

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 35 (25 August 2023)
SCA 40/2021
(Arising in MC 77/2020)

Pascal Leonel

1st Appellant

Selwyn Payet

2nd Appellant

Petula Labonte (a partnership known and

3rd Appellant

Registered with the business name Xtreme

Security Services)

(*rep. by Mr. Guy Ferley*)

and

The Procurement Review Panel (herein represented by its **Respondent**

Chairman, Ms. Brenda Bastienne) of Maison de Mahe,

Victoria House

(*rep. by Mr. Muhammad Saley*)

Neutral Citation *Leonel & Others v The Procurement Review Panel (herein represented by its Chairperson Ms. Brenda Bastienne) SCA 40/2021) SCCA 35 (25 August 2023)*

(Arising in MC 77/2020)

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

Summary: An appeal against the judgment of the Supreme Court refusing to grant leave to proceed in a judicial review application.

Heard: 9 August 2023

Delivered: 25 August 2023

ORDER

Appeal dismissed. No order as to costs.

JUDGMENT

Fernando, President (Robinson JA, Tibatemwa-Ekirikubinza JA concurring)

1. This is an appeal against a Ruling of the Supreme Court dated 3rd November 2021, by which the Supreme Court had dismissed the Appellants' application for leave to file their application for judicial review out of time.

2. In terms of the background to this appeal, the Appellants' had filed an application for judicial review on 22nd September 2020 against the decision of the Respondent dated 25th May 2020. At the ex parte hearing of 25th February 2021 to determine whether leave to proceed with the application for judicial review should be granted, the Appellants' were notified that the application for judicial review was out of time and that there was no application to file the application for judicial review out of time. On the 11th of March 2021, the Appellants filed an application to proceed with their judicial review application of 22nd September, out of time.
3. The Appellants have raised the following grounds of appeal:
 - i. "The Honourable Judge erred in failing to grant the Appellants leave to proceed with their judicial review action filed on the 22nd day of September before the Supreme Court of Seychelles.
 - ii. The Honourable Judge erred in failing to consider that the Appellants had good and valid reasons for filing their judicial review action outside the prescribed period.
 - iii. The Honourable Judge erred in failing to consider that the Procurement Review Panel, being part and parcel with the National Tender Board, is a body corporate and therefore can be sued in its own capacity." (verbatim)

The Appellants have by way of relief has prayed for a dismissal of the decision of the Supreme Court and that their action for judicial review be 'reheard'.

4. At the very outset I wish to state that this appeal is misconceived in view of the provisions of **rule 8 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules** which states: "*Where the Supreme Court refuses to grant leave to proceed, the petitioner may appeal to the Court of Appeal within 14 days of the order of refusal with leave of the Supreme Court first had and received.*" I am of the view that although this is, in fact an appeal against the refusal of the Supreme Court

to grant leave to proceed ‘out of time’, the provisions of rule 8, does apply to such applications. The Supreme court had refused to grant leave to proceed with the application for judicial review out of time, by its judgment of 3rd November 2021, and the appeal has been filed before this Court on 14 December 2021, almost 14 days after the expiry of the time period. Further leave of the Supreme Court has not been first had and received. Strangely, both the Appellants’ and the Respondent do not even refer to this in the Skeleton Heads of Argument filed. In my view this alone suffices to dispose of this appeal.

5. It is clear that the appeal was also misconceived in view that the relief prayed for by the Appellants’ from this Court, was that their application for judicial review be ‘reheard’. The Ruling of 3rd November 2021, dismissed the Appellants’ application for ‘leave to proceed’ for judicial review out of time. According to the **Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules**, one must first obtain leave to proceed with a judicial review application and it is only if leave is granted that the judicial review application will be heard. In this case the substantive application for judicial review has not been heard, for there to be a rehearing. At the hearing of the appeal, Counsel for the Appellant sought to correct the error in the relief prayed for by deleting the word ‘reheard’ and substituting it with the word ‘heard’. This does not cure the defect, as stated earlier, one must first obtain leave to proceed with a judicial review application and it is only if leave is granted that the judicial review application will be heard. What should have been sought was an order from this Court, directing the Supreme Court to rehear the Appellants’ application for ‘leave to proceed’ for judicial review out of time.
6. The first ground of appeal as correctly argued by the Respondent is vague and thus not in compliance of rule 18(7) of the Seychelles Court of Appeal Rules and should be dismissed outright. The complaint in the second ground of appeal that the learned Judge had failed to consider that the Appellants’ had good and valid reasons for filing their judicial review action outside the prescribed period is

incorrect as the Learned Judge had in fact at paragraphs 5 and 20 of the Ruling considered, the evidence of the 1st Appellant before making a determination. Despite the fact that no reasons had been given in the affidavit filed in support of the application to proceed with its application for judicial review out of time, the learned Judge had permitted the 1st Appellant to depone and explain the delay in filing the application for judicial review. The Appellants' have failed to explain how the learned Judge erred in arriving at her decision in this regard.

