

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2019] SCCC 11
CP 08/2019

In the matter between:

PRESIDENT DANNY FAURE

Acting in the capacity of Minister responsible for

Public Administration

(rep. by Alexandra Madeleine)

Petitioner

and

NICHOLAS PREA

In the capacity of Speaker of the National Assembly

(rep. by Mr Joel Camille along with Clifford Andre)

1st Respondent

ATTORNEY GENERAL

(rep. by H Kumar)

2nd Respondent

Neutral Citation: *Faure v Prea & Anor* (CP08/2019) [2019] SCCC 11 (29 November 2019)

Before: Govinden J, Dodin J, Pillay J

Summary: Constitutional Petition filed under Article 46(1) and 130(1) of the Constitution; Constitutional challenge to the annulment of a subsidiary legislation passed by the President of Seychelles by the National Assembly under section 64 of Interpretation and General Provisions Act 22 of 1976 read with article 89 of the Constitution; Annulment of subsidiary legislation by the National Assembly does not contravene the power vested in the President under Article 66(1) and (3A) of the Constitution; articles 85, 86 and 89 of the Constitution vests the National Assembly with all powers relating to the annulling of subsidiary legislation; Petition dismissed as the National Assembly acted within its vested legislative power.

Heard: 22 October 2019

Delivered: 29 November 2019

JUDGMENT

GOVINDEN J

Introduction

- [1] This is a constitutional petition filed under article 46 (1) and 130 (1) of the Constitution. It is unprecedented as it is the first time that the President of the Republic has sought a declaration from the Constitutional Court against a decision of the National Assembly, represented by the Speaker of the National Assembly.
- [2] It is the second suit between the parties based on the same facts. In the first case, *Faure v Prea & Anor* CP10/2019 [2019] arising in MC30/2019, the Petitioner initiated judicial review proceedings against the Respondents under article 125(1)(c) of the Constitution. This matter was referred by the Supreme Court to the Constitutional Court under Article 130 (1) of the Constitution for the latter to determine whether the Supreme Court had the necessary jurisdiction to hear the case in light of the constitutional issues raised. Following the hearing, this Court found that a Supreme Court judge may, sitting alone, determine the lawfulness of an action of the National Assembly in limited circumstances. However, where the challenged conduct or act is carried out under a power vested in the National Assembly by the Constitution, only the Constitutional Court can determine whether or not the exercise of this power is constitutionally compliant. This Court found that a determination of the constitutionality of an annulment requires a constitutional analysis that falls outside of the jurisdiction of the Supreme Court, and can only be heard by the Constitutional Court. The case was dismissed on that basis.
- [3] The present petition, which has been correctly filed before us, primarily relates to the constitutional roles and responsibilities of the Executive and the Legislature in making and passing of laws, specifically subsidiary legislation in terms of Article 89 of the Constitution. The unprecedented petition pitches the Executive arm of the state against the National Assembly in a very direct and public way. It is however, to the merit of all parties in this case, and a sign of the growing maturity of our democracy, that they have chosen to resolve this issue through the forum of the Constitutional Court.

[4] The facts that have led up to the filing of the Petition have given rise to many discussions in the media and in different political forums. The issues raised have generated extensive public interest and engagements. We, being bound only by the letters and spirit of our Constitution, will stay clear of this discourse and our determination is solely based upon evidence led and submissions made before us.

Background facts

[5] Parliamentary control and oversight of delegated legislation is of crucial importance in a constitutional democracy. Uncontrolled and unsupervised delegation of such legislation would provide an environment for the potential abuse of the law making process and, in the long run, unaccountability in the legislative process.

[6] In this jurisdiction delegated legislation is made by persons or authorities that the National Assembly has through parent or enabling Acts given power to make this type of legislation. Numerous terminologies exist to describe these enactments, they include such terms as statutory instruments (SI); secondary legislation and regulations. In Seychelles the generic constitutional expression for delegated legislation is subsidiary legislation. This is the term used in article 89 of the Constitution.

[7] Factors responsible for the growth of delegated legislation are many. Firstly, they relate to the increasing pressure on the legislature, and the demand of modern societies on the different functions of legislatures which has led to a lack of time to carry out all of the legislative business. As a result the legislature has had to delegate some of its law making function to the other branches of the State. Secondly, there are certain situations that call for immediate emergency measures to be taken, so much so that the Parliament cannot be expected to enact laws in order to address the situation. In such instances the legislature allows local authorities and agencies to enact delegated legislation in order to respond to the emergency. Thirdly, there are certain areas of law that needs technical or specialist input, here the legislature would prefer not to venture into the technicalities, but instead make the enabling legal environment through an Act and leave the technical details to be provided in delegated legislation. Delegated legislation is lastly also helpful as it leaves to the persons who have been delegated the legislative power the flexibility to meet

unexpected contingencies. There are future happenings that may not be predicted with reasonable accuracy at the time of making of the enabling Act, and delegated legislation allows for those contingencies as and when they happen.

[8] Seychelles has seen a steady increase in the amount of delegated legislation over the years, most commonly through the use of statutory instruments in order to give effect to functions and powers provided to different persons and entities under enabling legislation. The year 2018 for example saw the publication of 93 statutory instruments as compared to 23 Acts.

[9] Generally speaking there are two ways that a legislature exercises oversight of delegated legislation. First, the law can call for the legislation to be laid before the legislature and it does not come into effect unless the latter approves it. Alternatively, the law may provide for delegated legislation to come into effect immediately, but provides for a specified period of time in which the legislature can annul it.

[10] In this case the delegated legislation was made by way of a statutory instrument by the Petitioner under an Act of the National Assembly. This instrument was laid before the National Assembly, and by way of a motion, it was annulled by the National Assembly acting under section 64 of the Interpretation and General Provisions Act 22 of 1976, herein after also referred to as the “*IGPA*”. The Petitioner and the 2nd Respondent claims that the annulment is void and is of no effect, whilst the 1st Respondent argues otherwise.

The Petition

[11] The Petitioner avers that as the President he is, by virtue of Article 66 of the Constitution, vested with executive authority that extends to the execution and maintenance of the Constitution and the laws of Seychelles and all matters with respect to which the National Assembly has to make laws.

[12] The Petitioner avers that he is for the purpose of the Petition also the Minister responsible for Public Administration by virtue of Article 66 (3A) of the Constitution and section 2 of the Public Service Salary Act, 2013, herein after also referred to as the “*PSSA*”, and is responsible for the administration and implementation of this Act and has the power to

make regulations for all matters required or necessary in order to give effect to the provisions of the said Act. The Petition contains the following further averments:

- [13] That the 1st Respondent is the Speaker of the National Assembly of Seychelles elected in terms of Article 83 of the Constitution. The National Assembly being vested with legislative powers by virtue of Articles 85, 86 and 89 of the Constitution. That the 2nd Respondent is the Attorney General and is joined to the Petition in terms of Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules.
- [14] The Minister, as the Minister responsible for public administration has an obligation under section 7 (1) of the PSSA to cause the Salary Table contained in the First Schedule of this Act to be revised at least once every 5 years by such person or body as is determined in accordance with the Act. This revision of the salary structure was due on the 1st of April 2019.
- [15] The Chief Secretary for Public Administration who was entrusted to revise the Public Service Salary Table submitted her recommendation on the revision of the salary structure to the Petitioner and the latter caused the Public Service Table in the First Schedule to the PSSA to be amended in the Public Service Salary (Amendment) Bill, 2019 (Bill no 2 of 2019). The Bill was published was in the supplement to the Official Gazette dated 22 February 2019 and was thereafter tabled in the National Assembly.
- [16] That in the course of debates on the Bill, the Leader of Government Business in the National Assembly, moved for the withdrawal of the Bill in accordance with the Standing Orders, and that the 1st Respondent decided to forgo compliance with the Standing Orders and ruled for the Bill to be withdrawn by way of motion. As a result of a majority vote, the Bill was maintained in the National Assembly.
- [17] Following this, on the 2nd of April 2019, the Petitioner, in exercise of the powers conferred on him by section 13 read with section 7 of the PSSA, made a statutory instrument called the Public Service Salary (Amendment of First Schedule) Regulations,

2019, hereinafter also referred to as “SI 18 of 2019” which came into operation on the day it was gazetted on the 2nd April 2019.

[18] This statutory instrument was laid before the National Assembly on the 3rd April 2019 as per the Revised Order Paper (2)/No 7 of 2019 in accordance with section 64 (1) of the IGPA and that on the same day that it was laid, the Leader of the Opposition in the National Assembly tabled a motion before the National Assembly, “*That the National Assembly resolves to quash SI 18 of 2019 in accordance with the Interpretation and General Provisions Act, Section 64 (2)*”

[19] The members of the National Assembly debated on the motion to quash the said statutory instrument on the 3rd of April until the 4th of April 2019 and that by a resolution of majority votes, the National Assembly on the 4th of April 2019 annulled it and it ceased to have effect forthwith.

