IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Corum: Karunakaran ACJ, Renaud J and Burhan J.]

CP 02/2014

[2014] SCCC

THE SEYCHELLES NATIONAL PARTY
First Petitioner

THE SESELWA UNITED PARTY
Second Petitioner

CITIZENS DEMOCRACY WATCH
Third Petitioner

versus

GOVERNMENT OF SEYCHELLES
First Respondent

THE ATTORNEY GENERAL
Second Respondent

THE ELECTORAL COMMISSIONER
Third Respondent

THE COMMISSIONER OF POLICE
Fourth Respondent

Heard: 24th June 2014

Counsel: Mr. A. Derjacques Attorney at Law for first, second and third petitioners

Mr. R. Govinden Attorney General with Mr. Anath Assistant Principal State Counsel for first, second and fourth respondents

Ms. S. Aglae Attorney at Law for the third respondent

Delivered: 8 July 2014

RULING

Burhan J

[1] I have considered the application made by learned counsel Mr. Derjaques for the petitioners requesting my recusal from this case. I have already given reasons for my refusal to recuse on the 13th of May 2014. The said reasons for refusal to recuse dated 13th May 2014 will be reiterated in this ruling. I also at the very outset wish to express my appreciation to learned counsel Mr. Derjaques on the skilled and kind manner in which he presented his case to court. I also appreciate the concerns of his clients the 1st 2nd and 3rd petitioners in this case. I therefore having considered their views seriously and objectively have set down in detail the reasons for my decision.

[2] The main grounds urged by learned counsel for the petitioners in regard to my recusal are that as a constitutional case has been filed challenging my appointment and the said petition alleges a "predisposition towards a party" by me, I should recuse myself from this instant case. However it is to be noted that the parties in respect of the aforementioned petition challenging my appointment and the parties in this case in which the recusal is being sought, other than the learned Attorney General are not the same and therefore this ground bears no merit.

[3] Learned counsel Mr. Derjaques also referred to two instances where the appointments of judges were challenged and the judges referred to by learned counsel had not worked after the cases had been filed. He further stated that if my appointment is declared null and void, it would affect the judgment in this case. However although 2 cases were filed challenging the appointment of 2 judges **Constitutional Case No. 01 of 2004 namely The Bar Association of Seychelles v President of the Republic & Ors dated 28th January 2004** and **Constitutional Case No. 15 of 2011 namely Viral Dhanjee v James Alix Michel & Ors dated 4th October 2011,** both judges referred to by learned counsel continued to work as borne out by the date of their judgments that follow herein. **International Investment Trading SRL (I.I.T) v Vito Francavilla & Ors judgment dated 3rd March 2004, Sony Mathurin v Edward Uzice CS 31 of 1996 judgment**

dated 21st May 2004, Mauritius Commercial Bank (Seychelles) Ltd v The owners of vessel "LAVAN" CS 213 of 2003 judgment dated 24th March 2004, Robert Moss & Or v Alda Lucs & Ors CS 80 of 2000 judgment dated 13th February 2004, Jean Frederick Ponoo v Attorney General SCA 38 of 2010 judgment dated 9th December 2011, Financial Intelligent Unit v Mares Corp SCA 48 of 2011 judgment dated 9th December 2011 and **Francis Barreau v Republic CR-SCA 07 of 2011 judgment dated 2nd December 2011.**

[4] Therefore learned counsel's submission that the said judges did not work after there was a challenge filed in respect of their appointments with due respect to learned counsel cannot be accepted.

[5] Subsequently a motion and affidavits dated 22nd of May 2014 were formally filed by the representatives of the 1st and 2nd petitioners in this case seeking my recusal from this case. Once again the said application was opposed by the learned Attorney General.

[6] I have considered the main grounds urged by the 1st and 2nd petitioners as set out in their affidavits. The main contention of the 1st and 2nd petitioners is that there is a public perception amongst the informed and fair minded persons of the public that I would be bias for the respondents and not be impartial.

