**CONSTITUTIONAL COURT OF SEYCHELLES**

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**Reportable**
[2022] SCSC
MA 324/2021
(Arising in CP 06/2021)

In the matter between:

**PETER LESPERANCE** **Applicant**
*(rep. by Evelyne Almeida)*

and

**BENNY BASTIENNE** **1st Respondent**
*(rep. by Karen Domingue)*

**ATTORNEY GENERAL** **2nd Respondent**
*(rep. by Mohammad Saley)*

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| **Neutral Citation:** | *Lesperance v Bastienne & Or* (MA 324/2021) [2022] SCSC (18 October 2022). |
| **Before:** | Burhan, Dodin, Esparon JJJ |
| **Summary:** | Application for leave to file petition out of time; Rule 4 (3) Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules. |
| **Heard:** | 28 June 2022 and 18th July2022 (written submissions) |
| **Delivered:** | 18 October 2022 |

**ORDER**

Application seeking leave to file the Constitutional Petition out of time is declined, accordingly the Constitutional Petition is dismissed.

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**RULING**

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**RULING BY THE COURT**

[1] The Applicant Peter Lesperance, the Petitioner in Constitutional Court case CP 06/2021 seeks the leave of the Constitutional Court to file his petition out of time. The application

is made under Rule 4 (3) Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (hereinafter Constitutional Court Rules). Rule 4 (4) states that the Constitutional Court may, for sufficient reason, extend the time for filing a petition under Rule 3.

**Background Facts**

[2] The background facts of the case are that the Applicant in his Constitutional Court petition claims that his constitutional rights to a fair hearing have been breached by the judgment of the Court of Appeal in SCA 21/2017 dated 24 January 2020 that upholds the judgment of the learned Trial Judge in Supreme Court case [2017] SCSC 456 of 05 June 2017 where he was the defendant. He states at paragraph 8 of his petition that both judgments were based on "*erroneous factual conclusions on matters that were uncontroverted*." The Applicant avers bias and that his right to fair hearing had been infringed and avers that in the Supreme Court he was not afforded an impartial and independent tribunal to hear his case, not given an opportunity to adduce his evidence, and that material facts had been ignored in the judgment of the Supreme Court. He further avers at paragraph 12 that the decision of the Court of Appeal affirming the judgment of the Supreme Court *"is a perversion resulting from a failing to recognise or ignoring uncontroverted facts"*. He seeks the following reliefs in his petition as set down below:

*a.* *a declaration that constitutional right of the Petitioner has been breached under articles 16 and 26 of the Constitution.*

*b.* *quashing the order of the Court of Appeal ordering the Petitioner to pay SR50,000 to the 1st Respondent;*

*c.* *quashing the order of the Court of Appeal finding that there is no droit de superficie in favor of Rosie Lesperance on the house located at Anse Reunion, La Digue in terms of the sale of the land dated 4 December 1985;*

*d.* *Moral damages amounting to SR500,000 against the Respondents; and*

*e.* *Any other order that their Lordships deem fit.*

[3] The 1st Respondent in this application is also the 1st Respondent in the Constitutional Court case and the Plaintiff in the case before the Supreme Court.

[4] The 2nd Respondent is the Attorney General, who is a necessary party to the case under rule 3 (3) of the Constitutional Court Rules.

[5] The judgment in question was delivered on the 24.01.2020 by the Seychelles Court of Appeal and the Applicant accepts the fact he received it two weeks later.

[6] The Applicant filed his petition in the Constitutional Court under article 46 of the Constitution of the Republic of Seychelles on the 06.12.2021 a period of over one year ten months later.

