

**Rene v Regar Publication & Ors
and
Rene v Seychelles National Party & Ors
(2002) SLR 11**

France BONTE for the Plaintiff
Bernard GEORGES for the Defendants

Ruling on plea in limine litis delivered on 15 November 2002 by:

PERERA J: Three defamation suits have been filed by Mr France Albert Rene. In case nos. 9 and 10 of 2001, the Defendants are Regar Publications, Roger Mancienne, Jean Francois Ferrari and X-Press Printing. In case no. 11 of 2001, the Defendants are 1. The Seychelles National Party, and Regar Publications (Pty) Ltd.

The alleged defamation relates to Articles published in "The Regar" newspaper and "Nouvo Vizyon" under licence of the said newspaper, entitled "why Government did not negotiate with Seybrew"? It is averred that the statements made thereunder in their natural and ordinary meaning and/or by innuendo meant and were understood to mean that the Plaintiff had used and sues money in the children's fund recklessly and without regard to the purpose for which the fund was created and has on some occasions given part of it to persons other than deserving children. The Plaintiff avers that these statements are false and malicious and, constitute a grave libel on him and that consequently his character, credit, reputation, and office as the President of the Republic of Seychelles and as President of the Seychelles Peoples' Progressive Front have been injured.

Article 59 of the Constitution, provides inter alia that –

.....no civil proceedings shall be instituted or continued in respect of which relief is claimed against the person (holding office of President) in respect of anything done or omitted to be done in such private capacity.

The Defendants in the said suits, have filed statements of defence and raised three points in limine litis. They are –

1. The action of the Plaintiff contravenes Article 27 of the Seychelles Charter of Fundamental Rights and Freedoms and the Constitution in that the Defendants are unable to take the same, or similar, proceedings against the Plaintiff, or seek costs if they are successful in defending this action.
2. The hearing of his action by any of the judges of the Supreme Court currently in post contravenes Article 19 of the Seychellois Charter of Fundamental Human Rights and Freedoms and the Constitution, in

that the Defendants cannot be guaranteed a fair trial given that the said judges have been appointed by the Plaintiff from candidates proposed by an authority chaired by the Plaintiffs Attorney in the suit, or in one case, re-appointed by the Plaintiff on the recommendation of an authority chaired by the Plaintiff's Attorney in the suit: or who may be re-appointed by the Plaintiff on the recommendation of an authority chaired by the Plaintiff's Attorney in this suit

3. The action in this suit cannot be heard until such time as the Constitutional issues herein raised and raised in Constitutional Side 2/2001, 3/2001, 4/2001 and 5/2001 on 26th February 2001.

As regards the third point, there has been filed before the Constitutional Division of the Supreme Court, four petitions on 26 February 2001, as averred. In cases nos. 2 of 2001 and 3 of 2001, the petitioners seek a declaration that the hearing of the defamation cases brought by Mr France Albert Rene, by any of the judges appointed by him in his capacity as President, contravenes Articles 19 which guarantees the right to a fair hearing by an independent and impartial Court established by law. In cases nos. 4 of 2001 and 5 of 2001 it is alleged that the bringing of the defamation cases by Mr France Albert Rene contravenes Articles 27 of the Constitution which guarantees the right to equal protection of the law. These cases are pending hearing before the Constitutional Court, and the petitioners have not pursued them despite a notice being sent to them that those cases would be mentioned in Court on 27th March 2001. The Cause List however, does not show that they were listed that day. However, Counsel for petitioner in those cases had appeared before the Constitutional Court that day in the case of *Wavel Ramkalawan v The Republic* (Const Case no 1 of 2001). The petitioners had thereafter taken no steps since that day to prosecute their petitions before that Court.

The provisions relating to the scope and ambit of references of Constitutional issues arising in judicial proceedings, to a Constitutional Court, differs in various Constitutions. They depend on where the original jurisdiction or determining Constitutional questions is vested. The provision, as contained in Article 67(1) of the Constitution of Kenya is as follows-

Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate Court, and the Court is of opinion that the question involves a substantial question of law, the Court may, and shall if a party to the proceedings so requests, refer the question to the High Court.

In the case of *Githunguri v. The Republic of Kenya (1986) LRC (const.) 618*, the High Court of Kenya was satisfied that the Respondent had impliedly agreed with the grounds urged by the Applicant for a referral. There, the High Court is vested with the original jurisdiction in Constitutional matters.

