IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Coram: B. Renaud, D. Akiiki-Kiiza, C. McKee JJ]

CP08/2014

[2017] SCCC 4

IAN DELORIE
Petitioner

versus

THE GOVERNMENT OF SEYCHELLES
First Respondent

THE HONORABLE ATTORNEY GENERAL

Second Respondent

Heard: 1st December 2015, 2nd February 2016

Counsel: Mr. Frank Elizabeth and Mr. Philip Boulle for petitioner

Mr. Jayar Chinnasamy for the respondents

Delivered: 4 April 2017

JUDGMENT

Judgment of the CourtIntroduction

[1] This is a constitutional petition requesting that this Court grant an order declaring under Article 5 of the Constitution that the National Assembly Members Emoluments Act, Cap 136A ("the Act") as amended by the National Assembly Members Emoluments

(Amendment) Act 2008 ("the 2008 Amendment") and the National Assembly Members Emoluments Amendment Act 2013 ("the 2013 Amendment") is a violation of Article 105(1) of the Constitution and is therefore void. Simply put, the 2008 Amendment introduced a pension payable to the members of the National Assembly, including the Speaker and the Deputy Speaker, the Leader of the Opposition and the Leader of Government Business of the National Assembly.

[2] The Petitioner also seeks a declaration that all pensions paid to the members of the National Assembly pursuant to the Act are unconstitutional and unlawful and that these are unconstitutional charges to the Consolidated Fund. In addition the Petitioner requests an order that the National Assembly acted ultra vires in passing the Acts to the extent that it provides a pension for National Assembly Members.

[3] Article 5 of the Constitution provides that "This Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void." Although not specifically mentioned in the petition, the Petitioner approaches this court in terms of Article 130(1) of the Constitution and the Court is empowered by Article 130(4) to grant the remedy requested if it finds that there has indeed been such a contravention.

[4] Article 105(1) of the Constitution provides that the members of the National Assembly are entitled to the "salary, allowances and gratuity as may be provided by an Act" and that this may be a charge on the Consolidated Fund. The Act, initially passed in 1993, provided for payments to National Assembly members in the form of salary, allowances and gratuities. On 20 December 2007, Bill No 25 of 2007 was introduced by the Attorney-General which sought to "do away with allowances earlier paid [to the various members of the National Assembly]" and "to provide for a monthly pension upon ceasing to hold office" for the Speaker, Deputy Speaker, Leader of Opposition, the Leader of Government Business and the Members of the National Assembly. The Petitioner is challenging the constitutionality of this amendment.

[5] In response to the Petition, the Respondents raised three pleas in limine litis: (1) That the petition was barred as being out of time under rule 4(1)(c) of the Constitutional Court (Application, contravention, enforcement or Interpretation of the constitution) Rules of 1994 as amended; (2) that the petitioner did not have locus standi to approach

the Constitutional Court as he failed to show as to how and what/which Charter rights have been contravened or likely to be contravened in relation to him by the impugned Acts; and (3) that there was no prima facie case.

[6] The Court dismissed these points in limine, finding that the matter was filed in time and that the petitioner did have locus standi in an order in *Delorie v Seychelles Government* MA288/2014, dated 13 October 2015.

Case for the Petitioner

[7] On the main issue before this Court, the Petitioner argued that the 2008 Amendment was ultra vires and a violation of the terms of the Constitution because it provided a pension for National Assembly Members as a payment against the Consolidated Fund when the Constitution in Article 105 had authorised only "salary, allowances and gratuity". The Petitioner placed emphasis on the fact that the Constitution makes provision for the payment of a pension to the President in the express wording of Article 58 of the Constitution and is silent with regard to the National Assembly members. It was argued therefore that it was an apparent intention to limit the authorization of what could be drawn down from the Consolidated Fund, and this specifically excluded the payment of a pension by its deliberate omission.

