GEORGES v ELECTORAL COMMISSION

(2012) SLR 199

A G Derjacques for the petitioner
S Aglae for the respondent

Judgment delivered on 30 July 2012 by

KARUNAKARAN J:

The petitioner, Lucas Meinard Wallis Georges, aged 44 is a citizen of Seychelles. He is a resident of Anse Aux Pins District, Mahé. Needless to say, the petitioner has a constitutional right - like any other citizen of Seychelles who has attained the age of 18 years - to take part in the conduct of public affairs either directly or through freely chosen representatives. Obviously, the petitioner as a citizen has a right to be elected to public office and to participate, on general terms of equality, in Government or in public service as guaranteed by article 24(1)(c) and (d) of the Constitution of Seychelles. However, the exercise of these rights, though guaranteed by the Constitution, is not absolute by virtue of article 24(2) of the Constitution, which reads thus: "the exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society".

The Elections Act 1995 (hereinafter called the Act) as it exists today is a law contemplated under article 24(2) of the Constitution, which regulates the petitioner's right to be elected to public office and to participate in Government. Be that as it may, a few weeks ago, a directly elected member of the current National Assembly, who had been nominated for election by a particular political party and had been elected from the Anse Aux Pins constituency, resigned from his office. He ceased to be a member of the National Assembly. Following his resignation, the seat he had been occupying became vacant. Consequently, a by-election for the electoral area of Anse Aux Pins was announced by the respondent. The Electoral Commission accordingly appointed and announced the dates of election; that is, 8 and 10 August 2012. The petitioner accordingly submitted his nomination to the Electoral Commission on 17 July 2012 to stand for the said by-election. He registered himself as an independent candidate. Pursuant to the Elections Act, his nomination and candidature was accepted by the Electoral Commission on 20 July 2012. Besides, two other candidates from two registered political parties had also submitted their nominations to stand for the said election on their respective party tickets. They too were accepted by the Electoral Commission.

In pursuance of the intended by-election and in terms of section 97(2) of the Act, the Electoral Commission after having meetings with all three candidates and in consultation with the Seychelles Broadcasting Corporation, decided upon the

allocations of free broadcasting time to each political party and to each candidate as follows -

a) 13 minutes of airtime to each political party taking part in the by-election to launch their campaign as opening political broadcast on 27 July 2012.
b) Each candidate contesting in the by-election 5 minutes of airtime on both radio and television as political broadcast on the 31 July 2012.
c) 13 minutes of airtime to each political party taking part in the by-election to close their campaign as closing political broadcast on 4 August 2012.

According to the petitioner, as an independent candidate, he has not been allocated airtime on the Seychelles Broadcasting Television either on 27 July 2012 or on 4 August 2012, the two slots which were allocated to the registered political parties. It is the contention of the petitioner that the Electoral Commission has misconstrued the law under section 97(2) of the Elections Act and has illegally allotted additional free broadcasting time on 27 July and 4 August 2012 for the political parties of the other two candidates namely: Meggy Sodie Marie of Parti Lepep and Jane Georgette Carpin of the Popular Democratic Movement.

It is the submission of Mr Derjacques, counsel for the petitioner that the political parties are not participating as political parties in the by-election in one district as it is not a national or general election. This election will, further, not include or involve the obtaining of a proportional seat in the National Assembly of Seychelles, which is allocated to participating political parties in proportion to their percentages in votes obtained. It is the contention of Mr Derjacques that the law under section 97(2) of the Act must be interpreted to mean that free broadcasting airtime shall be allocated solely and only to candidates, and not to political parties, in a by-election, in one district. The interpretation given to section 97 must be fair and generous to all the candidates and must not discriminate against the other candidate.

It is therefore the case of the petitioner that the decision of the Electoral Commission contained in its letter dated 20 July 2012 addressed to the petitioner, maintaining the said allocation of free broadcasting time to the political parties, is illegal, ultra vires, harsh, irrational and unreasonable. The letter read –

> We advise that the airtime, allocated to all three candidates, has been done in accordance with section 97(2) of the Act. We take note of your concerns and advise that these issues will be taken up in the electoral reform.

