming justices of appeal that rendered the decision as respondents as untenable, improper and an abuse of process.

The Court stated in part –

(e) [The court quoted article 119(3) of the Constitution] We find that the three Justices of Appeal were clearly in the performance of duties, and far from it any violation of the Constitution which we so distinguish hereby. We consider also joining them and accordingly then in the circumstances of this case an abuse of process.

(f) Counsel for appellants tried to argue that Rule 3(2) of the Constitutional Court Rules provides for joining parties from who relief is sought. In this case it was against the 3 Justices of Appeal as 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents.

(g) This is clearly a rule of procedure that cannot override a substantive constitutional right and protection in article 119(3) of the Constitution.

The third element for a cause of action of whether or not on the petition the President of the Court of Appeal can be liable for any act or omission in the performance of his functions is not established on the pleadings. It cannot be established because the

President of the Court of Appeal enjoys immunity from legal action in respect of the performance of his functions as a Justice of Appeal and head of the Court of Appeal.

We find that this petition does not disclose a cause of action against the President of the Court of Appeal. As it does not disclose a cause of action against respondent no 1 nor does it disclose a cause of action against respondent no 2.

Turning to the question of whether a matter is 'frivolous or vexatious' we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary and Thesaurus (at page 600) frivolous is defined as 'adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.' We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.

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

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

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

For the foregoing reasons we are satisfied that the objections to the petition are seized with merit. The petition discloses no reasonable cause of action. The petition is frivolous and vexatious. This petition is untenable, improper and an abuse of the process of this court. It is both surprising and disturbing that it was commenced by a member of the Bar of the Supreme Court. This petition is dismissed with costs.

Before we take leave of this matter we wish to opine that if the petitioner is dissatisfied with a decision of a single judge of the Court of Appeal, including the President of the Court of Appeal, it is within his rights to seek a decision of the full Court of Appeal on that point, especially if there are claims, as here, that one has been prejudiced thereby. It may not be too late for the petitioner to take this course to vindicate his grievances.

**Record: Constitutional Case No 2 of 2009**