[8] The Petitioner argued further that the power of the National Assembly to determine the terms of their own benefits is 'exceptional' and should be interpreted very strictly and restrictively within the boundaries of the Constitution. Therefore, the Court was encouraged to adopt a narrow interpretation of the clear and specific wording of Article 105(1) upon the basis that if the drafters of the Constitution had intended for a pension to be provided, they should have included specific wording to that effect as is done with regard to the President. Therefore, the Petitioner argued that the 2008 Amendment was in violation of the Constitution and that this violation continued with the 2013 Amendment (which increased the pension amount).

[9] In response to the additional submissions by the respondents, the Petitioner clarified that it is not that the National Assembly member may not have a pension scheme, but rather that it is not to be a charge on the Consolidated Fund.

[10] In argument the Petitioner drew the Court's attention to the unfairness created, where the NA members will get a national pension along with all others under the Seychelles Pension Fund, and then they will get a second pension principally because they served on the National Assembly. This law gives special treatment to the class of persons who are National Assembly Members, and is not justified as National Assembly members sit for a limited period, which may be one, two or three terms, and will benefit for the rest of their lives after reaching the pensionable age.

[11] Therefore, the Petitioner is requesting a declaration of unconstitutionality of the 2008 and 2013 Amendments, and a declaration that the pensions which have been paid were unconstitutionally paid out.

Case for the Respondents

[12] In response the Respondent argued that Article 105 must be interpreted in the light of the overall scheme and objectives of the Constitution. The provision of a pension to National Assembly Members is not prohibited by the Constitution and is therefore lawful. The Respondent argued that the intention of the Constitution could be given expression by an Act and not necessarily only by a constitutional amendment

[13] Counsel for the Respondent argued that any emolument in addition to salary, allowance and gratuity may be granted by a legislative Act and can also be a charge on the Consolidated Fund in terms of Art 152 of the Constitution. Therefore the 2008 Amendment was neither a violation nor a contravention of Art 105(2).

[14] Furthermore, Counsel argued that the 2008 Amendment is neither ultra vires nor a violation of Article 85 of the Constitution as the ability to enact legislation to create a pension fits within the scope of the authority given to the National Assembly.

[15] Counsel encouraged the Court to apply a presumption of constitutionality, which is that the Court should favour the interpretation of a statute which renders it constitutional, and that the petitioner must show a clear transgression of constitutional principles before the Court will come to a finding of unconstitutionality.

[16] Counsel stated that in assessing the constitutional validity of a statute, the Court must consider whether the law was passed within the scope of the power conferred on a

legislature and if it is found that it violates no restrictions on that power, the law must be upheld, regardless of what the court may think of it. Respondents submit that the Constitution does not explicitly bar the provision of the pension to the members of the National Assembly and that an explicit bar would be required in order to grant the remedy to the Petitioner. Counsel argues further that a restriction on the powers of the Parliament cannot be implied – any such restriction would be clearly specified.

[17] Moreover, Counsel pointed out that the National Assembly members are also catered for a pension by the Constitutional Appointees Emoluments Act and so the invalidation of the Act would not do away with the provision of a pension to the Members.

[18] In oral submissions, Respondent's counsel accepted that the word 'pension' was not explicitly included in Article 105, however, he stated that there is no explicit bar to give the pension. There is a silence in the Constitution, and the courts are to read it in order to uphold the constitutionality of the impugned provisions.

[19] On the topic of the importance of a pension, Counsel expounded that a pension is paid in consideration of past services. Following the retirement from service of the employee, it is an important condition of employment which is earned by an employee by rendering required period of service and its receipt is one of the incidents of employment. Pensions are deferred wages paid at the time of retirement or thereafter. Pension should, therefore, be construed as part of one's earnings.

[20] Turning to the 2008 Amendment, Respondent's Counsel pointed out that the amendment sought to replace the scheme of 'allowances' with 'pension' and this is clear by the renaming of the titles in the Act from "Allowance" to "pension". Therefore, it was argued that a Pension can be treated as an allowance. He argues therefore that under this Act what was formerly known as an allowance was substituted for the word "pension" – however, it is the same thing – what was known as an allowance in 1993 is amended to pension in 2008. There was an allowance of Rs2000 / m which is totally repealed and therefore, it was argued that the allowance became the pension and therefore there is no extra benefit given by the Legislature in 2008 by merely using the word 'pension'.