Being aggrieved by the said decision of the respondent, the petitioner has now come before this Court for a judicial review of the said decision, invoking the supervisory jurisdiction of this Court over adjudicating authorities, conferred by article 125(1)(c) of the Constitution. The petitioner in essence seeks herein a declaration from the Court that the decision of the respondent allocating free broadcasting time to political parties is unlawful, illegal, irrational, unreasonable, and so presumably, null and void; and consequently, the petitioner prays this Court for a writ of certiorari to quash the said decision and a writ of mandamus ordering the respondent to allocate more free

broadcasting time on SBC Television to the petitioner, as has been allocated to the political parties of the other two candidates.

On the other hand, the respondent denied all the allegations made by the petitioner in this matter. Mrs Aglae, counsel for the respondent, contended in essence that the respondent did not misconstrue or misinterpret the law under section 97(2) of the Act. It is lawful or legal for the respondent to allocate additional free broadcasting time on 27 July and 4 August 2012 for the political parties of the other two candidates namely: Meggy Sodie Marie of Parti Lepep and Jane Georgette Carpin of the Popular Democratic Movement.

According to Mrs S Aglae, the decision of the Electoral Commission is neither illegal nor unreasonable. The respondent is under a statutory obligation to allocate free broadcasting time to the registered political parties in terms of section 97(1) as it reads "the Electoral Commission shall ..... allocate to each political parties", which according to her is "mandatory". Also it is her contention that any political party contesting in the election has a statutory right in terms of section 95 of the Elections Act to campaign in the election in favour of its candidate. This statutory right conferred on the registered political parties ought to be respected by the Electoral Commission. In the circumstances, Mrs Aglae submitted that the Electoral Commission has reached a reasonable decision within its powers and in accordance with law, which any other reasonable tribunal could have reached in the given matrix of facts and circumstances surrounding the case on hand. Hence, the respondent seeks dismissal of the instant petition.

I meticulously perused the records received from the Electoral Commission in this matter. I gave careful thought to the arguments advanced by both counsel touching on points of law as well as on facts including the authorities cited by Mr Derjacques. Although both counsel argued at length on a number of peripheral issues, it all boils down to three fundamental questions that arise for determination in this case. They are:

(i) Did the Electoral Commission misconstrue or misinterpret or misapply the law under section 97(2) of the Elections Act in arriving at its decision dated 20 July 2012?

(ii) Is the decision of the Electoral Commission in allocating free broadcasting time on SBC Television to the registered political parties of the other two candidates in this matter unlawful or illegal or ultra vires? and

(iii) Did the Electoral Commission act unreasonably or irrationally in its decision in allocating free broadcasting time on SBC Television to the political parties of the other two candidates, while it refused similar allocation of airtime to the petitioner, having regard to all the circumstances of the case?

Obviously, the crux of the issue in this matter relates to the interpretation of section 97(2) of the Elections Act. Before interpreting a sub-section in a statute, it is important that one should peruse the entire section of law and other provisions found

in the same statute as far as they are relevant to the subject under interpretation. The entire provision reads –

(1) For the exercise of the right to broadcast under section 96(ii), the Electoral Commission shall, in consultation with the Seychelles Broadcasting Corporation established by the Seychelles Broadcasting Corporation Act (hereafter referred to as the "Corporation"), allocate free broadcasting time *to each registered political party and each candidate.* [emphasis mine]
(2) In allocating free broadcasting time under subsection (1), the Electoral Commission shall allocate –
    (i) to each registered political party equal broadcasting time; *and*
    (ii) to each candidate equal broadcasting time.
(3) The Electoral Commission shall decide by draw of lots the order in which
    (i) each registered political party shall utilize the broadcasting time; and
    (ii) each candidate shall utilize the broadcasting time.
(4) The Electoral Commission shall inform each registered political party and each candidate the broadcasting time allocated to each such political party and candidate and the order in which such time is to be utilized.
(5) Any registered political party or candidate which or who fails to utilize the broadcasting time allocated under subsection (1) shall forfeit the right to broadcast.