[20] The Petitioner avers that the National Assembly in annulling the statutory instrument has contravened article 66 (1) and (3A) of the Constitution and his interest has been affected by the said contravention.

[21] It is averred that the likely contravention of Article 66(1) and (3A) of the Constitution arises due to the fact that the National Assembly, in annulling the statutory instrument, has prevented the Petitioner from discharging his responsibility in the execution and maintenance of the laws of Seychelles, and this is contrary to the functions of the National Assembly. It is also contended that this has further interfered with the obligations of the Petitioner in the administration and implementation of the provisions of the Act and with the authority delegated to the Petitioner to effect the review of the salary table as prescribed by the Act. Finally, that the National Assembly has acted ultra vires and therefore acted outside the functions of the National Assembly and has failed to discharge its legislative function.

[22] The second averment of contravention is that the National Assembly in annulling the statutory instrument has contravened the doctrine of separation of powers, which is a precept upon which our democratic society is founded and that the particulars of likely

contravention of the doctrine of separation of powers are the same ones averred by the Petitioner to be the particulars of contravention and likely contravention of article 66 (1) and 3(A) of the Constitution.

[23] According to the Petitioner the National Assembly, in not passing the Public Service Salary (Amendment) Bill 2019 and in annulling the statutory instrument, is also likely to contravene Article 35 (d) of the Constitution. The Petitioner avers that the particulars of likely contravention of Article 35 (d) of the Constitution arises as a result of the National Assembly preventing the State and the Petitioner to make and enforce statutory provisions for fair and equal wages for work of equal value, which he submits is an obligation on the Government under the said Article.

[24] As a result the Petitioner prays to this Court to declare that the National Assembly acted ultra vires in annulling SI 18 of 2019; to declare that the National Assembly has contravened or is likely to contravene Article 66 (1) and (3A) of the Constitution; and that the Petitioner's interest is likely to be affected by the said contravention; to make such other declarations or orders; issue such writs and give such directions as it may consider appropriate to safeguard the interest of the Petitioner and for the purpose of preventing the contravention of article 66(1) and (3A) and disposing of all the issues relating to the application; to declare that the National Assembly has contravened Article 35 (d) of the Constitution and that the Petitioner's interest is likely to be affected by the said contravention; to and/or make such additional orders under this Constitution or as may be prescribed by law.

[25] The Petition is duly supported by the Affidavit of the Chief Secretary of the Public Administration Department, Ms Jessie Esparon, who has sworn the Affidavit on behalf of the Petitioner.

The 1st Respondent's Reply to the Petition

[26] In his reply to the Petition the 1st Respondent, in a document entitled "*OBJECTIONS OF THE FIRST RESPONDENT*", admits paragraphs 1; 2; 3 and 4 of the Petition. It is therefore accepted by the 1st Respondent that the Petitioner is the President of the Republic of Seychelles and is by Article 66 of the Constitution vested with executive

authority which extends to the execution and maintenance of the Constitution and the laws of Seychelles; that the Petitioner is responsible for Public Administration by virtue of Article 66 of the Constitution and Section 2 of the PSSA and that he has the responsibility for the administration and implementation of the said Act and the power to make regulations for all matters required or necessary to give effect to the provisions of the said Act; that the Respondent is the Speaker of the National Assembly elected in terms of Article 83 of the Constitution and is vested with legislative powers by virtue of Article 85 and 86 as read with Article 89 of the Constitution; and that the 2nd Respondent is joined in the Petition pursuant to Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules.

[27] The 1st Respondent, however, denies and put to the proof of the Petitioner all of his averments in respect of the making; the tabling and the deliberations of the Public Service Salary (Amendment) Bill, 2019, as averred in paragraph 5 to 9 of the Petition, except that it is admitted that the said Bill was tabled before the National Assembly.

[28] As regards the move for withdrawal of the Bill by the Leader of Government Business averred in paragraph 10 of the Petition, the 1st Respondent admits that the Leader did move the National Assembly to withdraw the Bill, however he denies the rest of the averments and puts the 1st Respondent to the strict proof thereof. The 1st Respondent further avers that he did not decided to forgo compliance with the Standing Orders of the National Assembly by ruling that the Bill be withdrawn by way of motion. In that respect the 1st Respondent avers that he acted within the ambit of the Standing Orders as prescribed under the Constitution and the law in all his dealings with the Bill before the National Assembly and that the decision to maintain the Bill for consideration of the Assembly was a decision of the National Assembly and not that of the 1st Respondent.

[29] The 1st Respondent admits the averments that SI 18 of 2019 came into operation on the 2nd of April 2019 as averred under paragraph 11 of the Petition. The 1st Respondent admits to the laying of the Statutory Instrument before the National Assembly on the 3rd of April 2019 and the tabling of the motion of the Leader of the Opposition to quash the Statutory Instrument on the 3rd of April 2019 in paragraph 12 and 13 of the Petition,

respectively. The 1st Respondent also admits the averments that the National Assembly, by a vote on the 4th of April 2019, annulled SI 18 of 2019 and that the instrument ceased to have effect forthwith as averred to in paragraph 14 of the Petition.

[30] The 1st Respondent denies all averments regarding a breach of Article 66 (1) and (3A) of the Constitution by the National Assembly as averred to in paragraph 15 of the Petition and puts the Petitioner to the strict proof thereof. In answer to this averment the 1st Respondent averred that the decision to annul SI 18 of 2019 was a decision taken by a majority of the National Assembly after the matter had been placed before the members of the National Assembly for its consideration. After which a debate had ensued and had been concluded by the members of the National Assembly and from which a majority decision based on a majority vote was taken. The 1st Respondent contends that the decision to annul SI 18 of 2019 was lawful and based on lawful procedures, as prescribed under the provisions contained in Section 64 (1), Section 64 (2) and Section 64 (3) of the IGPA.

[31] The 1st Respondent contends further that the delegated power of the Minister, by virtue of Section 13 of the PSSA, as relied upon by the Petitioner, is subject and remains secondary to the National Assembly's powers as granted to it by section 64 of the IGPA. The 1st Respondent further avers that this power is conferred from primary legislation and that the considerations of SI 18 of 2019 by the National Assembly were, at all material times, done lawfully, in compliance with the Standing Orders as prescribed by the Constitution of Seychelles and after a full debate the majority members of the assembly voted to annul it. In that regard he avers that at all material times the decision to annul the SI 18 of 2019, rests primarily on the fact that the Bill remained at the debate stage and which constituted a live issue before the National Assembly, for its consideration, and moreover, that this took place in terms of its legislative powers as conferred to it by the Constitution of Seychelles. As a result, the 1st Respondent denies that the annulment of the SI 18 of 2019, was a violation of Article 66 as alleged or at all.

[32] The 1st Respondent denies all averments regarding the breach of the doctrine of separation of powers as averred to in paragraph 16 of the Petition and puts the Petitioner

to the strict proof thereof. In further answer to this averment the 1st Respondent repeats his averments in response to paragraph 15 and avers further that the National Assembly would only have been in contravention of the doctrine of separation of powers had it acted outside the ambit of its powers and that at all times the National Assembly acted within the ambit of the Constitution and within the purview of the law, namely by virtue of as Section 64 (2) and Section 64 (3) of the IGPA.

[33] The 1st Respondent denies all averments regarding the breach of Article 35 (d) of the Constitution and puts the Petitioner to the strict proof thereof and in so doing repeats the averments that he made in respect of his answer to paragraphs 15 and 16 of the Petition. Consequently, the 1st Respondent moves this Court to dismiss the Petition with costs. The Reply of the 1st Respondent is duly supported by the Affidavit of the 1st Respondent.

The 2nd Respondent's Reply to the Petition.

[34] The 2nd Respondent has filed a Reply to the Petition. In his Reply the 2nd Respondent has given total support to the Petition. It is the position of the 2nd Respondent that the National Assembly committed a contravention in annulling SI 18 of 2019 on the 4th of April 2019 as it prevented the Petitioner from exercising his duty and power to fulfil his obligation to revise the Public Service Salary Table under Section 7 read with Section 13 of the PSSA. It is the further contention of the 2nd Respondent that the action of the National Assembly prevented the Petitioner in exercising the Executive authority delegated to him under Article 66(1) and (3A) of the Constitution to effect the execution and maintenance of the Constitution and the Laws of Seychelles and to all matters with respect to which the National Assembly has the power to make laws. Likewise, it is the averment of the 2nd Respondent that the action of the National Assembly prevented the Petitioner to fulfil his obligations to ensure the realisation of right of public servants under article 35 (d) of the Constitution, which includes a right to fair and equal wages for work of equal value.

Submission of parties

[35] The Court invited parties to file written submissions. The parties filed their submissions setting out the factual and legal arguments in support of their respective cases. The Court

in addition gave them the right to add and or expatiate on their written submissions through oral submissions on the hearing date.