7. One of the grounds upon which the Supreme Court had refused leave, was that the Petition before it for judicial review of the Procurement Review Panel, had been filed outside the time period for filing of such an application. **Rule 4 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules**, states “*A petition under rule 2 shall be made promptly and in any event within 3 months from the date of the order or decision sought to be canvassed in petition unless the Supreme Court considers that there is good reason for extending the period within which the petition shall be made.*”
8. The decision sought to be challenged in this case as set out in the Appellants' Petition seeking Judicial Review was made on 25 May 2020. The said application for Judicial Review had been filed on 22 September 2020, clearly outside the prescribed time limit.
9. The Appellants had admitted in Answer to the Preliminary Objections of the Respondent, that they had not filed the petition within the prescribed time as set out in the Rules, but had not averred in the affidavit that was filed under **rule 2(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules**, in support of their petition dated 22 September 2020, that the petition was filed outside the prescribed time nor sought an extension of time from the Supreme Court for late filing. It was only, after the ex parte hearing of 25th February 2021 as stated at paragraph 2 above, that the Appellants on the 11th of March 2021, filed an

application to proceed with their judicial review application of 22nd September, out of time, by seeking to amend their application. Also the Appellants had not annexed to the petition filed before the Supreme Court a “*a certified copy of the decision sought to be canvassed...in the form of an exhibit*” as required by **rule 2(2) of the said Rules**.

10. I have gone through the reasons adduced for late filing and certainly find as the Trial Judge had determined that there was no good reason for extending the time period prescribed in the Rules. The Appellants’ statement in their Skeleton Heads of Argument filed before this Court, that “The 1st Appellant also deponed that he was not aware that there was a timeframe from the date that the said decision was made for them to file their application for judicial review before the Supreme Court of Seychelles” (emphasis added) is unbelievable and not an excuse and itself a reason to dismiss the application for judicial review out of time. It is trite law that ignorance of the law is not an excuse and the time limits for filing judicial review applications must be respected as spelled out in **O’Reilly V Mackman [1993] 2 AC 237** and the judgment of this Court in **Labrosse V Chairperson of Employment Tribunal (SCA 36/2012) [2014 SCCA 44]**.

11. There is no merit in the third ground of appeal. It is clear from the provisions of the Public Procurement Act that the Procurement Review Panel does not form part of the National Tender Board and certainly is not a body corporate. The Review Panel established under section 99 of the Public Procurement Act, is an independent adjudicating authority, that is separate from the National Tender Board established under section 13 of the Public Procurement Act, and tasked with handling complaints and disputes related to public procurement processes. It operates separately from the procuring entities and the National Tender Board, ensuring impartiality in resolving procurement related issues. It serves as an avenue for bidders or contractors to appeal decisions made by the National Tender Board if they believe there has been a violation of procurement rules or

regulations. I therefore agree with the learned Judge's finding that the Procurement Panel and the National Tender Board "cannot be said to be part and parcel of one another. They are part and parcel of the public procurement system but the Review Panel does not operate under the purview of the National Tender Board. Bearing in mind that not all bids go through the National Tender Board but depending on the threshold can be awarded by a Chief Executive Officer or a Procurement Committee, the Procurement Review Panel has the mandate to review procurement proceedings of a Chief Executive Officer of the Board under section 100." However, the issue whether the Procurement Review Panel was the proper party to be sued is another matter, which I do not intend to determine in this case as it is not the basis, on which ground three had been based.

12. The appeal not having any merit and the case being defective in all its forms both before this Court and the Supreme Court and in view of the delays in filing the necessary applications, I have no hesitation in dismissing the appeal. I make no order as to costs.



Fernando, President

I concur



F. Robinson JA

I concur



Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated, and delivered at Ile du Port on 25 August 2023.