[21] Respondent's Counsel did concede in the argument that the nature of the payment was different: whereas the allowance subsisted during the person's term as a member, the pension was paid after the expiry of their tenure.

[22] The question for this Court to decide, therefore, is whether the National Assembly was acting ultra vires in creating a pension for the National Assembly Members as a charge on the Consolidated Fund?

Analysis

[23] By the Constitution of the Republic of Seychelles, the powers of the state are divided into Legislative, Executive and Judicial. All legislative power is vested in the National Assembly (Article 85); the executive power is vested in the President (Article 66) and the judicial power is vested in the Judiciary (Article 119). All of these power-holders are required to exercise their powers subject to the Constitution which is supreme over all (see the Preamble to the Constitution and Article 5).

[24] The Constitution contains an enumeration of the powers specifically conferred upon the National Assembly and grants the National Assembly a general power to legislate under Article 85 which is only subject to the Constitution. Part of this power includes the power to make Acts which authorize payments out of the Consolidated Fund or any other public fund (Article 152).

[25] The legislative power is subject to constitutional limitation and it is the right and power of the Judiciary to declare and enforce constitutional limitations upon legislative action (Art 46 and Art 130).

[26] It is helpful to first look at the power of the National Assembly in order to determine the scope of those powers. Article 85 vests "[t]he legislative power of Seychelles … in the National Assembly" which power "shall be exercised subject to and in accordance with this Constitution."

[27] This creates a regime where the only limitations on the powers of the National Assembly are those limitations laid down by the Constitution. This is the hallmark of a Constitutional Supremacy in contrast to the system of a Parliamentary Supremacy, where the legislature has unfettered discretion in the exercise of its legislative powers.

[28] Therefore, we look to the wording of the Constitution for any limitations on the scope of the power of the National Assembly with regard to making payments from the Consolidated Fund or with regard to the payments that may be authorised for various constitutional actors, including the National Assembly members themselves.

[29] Article 151 of the Constitution creates a Consolidated Fund, "into which shall be paid all revenues or other moneys raised or received for the purposes or on behalf of the Republic, not being revenues or other moneys that are payable by or under an Act for some specific purpose or into some other fund established under an Act for a specific purpose."

[30] Article 152 ensures that money shall not be withdrawn from the Consolidated Fund except where it is -

> *1(a) to meet expenditure that is charged on the Fund by this Constitution or by an Act; or*
>
> *(b) where the issue of those moneys has been authorised -*
>
> *(i) by an Appropriation Act;*
>
> *(ii) by a supplementary estimate approved pursuant to article 154(7) by resolution of the National Assembly passed in that behalf of; or*
>
> *(iii) under article 155.*

[31] Therefore, Article 152(1)(a) vests a power with the National Assembly that it may pass an Act, with or without specific Constitutional authorisation, which Act creates an expenditure which may be paid from the Consolidated Fund. This is a general, residual power granted to the National Assembly and must be exercised subject to certain procedural constraints, such as the requirements for the introduction of a Bill authorizing withdrawals from the Consolidated Fund under Article 90.

[32] Article 152(1)(a) also makes provision for instances where the Constitution itself authorises certain withdrawals from the Consolidated Fund. Many of these specific authorisations have to do with emoluments payable to persons who have been appointed to perform constitutional functions. And this is where we come to the crux of the present matter before the Court.

[33] In these authorising provisions dealing with the emoluments for persons performing constitutional functions, the Constitution provides specifically for Acts to be passed to make pensions payable for three Constitutional appointees: the President, the Auditor-General and the Attorney-General.

[34] With regard to the President, Article 58 of the Constitution provides that:

> *58. (1) The President shall receive such salary, allowances and gratuity as may be prescribed by an Act.*
>
> *(2) Where the person holding the office of President ceases to hold office otherwise than by being removed under article 54, the person shall receive such **pension**, gratuity or allowance as may be prescribed by an Act.*
>
> *(3) The salary, allowance, **pension** or gratuity, as the case may be, payable under this article to the President or a person who has ceased to be President **shall be a charge on the Consolidated Fund** and shall not be altered to the disadvantage of the President or the person who has ceased to be President.* (emphasis added)

[35] For the Attorney-General Article 76 (12) provides that "[t]he salary, allowances, **pension** or gratuity payable to the Attorney-General shall be a charge on the Consolidated Fund."