Submissions of the Petitioner

[36] In her written submissions filed in support of the Petition, the Learned Counsel for the Petitioner first gave a background to the PSSA and then recited what she described as background to the annulment of SI 18 of 2019. Thereafter, the Learned Counsel submitted on the respective cases of the parties. She finally concluded her submissions on the particulars of contravention as set out in the Petition.

[37] As regards the particulars of a likely contravention of Article 66(1) and (3A) of the Constitution, the Learned Counsel for the Petitioner submitted that article 66 (1) and (3A) has been or is likely to be contravened in relation to the Petitioner.

[38] Counsel submitted that under Article 66 of the Constitution the Petitioner retains his executive authority over matters for which the National Assembly has powers to make laws and that he is politically responsible to a department or Ministry that he has not specifically assigned to the Vice President or a minister and that in this case he has decided to retain the responsibility of the Minister for Public Administration.

[39] The Learned Counsel submitted that as the Minister responsible for public administration the Petitioner is obligated under section 7 (1) of the PSSA to cause the Public Salary Table under the Act to be published once every 5 years and that in making the SI 18 of 2019 on the 2nd of April 2019, the Petitioner was acting in his capacity as Minister responsible for public administration under the said Act.

[40] In that respect Learned Counsel submitted that the Petitioner was acting within the provisions of Article 66 of the Constitution and not beyond it when he sought to carry out his executive duties under the provisions of section 7 of the said Act.

[41] The Learned Counsel cited the verbatim proceedings of the National Assembly for the 3rd and 4th of April 2019 and the various reasons that had been given for the annulment of SI 18 of 2019 and submitted that the 1st Respondent by going into the merits of the Public

Salary Table in annulling the statutory instrument acted beyond its oversight powers in respect of delegated legislation.

[42] The Learned Counsel further submitted that the National Assembly has a clear mandate under the Constitution and that as per the Constitution they are:

- (1) to legislate in terms of Article 85 and 86 of the Constitution read with article 89 of the Constitution.
- (2) to oversee the performance of functions of the executive and other authorities and bodies as provided for by the Constitution;
- (3) to represent the constituents of the electoral areas through its members and
- (4) to participate in budgetary allocations.

[43] In this regard the Learned Counsel submitted that the National Assembly in acting the way that it did, acted outside the ambit of its constitutional mandate.

[44] Learned Counsel for the Petitioner submitted that the Petitioner's power in executing and maintenance of the Constitution and the laws of Seychelles is also exercisable pursuant to delegated legislation, having constitutional validity under article 89 of the Constitution, and includes the statutory instrument in issue in this case.

[45] Learned Counsel contended that it appears that the annulment of SI 18 of 2019 by the National Assembly was as a result of the disagreement of the 5 percent increase being provided under the new salary table and that this is clearly outside the National Assembly's oversight role in respect of delegated legislation. She acknowledged the power of the National Assembly to scrutinise the Petitioner's power through parliamentary oversight, however, it is her submission that this power is not absolute under the Constitution and the law but subject to justification that has to exist both in law and the facts. The Petitioner submitted that the National Assembly could not have annulled the statutory instrument without giving reasons and that in so doing it could only have looked at the following factors:

- (a) Whether the Minister had the power to make SI 18 of 2019.
- (b) Whether the question of SI 18 of 2019 followed the prescribed procedure.

- (c) Whether the statutory instrument is in accordance with the provisions of the enabling Act
- (d) Whether the provisions of sections 65 and 67 of the IGPA have been complied with and,
- (e) Whether the SI 18 of 2019 is clear and not vague.

[46] With regard to the issue of the power to make the statutory instrument, the Learned Counsel for the Petitioner submitted that sections 7 (4) and 13 of the PSSA gives very broad power to the Petitioner to make regulations, and that provided that whatever the Petitioner does is consistent with the Act or required by the Act or necessary to give effect to the Act, the action of the Petitioner would be within his powers.

[47] With respect to the argument regarding whether the provisions of SI 18 of 2019 followed the prescribed procedure, it is the submission of the Petitioner that the prescribed procedure laid down in the enabling legislation must be fully observed. In that regard the Petitioner relies on the authority of the case *of R vs Kahn* 1945 NPD 304 at p. 307 and *R vs Carto* 1917 EDL 87 at p. 92, where it was held that the procedure laid down for the passing of by-laws in terms of section 228 of the Urban Councils Act must be fully adhered to, otherwise the by-laws will be invalid. It is her submissions that the procedure set out under section 7 of the PSSA was observed by the Petitioner.

[48] When it comes to the argument as to whether SI 18 of 2019 is in accordance with the provisions of the enabling Act, the Learned Counsel, after referring to case law and specific statutory provisions of the Act on the subject, submitted that the statutory instrument is consistent with the Act and does not derogate from its provisions.

[49] Concerning compliance with the provisions of sections 65 and 67 of the IGPA, counsel made extensive reference to the provisions of section 65 (1) and 67 (1) of the Act and submitted that the statutory instrument also complied with the referred provisions of the IGPA.

[50] As regards the issue of whether SI 18 of 2019 is clear and not being vague, the Learned Counsel submitted that delegated legislation must indicate with reasonable clarity the act required or prohibited; if it does not do this it may be struck down as being void for

vagueness. Counsel support this proposition with a number of South African cases. It is the submission of Counsel that the delegated legislation meets the requirement in the sense that it contains a clear prohibition or command leaving no doubt that it is to be obeyed and therefore it could not have been annulled on that basis.

[51] The Learned Counsel for the Petitioner then submitted that the Petitioner, in the light of the above, fulfilled the requirements necessary in the making of SI 18 of 2019 and was in compliance with article 66 (1) and (3A) of the Constitution, read with article 89 of the Constitution.

[52] When it comes to submissions in respect of the particulars of contravention of the doctrine of separation of powers, it is the submission of Counsel that the doctrine of separation of powers has been breached by the 1st Respondent being the legislative arm of the government. It is her submission that the 1st Respondent has encroached on the domain of the Executive when it annulled SI 18 of 2019 after the National Assembly having delegated to the Petitioner the power to make regulations, *“for all matters which by or under this Act are required or necessary to be provided for giving effect to the provisions of this Act”* to the Petitioner.

[53] Finally, in her written submissions on the breach of Article 35 (d) of the Constitution, it is the submission of the Learned Counsel for the Petitioner that the revision of the Public Salary Table was in order to provide fair and equal wages for equal value pursuant to article 35 (d) of the Constitution and the fact that the Public Service Salary (Amendment) Bill 2019 was not passed by the 1st Respondent and the SI 18 of 2019 was annulled by the 1st Respondent the Petitioner was prevented from providing *“ fair equal wages for work of equal value”* to the Seychellois people as guaranteed under the Constitution.

[54] In her oral submissions Learned Counsel for the Petitioner expanded on her written submissions. She submitted that the power of the National Assembly to annul subsidiary legislations without reasons cannot and does not mean that the power should be exercised arbitrarily in accordance with the whims and caprices of persons who compose the National Assembly. She submitted that the power should be exercised within the four

corners of the enabling legislation to ensure primarily that the Executive did not exceed its powers and does not go beyond the enabling Act and that after all in delegating that power to the Executive the National Assembly had placed sufficient confidence in the Minister to bring about its will.

Submissions of the 1st Respondent

[55] In his written submissions in support of his client's case Learned Counsel for the 1st Respondent advances the following arguments.

[56] First and foremost Learned Counsel submitted that there is no suggestion in the Petition other than what is averred in paragraph 10 of the Petition (relating to non-compliance with the Standing Orders) that the decision of the 1st Respondent to have the Leader of Government Business withdraw the Bill and for the Assembly to take a decision on it and take a vote on it, amounted to a violation and or likely violation of the Petitioner's rights under Article 66 (1) and (3A), as alleged or at all. At any rate it is his submission that the 1st Respondent had appreciated that this was a motion invoked under Order 72 and rightly proceeded to treat it within the ambit of Order 39, after having considered the practice of the jurisdiction from which our Standing Orders have been modelled, being the Republic of Mauritius.

[57] As regards the arguments that the National Assembly actions contravened or is likely to contravene article 66 (1) and (3A) Learned Counsel for the 1st Respondent acknowledged that the National Assembly is constitutionally obliged to comply with the provisions of the Constitution based on the principle of supremacy of the Constitution as set out in article 5 of the Constitution. However, the Learned Counsel asked the Court to note that there are no averments in the Petition attacking the manner in which the decision to quash SI 18 of 2019 was made by the 1st Respondent, except the general averments under paragraph 10 of the Petition that the Standing Orders are alleged to have been forgone by the 1st Respondent.

[58] At any rate it is the contention of the 1st Respondent that he had the power under the Constitution to quash the SI 18 of 2019 in the manner that it did. Going over the chronology of events starting from the publication of SI 18 of 2019 to the debate on the

motion and its annulment, the 1st Respondent submitted that the decision of the National Assembly was legal and was carried out under the existing law which empowers the National Assembly to make the decision to quash the subsidiary legislation, as it shall deem fit.

