

IN THE SEYCHELLES COURT OF APPEAL

**[Coram: F. MacGregor (PCA) B. Renaud (J.A) F. Robinson (J.A) Dodin (J.A)
Carolus (J.A)]**

**Constitutional Appeal SCA CP 6/2018
(Appeal from Constitutional Court Decision CP09/2017)**

Mr. Duraikannu Karunakaran

Appellant

Versus

The Tribunal represented by

1st Respondent

1. Judge Mohan Burhan
2. Judge Samia Govinden
3. Judge Frederick Egonda-Ntende

The Honourable Attorney General

2nd Respondent

Heard: 23 April 2019

Counsel: Mr Phillippe Boule for the Appellant

Mr. David Esparon for the second Respondent

Delivered: 21 June 2019

JUDGMENT

[1] This Judgment arises out of an Appeal against a decision of the Constitutional Court dismissing Constitutional Petition CP09/2017 as amended by an Amended Petition dated 22nd January 2018 (hereinafter “the Petition”).

[2] At the time of filing of the Petition and this Appeal the Appellant was a Judge of the Supreme Court. He resigned before the Appeal was heard.

- [3] The first Respondent is a tribunal of inquiry appointed under Article 134(2)(a) of the Constitution to enquire into the matter of whether the Appellant ought to be removed from office. Judge Mohan Burhan, Judge Samia Govinden, two Judges of the Supreme Court and Judge Frederick Egonda-Ntende the former Chief Justice were appointed as members of the tribunal with the latter as its President.
- [4] The Attorney General is cited as second Respondent in terms of Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.
- [5] For the purposes of this Appeal, it is unnecessary to go into much detail in the facts forming the basis of the Petition. Suffice it to say that the case for the Appellant was that the first Respondent in carrying out its inquiry did so outside its mandate, that the conduct of the first Respondent amounted to hiding its mandate from the Appellant, resulting in a perversion of the course of justice and its inquiry being devoid of any fairness and judiciousness. The Appellant further avers that the first Respondent's process of adjudication was unethical and irrational and violates the principles of fair hearing and justice under Article 19(7) of the Constitution in that it was conducted in contravention of its mandate. In terms of the Petition the Appellant sought declarations that his right to a fair hearing was violated by the first Respondent and that its report and recommendation to the Constitutional Appointments Authority dated 25th August 2017, is unconstitutional, null and void.
- [6] The proceedings before the Constitutional Court, on the other hand, form the basis of this appeal and hence it is important that they are set out in detail. We now proceed to do that. The matter was called before the Constitutional Court for the first time on 21st November 2017, and thereafter on 28th November 2017, and 23rd January 2018, to deal with the issue of representation of the first Respondent and for amendment of the Petition to add the Attorney General as second Respondent.
- [7] At the sitting of 6th February 2018, Mr. Chetty who had been cited in the Petition as representing the first Respondent was granted leave to withdraw from the proceedings. The Court drew attention to the fact that Judges Mohan Burhan and Samia Govinden had refused service of the Petition and adjourned the matter to 27th March 2019, for the Appellant and the second Respondent to address the Court on two preliminary points, namely whether the Judges

cited as representing the first Respondent were entitled to refuse service of summons and whether the first Respondent was still in existence and capable of being sued.

- [8] On 27th March 2019, counsel for the Appellant enquired as to whether the Attorney General had any concessions to make on the issue of service, whereupon Mr. Chinnasamy representing the second Respondent addressed the Court on the matter. As soon as counsel for the Appellant started addressing the Court, the proceedings were interrupted by the Appellant approaching Mr. Chinnasamy and saying something to him whereupon the latter informed the Court that the Appellant had “*given [him] absolutely nasty abuses*” calling him an “*ass-licker*”, which the Appellant denied. When the Court resumed its sitting after a brief adjournment of the proceedings, it stated that it was convinced that the Appellant had used the words complained of by Mr. Chinnasamy and asked the Appellant to apologise to him. The Appellant responded by saying “*I never uttered these words. I asked him to make submissions sensibly.*” The matter was adjourned to the 15th May 2018, to allow time to Mr. Chinnasamy to file a formal complaint regarding the incident, and for the Court to deal with the matter before resuming consideration of the matters it had previously been dealing with.
- [9] On 15th May 2018, the Court proceeded to make an order to the effect that the behaviour of the Appellant at the Court’s last sitting constituted an interference with the work of the Court amounting to contempt. In terms of the order, the Court, on the basis of its own observations, a letter from the second Respondent as well as statements of two other counsel from the Attorney General’s Chambers, took the view that sufficient grounds existed for the Appellant to show cause as to why he should not be dealt with for contempt of court.
- [10] The Court then proceeded to provide the Appellant with the statements from the Attorney General’s Chambers so that he could take a stand. Mr. Boule, while not questioning that the Court is empowered and has a duty to sanction contempt stated that since the matter involved contempt in the face of the Court no third party could interfere. He complained that the Attorney General had interfered in the work of the Court and stated that it was totally inappropriate and improper for third parties to influence the Court. On that basis he accepted the documents under protest. The matter was adjourned to the 12th June 2018, for the Appellant to be served with a summons to show cause why he should not be held in contempt and for