[7] Considering the documents filed by the petitioners, it is clear that both petitioners have based their apprehensions on a case filed against me by persons who I have convicted for serious offences and imposed long terms of imprisonment. It is wrong and not reasonable to base ones apprehension of bias on the mere filing of a case by individuals who quite obviously would be prejudice against me and then state that there is a public perception amongst the informed and fair minded persons of the public that I would be bias for the respondents and not be impartial.

[8] In regard to the application for Judicial Review filed by Mrs. Amesbury Attorney at Law it is also apparent that she seeks personally in her application for Judicial Review to challenge my appointment as judge and that it be declared invalid. It is apparent therefore that the petitioners have not based their apprehension of bias on public

perception amongst the informed and fair minded persons but on the views of an interested party who seeks my removal from office and therefore the petitioners cannot contend that there is a reasonable apprehension of bias and state that there is a public perception amongst the informed and fair minded persons that I would be bias.

[9] In regard to learned counsel for the petitioner's contention in regard to the nexus of time and events, all judicial offices take the sacred oath to act impartially and without fear and favour. Therefore in my view this sacred oath supersedes any act of appointment, even it be done by the President of the Republic, when one is performing one's official duties. To give any other interpretation in the absence of any evidence would undermine the sacred official oath taken under the Constitution.

[10] Further the subject matter in this case is not in respect of the personal or private interest of the petitioners but is a challenge in respect of the constitutionality of a piece of legislation and therefore a matter of public interest. The question of bias would therefore not arise because the issues in this case have nothing to do with personalities but are in respect of questions of law.

[11] Applications for recusal are mainly based on the maxim that judges are charged with the duty of impartiality in administering justice. The test to apply as set down by various authorities is whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased. The factors to be considered by a judge challenged with recusal in deciding his partiality or impartiality is whether;

a) he has personal interest or personal knowledge in respect of the case,

b) he has a personal interest in the outcome of the case.

c) he is related to a party or attorney in the case.

d) he is a material witness in the case.

e) he has previously acted as an attorney for either party.

[12] I am satisfied that none of these factors apply to me and therefore there exists no substantial or recognised ground for me to recuse myself from this case.

[13] It is also to be borne in mind that this bench comprises of 3 judges. The petitioners have not challenged the impartiality of the other two judges and whatever decision made by this bench is appealable to the Court of Appeal. Therefore the petitioners are not without relief if they disagree with the judgment of mine or the Constitutional Court as presently constituted, a fact referred to by Bwana J and Amarasinghe J in the case of ***Mathew Abraham Servina v The Speaker of National Assembly Constitutional Case No 2 of 1994.***

[14] In the case of ***Livesey v New South Wales Bar Association (1985) L.R.C (Const) – 1107*** it was held;

"-----, i*t would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds <u>of possible appearance of prejudgment or bias</u>, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been <u>entrusted by the ordinary procedures and practice of the particular court.</u>"* (underlining mine)

[15] A panel of judges has been appointed and entrusted to hear this case. It is my considered view if the petitioners had any apprehension, they should have first made representations to the authority that appointed this panel namely the Hon Chief justice and moved that a fresh panel be constituted to hear the case, rather than to seek my recusal on a mere apprehension of bias based on cases filed by interested parties who seek my removal from office.

[16] In the light of the aforementioned case, it is clear that mere *possible appearance of pre judgment or bias* is insufficient there should be a reasonable apprehension or real possibility of bias.

[17] I am of the view that I would be abdicating in my judicial function which has been entrusted to me and I would be encouraging procedural abuse, if I were to automatically

disqualify myself on the mere request of a party or counsel when no material grounds have been adduced or merely on a statement that "|impartiality must seen to be done". I am satisfied that I can act impartially, competently and diligently in this case. The application seeking my recusal from the case in its entirety is baseless and not an application of substance. I therefore accordingly kindly decline the application to recuse myself.

Signed, dated and delivered at Ile du Port on 8 July 2014

M Burhan
Judge of the Supreme Court