- [59] The 1st Respondent further relies on the pronouncement of this court rendered in the case of *President Danny Faure vs Nicholas Prea and Ors CP10/19 (Arising in Supreme Court side MC 30 /19)* in which this Court held that the law does not require reasons to be given before or after an annulment of a SI, and that the National Assembly had acted lawfully and within the ambit of the Constitution in quashing the SI.
- [60] The 1st Respondent submitted that the averments of the Petitioner that the act of the National Assembly has prevented him from discharging his responsibility in the execution and maintenance of the laws of Seychelles is not only unsubstantiated before this Court but that it also has no merits as the Petitioner's right to make subsidiary legislation is preserved by virtue of Article 89 of the Constitution.
- [61] Regarding the Petitioner's complaint that the National Assembly has interfered with his obligations in the administration and implementation of the PSSA and interfered with the authority delegated to him to review the salary table under the Act, the 1st Respondent submitted that this argument cannot stand as the act of the National Assembly was sanctioned by both the Constitution and the IGPA.
- [62] The 1st Respondent also submitted as unsubstantiated the averments in the Petition that the act of the National Assembly was ultra vires and made outside the vested functions of the National Assembly. Finally, the 1st Respondent adopts his averments found in his Reply to the Petition in respect of the doctrine of separation of powers and breach of article 35 in his submissions in response to the Petitioner's submission on these two aspects of the Petition.
- [63] In his oral submissions Learned Counsel for the 1st Respondent first repeated his submissions that the 1st Respondent did not seek to forgo the provisions of the Standing

Orders of the National Assembly in his various decisions leading to the annulment of SI.18 of 2019

[64] Regarding the main thrust of the alleged unconstitutionality, namely that the National Assembly usurped the power of the Petitioner, the Learned Counsel submitted that there is a lack of facts in the Petition and its supporting evidence to substantiate the allegations. According to him the power to quash the SI was given by virtue of article 85 and 86 of the Constitution and the provisions of the IGPA. It is his submission that as the procedure under the IGPA was followed to the letter by the 1st Respondent, no issue of breach of the two articles of the Constitution will arise.

[65] Contrary to the argument of the Learned Counsel for the Petitioner Counsel for the 1st Respondent submitted that the National Assembly has unfettered powers to annul a statutory instrument made by the Executive arm of the State and that this is absolute given the existence of the provisions of articles 85; 86 and 89 of the Constitution.

Submissions of the 2nd Respondent

[66] The 2nd Respondent chose not to file written submissions and did not make any oral submissions.

Issues for determination

[67] This Court has to make a determination on issues that have arisen out of the pleadings. We have an adversarial legal system. Parties must plead their cases in writing and they are bound by their pleadings. The Court cannot circumvent the case as framed by pleadings and to supplement the legal arguments with its own in the name of justice or equity. Despite the breadth of Articles 130 and 46 of the Constitution, our Courts are reluctant to grant remedies that are not in the pleadings. If we do so we would be acting ultra petita (*Charlie vs Farncoise* SCA 12/94; *Monthy vs Esparon* (2012) SLR 104, *Barbe v Hoareau* SCA 5/01, *Leon vs Volcere* SCA 2/04). This Court therefore has to determine the cases of the respective parties based on their Petition, their Reply to Petition and their respective affidavits.

- [68] The Petitioner in this case claims that the National Assembly has contravened Article 66 (1) and (3A). In annulling the SI 18 of 2019, it his petition that the latter has prevented him from discharging his legal and administrative responsibilities, whilst at the same time preventing him from discharging his constitutional obligations. The Petitioner, in doing so, particularised what he considered to be the remits of his constitutional powers and that of the National Assembly when it comes to enacting of subsidiary legislation. The Petitioner also claims that article 89 of the Constitution empowers the Petitioner to exercise delegated legislative powers and that the exercise of this power can only be curtailed under limited and justifiable circumstances. The Petitioner lastly claims that the act of the 1st Respondent infringes on a power that has been constitutionally delegated to him and hence breached the separation of powers principle and that in so doing it also encroached on the right to work under article 35 (d) of the Constitution.
- [69] An ancillary issue arose in the Petition regarding whether the 1st Respondent breached the Standing Orders of the National Assembly, however the Petitioner does not ground this alleged breach in the particulars of contravention in the Petition.
- [70] The 1st Respondent's answer is principally that the National Assembly has the legal and constitutional powers to annul any subsidiary legislation laid before it and that the annulment of the subsidiary legislation in this case was effected lawfully through the exercise of those powers
- [71] From the claims made before us it is patently clear that the Petition does not present a case of there being any Acts or statutory instruments that are ultra vires the Constitutional powers of the Petitioner or that the National Assembly acted upon and enforced any Acts or statutory instruments that are ultra vires the provisions of the Constitution. No issues are raised under article 5 of the Constitution with regards to the constitutional validity of the provisions of the PSSA; the IGPA or the Standing Orders of the National Assembly. We are of the view that, to the contrary, the Petitioner's case is that though those legal provisions are constitutional, the actions or omissions of the National Assembly taken or omitted to be taken under those legal provisions have to be struck down if they are found to infringe the powers of the Petitioner under the Constitution. Hence, it is the National

Assembly's various acts and or omissions that constitute the alleged breaches and which are the subject of the Petitioner's constitutional challenge, and not the enactments under which it acted or purported to act. This court, therefore, will refrain from making determinations on any issue of unconstitutionality of relevant enactments.

[72] We are of the view that this therefore leaves this Court with the following issues for determination:

- (1) *What are the constitutional duties of the Petitioner set out in article 66 of the Constitution and whether the acts or omissions of the National Assembly has breached any such duties.*
- (2) *What is the scope of the legislative power of the National Assembly under article 85 and 86 as read with article 89 of the Constitution and whether the 1st Respondent acted outside the ambit of this power.*
- (3) *What is the scope of article 89 of the Constitution in the light of the doctrine of separation of powers enshrined in article 47 of the Constitution.*
- (4) *Whether the impugned act of the National Assembly amounts to a breach of article 35(d) of the Constitution.*
- (5) *Whether the procedures adopted by the National Assembly was intra vires the Standing Orders of the National Assembly.*

Discussions and determination

What are the constitutional powers of the Petitioner set out in article 66 of the Constitution and whether the acts or omissions of the National Assembly has breached any such powers?

[73] When it comes to Article 66 of the Constitution the Petitioner's averments have limited the alleged breaches to that of article 66(1) and 66 (3A). Nevertheless, it would be pertinent for us to refer to the whole of Article 66 of the Constitution for the sake of completeness and also so as to put these provisions in their proper constitutional context. Article 66 reads as follows;

“(1) The executive authority of the Republic shall vest in the President and shall be exercised in accordance with this Constitution and the Laws of Seychelles.

(2) The executive authority vested in the President under this article shall extend to the execution and maintenance of this Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly to make laws.

(3) Subject to this Constitution, the functions conferred on the President by clause (1) may be exercised by the President directly or through subordinate officers.

(3A) The President is politically responsible for a Ministry or department that the President has not specifically assigned to the Vice-President or a Minister.

(4) Nothing in this article shall prevent the National Assembly from conferring, by or under an Act, functions other than the President or an authority.”

[74] Article 66(1) of our Constitution is a vesting clause, it vests executive powers in the Petitioner. Article 66(2) extends this executive power to the execution and maintenance of the Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has powers to make laws. Under the Seychelles Constitution there are three main vesting provisions. Article 66 is the first one, it vests executive powers in the President; the second is article 85, which vests legislative powers in the National Assembly and the third article 119, which vests judicial powers in the judiciary.

[75] These vesting clauses in our Constitution are of pivotal importance as they cater for and lay the foundation of the balance of powers enshrined in the definition of our democratic society in article 47 of our Constitution. By so vesting in the three arms of the state separate and distinct powers the Constitution gives to each arms specific powers and authority, restricted to that particular arm, subject to checks and balances mechanisms within the Constitution.

[76] The powers vested in the Petitioner by article 66 would be executive powers as head of the Executive arm of the state. This article is meant to give to the Petitioner general executive powers for him to be able to oversee the executive arm of the state, which includes the cabinet of ministers; government departments; persons, entities or agencies, subject to limitations in the Constitution. The Petitioner as head of the executive and acting through his subordinate officers would have the power and duty to enforce the Constitution and the laws and to administer the day to day business of government. Such vested power cannot be taken away neither by the legislature nor by the Judiciary.

[77] The Petitioner enjoys other powers set out in chapter IV of the Constitution, such as the Head of State and Commander in Chief of the Armed Forces. These powers are distinct and cater for specific executive functions. Whilst article 66 caters for the provision of powers that are necessary for general executive functions.

