

**IN THE CONSTITUTIONAL COURT OF SEYCHELLES**

**[Corum: M. BURHAN - PRESIDING JUDGE, S. ANDRE - JUDGE S.  
NUNKOO - JUDGE ]**

**MA 78/2018  
(arising in CP 10/2017)**

**[2018] SCCC 12**

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**RALPH VOLCERE**

Petitioner

versus

**MINISTER FOR HOME AFFAIRS AND LOCAL GOVERNMENT**

1<sup>st</sup> Respondent

**GOVERNMENT OF SEYCHELLES**

2<sup>nd</sup> Respondent

**ATTORNEY GENERAL**

3<sup>rd</sup> Respondent

**MINISTER OF HEALTH**

4<sup>th</sup> Respondent

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Heard: 7 August 2018

Counsel: Mr. Frank Elizabeth Attorney at Law for the Petitioner

Mr. George Thachett along with Mr. Ananth Subramaniam Assistant  
Principal State Counsels for the Respondents

Delivered: 11 September 2018

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## RULING ON PRELIMINARY OBJECTIONS

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### **Ruling of the Court**

- [1] This Ruling arises out of Constitutional Petition No. 10/2017 of the 7<sup>th</sup> December 2017, as amended on 28<sup>th</sup> March 2018, by Ralph Volcere (“*the Petitioner*”) against the Minister for Home Affairs and Local Government (“*1<sup>st</sup> Respondent*”), the Government of Seychelles (“*2<sup>nd</sup> Respondent*”), the Attorney General (“*3<sup>rd</sup> Respondent*”) and the Minister of Health (“*4<sup>th</sup> Respondent*”).
- [2] The Petitioner is seeking a declaration from the Constitutional Court that the 1<sup>st</sup> Respondent has violated and continues to violate Articles 15, 16 and 29 of the Constitution of Seychelles (“the Constitution”), by refusing to make Regulations under sections 4 (1) and 54 (2) (a) of the Misuse of Drugs Act 2016 (“*MODA 2016*”) to authorize the possession, use, sale, supply, prescription, or other dealing in, or the manufacture, importation or exportation of any controlled drug for medical or scientific purposes.
- [3] The Petitioner further seeks a writ of mandamus against the 1<sup>st</sup> Respondent as a constitutional remedy to compel her to immediately make such Regulations under the *MODA 2016* and to give said Regulations retroactive effect by rendering them applicable from the 1<sup>st</sup> June 2016 when the *MODA 2016* came into operation, so as to give legitimacy to the acts of those terminally ill Seychellois who have been using and continue to use cannabis or its derivatives to treat their medical conditions, and to the acts of the people who supply, sell, possess, prescribe, import, export, manufacture, cultivate or otherwise deal with the said products.
- [4] The Respondents on their part have, by way of their reply from the 26<sup>th</sup> February 2018, raised a threefold preliminary objection against the above Petition, as follows:
- (i) *Firstly, that the Petition is infructuous in law, in that the Regulations for medical use of controlled drugs in accordance with section 4 of the MODA 2016 are*

already in place in view of section 55 (3) of the MODA 2016 hence the Petition being infructuous and only to be dismissed; and

(ii) Secondly, that the Petitioner has no locus standi to file the Petition, in that there is no violation or likely contravention of any of the Constitutional rights of the Petitioner under the MODA 2016; and that there is no prima facie case of any alleged violation of the Constitutional rights as alleged by the Petitioner and further that the Petitioner does not enjoy any guaranteed/vested right within the framework of the Constitution to pray for mandatory relief from Court without any actual violation of any rights guaranteed in the Constitution.

(iii) Thirdly, the nature of the relief prayed for by the Petitioner is beyond the jurisdiction of the court as it falls especially under the policy decision of the Executive as well as legislative functions of the state. And further, it is respectfully averred that the reliefs sought by the Petitioner is not sustainable under the principle of separation of powers and granting of any reliefs prayed for by the Petitioner would amount to intrusion into the powers and functions of other organs of the State or invalidating the scheme of constitution with reference to judicial powers; and that the Respondents dependent on the ruling on the plea in limine litis reserves the right to file defence on the merits and should the plea in limine succeed in their favour, moves for dismissal of the Plaint and compensatory costs.“

[5] In support of the above argument relating to the purported upsetting of the principle of separation of powers the Respondents made reference to the following cases: (**Republic v Albert Geers & Ors (2018) SCSC 39**), (**Khanaiya Lal Sethia & Anr v Union of India & Anor of the 4<sup>th</sup> August 1997**; **Academy of Nutrition improvement and others v/s Union of India Writ no 80 of 2006 Ruling**), and (**Centre for Health Human Rights and Development (CEHURD) and Ors v/s Attorney General (Constitutional Petition No. 16 of 2011) Ruling of the 5<sup>th</sup> June 2012**).