[36] Further, with regard to the Auditor-General, Article 158 (9) provides that "[t]he salary, allowances, gratuity or **pension** payable to the Auditor-General shall be provided for by or under an Act and shall be a charge on the Consolidated Fund."

[37] Whilst the wording for all three of these persons is different, the provisions all specifically provide that the provision of salary, allowances, gratuity and pension shall be a charge on the Consolidated Fund.

[38] However, for other persons appointed to constitutional positions, including National Assembly Members, the wording of the Constitution is limited to 'salary, allowances and gratuity' which may be provided by an Act and shall be a charge on the Consolidated Fund. For the sake of completeness, these provisions are laid out in full below.

a. Article 105(1) provides that "[a]n Act may provide for the salary, allowances and gratuity of members of the National Assembly."

(2) The salary, allowances or gratuity payable to members of the National Assembly shall be a charge on the Consolidated Fund.

b. Article 66 (13) The Vice-President shall receive such salary, allowance and gratuity as may be prescribed by an Act and the salary, allowance or gratuity shall be a charge on the Consolidated Fund.

c. Article 69(5) A Minister shall receive such salary, allowances and gratuity as may be prescribed by an Act.

(6) The salary, allowances or gratuity payable under clause (5) shall be a charge on the Consolidated Fund.

d. Article 82 (6) An Act may provide for the salary, allowances and gratuity of the Speaker and Deputy Speaker.

(7) The salary, allowances or gratuity payable to the Speaker and Deputy Speaker shall be a charge on the Consolidated Fund.

e. Article 84 (4) An Act may provide for the salary, allowances and gratuity of the Leader of the Opposition.

(5) The salary, allowances or gratuity payable to the Leader of the Opposition shall be not less than those payable to a Minister and shall be a charge on the Consolidated Fund.

f. Article 115C (4) The salary, allowances and gratuity payable to the Chairperson and Members of the Commission shall be prescribed by or under an Act and the salary, allowances or gratuity shall be a charge on the Consolidated Fund.

g. Article 133(1) The salary, allowances and gratuity payable to a Justice of Appeal or Judge shall be prescribed by or under an Act and shall be a charge on the Consolidated Fund.

h. Article 142 (4) The salary, allowances and gratuity payable to a member of the Constitutional Appointments Authority shall be prescribed by or under an Act and the salary, allowances or gratuity shall be a charge on the Consolidated Fund.

i. Article 144 (4) The salary, allowances and gratuity payable to the Ombudsman shall be prescribed by or under an Act and the salary, allowances or gratuity so payable shall be a charge on the Consolidated Fund.

j. Article 150 (4) The salary, allowance and gratuity payable to a member of the Public Service Appeal Board shall be prescribed by or under an Act and the salary, allowances or gratuity so payable shall be a charge on the Consolidated Fund.

[39] There is no apparent reason why the Constitution drafters provided for a pension for three specific constitutional functions, and not for the other ten types of appointees, however, the language of the Constitution clearly distinguishes on this ground. It, therefore, becomes relevant whether this distinction has any impact on the residual power of the National Assembly to authorise withdrawals from the Consolidated Fund.

[40] The Petitioner argues that the specific provision of a pension for the President but not for the members of National Assembly thereby excludes the possibility of an Act creating a pension for these members payable from the Consolidated Fund.

[41] The Respondents argue in turn that there is no explicit restriction on the power of the National Assembly in this regard and that therefore the residual power to authorise withdrawals from the Fund under Article 152 saves the 2008 Amendment.

[42] The Petitioner's argument relies on a canon of statutory interpretation that where the "specific inclusion of one thing implies the exclusion of all other things" (known as the *expressio uni usest exclusio alterius* rule). This has been part of the Common Law statutory interpretation since the 19th century. [See *R v Inhabitants of Sedgley* (1831) 2 B & Ad 65]. This is a common sense rule that imputes an intentionality in the language choices made by the draftspersons of legislation.