[78] Our commitment to the principle of constitutionalism and the supremacy of the Constitution is present in the very opening of article 66. In its endeavour to act as a bulwark against autocracy by the Executive this provision affirms in no uncertain terms that the executive authority that is vested in the Petitioner can only be exercised lawfully if it is carried out in accordance with the Constitution and the laws of Seychelles. It is partly because of this democratic principle that this Court has been petitioned by the Petitioner to decide the extent of his legislative powers under the laws and the Constitution of Seychelles.

[79] In this case there is no dispute regarding the power of the Petitioner to assume the responsibility for a ministry or department that the Petitioner has not specifically assigned to the Vice President or a Minister. It is admitted by the 1st Respondent that the Petitioner was at all material time acting as the Minister responsible for public administration pursuant to the powers that the Constitution has bestowed upon him under its Article 66 (3A). Hence, we find that Article 66 (3A), though it is referred to as possibly being the subject matter of an infringement by the Petitioner, is a not a contentious provision in this case.

[80] Moreover, there appears to us that there are also no issues in contest in this case regarding the fact that the Petitioner is vested with executive powers and that he exercises these powers subject to and in compliance with the Constitution in accordance with Article 66(1).

[81] When it comes to Article 66 (3) we also find that there is no bone of contention between the parties relating to the fact that the Petitioner is enjoined with powers to exercise his executive functions personally or through subordinate officers. It is admitted that in this particular case the Chief Secretary of Public Administration exercised some of those powers when it came to the policy decision behind SI 18 of 2019.

[82] We are of the view that the only disagreement appears to be the construction to be given to Article 66 (2), namely, what does the Constitution mean when it says that the Petitioner's executive authority is extended to "*the execution and maintenance of this*

constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has the power to make law.”

[83] The Petitioner claims that his power to make a delegated legislation in the form of SI 18 of 2019 is a legislative power given and delegated to him pursuant to article 89 of the Constitution as read, by necessary implication, with article 66 (2) and that this power cannot be taken away by the National Assembly without justification or reasons given. It is his contention that the exercise of unfettered powers by the National Assembly would infringe his executive powers to execute and maintain the laws and the Constitution of Seychelles and all matters with respect to which the National Assembly has the power to make laws.

[84] We have carefully scrutinised the arguments of all parties with regards to the powers of the Petitioner under article 66(2), especially when it comes to its relevance in the legislative field. Having done so we have come to the conclusion that this article taken on its own cannot provide sufficient ground to the Petitioner to successfully argue that he can justifiably enact any subsidiary legislation at will and without any checks and balances or interference from the legislature, this is so as article 66(2) is essentially an executive empowering provision as compare to a legislative empowering provision. Read alone, without the other impugned provisions in this case, such as article 85 and 89, the Petitioner would not be able to argue that this article vests in him legislative powers.

[85] Article 66 (2)'s reference to the execution of laws and maintenance of the Constitution and the laws, to our minds, is not a Constitutional provision granting legislative powers. In other words, it does not vest in the Petitioner law making powers. What this provision does is give to the Petitioner law execution or law enforcement powers, which is part of the Petitioner's executive powers in a Presidential system of government such as ours. As the President, the Petitioner has the duty as the head of the executive to enforce the laws of the land and the Constitution. This duty is also extended to maintenance of the law and the Constitution, which forms part of his constitutional duty to execute and promote the rule of law and the supremacy of the Constitution. As such the Petitioner is constitutionally obligated to ensure that the Judiciary; the Attorney General; the police

and other law maintenance and enforcement authorities are sufficiently manned and equipped and sufficient budget is allocated to those institutions. This obligation would also extend to ensuring that the laws on our statute books are relevant and meet the objectives that they were promulgated for and that law and order exist throughout the Republic. The duty to maintain the Constitution on the other hand is the Petitioner's constitutional obligation to prevent constitutional usurpation. He is duty bound to prevent any attempt to unlawfully subvert the Constitution. He maintains the Constitution, which can only be changed through process set down in the Constitution itself.

[86] The duty to ensure the reign of the rule of law in article 66(2) is incidentally also extended to cover all matters to which the National Assembly has power to make laws. This court is of the view that the phrase "*and to all matters with respect to which the National Assembly has powers to make laws*", is meant to extend the law enforcement and maintenance powers to all other matters, being matters upon which the National Assembly has power to make laws. A purposive construction of this phrase leads us to believe that it is meant to capture any other aspects of the rule of law for which the National Assembly has the power to make laws. The Constitutional makers as such wanted to keep open to the greatest extent, the capacity of the Petitioner to make sure that the rule of law, enshrined as a basic tenet of our democratic society, is effected and protected to its full extent in Seychelles at all times. In so doing the Petitioner's law enforcement and maintenance power is extended to and covers all matters that can be legally enacted by the Assembly in the present and for the future. In this regard it is forward looking, it applies prospectively and creates and keeps open the law enforcement powers on actual and future laws.

[87] Hence we are of the view that "*to all matters with respect to which the National Assembly has power to make laws*" cannot be interpreted to mean that it gives the power and authority to the Petitioner to make laws or statutory instruments similar to or on par with the powers with respect to which the National Assembly has power to make laws. To accede to this argument is tantamount to justify law making power of the executive. This would be an affront to the principle of separation of powers as enshrined in our Constitution. The dictate of our supreme law guarantees, subject to the constitutional

limitations that we shall see later, is that legislative powers lies with the National Assembly. Ruling by Presidential Decree has been cast out of our Constitution.

[88] Nonetheless, we are of the view that article 66(2) can validly be used in support of the argument that the law making powers of the National Assembly is shared with the Petitioner. That is, that article 66(2), as we have interpreted it to be, goes in favour of the argument that the 1st Respondent has a constitutional duty to ensure that if it resolves to strike down statutory instruments made by the Petitioner, it has the corollary duty to give due regard to the duties of the Petitioner under article 66(2) to execute and maintain the rule of law and constitutionalism and hence show greater transparency and accountability in that decision making process. This inevitably leads us to the second issue that we have for our determination in this case.

What is the scope of the legislative power of the National Assembly under article 85 and 86 as read with article 89 of the Constitution and whether it acted outside the ambit of its power

[89] Article 85 of the Constitution provides as follows;

“The legislative power of Seychelles is vested in the National Assembly and shall be exercised subject to and in accordance with this Constitution”

[90] Article 86(1) provides the manner that the legislative power has to be exercised, it states that;

“The legislative power vested in the National Assembly shall be exercised by Bills passed by the Assembly and assented to or deemed to have been assented to by the President”.

[91] Article 89, on the other hand, operates as a proviso to articles 85 and 86 and provides as follows:

“Article 85 and 86 shall not operate to prevent an Act from conferring on a person or authority power to make subsidiary legislation”.

[92] Similar to the vested clause of the executive powers of the Petitioner we find that the very provisions that vest the National Assembly with legislative powers also subject it to the Constitution. However, contrary to article 66(2) article 85 of the Constitution does not subject the exercise of the legislative powers to the laws of Seychelles but only to the

Constitution. We find that this places relatively less restriction on the exercise of the legislative powers of the National Assembly as compared to that of the Petitioner's executive powers. Legislative powers of the National Assembly are exercised **subject to** and in accordance with the Constitution. Therefore, only the Constitution should bind the exercise of legislative powers and not laws promulgated under the Constitution. We can see the wisdom in the making the Assembly subject only to the Constitution as it would make no sense to give the National Assembly power to make laws and on the other hand to have the same laws curtailing the law making power of the same Assembly. This would have led to the constitutional absurdity of the Assembly being the constitutional guardian of their own constitutional authority, a situation that would have led to a clear abnegation of the separation of powers. Hence, in determining the Petition and the limits imposed upon the exercise of the legislative powers and the lawful intrusion by the other arms of the State in the exercise of that power this Court would be guided by the letters and spirit of the Constitution.

[93] Some parliamentary systems of government follow the principle of the supremacy of the legislature, which holds that the legislature is the supreme branch of the state and cannot be bound by the other institutions such as the judiciary or a written constitution. Article 66(1) clearly removes the concept of parliamentary supremacy from our constitution, in our context Constitutional supremacy is instead reaffirmed.

[94] The legislature being accountable to the Constitution in its exercise of its legislative powers, it should comply with the constitutional provisions that curtails or that imposes restrictions in the exercise of those powers, to the extent that the Constitution says so. The issue that calls for our determination here calls upon us to review the constitutional provisions relating to legislative powers and to come to a determination as to what are the powers that have been enjoined under the Constitution and to what extent have those powers been reasonably restricted by devices of check and balances. Then to review the facts of the case in the light of this determination and decide whether the Petitioner is right in his claim that the National Assembly as represented by 1st Respondent usurped his exercise of his power when it acted the way it did.