Literal Rule

It is a fundamental principle of interpretation of statutes that while interpreting any provision of law in a statute the court ought to apply the "literal rule" as the first rule; the "golden rule" is to give effect to the meaning the legislature intended to convey, unless such meaning leads to utter absurdity. Under the literal rule, the words of the statute are given their natural or ordinary meaning and applied without the court seeking to put a twist or gloss on the words or seek to make sense of the statute. In other words, the words of a statute must prima facie be given their ordinary meaning. When the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. Even if such consequences appear to be unfair and ungenerous as Mr Derjaques attempts to portray in the instant case. It is said that the words themselves best declare the intention of the law-giver.

Applying this rule in the present case, it is evident on a plain reading of section 97(2) of the Act that:

(1) The two paragraphs 97(2)(i) and 97(2)(ii) undoubtedly refer to two distinct and separate categories of entities: (a) the registered political parties and (b) the candidates themselves who are contesting in the election. There is no ambiguity in law in this respect. A registered political party is a separate legal persona, a legal entity which is distinct and different from a natural person, the candidate, namely the individuals. The meaning is plain, simple, clear and unequivocal under paragraphs 97(2)(i) and 97(2)(ii). The Electoral Commission should therefore, allocate each entity free broadcasting time as it clearly reads thus:

*"*shall … allocate free broadcasting time *to each registered political party and each candidate*". This the Election Commission has done in accordance with law in this matter and so the Court finds.

(2) The word "shall" used in the section, unequivocally implies that the Electoral Commission is under a statutory duty to allocate free broadcasting time separately to each of both categories of entities: (i) the legal entity namely, the registered political parties which have fielded their candidates in the by-election and (ii) the natural persons, the candidates, who are contesting in the by-election. Indeed, 'shall' in the normal sense imports command. However, it is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' appears and the other circumstances. Unless an interpretation leads to some absurd or inconvenient consequences or contradicts with the intent of the legislature the court shall interpret the word 'shall' in the mandatory sense and so I do herein, upholding the submission of Mrs Aglae that the Election Commission is under a legal duty to allocate free airtime separately to the registered political parties in this respect.

(3) Moreover, it is to be gathered the usage of word "and", which appears between the two sub-sections 97(2)(i) and 97(2)(ii), clearly differentiate to indicate the separate existence and identity of each category enumerated under sub-section 97(2). Each category on its own is statutorily entitled to free broadcasting time, in any election whether general or by-election for that matter.

(4) The attempt by Mr Derjaques to distinguish a by-election from a general or national election does not appeal to me in the least as law does not make such distinction under section 95, 96 or 97 of the Act. The same rules apply as far as the conduct of the elections, and in respect of the privileges, right and liabilities of the political parties and the candidates, who contest in the elections for the National assembly.

In view of all the above, it is evident that the Electoral Commission has correctly interpreted the law. The Commission did not misconstrue or misinterpret or misapply the law under section 97(2) of the Elections Act in arriving at its decision dated 20 July 2012 and so the Court finds. This answers question no 1 formulated hereinbefore.

Having said that, I note Mr Derjacques also submitted that since the literal interpretation does not accord with fairness and justice to the petitioner, he invited the Court to consider a farfetched interpretation of section 97(2) in order to meet fairness and justice in this matter. With due respect, were I to accept Mr Derjacques' submission in this respect, I would have to import additional words into section 97(2) of the Elections Act. This I am not empowered to do as this Court thereby would legislate rather than interpret the law.

On the issue of consequences, I too, as a man of the world share the concern of Mr Derjacques. However, as a judge I have no doubt that this Court should apply the law as it stands today in the Elections Act until such time the Act is repealed or amended accordingly to meet the changing needs of time and the socio-political dynamics.