him to show cause on that date. The Appellant was duly served with a summons to show cause in proceedings registered as MA 143/2018 and filed an answer thereto on 24th May 2018.

- [11] At the proceedings of 15th May 2018, Mr. Boulle objected to the main case being put on hold pending hearing of the contempt proceedings, stating that both matters must be dealt with independently of each other. Consequently the main case was set for 4th September 2018, for Mr. Boulle to submit on the two preliminary issues.
- [12] In the interim, the Appellant filed a Notice of Appeal on 17th May 2018, appealing against the Court's finding of contempt and its order to show cause. By Notice of Motion filed on 18th May 2018, the Appellant further applied to the Court of Appeal for leave to appeal and for a stay of the showing of cause by the Appellant in the contempt proceedings before the Constitutional Court. The Court of Appeal refused to grant both orders. On 11th June 2018, the Appellant filed a Notice of Motion in MA201/2018 before the Constitutional Court for leave to appeal against the aforementioned interlocutory orders of that Court.
- [13] When the matter was called before the Constitutional Court on 12th June 2018, to proceed with the contempt proceedings, Mr. Boulle informed the Court that his license had expired and that in the circumstances he was unable to represent the Appellant. The Appellant informed the Court of his intention to retain the services of counsel from the UK and requested for six weeks to do so. The Court granted the Appellant until 4th September 2018, the same date on which the Court was to deal with the preliminary issues.
- [14] On 4th September 2018, Mr. Frank Elizabeth appeared in Court standing in for Mr. Boulle representing the Appellant. He stated that he had not been instructed by the Appellant but that Mr. Boulle had requested him to stand in for him as he was out of the jurisdiction. Mr. Elizabeth's request that the motion for leave to appeal be postponed to another date for hearing because Mr. Boulle was out of the jurisdiction, was refused. Consequently he moved for an order in terms of the motion as supported by the Affidavit in support thereof. The Court dismissed the motion and refused leave to appeal on the basis that the motion was premature there being no order made by the Court yet.

[15] The Court also dealt with another motion for the contempt proceedings to be heard before another bench. Again Mr. Elizabeth stated that he had been instructed by Mr. Boule to seek another date to hear that motion which the Court refused to grant, holding that Mr. Elizabeth should have been fully instructed and ready to take up the matter before the Court if he was standing in for Mr. Boule. Again Mr. Elizabeth moved in terms of the application and the Court refused to grant the motion.

[16] After a short adjournment the Court resumed proceedings in the main case. Mr Elizabeth stated that he was standing in for Mr. Boule on behalf of the Appellant and stated the following:

I have been advised that Mr. Karunakaran is not of good health and he was in India and fell sick. He has sent me a medical report on my phone just now and he is, I have been instructed at the doctor at the moment.

[17] The Court refused to entertain Mr. Elizabeth's explanations and proceeded with the contempt matter. After considering the evidence it proceeded to convict the Appellant of contempt of court and sentenced him to pay a fine of five thousand Rupees within one month and in default to seven days imprisonment.

[18] Mr Elizabeth stated that he was not in a position to submit on the two preliminary issues on which the Appellant was to address the Court, namely whether the Judges cited as representing the first Respondent were entitled to refuse service of summons, and whether the first Respondent was still in existence and capable of being sued. He made a motion for the Court to extend time to Mr. Boule to make written submissions on these two issues and for a date to be given for a ruling thereon. He stated that if no submissions were forthcoming by that date the Court could rule on the issues in the absence of such submissions. The Court refused to entertain the motion and the Petition was "set aside" with costs.

[19] The Petitioner appealed against the decision of the Constitutional Court of 4th September 2018, dismissing the Petition. The grounds of Appeal as set out in the Notice of Appeal are set out below.

