

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Corum: D. Karunakaran J (Presiding), M Burhan J, G.Dodin J]

CP 03/2015

(arising in CA 34/2013)

[2016] SCCC 6

INTERSHORE BANKING CORPORATION LTD

Petitioner

versus

THE CENTRAL BANK OF SEYCHELLES

Respondent

Heard: 03 November 2015
Counsel: Mr. Philippe Boullé Attorney at Law for petitioner
Hon Attorney General Mr. Ronnie Govinden for respondent
Delivered: 23 February 2016

JUDGMENT OF THE COURT

[1] This is a referral made by the learned trial judge of the Supreme Court in terms of Article 46 (7) of the Constitution of the Republic of Seychelles (hereinafter referred to as the Constitution).

Article 46 (7) of the Constitution reads as follows:

“Where in the course of any proceedings any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or had already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court”.

[2] The back ground facts of this case are that the Appellant (hereinafter referred to as the Petitioner) Intershore Banking Corporation Ltd, preferred an appeal to the Supreme Court from a decision refusing the application for a business banking license by the Governor of the Central Bank of Seychelles (CBS), hereinafter referred to as the Respondent.

[3] Before the appeal was heard, the Petitioner by way of a motion moved that the Supreme Court order CBS:

1. Furnish him with a copy of the confidential information upon which the Central Bank based its decision under sections 6 (1) (d) and 6 (1) (j) of the Financial Institutions Act (FIA) which decision was canvassed by him in the appeal.
2. In the alternative to refer the matter to the Constitutional Court under Article 130 (6) of the Constitution as it raises a constitutional issue relating to the appellants constitutional rights of right to information, equal protection of the law and fair hearing envisaged in Articles 28, 27 and 19 (7) of the Constitution.

It was on this motion that the learned trial judge made two referrals to the Constitutional Court.

[4] The 1st referral from the learned trial judge reads as follows:

“Does the failure of the Board of the Central Bank of Seychelles to set out the reasons for its non approval of the banking licence requested by the applicant on the ground that such approval is denied on the confidential information disclosed to it under section 6 (3) (b) (ii) of the Financial Institutions Act [conveyed to the applicant by its

letter dated 18th October 2013, FSS/BK/LIC/21 (m)] directly or indirectly violate the applicants right to access to official information in terms of Article 28 (1) and 28 (2) of the Constitution?”.

[5] In order to answer the 1st referral one must consider Articles 28 (1) and (2) of the Constitution which reads as follows:

“(1) The State recognises the right of access of every person to information relating to that person and held by a public authority which is performing a governmental function and the right to have the information rectified or otherwise amended, if inaccurate.

(2) The right of access to information contained in clause (1) shall be subject to such limitations and procedures as may be prescribed by law and are necessary in a democratic society including –

a) for the protection of national security

b) for the prevention and detection of crime and the enforcement of law;

c) for the compliance with an order of a court or in accordance with a legal privilege;

d) for the protection of the privacy or rights or freedoms of others;”

[6] It is therefore apparent that the right to access personal information is not an absolute right. If the information one seeks to access is subject to the limitations contained in Article 28 (2), then access could be denied. It is therefore of paramount importance that the nature of the information be known, in order to ascertain whether it is subject to the limitations set out in Article 28 (2) of the Constitution.

[7] In his submissions learned counsel Mr. Philippe Boule who is a director of the Appellant Company, repeatedly referred to the information as a “ a piece of paper by an Irish man”. However the Hon Attorney General referred to the information coming within the purview of Article 28 (2) of the Constitution and being under the “Anti Money Laundering Act” (Pg34 of the proceedings of 3rd November 2015 9.a.m.) and was willing to make the Constitutional Court privy to the information. In the light of these insinuations and

allegations referred to by both parties and the willingness of the Hon Attorney General to make court privy to the said information, it is our considered view, that it is the trial judge who should first have access to, assess and decide whether the information falls into the categories of limitations set out in Article 28 (2) of the Constitution, especially considering the fact that section 16 (3) of the FIA provides a right of appeal from a decision of the CBS to the Supreme Court.

[8] It is apparent that the Respondent was relying on the prescribed law contained in section 6 (3) (b) (ii) of the Financial Institutions Act.