[43] However, it is also a rule which should be approached with caution. Lopes LJ in *Colquhoun v Brooks* (1888) 21 QB 52 at 65 describes the rule as "a valuable servant, but a dangerous master". The American courts treat the maxim with caution, and state that it is "no magical incantation, nor does it refer to an immutable rule." [*Estate of Banerjee* 21 Cal.3d 527]. Similarly, the South African courts state that "'[i]t is not a rigid rule of statutory construction'; in fact it has on occasion been referred to as a 'principle of common sense' rather than a rule of construction, and 'it must at all times be applied with great caution'.[*National Director of Public Prosecutions v Mohamed NO and Others* (CCT44/02) [2003] ZACC 4; 2003 (4) SA 1 (CC) at [41]. Footnotes omitted.].

[44] In *Colquhoun v Brooks* Lopes LJ states that the maxim "ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice" (at 65. This dictum has also been cited with approval by the Canadian Supreme Court in *Nicholson v. Haldimand-Norfolk Regional Police*

Commissioners [1979] 1 S.C.R. 311 at 322.). Furthermore, when discussing this maxim, *Maxwell on the Interpretation of Statutes* cautions that the Courts should take care to distinguish when the language choice reflects that the "legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution". [R. Wilson and B. Calpin, *Maxwell on The Interpretation of Statutes* 11ed (Sweet & Maxwell 1962) 306-7].

[45] In *Banerjee,* the Court finally holds that "[m]ore in point here, however, is the principle that such rules shall always 'be subordinated to the primary rule that the intent shall prevail over the letter.'" (Citing Davis v. Int. Alliance etc. Employees (1943) 60 Cal.App.2d 713, 721 [141 P.2d 486].*Bindra's Interpretation of Statutes* recommends that it "may be applied only when in the natural association of ideas, the contract between what is provided and what is left out leads to an inference that the latter was intended to be excluded." [M.N. Rao and A. Dhanda, *Bindra's Interpretation of Statutes* 10ed (LexisNexis Butterworths 2007) 648.]

[46] We have looked at the introductory comments on the Bills introducing the 1993 National Assembly Members Emoluments Bill and the 2008 Amendment, and these, too, do not shed any light on the legislative choices to provide 'salary, allowances and gratuity' under the former, and to replace allowances with a pension under the latter. Nor does the latter Bill make any reference to the constitutional provisions which it seeks to enforce and its departure from the wording of the Constitution in those provisions.

[47] The drafting of a constitution is not the same as the drafting of ordinary legislation. We have to give extra credence to the language choices made in the drafting of the Constitution given the nature of the document being drafted; the specific environment created to enable negotiations and enhanced scrutiny; and the fact that the final document was adopted by the Constitutional Assembly before being put to the people of Seychelles who also adopted the Constitution by referendum. We cannot, therefore, assume that it was an unintended choice to provide for specific authorization for pensions for only three constitutional functionaries.

[48] Furthermore, shortly after the adoption of the constitution the Acts providing for the emoluments payable to the President, the National Assembly members, the Judiciary and the other Constitutional Appointees were passed in close succession. At that point it

would have been apparent to the National Assembly and the Attorney General of any inadvertent oversight in the empowering provisions, and constitutional amendments could have been adopted to bring consistency between the various provisions. Therefore, it appears to us that the *expressio uni usest exceptio alterius* maxim applies in this context and there was a clear intention to exclude pensions from the payments which the National Assembly could authorize as withdrawals from the Consolidated Fund.

[49] The question remains whether the 2008 Amendment may be saved by virtue of the general legislative powers to authorize withdrawals from the Consolidated Fund granted to the National Assembly under Article 152(1)(a) read with Article 85? In our opinion this cannot be so, as the rule of implied exception must apply. The rule of implied exception (or *generalia specialibus non derogant)* is that when there are two provisions of a statute, or statutes which are in apparent conflict with each other, and one of them is more specifically dealing with the matter while the other is more general in application, the conflict is resolved by applying the specific provision to the exclusion of the general one. [See Sullivan, R., *Sullivan and Driedger on the Construction of Statutes* 4ed (Butterworths 2002), page 273, See also *R. v. Greenwood,* [1992] 7 O.R. (3d) 1.