[6] The Petitioner on his part submitted, in a gist, as answer to the above preliminary objections that, firstly, the old Regulations enacted by virtue of MODA 1990, which were saved by the new MODA 2016, are completely irrelevant and otiose to the present MODA

2016 as they related to an entirely different context: the previous act was dealing with a situation where cannabis was still being classified as an illegal drug whereas *MODA 2016*, in the view of the Petitioner, made the same legal for medical and scientific purposes. The Petitioner submitted that the old Regulations did not provide for any modalities with respect to the medical and scientific use of cannabis and that such Regulations had become necessary under the new Act, as the Act itself does not provide for a solution to any of the specific questions arising from the alleged legalization of cannabis for medical and scientific purposes.

[7] The Petitioner further submitted with respect to the issue of *locus standi* that the court of appeal has given the issue of *locus standi* before the Constitutional Court a very wide and liberal interpretation in the case of (***Chow v/s Attorney General and Ors SCCA 2/2007***). The Petitioner averred that in light of said case the restricted and limited definition given by the Respondents to *locus standi* is otiose and that it was thus sufficient for him to state that he was bringing the petition on behalf of his mother, who suffers from Alzheimer’s disease and who has been medically advised to try cannabis oil as an alternative medical treatment. The Petitioner further submitted that even if he were bringing this action in his capacity as a citizen of this country, under the preamble and Article 40 of the Constitution he would meet the criteria for *locus standi*.

[8] Finally, with regards to the third preliminary objection, the Petitioner referred the court to Article 129 (4) of the Constitution, which provides that the Constitutional Court has the power to “*grant any remedy available to the 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*” and Article 46 (5) of the Constitution, which also gives the court very wide powers “*to make appropriate orders*”. In light of these provisions the Petitioner submitted that the nature of the reliefs sought is within the jurisdiction of the court. All in all, the Petitioner moved for the dismissal of the preliminary objections.

- [9] This court having duly considered the illustrated points of law in line with the submissions of both the Petitioner and the Respondents finds as follows:
- [10] With regards to the first preliminary objection in that the petition is infructuous, this court upon a very careful scrutiny of the pertinent provision section 4 and in particular of the saving provisions contained in section 55(3) of the *MODA 2016*, finds that ex-facie the wording and contents of these relevant provisions in the new *MODA 2016* are dissimilar to the wording and content of the provisions in the previous *MODA 1990*. It is our view that this dissimilarity gives a legitimate right to the Petitioner, to enlighten this court as to the necessity of new enabling Regulations under the new *MODA 2016*, which the Petitioner alleges, if not regulated, is a breach of the stated Articles of the Constitution.
- [11] On the above basis, we find that the petition is not infructuous in law hence the first *plea in limine litis* misconceived.
- [12] With regards to the second preliminary objection, in that, the Petitioner has no locus standi to file the Petition, as there is no violation or likely contravention of any of the constitutional rights of the Petitioner under *MODA 2016* and lack of a prima facie case of any alleged violation of the constitutional rights as alleged by the Petitioner and further that the Petitioner does not enjoy any guaranteed/vested right within the framework of the Constitution to pray for mandatory relief from court without any actual violation of any rights guaranteed in the Constitution, this court endorses the distinguished observations of Learned Justice Domah in the Chow case, in that, “*the concept of locus standi which encapsulates the enabling provisions of Articles 46 and 130 should not be used to restrict or disable the provisions, if used thus it is improperly used*”.
- [13] We further endorse the Learned Justice’s observation that, “*it may be tempting to decide the petitioner has no locus standi and the petition is frivolous and vexatious and that it is the end of the matter. The courts will discharge its function as a court honourably by doing so. It may not be so easy to say the petitioner has a locus but let us at least hear him to see whether he has a point in the higher interest of the constitution which we all*

*have to serve. To say so would be a responsible exit of the constitutional court that will not hide behind an honourable exit.”*