Section 259(3) of the Constitution of Nigeria (1979) provides that "any question as to the

interpretation or application of the Constitution which involves a substantial question of law shall be referred to the Supreme Court". However in the case of *Ukaegbu v Attorney General of Imo State* (1989) LRC (Const) 867, the Federal Court of Appeal referred such a question to the Supreme Court. In doing so, one of the questions referred was already decided by that Court. The Supreme Court held inter alia that "a decision already made by the Federal Court of Appeal cannot be referred to the Supreme Court for "another decision" under that Section. Once a decision on the substantial question of law" is given by the Federal Court of Appeal, the only way to obtain a review of that decision is by way of Appeal to the Supreme Court".

Mr Georges, submitted that, I, sitting as a single judge of the Supreme Court, did not have, jurisdiction to determine any of the Constitutional issues raised in the plea in limine litis. With respect, this is not a correct submission.

Article 129(1) of the Constitution is follows –

The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two judges sitting together.

Article 46(7) is as follows-

Where in the course of proceedings in any Court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the Court shall, if satisfied that the question is not frivolous or vexations or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

The Court consisting of not less than two judges of the Supreme Court exercise jurisdiction in Constitutional matters, is not a separate Court, but a division of the Supreme Court. Hence in terms of Articles 129(1) and 46(7), a bench of not less than two judges should determine Constitutional questions arising in the course of proceedings in a case only if the Court is satisfied that those questions are not frivolous or vexations or they have already been the subject of a decision of the Constitutional Court or of the Court of Appeal. If the Court is satisfied that they are otherwise, a single judge of the Supreme Court is not precluded from determining such question in the course of the trial or at any time before the trial as any other point of law raised under Section 90 of the Code of Civil Procedure. Hence it is not every Constitutional question that should be referred to the Constitutional Court.

The provisions of Article 46(7) give a discretion to a trial judge to decide whether a Constitutional question arising in the course of the proceedings should or should not, be

referred to the Constitutional Court for determination, as the Constitutional jurisdiction is vested in the Supreme Court, but where such question is not frivolous or vexatious or has already been judicially settled, it should be exercised by not less than two judges of the Court. Therefore, it is not a question of lack of jurisdiction of the Court, but merely a question of composition of the bench to exercise that jurisdiction. The Constitutional Court does not exist as a separate Court.

Are the questions sought to be referred to the Constitutional Court frivolous or vexatious?

Basically, the first and second points raised in plea in limine are already before the Constitutional Court. The raising of the same issues in the pleadings of the present cases are vexatious to the Plaintiff who has pleaded a valid cause of action. They do not arise from the pleadings.

This is so as the Plaintiff seeks redress, not in his capacity as the President of Seychelles, but in his Private, Civil and Political capacity. The Fundamental Rights are a guarantee against state action, as distinguished from violation of such right by private parties. Therefore, while ordinary legal Rights are available against private individuals, a Fundamental Rights action is available only against the state, and not for the violation of any such right by a private individual. Hence as the present actions involve Private parties, the Defendants cannot allege contravention of any Fundamental Right as Private Parties owe each other no Constitutional duties (*Hill v Church of Scientology of Toronto* (1996) 3. CHRLD - 335).

It is an accepted principle of Constitutional interpretation that the Constitution cannot ever be in conflict with itself. Section 8 (b) of Schedule 2 of our Constitution provides that the "Constitution shall be read as a whole". Ground 1 of the plea in limine litis is that, while the President in his private capacity has instituted the present action, the Defendants are unable to take the same or similar proceedings against him, or seek costs if they are successful in defending the action. This is averred to be a contravention of the right to equal protection of the law, guaranteed in Article 27.

A similar application for a referral was made in *M'membe and Or v The People* (1998) 2 CHRLD 28. Two cases of criminal defamation were filed by the Attorney-General against two Defendants in respect of defamation of the president of Zambia. The Defendants sought a referral to the High Court to determine whether Section 69 of the Penal Code which contained the provision that defamation of the President was an offence, contravened the Constitutional Rights of Freedom of expression (Art 20) and freedom from discrimination (Article 23). The trial judge refused the referral and ruled that Section 69 did not contravene any provision of the Constitution. In appeal, the Supreme Court upheld the decision of the trial judge and held that –

Favourable treatment attributable solely to the office of President cannot be described as attributable wholly or mainly to his political opinions within the meaning of Article 23 (freedom from discrimination). Moreover, it is

self-evident that the election of any person to the office of President has legal and Constitutional consequences. It cannot be argued that the President should stand before the law equally with everyone else when for example Article 43 of the Constitution grants him immunity from Civil or Criminal Suit while he occupies office.