1. *The Constitutional Court erred in dismissing the Petition as the Petition was not fixed for hearing on the merits on the date that the petition was dismissed.*
2. *The Constitutional Court erred in raising proprio motu points of law which did not arise from the pleadings of the parties, namely the validity of the service of summons on Judge Mohan Burhan and Judge Samia Govinden and the existence of the Tribunal.*
3. *The Constitutional Court erred further in ordering the hearing of the points of law ex parte.*
4. *The failure by the Constitutional Court to find that the summons had been lawfully served on Judge Mohan and Judge Samia Govinden representing the 1st defendant is flawed, misconceived and unsound in law.*
5. *Denying the appellant a Constitutional remedy upon a single request for an adjournment of arguments by Appellant's Counsel is unjust, unreasonable and a violation of the Appellant's constitutional right to a fair hearing.*

[20] The Appellant seeks the following relief from the Court of Appeal:

1. *A reversal of the dismissal of the Petition.*
2. *Declaring that summons had been lawfully served on Judge Mohan Burhan and Judge Samia Govinden.*
3. *Ordering that the Petition be heard by the Constitutional Court.*

[21] In light of the pleadings, the matters which arise for consideration by this Court may be confined to firstly whether the Constitutional Court rightfully dismissed the Petition as it was not fixed for hearing on the merits on the day that it was dismissed, and secondly whether the Appellant was denied a constitutional remedy upon a single request for adjournment in violation of his constitutional right to a fair hearing, as encapsulated in grounds 1 and 5

respectively. In our view grounds 2, 3 and 4 which deal with the validity of the service of summons on Judges Mohan Burhan and Samia Govinden and the capacity of the first Respondent to be sued ought not be dealt with in this Appeal as they are matters on which no final determination was made by the Constitutional Court, the Petition having been dismissed for want of prosecution. We therefore dismiss grounds 2, 3 and 4.

[22] In dealing with the issue of whether the Constitutional Court was right to dismiss the Petition, we consider it appropriate to also deal with the import of the words used by the Constitutional Court in disposing of the Petition. The Learned Presiding Judge in refusing Mr. Elizabeth's motion to grant time for Mr. Boule to make written submissions on the preliminary points stated that "It is the view of my colleagues and mine as well that this motion also cannot be entertained. So the application is **set aside** with costs." Emphasis is ours.

[23] In that respect, the Appellant, in his skeleton arguments in relation to his first ground of Appeal, avers that "[w]hile the "set aside" is vague and infelicitous in dealing with a Constitutional Petition and may be interpreted in any inconclusive manner, the abrupt order did not leave room to continue proceedings before the Court and thus considered as a dismissal."

[24] The Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (hereinafter "The Rules") 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 (Vide Rule 2(1) of the Rules). Rule 2(2) further provides that –

2.(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.*

[25] In the absence of any provision in the Rules pertaining to the issue at hand it is therefore to the Seychelles Code of Civil Procedure that we turn to in order to throw some light on this matter. The term "set aside" is used in a number of provisions in the Seychelles Code of Civil Procedure in respect of judgements already delivered and which for some reason have to be

set aside. It is used in section 69 in respect of judgments given *ex-parte*, in section 173 for the setting aside of judgments by *tièrce opposition*, in section 297 in respect of judgements delivered pursuant to summary procedure in actions upon bills of exchange or promissory notes. The term “*set aside*” is also used in section 207 in respect of arbitration awards. Other than in the aforementioned instances, an order of a Court may be wholly or partly “*set aside*” when the circumstances which gave rise to such order no longer exist or have changed, or the Court is of the view that the order is not or is no longer necessary.

[26] The term “*dismiss*” appears in sections 64 and 67 of the Seychelles Code of Civil Procedure in relation to the appearance of parties in court proceedings, as well as in sections 85, 91, 92 and 314. A reading of those provisions reveal that the term “*dismiss*” in relation to a matter before a Court means to finally dispose of that matter, with the option in certain circumstances to commence proceedings anew.

[27] In dismissing the Petition the Constitutional Court did not state under what provisions it did so. We find it appropriate to reproduce sections 63 to 69 (relating to appearance of parties) as well as sections 129 and 133 (relating to hearings) of the Seychelles Code of Civil Procedure below. In these sections Plaintiff is assimilated to Petitioner and Defendant is assimilated to Respondent in the proceedings in the Constitutional Court.