- [14] Noting the right of a citizen to act or be heard before the courts has become ‘*one of the most amorphuous concepts in the entire domain of public law*’, we note in this Petition that the Petitioner brings this Petition in line with the provisions of Article 46 (2) as read with sub article (1) thereof. Article 46 (1) read thus, “*A person who claims that a provision of this charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the constitutional court for redress.*” Sub article (2) further provides that; “*An application under clause (1) may, where the constitutional court is satisfied the person whose right or freedom has been or is likely to be contravened is unable to do so, be made by another person acting on behalf of that person, with or without that person’s authority*”.
- [15] The Petitioner in the Petition at paragraphs 10 and 19 thereof, claims that, the provisions of Articles 16, 17, and 29 of the Constitution have been contravened in the 1<sup>st</sup> Respondent’s refusal and failure to make Regulations under *MODA 2016* to “*regulate the possession, use, manufacture or importation or exportation of, any controlled drug for medical or scientific purposes*” and same with regards to the right of his mother *Marie Therese Volcere* who is suffering from *Alzheimer’s* and has been advised to use cannabis oil as an alternative treatment since conventional medicine does not alleviate her medical condition and she is getting worse by the day.”
- [16] It is evident thus upon a careful reading and scrutiny of Article 46 (2) of the Constitution, that the Petitioner brings this Petition on behalf of another, namely his sick mother whose medical condition in his view, necessitates the enacting of new Regulations under the new Act. It is thus clear that it is the interest of the sick mother at forefront here and not that of the Petitioner, hence him being qualified for filing this petition under Article 46 (2) of the Constitution. In support of this stance this court refers to the Ruling in the matter of ***(Constitutional Court of Seychelles of Queency Jumaye v/s Anaclet Tirant and Anor CC No. 6 of 2007 Ruling of the 12<sup>th</sup> February 2008)***.

- [17] En passant, this Court notes the Ruling in the Constitutional Court case of (***Ralph Volcere v/s Michel Felix and Ors CC No. 04/2017***), wherein the Court explored the issue of locus standi under the provisions of Article 130 of the Constitution in defining the criteria for the application of the ordinary restrictive test and the exceptional restrictive test as determined by our local case law. However, for the purpose of this Ruling this Court shall not dwell on the contents of those tests for it has found clearly that Article 46 (2) applies in view of the inability of the mother of the Petitioner to apply for redress on her own in view of her grave illness illustrated at paragraph 10 of the Petition.
- [18] It follows thus, that the second point of law as raised is hereby dismissed as per above analysis and this court rules that the petitioner has locus standi to file this Petition on behalf of his sick mother as mentioned.
- [19] Finally, in relation to the last preliminary objection raised by the Respondents in that, *“the nature of the relief prayed for by the petitioner is beyond jurisdiction of the court as it falls especially under the policy decisions of the executive as well as legislative functions of the state. And further, it is respectfully averred that the reliefs sought by the petitioner would amount to intrusion into the powers and functions of other organs of the state or invalidating the scheme of constitution with reference to judicial powers”*, this court notes, clearly the reliefs and prayers sought by the Petitioner in the Amended Petition and considers that at this stage of the proceedings **‘it would be premature’** for this court to decide on whether the prayers sought, are indeed within the exclusive precincts of a “political question”, hence solely within the discretion of the Executive and or the Legislature.
- [20] The prayers and reliefs sought are to our mind within the legal parameters of Article 46 (5) of the Constitution. The contents and/or the substance and nature of the reliefs granted by the court shall only be determined at the stage of the hearing on the merits and in that light, it is the duty of the court to avoid encroaching and/ or usurping the sacrosanct principle of separation of powers, rather if the need arises, engage in an *“institutional conversation”* in terms of the *“checks and balances”* with the other arms of the government in the national interest and within the realms of the constitutional mandate of

this court, in an attempt to reinforce rather than jeopardize the principle of separation of powers.

[21] Thus in view of the premature nature of the third legal objection of the Respondents, it fails accordingly.

[22] For all the reasons which we have given above we take the view that the Petitioner has the necessary locus standi as has been laid out in the pleadings and that the petition is not frivolous and vexatious. Hence, the preliminary objections are overruled and the Respondents are hereby called upon to file their defence on the merits. Thereafter this court shall fix a date for hearing accordingly.

Signed, dated and delivered at Ile du Port on 11 September 2018

M Burhan  
**Judge of the Supreme Court**

S. Andre  
**Judge of the Supreme Court**

S. Nunkoo  
**Judge of the Supreme Court**