- [95] We are of the view that our Constitution first and foremost, though it vests legislative powers in the National Assembly, creates a system of checks and balances by giving to the Executive arm of the state, through the Petitioner, some residual legislative powers. In an attempt to ensure that there is no autocracy of an overbearing legislature our Constitution has bestowed upon the executive arm of the state powers that acts as a counter balance to the National Assembly's law making power. The involvement of the Petitioner therefore proves to be an essential component in the law making process.
- [96] The first area where the Petitioner acts as a check and balance to the National Assembly is in the primary legislative process. The constitutional intervention of the Petitioner in the making of Acts of parliament are many and they occur mostly at the end of the law making process.
- [97] Firstly, though Acts are approved by the National Assembly, it needs the assent of the Petitioner for it to become law of the land. This principle is clearly set out in article 86(1) of the Constitution.
- [98] Secondly, under article 86 (2), where a Bill is presented for assent, the Petitioner must within 14 days of the presentation assent or withhold assent to the Bill. The procedure for withholding assent is further particularised in article 88.
- [99] Thirdly, the Petitioner must, as soon as practicable, cause a Bill which has been assented to or deemed to have been assented to in accordance with the Constitution to be published in the Gazette which then becomes law under article 86 (3).
- [100] Fourthly, a Bill passed by the National Assembly and assented to or deemed to have been assented to by the President must according to article 86 (4) be styled an "Act" and the words of enactment shall be "*Enacted by the President and the National Assembly*" by virtue of the dictate of the article .
- [101] Finally, if he is of the opinion that a Bill presented for assent infringes or may infringe this Constitution, the Petitioner must within 14 days of the presentation of the Bill advise the Speaker and refer the Bill to the Constitutional Court for a decision in this respect.

[102] Therefore, we see that in our constitutional scheme, as in many democratic presidential systems of government, the primary legislative process is one of shared responsibility. The National Assembly approves a Bill, however it needs the assent, and in some instances, the deemed assent of the Petitioner for the Bill to become law. It is further the constitutional obligation of the Petitioner to publish a Bill of the National Assembly which he has assented to, without which it does not become law. An Act is published as enacted both by the Petitioner and the National Assembly. Moreover, it is a constitutional prerogative of the Petitioner to seek a priori constitutional review of any of the Bill referred to him. These intricate checks and balances applies irrespective of the political composition and outlook of the National Assembly.

[103] Accordingly, the Petitioner makes sound arguments when he claims that he is also bestowed with some legislative powers and that notwithstanding the statement in article 85 of the Constitution, exercising legislative function is not the unilateral power of the National Assembly but one of a shared responsibility. We find merit in this argument when it comes to the primary legislative process. We find that the National Assembly of Seychelles as a creature of the Constitution, is subject to it, and that the Constitution grants it legislative powers to make statutes that is exercisable only with the participation of the Petitioner.

[104] The second area where the National Assembly shares its responsibility in legislating is through the making of subsidiary legislation. The constitutional validity of this legislation is conferred by article 89 of the Constitution. This very article provides that article 85 and 86 cannot be used to prevent an Act from conferring on a person or authority power to make delegated legislation. In other words under our Constitution a person cannot successfully argue that as the National Assembly has legislative power that is exercised by Bills assented to by the President, a law cannot confer power to a person or authority to make a subsidiary law.

[105] This is not a primary law making power, however, it is a law making power within the mandate of the enabling provisions within the parent Act. Primary law making power

through Acts of the National Assembly would still reside with the National Assembly and the President of the Republic under article 85 and 86 of the Constitution.

[106] However, the scope of the shared responsibility is more limited here. We are of the view that article 89, however, does not erode the vested power of the National Assembly to make laws to the extent submitted by the Learned Counsel for the Petitioner goes. This is so as first and foremost it is the very National Assembly, with the assent of the Petitioner that has to make the enabling Act that confers the power to make the subsidiary legislation to the person or authority. In other words, therefore, it would be up to the National Assembly to decide when; to whom and under what circumstances that it would give this subsidiary law making power to. Of its own choosing the Assembly may decide not to give any subsidiary law making power to any person or authority by not providing any regulatory making power in an Act that it approves or at its own discretion may provide as little of such power as it wants. Neither the Executive nor the Judiciary, both of which rely on statutory instruments for their functions, would be able to contest, less it goes to their very core function of their constitutional mandates.

[107] Many enactments are passed by the National Assembly and assented to by the Petitioner that gives regulatory powers to the responsible ministers under these Acts. When it comes to the Judiciary similar rule making powers are given to the Chief Justice under laws that regulate the Judiciary. The power of the National Assembly to make regulations so as to govern their internal conduct will also flow from enabling legislations under article 89. The Petitioner as President or a Minister or under a relevant enabling statute is also given enabling powers to make subsidiary legislation. A case in point being the enabling Act in this case, being the PSSA, which under section 13 allows the Petitioner to make subsidiary legislation, including amending the Salary Table.

[108] Whilst the Constitution of Seychelles contains provisions for empowering the National Assembly and the Petitioner to make Acts that would confer subsidiary law making powers to persons and authorities, it however does not contain any express provisions regarding the control of the use of and supervision of powers by those persons or

authorities. The provisions of the law that governs this legislative aspect is found in the IGPA.

[109] This Act, as many other pre-constitution enactments, was saved by the provisions of paragraph 2(1) of the Seventh Schedule of the Constitution. Even though it predated the promulgation of the Constitution it continues to be in force on and after the date of coming into force of the Constitution unless it is struck down by this Court under article 5 of the Constitution.

[110] We note that though there has been no expressed consequential amendments to the provisions of section 64 of the IGPA in respect of the terminologies, by necessary implications the term the People's Assembly has been substituted by the term the National Assembly by virtue of the Seventh Schedule of the Constitution. Under paragraph 5 of this Transitional Schedule members of the Legislative Assembly under the previous constitution continued to exercise functions under the 1993 Constitution so far as this is not inconsistent with the provisions of the new Constitution.

[111] Section 64 of the Act which provides as follows;

“(1) Subject to Subsection (3), a statutory instrument made under an Act after the commencement of the Act shall be laid before the People's Assembly.

(2) If the People's Assembly passes a resolution, within three months after a statutory instrument is laid before it, to the effect that the statutory instrument is annulled, the statutory instrument shall thereupon cease to have effect, but without prejudice to the validity of anything previously done under the statutory instrument.

(3) Subsection (1) does not apply to a statutory instrument a draft of which is laid before, and approved by resolution by the People's Assembly before the making of the statutory instrument.”

[112] Section 64 of the IGPA hence prescribes the following procedure; firstly, it obliges all the makers of statutory instruments to lay these instruments before the National Assembly. The mandatory requirement of section 64 (1) would as such invalidate any statutory instrument that is not laid before the National Assembly. Secondly, once laid, the National Assembly can within three months from the statutory instrument being laid pass a negative resolution and annul the legislation. Once annulled it ceases to have legal

effect for the future. Thirdly, if the National Assembly had approved the statutory instrument prior to it being made, the legislation does not need to go through the negative resolution procedure.

[113] Section 64 only covers the legislative supervision of subsidiary legislation, and specifically statutory instruments. These enactments must comply with provisions of its enabling legislation and the other requirements of the IGPA as set out in Part X of the Act.

[114] The fact that the provisions of the Act were not challenged by the Petitioner, presents his case with a formidable opposition. Can it be successfully argued that granted that section 64 of the IGPA is constitutionally valid and granted that it gives to the National Assembly the power that it does and granted that the Assembly did use those powers in this case, was the latter still acting outside its powers and encroached on the power of the Petitioner?

[115] We have scrutinised the provisions of section 64 of the IGPA in the light of the above discussions. Having done so we are of the view that the legislative power is vested in the National Assembly which it exercises with the concurrence of the Petitioner when it comes to Acts of Parliament. As far as the legislative powers to make subsidiary legislation is concerned the National Assembly (acting in concurrency with the Petitioner) can delegate that power to a person or authority in an Act. However, once delegated, the Constitution does not provide for any further procedures for the exercise of this delegation. The National Assembly assumes the power of control over the delegated legislation through section 64 of the IGPA. The Petitioner has no such statutory functions as the responsible Minister and neither as the President under the Act. His function is to make the subsidiary legislation and to lay it before the National Assembly. Constitutionally speaking he has no constitutional or statutory powers to check the National Assembly's legislative power in controlling subsidiary legislation.

[116] In terms of the checks and balances on the National Assembly's legislative power, the Petitioner would have already exercised that check and balance over the power of the Assembly when the enabling provisions of the PSSA were assented to or deemed to have

been assented to by him. The Petitioner's powers to check and balance the legislative power of the Assembly through a veto by not assenting does not operate or extend to instances such as the one presented before us, where he is acting under the purview of a delegated legislation. This form of the Petitioner's legislative power operates only when it comes to enactments of laws under article 66 (2) of the Constitution. In this case the Petitioner was acting as a Minister under an enabling provision of an Act that had already been assented to and enacted into law, his power, therefore, is subject to the legislative powers of the National Assembly as that of a Minister under an enabling Act. Moreover, the power is delegated to the Petitioner, however once delegated it does lose its legislative status and become executive, it remains as such, and the National Assembly can exercise total control over it.