APPEARANCE OF PARTIES

63. *On the day fixed in the summons for the defendant to appear and answer to the claim, the parties shall be in attendance at the Court House in person or by their respective attorneys or agents.*

64. *If on the day fixed for the defendant to appear and answer the claim, or on any other subsequent day to which the hearing of the suit is adjourned, when the case is called on, neither party appears, the suit shall then be dismissed unless the court, for reasons to be recorded, otherwise directs.*

When a suit is dismissed under this section, the plaintiff may bring a fresh suit, subject to the law as to prescription.

65. *If on the day so fixed in the summons when the case is called on the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court, after due proof of the service of the summons, may proceed to the hearing of the suit*

and may give judgment in the absence of the defendant, or may adjourn the hearing of the suit ex parte.

66. *If the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.*

67. ***If on the day so fixed in the summons, when the case is called on, the defendant appears and the plaintiff does not appear or sufficiently excuse his absence, the plaintiff's suit shall be dismissed.***

If the defendant admits the plaintiff's claim or part thereof, the court shall give judgment for the plaintiff for so much of the claim as is admitted. If the defendant has claimed a set off (compensation), the court may proceed to the hearing of the set off and may give judgment thereon.

68. *If there be more defendants than one, and one or more of them appear, and the others do not appear, the suit may proceed, and the court shall, at the time of passing judgment, make such order as it thinks fit with respect to the defendants who do not appear.*

[...]

69. *If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.*

HEARING

129. *On the date fixed by the court for the hearing of the suit, the parties shall appear and the court shall proceed to the hearing of the suit. The court may, at any stage of the suit, if sufficient cause be shown and subject to such order as to costs as to the court may seem fit, grant time to the plaintiff or defendant to proceed*

in the prosecution or defence of the suit and may adjourn the hearing of the suit.

[...]

133. *If on the day to which the hearing of the suit has been adjourned by the court or by the Registrar under section 132, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the manners directed in that behalf by sections 64, 65 and 67 or may make such order as it thinks fit.*

Emphasis is ours.

[28] It is clear in the circumstances of this case that the Petition was dismissed by the Constitutional Court under sections 133 and 67 of the Seychelles Code of Civil Procedure because of the non-appearance of the Appellant and his counsel. The use of the words “*set aside*” was but an unfortunate choice of words but the meaning of the words are clear and undisputable, namely that the Petition was dismissed.

[29] It may be argued that section 133 of the Seychelles Code of Civil Procedure only allows the Court to dismiss a suit for non-appearance of any or both of the Parties “*on the day to which the hearing of the suit has been adjourned*” i.e. at the actual hearing of the Petition on the merits. The Appellant, in his first ground of Appeal, has raised the point that the Petition was wrongfully dismissed as on the date that it was dismissed, the Petition was not fixed for hearing on the merits but the Court was still in the process of dealing with preliminary issues. In our view it is irrelevant that the Petition was dismissed at the stage where the preliminary points were still being dealt with as opposed to the merits. It would be unreasonable and make no sense to suggest that a party who is in breach of procedural rules cannot be sanctioned for that reason. The procedural rules exist to ensure that proceedings are carried out in an orderly and timely manner and so that the Constitutional Right to a fair hearing of the parties is respected, and this, whether the Court is dealing with preliminary matters or with the merits of a particular case.

[30] It may also be argued that the Appellant was, if not present, at least represented. In our view simply being represented by counsel who is clearly uninstructed and unable to take up a party’s case amounts to being unrepresented.

[31] The proceedings before the Constitutional Court commenced with the Appellant being represented by Mr. Boulle. Even before the merits of the matter could be dealt with two other matters arose, namely the contempt of court proceedings which was fixed for the 12th June 2018, and the preliminary points raised by the Court on which Mr. Boulle was invited to address the Court on 4th September 2018. On 12th June 2018, Mr Boulle informed the Court that he could no longer represent the Appellant because his licence had expired. From that point onwards Mr. Boulle was no longer counsel on record for the Appellant. The Appellant requested the Court to grant him six weeks to retain foreign counsel. He was given until 4th September 2018, a full six weeks more than he had requested, and the same date on which the two preliminary points were to be addressed.