The position under the Constitution of Seychelles would be similar, and hence the staying of the present actions and referring ground 1 of the plea to the Constitutional Court would be vexatious to the Plaintiff.

Moreover, on the second leg of Article 46(7), the immunities and benefits, granted to certain persons or groups, and special burdens imposed on them under the doctrine or reasonable classification have already been the subject of the decision in the cases of *Roger Mancienne v The A-G (Const. Case 9 of 1995)* and *Gervais Aimee v The Government of Seychelles (Const Case no. 4 of 1997)* In the case of *Mancienne (supra)*, the Constitutional Court ruled that the granting of immunities and privileges to investors under the Economic Development Act, did not contravene the right protection of the law as contained in Article 27. In the case of *Gervais Aimee (supra)* it was held by the Constitutional Court that the provision of a shorter limitation period for actions against the State Officers was not a contravention of Article 27. A referral of the same Constitutional issue which arises in the present matter is therefore unnecessary, as both decisions have been upheld by the Seychelles Court of Appeal, and the jurisprudence is well settled.

As regards the second ground relating to the independence of the judges of the Supreme Court who would be hearing the defamation cases filed by the Plaintiff the Constitutional Court, in the case of the *Seychelles National Party v The Government of Seychelles (Const. Case no 6 of 1999)* decided what the concept of "independence" implied, in Article 168(1) of the Constitution. That Court ruled thus:

In the present case the petitioner avers that "there can be no guarantee" that Public Servants will remain outside- the influence of the State or that of the President who is the head of the executive, the husband of one of their fellow members (of the Seychelles Broadcasting Corporation Board) and the Minister effectively in charge of three of them. This is not a real risk of contravention of Article 168, but a "speculative possibility" which is inadequate to maintain a complaint under Article 130(1) of the Constitution.

The Constitutional issue that where a party is apprehensive of the impartiality or independence of the judges, a reasonable apprehension of bias, must be proved by the Applicant was directly considered by 10 judges of the Constitutional Court of South Africa in the case of the *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors (2000) 2 CHRLD 382*. The High Court had set aside a Presidential Commission of inquiry into the affairs of the Football Union. The President filed an appeal before the Constitutional Court. One of the Respondents made an application to the Constitutional Court alleging that he had a reasonable apprehension

that several judges of that Court would be biased against him in favour of the President and that he might not receive a fair trial as guaranteed by Article 34 of the Constitution. This objection centered inter alia on their appointment to the bench by the President.

The Court dismissed the application unanimously on the following grounds.

1. The test to be applied in cases of this nature is objective and the onus of establishing it rests on the Applicant. The question that would arise is whether a reasonably objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind, open to persuasion by the evidence and the submissions of Counsel, to bear on the adjudication of the case.
2. The reasonableness of the apprehension must be assessed in the light of the oath of office prescribed in the Constitution, together with the judge's ability to carry out that oath as a result of legal training and experience. It must be assumed that judges can disabuse their minds of any irrelevant personal beliefs or predispositions.
3. Litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially. However, this does not give litigants the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour than would other judicial officers drawn from a different segment of Society.

In ground 2 of the plea in limine in the present case, the four judges of the Supreme Court have been specifically mentioned for the purpose of the averment that the hearing of the defamation cases by any one of them contravenes the right to a fair hearing by an independent and impartial Court as guaranteed in Article 19 of the Constitution. This challenge is an exercise in futility as under Article 128 of the Constitution any acting appointment, or ad hoc appointment of judges, must be made by the President from among those proposed by the Constitutional appointments authority, in which the Counsel or the Plaintiff is the Chairman. That is the Constitutional Procedure for all appointments of judges. Hence, unless the instant challenge is personalised to the present panel of judges, which Mr Georges submitted was not the case, this ground is frivolous and vexatious.

Accordingly, as both grounds 1 and 2 of the plea in limine litis are frivolous and vexatious, and also as the Constitutional questions raised therein have already been the subject of decisions of the Constitutional Court and of the Court of Appeal, I exercise the discretion vested in me under Article 46(7) of the Constitution and refuse the application for a referral to the Constitutional Court.

Consequently, the defamation suits filed by the Plaintiff in cases nos. 9 of 2001, 10 of 2001 and 11 of 2001, shall proceed for hearing in due course.

Costs in the cause.

Record: Civil Side No 10 of 2001