In the case of *Whitely v Chappel* (1868) LR 4 QB 147, the defendant was prosecuted for the offence of “impersonation” involved in an election. The statute made it an offence 'to impersonate any person entitled to vote’. The defendant, in fact, used the vote of a dead man. The statute relating to voting rights required a person to be living in order to be entitled to vote. The Court had to apply the literal rule to interpret the plain and ordinary words used in the statute. There was no other possible interpretation as has happened in the present case. The defendant impersonated a person not entitled to vote. The Court therefore acquitted the defendant. As I observed supra, when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences.

In view of all the reasons stated above, the Court finds that the decision of the Electoral Commission in allocating free broadcasting time on SBC Television to the registered political parties of the other two candidates in this matter is lawful, legal and valid in the eye of law. This answers question no 2 above.

I shall now proceed to examine question no 3 supra, which touches the fundamental principles governing the matters of judicial review. At the outset, I would like to restate herein what I have stated in *Cousine Island Company Ltd v Mr William Herminie, Minister for Employment and Social Affairs and Others* Civil Side No 248 of 2000. Whatever the issue, factual or legal, that may arise for determination following the arguments advanced by counsel, the fact remains that in matters of judicial review, the court is not sitting on appeal to examine the facts and the merits of the case heard by the administrative or adjudicating authority. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the court is concerned only with the “legality”, “rationality” (reasonableness) and “propriety” of the decision in question vide the landmark dictum of Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374.

On an appeal the question is “right or wrong?” Whereas on a judicial review the question is “lawful or unlawful?” – Legal or illegal? “Reasonable or unreasonable?” - Rational or irrational?

On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the court may without much ado determine the issue of “legality” of any administrative decision, which indeed, includes the issue whether the decision-maker had correctly construed the law, applied and acted in accordance with law. This may be determined by using the litmus test, based on an objective assessment of the facts involved in the case. On the contrary, the entity of “reasonableness” cannot be defined, ascertained and brought within the parameters of law; there is no litmus test to be applied, for it requires a subjective assessment of the entire facts and circumstances of the case under

consideration. Such assessment ought to be made applying the yardstick of human reasoning and rationale.

I will now turn to the issue as to “reasonableness” of the decision in question. What is the test the court should apply to determine the reasonableness of the impugned decision in matters of judicial review?

First of all, it is pertinent to note that in determining the reasonableness of a decision one has to invariably go into its merits, as formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. Where judicial review is sought on the ground of unreasonableness, the court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan *Administrative Law* (3rd ed, 2001)). Applying this test, as I see it, the court has to examine whether the decision of the Election Commission in allocating free broadcasting time on SBC Television to the political parties of the other two candidates, while it refused similar allocation of airtime to the petitioner, is unreasonable having regard to all the circumstances of the case.

At the same time, one should be cautious in that –

> judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.
> [Per Lord Fraser *Re Amin* [1983] AC 818 at 829, [1983] 2 All ER 864 at 868]

In determining the issue of reasonableness of the decision in the present case, the court has to make a subjective assessment of the entire facts and circumstances of the case and consider whether the impugned decision of the Election Commission is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do, in what I venture to call, a broad common sense way as a person of the world, and come to his or her conclusion giving such weight, as he or she thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matter, which he ought to take into account per Lord Green in *Cumming v Danson* [1942] 2 All ER 653 at 656.

In my considered view, the Electoral Commission has taken into consideration all relevant factors including the intended electoral reform and had taken its decision only

after having given opportunity to the petitioner to present his case or grievance to the Commission. Undoubtedly, the Electoral Commission had to apply the law as it is and has decided in accordance with section 97(2) of the Act. It has rightly refused the petitioner's request not to allocate free broadcasting time to the registered political parties over and above the time allocated to the respective candidates. Hence, I conclude that the Electoral Commission did decide so, for lawful and valid reasons as any other reasonable tribunal would and should do in identical circumstances.

In view of all the above, the Court concludes that the decision of the Electoral Commission in this matter is neither illegal nor unreasonable nor irrational. Therefore, I decline to grant the writ of certiorari or mandamus as sought by the petitioner in this regard.

In the final analysis, the Court finds that the instant petition for judicial review is devoid of merit. The petition is therefore dismissed. I make no order as to costs.