[117] What the National Assembly cannot do is to interpret or use article 85 and 86 in such a way so as to prevent the PSSA from conferring to the Petitioner power to make subsidiary legislation. It cannot hinder the conferring of this power by saying that this power is theirs and theirs only. However, we are of the view that there is a difference between the conferment of the power and the power of oversight in the use of that power. The enabling provision of the PSSA compels the Petitioner to make regulations "*consistent with this Act*". This provision has been enacted in the following terms;

13 "*The Minister may, in consultation with the President, make regulations, consistent with this Act, for all matters which by or under this Act are required or necessary to be provided for or in giving effect to the provisions of this Act*"

[118] The case before us relates to whom between the Petitioner and the National Assembly retains the powers of legislative oversight to decide on the consistency of the regulations with the Act in light of the statutory obligation on the Petitioner to lay before the National Assembly subsidiary legislation that is consistent with its enabling Act. We find that to hold that it is the Petitioner who would have to decide on the issue of consistency would not only fly in the face of section 64 but would also be going against the principle of checks and balance that permeates the legislative process. Accordingly, the Petitioner can make the subsidiary legislation as he has been conferred the power, however he cannot at the same time be the final arbitrator of its consistency with its parent legislation.

[119] Furthermore, by delegating legislative power to a person or authority by a law the National Assembly cannot be deemed to have forfeited that function unchecked to that person or authority. That would consist of the Assembly forfeiting their constitutional duty to make laws, which itself would have been constitutionally questionable.

[120] We are also of the view that although the exercise of this legislative power is reviewable by this Court under the Constitution, the court's power to review is limited to a determination of whether the National Assembly acted within or outside that power.

[121] We therefore note that our intervention is constrained in this matter and cannot go into the merits of or reasons for and against SI 18 of 2019. Absent an explicit constitutional challenge to the legislative and constitutional provisions in issue, we also cannot scrutinise the merits of the decision of the 1st Respondent based on the factual grounds submitted by the Petitioner. This is because the measurement for constitutional compliance in this matter, as indicated above, must be against the provisions of the Constitution and the IGPA. In their current and unchallenged form, these provisions do not prescribe an oversight procedure for delegated legislation. To consider the reasons would require this Court to devise additional criteria for not only the oversight and annulment of delegated legislation by the National Assembly, but effectively the exercise of this delegated power by the executive. This is not a straightforward matter and, as discussed below, delegated legislation raises complex and technical questions that relate to the interaction between the act of delegation, the execution by the functionary, oversight and the content and nature of the delegated power (which can cover a broad range of powers and functions). It is an area of constitutional law that many jurisdictions grapple with. Despite this issue being a matter of constitutional importance, it is however beyond the ambit of the case brought by the Petitioner, and legal arguments to this effect have not been made in the course of these proceedings. Devising an additional measurement based on the narrow legal arguments presented, and in light of the complexities associated with such an exercise, would cause the Court to exceed the bounds of the separation of powers.

[122] The legal effects of section 64 of the IGPA have been pronounced upon by this Court in the case of *President Danny Faure vs Nicholas Prea and the Attorney General* (CP 10/2019). In this case we held that the National Assembly was not exercising quasi-judicial powers when it annulled SI 18 of 2019. The Court held that the provisions of the Constitution and the IGPA do not call for reasons to be given before or after an annulment is effected or for a party to be heard prior to the annulment being voted upon. We do not wish to depart from this pronouncement in this case, and have not been asked to do so.

[123] However, we do believe it is important at this juncture to comment generally on the execution of delegation legislation and its oversight and scrutiny by the legislature, which does have constitutional implications for the separation of powers. Legislative oversight of delegated legislation is common in most comparable jurisdictions. The Seychelles Constitution and law is therefore not unique in its delegation of subsidiary legislative power to other branches of government. Similarly, the legislature's retention of its oversight function of delegated legislation is also common place. However, several jurisdictions have gone further in providing more clarity regarding the parameters of this oversight function. Several countries surveyed are in a similar position to the Seychelles in that they are relatively young constitutional democracies and have similar delegating provisions and pre-constitutional interpretation legislation. This case is indicative that it is perhaps time for Seychelles to look to other jurisdictions for lessons, so as to avoid unnecessary tension and conflict between the three arms of government. In this regard it is encouraging to note that Standing Order 2 of the National Assembly of Seychelles Standing Orders, 2009 does envision the development of new procedures, where there are none, which are to be guided by constitutional principles and comparative practice. The Standing Order requires that:

“In case of any doubt and for any question of procedure not provided for in these Orders, the Speaker shall decide, having regard to the practice of the Assembly, the Constitutional provisions of Seychelles and practices of other Commonwealth Parliaments in so far as they may be applicable to the National Assembly of Seychelles.”

[124] Seychelles is therefore in a fortunate position in that it can draw on the experiences of a number of jurisdictions that have considered this issue.

[125] In the United States, delegation of legislative power to the executive is dealt with under the doctrine of separation of powers. It has been held by the United States Supreme Court in *INS v Chada* 462 US 919 (1983) that Congress as the body in which all federal law-making power has been vested must make legislative decisions in accordance with the “single, finely wrought and exhaustively considered procedure” laid down by the US Constitution, which requires laws to be passed bicamerally and then assented to by the President for consideration for a possible veto. Whilst it was held in *Panama Refining Co v Ryan* 293 US 388, 421 (1935) that the delegation of legislative power within prescribed limits is permissible because, as the United States Supreme Court has said “without capacity to give authorization of that sort we should have anomaly of legislative power which in many circumstances calling for its exertion would be but a futility”. However, it has been held by the United States Supreme Court that delegation must not, however, be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the law made by Congress. This distinction was explained in the case of *Hampton & Co v United State* 276 US 394 (1928) as follows:

“The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made”.

[126] In the United Kingdom the parliamentary control is exercised under the provisions of the Statutory Instruments Act 1946. This control comes by both affirmative and negative resolutions and the Parliament is limited to approving or rejecting the instrument as valid. The last occasion that a subsidiary legislation was annulled in the United Kingdom was on the 22nd of February 2004, when the House of Lords passed a motion to annul the Greater London Authority Elections Rules. Before that, the House of Commons annulled a piece subsidiary legislation in 1979 when it quashed the Paraffin (Maximum Retail Price) (Revocation) Order 1979.

- [127] In Kenya, the Interpretation and General Provisions Act (section 34) provides that all delegated legislation made under any Act must be laid before the National Assembly without unreasonable delay. The Assembly may then annul the legislation within the following 20 sitting days, without prejudice to the validity of anything already done in terms of that legislation. This is similar to the Seychelles constitutional and legislative framework. Before this however, delegated legislation however must be referred to a parliamentary committee established to review and scrutinise statutory instruments. The committee may also scrutinise statutory instruments which were published before the Act commenced. The Act further requires that the Committee, when scrutinising a statutory instrument must be guided by *‘the principles of good governance, rule of law’* and the Committee must consider whether the statutory instrument meets a number of requirements, including whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law; infringes on fundamental rights and freedoms of the public; contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament; and appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made.
- [128] The Zambian Constitution, like our Constitution, also states that despite it vesting the legislative authority of the Republic in Parliament, this *‘shall not prevent Parliament from conferring on a person or authority power to make statutory instruments’*. A Parliamentary Committee, established under Parliamentary Standing Orders, scrutinises subsidiary legislation after it has taken effect and checks that instruments are in accordance with the Constitution or statute under which they are made; do not trespass unduly on personal rights and liberties; do not make the rights and liberties of citizens depend upon administrative decisions; and are concerned only with administrative detail and do not amount to substantive legislation which is a matter for parliamentary enactment. If considered necessary by the Committee, it may invite stakeholders which the statutory instrument will likely impact to interact with the Committee.
- [129] Similar oversight committees/procedures exist in Tanzania, Ghana, Canada, New Zealand and Australia.

[130] What is clear is that most modern constitutional systems require something more than mere tabling, and the two most frequent methods used are to subject all delegated legislation to a procedure for either approval or disapproval by the legislature. A mechanism is thus established and some process devised whereby a greater and clearer degree of scrutiny is applied to delegated legislation by the legislature. Typically, a piece of subsidiary legislation will be examined by a committee (established in terms of legislation or an internal process, not a court or the executive) and measured against pre-determined standards which usually focus on potential contraventions of protected rights or legal and constitutional principles. Only after this process has been completed will the delegated legislation come into force. In many countries before an instrument can be disallowed, legislatures require that there be some kind of engagement with the functionary who made the instrument, usually with a view to try and resolve the conflict or concern. This is intended to reduce confrontation between the legislature and the executive.

[131] In this way, the legislature retains its oversight control of delegated legislation, however there is also greater clarity that guides both the execution of delegated legislation and the oversight of this legislation by the legislature, therefore minimising arbitrary exercises of power both within the executive and the legislature. Where the exercise of delegation or the oversight and/or annulment is questioned, these procedures can greatly assist courts in the determination of whether conduct is complained of is rational and not arbitrary or an abuse of power - essential features of any constitutional democracy. This approach is perhaps more constitutionally palatable. However, this debate is beyond the scope of this judgment and the jurisdiction of the judiciary and is a matter best determined by the National Assembly and Executive.

