

IN THE SEYCHELLES COURT OF APPEAL

Between

Viral Vadilal Dhanjee

Applicant - Appellant

Against

The Electoral Commissioner

1st Respondent

And

The Chief Electoral Officer

Mr. Charles Morin

2nd Respondent

SCA: 16 of 2011

Before: MacGregor, President ; Hodul, Fernando, JJA

Mrs. A.G. Amesbury for the APPLICANT - APPELLANT

Mr. R. Govinden, Attorney General for the RESPONDENTS

Date of Hearing: 21st June 2011

Date of Judgment: 21st June 2011

JUDGMENT

A.F.T. FERNANDO. J.A

- 1) This was an application dated 17th of June 2011, under rule 25 of the Court of Appeal Rules for:
 - a) "an order that the Court stay the hearing of the appeal in SCA No 16 of 2011 until the Election Petition presently before the Constitutional Court is finally determined,

b) An order that Justice Macgregor recuse himself from appeal SCA 16/2011 and all other cases incidental thereto,

c) An order that this interlocutory application is heard as one of extreme urgency.”

2) The relevant provisions of rule 25 states:

“(1) In this Rule, an interlocutory matter means any matter relevant to a pending appeal the decision of which will not involve the decision of the appeal.

(2) An interlocutory matter, other than an application for special appeal, may be brought before the President or a single Judge designated by the President :

Provided that the President or the Judge before whom the matter is brought may in his discretion hear or refuse to hear or transfer the application to the full Court.”

3) This application came up before three Justices of Appeal as set out above and came up for hearing within four days of the filing of the application thus acceding to the third relief prayed for by the Applicant.

4) The Applicant in Constitutional Court Case No. 3 of 2011 made application against the Respondents above-named, praying for among other matters for a declaration that the disqualification of the Applicant as a Presidential candidate, on Nomination Day, for the Presidential Election 2011 by the 2nd Respondent above-named was illegal and a contravention of his right to participate in a public office under article 24 (1) (c) of the Constitution and for an order that the Presidential election be postponed until the final determination of the case.

5) The Constitutional Court granted the declaration but did not order the postponement of the election by its judgment dated 11th May 2011.


6) Being dissatisfied with the said judgment both the Applicant and the Attorney-General as Counsel for the Respondents appealed to the Court of Appeal in case No SCA 16 of 2011. The Applicant in his Notice of Cross-Appeal dated 13th of May 2011 prayed that his case be heard as one of extreme urgency and for an order postponing the Presidential Election until the final determination of his appeal.

7) The Applicant by his application dated 16th of May 2011 prayed for an interlocutory injunction restraining the Respondents from holding the May 2011 Presidential Election which was to commence on the 18th of May 2011, pending the final determination of the appeal against the judgment of the Constitutional Court in SCA 16/2011 and prayed that his application be heard as one of extreme urgency.

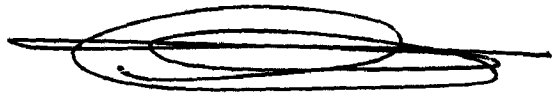
- 8) The application was heard by the President of the Court of Appeal on the 19th of May 2011 and his Preliminary Ruling was delivered on the following day dismissing the application for an injunction with a detailed Ruling on the 27th of May 2011.
- 9) It is in the backdrop of this, that the instant interlocutory application is being made to this Court.
- 10) The Applicant's basis for an order that the Court stay the hearing of the appeal in SCA No 16 of 2011 until the Election Petition presently before the Constitutional Court is finally determined is set out in detail at paragraphs 11 to 13 of his Affidavit attached to his application dated 17th of June 2011 and as argued before us, is more a complaint for not hearing the appeal in SCA No 16 of 2011 against the judgment of the Constitutional Court and his application for an interlocutory injunction restraining the Respondents from holding the May 2011 Presidential Election before the commencement of the election on the 18th of May. He specifically states at paragraph 11 of his Affidavit: "I aver and verily believe that if the SCA 16/2011 can be mentioned now, it could have been fixed for mention and final determination at a time prayed for by me when time was of the essence". And again: " I also aver and verily believe that if the case can be called now, outside the usual time when the SCA normally sits it could have likewise sat at any time before I filed the Election Petition." The Applicant also states: "I aver that it is in the interest of justice that the hearing of the Appeal SCA 16/2011 should be stayed until the Election Petition is heard and determined by the Constitutional Court....".
- 11) We see no merit in the Applicant's prayer for an order that the Court stay the hearing of the appeal SCA No 16 of 2011 until the Election Petition presently before the Constitutional Court is finally determined, especially in view of the Applicant's own averment at paragraph 9 of his Affidavit namely: "On 31st May 2011 I filed an Election Petition asking the court to declare the May 2011 Presidential Election null and void for non-compliance with the Election Act relying on the judgment of the Constitutional Court" (underlining by us). In the said paragraph it is also averred that the Attorney General in his appeal against the Constitutional Court judgment had averred that the Constitutional Court was wrong to have made such finding. As stated at paragraph 6 above both the Applicant and the Respondents have appealed against the judgment of the Constitutional Court. That being the case the interest of justice demands that the Appeal against the judgment of the Constitutional Court, namely SCA 16/2011 should be heard and determined prior to the hearing of the Election Petition.
- 12) Article 120(5) of the Constitution states: "Proceedings in respect of a matter relating to the application, contravention, enforcement or interpretation of this Constitution shall take precedence over other matters before the Court of Appeal" and article 120(7) states: "The Court of Appeal shall sit, as occasion requires, to deal with matters before it as expeditiously as is practicable." The Applicant's submission in this application amounts to a request to this Court not to comply with its mandatory obligations under the said provisions of the Constitution based

on a mere allegation that this Court had on an earlier occasion failed to act in accordance with these provisions. This is not a submission that should be made to any court.

- 13) The Applicant's second prayer that Justice Macgregor recuse himself from appeal SCA 16/2011 and all other cases incidental thereto was based on his constitutional right to have the extent of his civil right or obligation determined by a competent "impartial and independent court" (underlining by us), as averred at paragraph 14 of the Affidavit. When pointed out that this case would be heard by three Justices of Appeal or by the full bench of the Court of Appeal consisting of 5 Justices of Appeal Counsel for the Applicant decided not to pursue further that prayer.
- 14) We therefore refuse to stay the hearing of the appeal in SCA No 16 of 2011 until the Election Petition presently before the Constitutional Court is finally determined.


A.F.T.FERNANDO
JUSTICE OF APPEAL

I concur:


F.MACGREGOR
PRESIDENT OF THE COURT APPEAL

I concur:


J.Hodoul
JUSTICE OF APPEAL

Dated this 21st day of June 2011, Victoria, Seychelles