[50] In the present situation, Articles 58, 76, 158, 105, 66, 69, 82, 84, 115C, 133, 142, 144, and 150 all specifically state what types of emoluments Acts the National Assembly may provide for the respective constitutional functionaries as withdrawals from the Consolidated Fund: Acts pursuant to Articles 58, 76 and 158 may withdraw from the Consolidated Fund to provide salary, allowances, gratuity and pensions. Acts pursuant to Articles 105, 66, 69, 82, 84, 115C, 133, 142, 144 and 150 may only draw from the Consolidated Fund to provide salary, allowance and gratuity.*The word 'pension' would need to be present in this latter group of Articles in order for it to be authorised by the Constitution.*

[51] To interpret Article 152(1)(a) read with Article 85 as further empowering the National Assembly to grant pensions or any other payment in addition to those specified in Article 105 would render Article 105(1) redundant and superfluous – there would be no need for that provision at all. It would also render all of those other provisions

redundant. We cannot accept such an interpretation in the light of the additional respect we must give to constitutional drafting choices.

[52] Furthermore, paragraph 8 of Schedule 2 to the Constitution lays out the "general principles of interpretation" that Courts must apply, and specifies that "(a) the provisions of this Constitution shall be given their fair and liberal meaning; (b) this Constitution shall be read as a whole; and (c) this Constitution shall be treated as speaking from time to time." To adopt the approach taken by the Respondents would be to rob these provisions of their meaning and would undermine the structure of the Constitution and is simply not fitting with a 'fair and liberal' reading of these provisions or the Constitution 'as a whole'.

Findings and Conclusion

[53] Therefore, we come to a finding that the 2008 Amendment was ultra vires the powers of the National Assembly and therefore falls to be declared unconstitutional and void.

[54] This is not to say that pensions cannot be paid to constitutional functionaries, but rather that the limitation is on the withdrawal of these monies from the Consolidated Fund.

[55] We have been called upon in this judgment to consider the constitutionality of the National Assembly Members Emoluments Act, as amended by the 2008 Amendment and the 2013 Amendment. We have found that the 2008 Amendment exceeded the powers of the National Assembly and therefore is unconstitutional. However, once the amendment was passed we need to consider those provisions in their place in the main Act, and not the amending Act per se. The provisions of the Act as amended will be unconstitutional. Therefore, where provision is made for pensions in the Act, those provisions are unconstitutional and void. These provisions are: sections 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d).

[56] This finding has significant implications for the constitutionality of this Act and the general structure of emoluments paid to constitutional functionaries under the Act, the Judiciary Act and the Constitutional Appointees Emoluments Act. We are minded of the

impact that such a finding may have on persons who are already receiving pensions under this Act.

[57] Under Article 130(4), the Court may—

> *(a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;*
>
> *(b) declare any law or the provision of any law which contravenes this Constitution to be void;*
>
> *(c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate.*

[58] In the circumstances, we declare that the pensions provided to National Assembly Members under sections 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d) of the National Assembly Members Emoluments Act are unconstitutional to the extent that they authorize the payment of a pension for National Assembly Members from the Consolidated Fund.

[59] We do not believe that it is just to grant this order retrospectively, and therefore will not declare that payments made prior to this order are void.

Order of the Court

[60] Therefore we make the following order:

a. The provisions of sections 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d) of the National Assembly Members Emoluments Act are unconstitutional and void.

b. This order will have prospective effect. No order is made with regard to payments already made under the Act.

c. Notice of this finding of unconstitutionality is to be served on the President of the Republic of Seychelles and the Speaker of the National Assembly in terms of Article 130(5) of the Constitution.

Signed and dated at Ile du Port on 31 March of 2017.

B. Renaud
Judge of the Supreme Court

D. Akiiki-Kiiza
Judge of the Supreme Court

C. McKee
Judge of the Supreme Court

Delivered by B. Renaud (P) and D. Akii-Kiiza on 4 April 2017