[132] In this regard, the following observation, in response to the inherent tension that exists within the separation of powers warrants mention and is relevant to the present matter and Seychelles' young constitutional democracy. The South African Constitutional Court in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* (CCT 232/18) observed:

“It has been astutely noted that an understanding of the separation of powers as ‘a relationship of mutual accountability, responsiveness and openness between the three branches’, may give rise to unavoidable – even productive – tension:

‘Dialogic engagement in this context will frequently be characterised by disharmony and mutual resistance to an over-assertion of power by one branch. What is important, however, is that the branches of government remain engaged with each other in a manner which is open and respectful of the institutional strengths and weaknesses of each other. Through this process the limits of each branch’s institutional power will be continually defined and redefined as they respond to the multifarious challenges of South Africa’s evolving constitutional democracy.’” (Footnotes omitted).

[133] As a parenthesis we would wish to add the challenge that this case has presented to the parties before the Court has arisen out of a state of cohabitation of government that presently exists in the Republic of Seychelles following the last Presidential and National Assembly election, a situation where the Petitioner does not enjoy the political support of the National Assembly. In a non-cohabitation scenario, where the Executive has the support of the Legislature, policy disapproval of primary or subsidiary legislations would rarely occur given that both arms of the state would have same policy perspectives on legislative matters. The nature of our constitutional set up, however, makes cohabitation a truism and it imposes circumstances that the Constitutional Court must give constitutional sense and meaning, especially in the area of constitutionally shared responsibilities such as in legislative matters. At no point should we reverse; reduce or circumvent the constitutionally vested powers in order to accommodate a state of cohabitation of government. The constitutional status quo should be maintained at all costs and to this end no strained constitutional interpretation is permitted in an attempt to meet political deadlocks imposed by our political conjuncture. We have to do this even if it stands the risk of failing to meet some socio-economic objectives of the government. The supremacy of our Constitution calls for nothing less.

[134] Accordingly, it is important to stress that the decision of this Court in this matter is not a pronouncement on the constitutionality of the present legislative framework. This Court however, would be remiss in its duty if it did not, as we have done, acknowledge the broader constitutional questions that have arisen in our analysis of the pleadings. The accountable exercise of delegated powers, and oversight, are essential to good and effective governance and are a constitutional imperative. However, in the absence of constitutionally acceptable parameters, the exercise of these powers is unlikely to prevent conflicts of this nature from occurring in the future. This is a matter best left to the National Assembly and Executive. This standoff can possibly be resolved by the Petitioner and the 1st Respondent by making a concerted effort to act under the provisions of Section 64 (3) of the IGPA or if the Petitioner feels very strongly on this, by invoking Article 110 of the Constitution, but it cannot be resolved by the court.

[135] That said, in the matter before us, it is our determination based on the arguments presented that the National Assembly was acting within its legislative powers under article 85; 86 and 89 of the Constitution when it annulled SI 18 of 2019 as read with section 64 of the IGPA.

The scope of article 89 of the Constitution in the light of the doctrine of separation of powers

[136] Separation of powers is a corollary of the balance of powers. The balance of powers is an essential cog in the machinery of our democratic society. Article 47 of the Seychelles Constitution in defining our democratic society has put as the existence of the balance of powers as an essential requirement. This principle has been succinctly defined in the case of *Patrick Herminie and Or vs Patrick Pillay and Ors* (CP 02/18) as follows, “*The Constitution therefore creates a separation between the Executive; Legislature and Judiciary and provides that there should be a balance of powers amongst these powers. The separation of powers seeks to ensure the independent exercise of the powers and the requirement for balance so as to ensure that the different branches of government are accountable to one another and to the public that they served. But also that they stay within their purview, so that no branches usurps the role of the other*”.

[137] As part of his contention against the National Assembly in this case, the Petitioner alleges that the former has breached the balance of powers as enshrined under our constitution. He says that the enactment of the statutory instrument was part of his constitutional powers and not that of the National Assembly and that the latter in acting the way it did has usurped this power.

[138] In our determination in respect of the alleged contravention by the Assembly of articles 85, 86 and 89 of the Constitution we have held that the power that the National Assembly exercised was of a legislative nature and therefore not one enjoyed by the Petitioner under the Constitution when it comes to the enactments of subsidiary legislation. For similar reasons we hold that the action of the National Assembly could not have consisted of a contravention of the doctrine of separation of powers. The National Assembly acted within its legislative powers vested in it by virtue of article 85 of the Constitution.

Whether the impugned act of the 1st Respondent amounts to a breach of article 35 (d) of the Constitution

[139] Article 35 of the Constitution reads as follows;

35 “The State recognizes the right of every citizen to work and to favourable conditions of work and with a view to ensuring the effective exercise of these rights the State undertakes-

(a) to make and enforce statutory provisions for safe, healthy and fair conditions of work, including reasonable rest, leisure, paid holidays, remuneration which guarantees, as a minimum, dignified and decent living conditions for the workers and their families, fair and equal wages for work of equal value without distinction and stability of employment;”

[140] It is the contention of the Petitioner that the subsidiary legislation that was quashed by the National Assembly was founded on the constitutional right to work principle as set out in article 35 (d). He claimed that he, on behalf of the Republic of Seychelles, was fulfilling his constitutional undertaking to make and enforce statutory provisions for fair and equal

wages for work of equal value without distinction when he enacted SI 18 of 2019 and that the National Assembly in annulling the statutory instrument has breached the right of every citizen in article 35 (d) of the Constitution.

[141] The right to work found in article 35 is one of our socio-economic constitutional rights. It gets its inspiration from the provisions of article 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights 1966*, of which Seychelles is a member state. The right to work and equal wages for equal value without distinction is guaranteed under the provisions of paragraph 7 (a) (1) of the said Convention. Enforcing the provisions of this Convention, similarly to the enforcement of socio-economic rights domesticated under the Convention has been held to blur the doctrine of separation of powers. We understand that the wordings of those rights, in loose and vague terms and the different levels of the State's undertakings inherent in the wording of the rights appears to raise questions of policy that falls mostly within the jurisdiction of the executive and the elected representatives of the people in the National Assembly rather than of judges. Nonetheless we understand that article 35 is an enforceable right similar to all the Rights and Freedoms in Chapter III of our Constitution and as such can be subject of a Constitutional Petition under article 46 (1) of the Constitution. However, the extent to which we can intervene and make a decision on competing facts and determine whether they consist of a breach of a State undertaking is limited.

[142] In this case the Petitioner claims that it was implementing one of his government policy undertakings under article 35 (d) of the Constitution, the formulation of which was done to bring about fair and equal wages for work of equal value without discrimination. The National Assembly appears to have a different policy on the subject, it has, on this basis, counter proposed that policy and has quashed the SI 18 of 2019 upon which the Petitioner's policy decision is based. Again this Court will not venture and make a determination on the merits of policy content for or against this instrument for fear of stepping into the political arena.

[143] We find, however that we have already made a determination that the act of the National Assembly was constitutionally valid as it was acting within its legitimate legislative

mandate. Therefore we find that the act of the National Assembly being constitutionally permissible, it cannot amount to a breach of article 35(d) of the Constitution.

Whether the procedures adopted by the 1st Respondent was ultra vires the standing orders of the National Assembly

[144] The Petitioner has averred in his Petition that the 1st Respondent has failed to comply with the Standing Orders of the National Assembly when he ruled for the Bill to be withdrawn by way of motion as a result of the Leader of the Government Business in the National Assembly moving for the withdrawal of the Bill during the course of debates on the Bill. Though this is not particularised as a particular contravention in the Petition there is a broad prayer in the Petition, (prayer 1) to declare that the National Assembly has acted ultra vires to the extent that it annulled SI 18 of 2019.

[145] To our mind, however, this broad sweeping prayer could not be taken to include alleged acts that have contravened the Standing Orders. As an allegation of a breach of the provision of the Standing Orders in the Petition cannot amount to a constitutional breach without additional prayer to that effect. There is no provision to that effect.

[146] Our opinion is supported by Counsel, as upon being queried by the Court about the Petitioner's averred particulars of contravention, Learned Counsel for the Petitioner does not appear to make this alleged breach of the Standing Orders as a ground for a contravention of the Constitution in the Petition. Hence, although much ink has been spilled in the submissions regarding this issue, we do not consider that it calls for the determination of the Court.

Final determination

[147] In our final determination we declare therefore that the National Assembly of Seychelles was acting within its constitutionally vested legislative powers when it annulled SI 18 of 2019 and as such it did not contravene of any provisions of the Constitution.

[148] The Petition is accordingly dismissed.

Signed, dated and delivered at Ile du Port on the 29 day of November 2019

Govinden J

Dodin J

Pillay J