Section 6(3) (b) (ii) of the FIA reads as follows:

(3) Within 90 days after the receipt of a complete application, the Central Bank shall –

(a) grant a licence; or

(b) inform the applicant that it has refused to grant a licence giving the reasons for the refusal:

Provided that the Central Bank shall be under no duty to give reasons where-

i. it is precluded by law;

ii. information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency; or

iii. information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any other foreign regulatory agency pursuant to a memorandum of understanding, an agreement or a treaty entered into by the Central Bank or the Republic of Seychelles.

[9] Section 6 (3) (b) (ii) of the FIA empowers the Central Bank to refuse the grant of a licence without giving reason, if the information they have has been disclosed to the Central Bank

under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency.

[10] We are aware that the challenge of the Petitioner is not in respect of the fact that the Central Bank failed to give reasons but his challenge is that he is entitled to the information in order that he could challenge the decision taken to refuse his licence. Neither does the Petitioner in his submissions challenge the substantive law as contained in section 6 (3) (b) (ii) of the FIA as unconstitutional.

[11] It is our view that the learned trial judge having been made privy to the nature of the said information, could decide whether access to the information could be denied as it falls under the limitations contained in Article 28 (2) or whether limited or full disclosure could be permitted as it partially falls or does not fall within the ambit of 6 (3) (b) (ii) of the FIA and Article 28 (2) of the Constitution. In regard to the power of court to lift the cloak or veil of confidentiality which is sometimes done in the interests of justice, permitting limited disclosure, we refer to the case *Michael Wilson & Partners v John Forster Emmot [2008] EWCA Civ 184*.

[12] Therefore in answer to the 1st referral, we direct the Hon Attorney General provide the learned trial judge the information, in order that the learned trial judge could verify the nature of the information after being made privy to it and decide whether or not the information falls within the ambit of Article 28 (2) of the Constitution and make a suitable ruling in respect of same.

[13] The 2nd referral referred to court reads as follows:

Does the above failure of the Central Bank to disclose confidential information to the appellant infringe any other Articles of the Constitution?”.

[14] Learned counsel for the applicant submitted in this regard that firstly it was a matter of procedure that the information be produced, as the appeal record would not be complete as required by the appellate rules and this was therefore a procedural issue which violated his right to a fair hearing under Article 19 (7) of the Constitution.

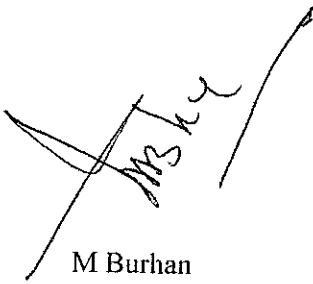
- [15] In answer to this issue, it is our view that procedural issues are best dealt with by the trial court and there is no necessity to refer such matters to the Constitutional Court, unless the law relating to the procedure is in the view of the trial judge unconstitutional.
- [16] In regard to the Petitioner's contention that his right to equal protection before the law under Article 27 has been infringed, we draw reference to the case of *Alcide Boucherou & Ors v Supt of Prisons & Ors SCA 01/2013*, where it was held that –
- “in this regard we endorse the findings of the Constitutional Court that the right to equal protection translates into the State treating an individual in the same manner as others in similar conditions and circumstances. A distinction or classification is constitutional if it has a rational basis or legitimate state objective... . However, where the discrimination or classification has a rational basis or where the state has a rational interest in making the distinction then the qualification will pass the Court's scrutiny.”*
- [17] We are satisfied limitations concerning the access to personal information as contained in Article 28 (2) of the Constitution have been made as the State has a rational interest to do so and it has been done on a rational basis. It cannot be said that Article 28 (2) conflicts with Article 27 as the principle of constitutional interpretation is that the entire Constitution must be read as an integrated whole with no one provision destroying another, *Hans Josef Hackl v The Financial Intelligence Unit & Anor CC 1/2009*.
- [18] Therefore the answer to the 2nd referral would be, if the nature of the personal information fits into the categories of limitations set out in Article 28 (2) of the Constitution, it cannot be said to violate or infringe any other Article in the Constitution.

[19] We therefore proceed to send the referral back to the learned trial judge with instructions to proceed as directed herein.

Signed, dated and delivered at Ile du Port on 23 February 2016



D Karunakaran
Judge of the Supreme Court



M Burhan
Judge of the Supreme Court



G. Dodin
Judge of the Supreme Court