[32] On 4th September 2018, therefore the Appellant should have been either present in Court or represented by either the foreign counsel whose services he had indicated he was going to retain or another counsel. If the Appellant was unable to attend because of illness he should at least have produced a medical certificate to that effect. If he had wished for Mr. Boulle to represent him on the 4th September 2018, Mr. Boulle should have firstly been present and informed the Court that he was representing the Appellant anew and secondly also been ready to take up the matters which the Court was to deal with on that date. If he was unable to attend because he was out of the jurisdiction, the Court should have been made aware that he was once more representing the Appellant and his absence should also have been communicated to the office of the Chief Justice. In such a case he should have entrusted the task of representing the Appellant to another counsel who was adequately instructed to take up the matters which the Court was to deal with on that date.

[33] Instead Mr. Elizabeth put in an appearance when the case was called, stating that he was not instructed by the Appellant but clarifying that he was standing in for Mr. Boulle who was out of the jurisdiction. The Court dealt with a number of motions and other matters which it was in a position to do, but when it came to the preliminary points on which the Appellant or his counsel was to address the Court, in response to the Court's enquiry as to whether he was in a position to submit to the Court on these matters, Mr. Elizabeth replied "*I am not in a position to submit*". Consequently the Court proceeded to dismiss the Petition, which in our view it was entitled to do in the absence of the Appellant or adequately instructed counsel.

[34] Even if Mr. Elizabeth was present, the fact that he was not adequately instructed and therefore unable to submit on the preliminary points amounts, to our minds, to the Appellant being unrepresented. His presence served no practical purpose. The Court had a discretion to either grant an adjournment under section 129 of the Seychelles Code of Civil Procedure “*if sufficient cause be shown*” or to proceed in terms of section 133 of the same Code and dismiss the case which, in our view, it rightly did as the Appellant had not shown sufficient cause for an adjournment.

[35] The conduct of the Appellant and his counsel also amounts to a breach of Practice Direction No. 1 of 2017, the provisions of which are reproduced below, which entitled the Court to dismiss the Petition:

1. *All absences from the jurisdiction by legal practitioners have to be communicated to the Office of the Chief Justice.*
2. *Where a legal practitioner has accepted instructions from a client and cannot appear or act personally on behalf of his client for any particular reason including illness or absence from the jurisdiction, he/she is required pursuant to Rule 8 of the Legal Practitioner’s Act (Professional Conduct) Rules 2013 to brief another legal practitioner to appear on behalf of his/her client.*
3. *With immediate effect civil or criminal cases will not be adjourned merely on the ground that Counsel is absent.*
4. *Where Counsel default appearance in Court, in criminal cases, accused persons will be asked to seek alternative Counsel; and civil cases will either be listed for ex-parte hearing or dismissed for want of appearance.*

[36] Ground 1 therefore fails.

[37] The Appellant contends in ground 5 of the grounds of appeal that: “*Denying the appellant a Constitutional remedy upon a single request for an adjournment of arguments by appellant’s*

Counsel is unjust, unreasonable and a violation of the appellant's constitutional right to a fair hearing.” It is incorrect to say that the Petition was dismissed “*upon a single request for an adjournment of arguments by Appellant's Counsel*”. We note that Mr. Boulle was to address the court on the preliminary points on 27th March 2018, when the proceedings were interrupted by the Appellant himself which led to the contempt of court proceedings. The matter was then set for the 15th May 2018, for Mr. Chinnasamy to file a formal complaint against the Appellant, on which date the Court again fixed another date for arguments on the preliminary points, that is the 4th September 2018, the date on which the Petition was dismissed. This Court finds that the Appellant was given ample opportunity by the Constitutional Court to prepare to address it on the preliminary points and appear either in person or if he was unable to do so, by a properly instructed counsel, which he failed to do. We further find that there was no obligation on the Constitutional Court to have requested the second Respondent to address the Court on Mr. Elizabeth's request before dismissing the Petition. In the circumstances we do not find any merit in Ground 5 which stands dismissed.

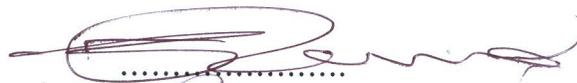
[38] We therefore dismiss the Appeal and uphold the decision of the Constitutional Court. We make no order as to costs.

Signed, dated and delivered at Ile du Port on 21 June 2019

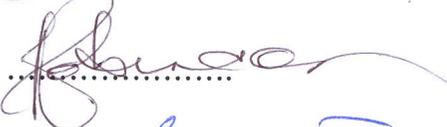
F. MacGregor (PCA)



B. Renaud (J.A)



F. Robinson (J.A)



G. Dodin (J.A)



E. Carolus (J.A)