**Applicants Case and Submissions**

[7] Due to the aforementioned delay in filing, the Applicant files this Notice of Motion for leave to file his petition out of time in line with Rule 4 (3) and (4) of the Rules. The main grounds he urges in explaining his delay in filing the Constitutional Court case out of time are summarised as follows:

*a.* It was only in April or May 2020 when he watched a television program he heard the Chairman of the Human Rights Commission state that one could challenge the decision of the Court of Appeal through the Constitutional Court if one's constitutional rights were breached. It was only in September 2020 that he was able to meet the Chairman and thereafter lodged a formal complaint on the 21 September 2020 against the decision of the Seychelles Court of Appeal. It was only in 2021 April that he states in paragraph 7 that he was advised that *"there were possible fair hearing issues with from the decision (sic) taken by the Supreme Court of Seychelles in CS 246 of 2006 and that the Court of Appeal could have, but did not remedy that decision"*. He was also advised to seek legal aid.

b. He explains his further delay by stating he was advised to get legal aid and he applied for legal aid on the 26th of April 2021 and received legal aid only on the 28th of May 2021. He had to furnish the necessary pleadings and documentation and it was only at the end of November 2021 that his legal aid lawyer completed the pleadings.

[8] In his written submissions, dated 18.06.2022, the Applicant states:

a. That whether he may be granted leave to file his petition out of time is a matter of discretion resting with the Court and in exercising that discretion, the Court should consider the case *Parcou v Parcou* SCA32/1994, as explained in *Kannus Supermarket v Vaithiyanathan/uthrapathy* (MA200/20) [2021] SCSC320 (14.06.2021). Therefore, the Court should consider (1) length of delay, (2) reasons for delay, (3) degree of prejudice to the Applicant and (4) whether there is an arguable cause.

b. Considering the length of the delay, the Applicant puts his focus on the Covid situation happening in 2020 that lead to delays in law firms as well. He cites Sections 3 (1) (a) and 5 (2) of the Suspension of Prescription and Time Limitation Period (Temporary Provisions) Act 2020 (Act 17 of 2020) which, read with Official Gazette No. 351 of 2020 gives him 21 days after the 25th May to file his Application, leading him to the conclusion that it was "only" filed 17 months out of time, after the 24th June 2020.

c. Considering reasons for the delay, the Applicant repeats what he already stated in his affidavit.

d. Considering the degree of prejudice to the Applicant he states that the prejudice *"arises out of the fact that the Court of Appeal's judgment was based on erroneous factual conclusions on matters that were uncontroverted"*. He also fears about the prejudice caused by the alleged bias of the Presiding Judge because he has an *"honest belief of a likely breach of his right to a fair hearing"*.

e. On the question of whether there is an arguable case, the Applicant submits that although Rule 4 (1) (a) of the Constitutional Court Rules has been breached, in his opinion *"strict adherence to rules must not be used to defeat justice"*.

**First Respondent's Objections**

[9] The Respondents filed objections to the granting of leave to file the petition out of time. Thereafter an opportunity was given to all parties to file their respective submissions.

[10] In his affidavit dated 28.06.2022, the 1st Respondent sets out the grounds of his objections to the grant of leave to proceed out of time which are summarised below;

a. the Application is frivolous and vexatious.

b. the factual errors the Applicant refers to found in the judgment don't have any effect on the outcome of the case and the Applicant had already raised these factual issues in respect of the judgment of the Supreme Court before the Seychelles Court of Appeal and the Seychelles Court of Appeal had held that these errors had no bearing on the outcome of the case and is now seeking to have a second bite of the cherry.

c. the Applicant has been involved in litigation for more than 20 years and is savvy in matters of seeking legal advice and filing cases in court, and he would have known that it is possible to file a suit like that before the Constitutional Court.

*d.* that the Applicant has failed to set out any serious, sufficient and reasonable cause for the Constitutional Court to grant the Applicant leave to file his petition out of time.

e. that in order for the Court to grant leave to file a Petition out of time there must be exceptional reasons or at the very least an arguable point of law which is of general public importance.

f. the Applicant is seeking to abuse the process of Court as having exhausted all his legal remedies he now seeks to again rehearse matters which have been heard by

both the Supreme Court and Court of Appeal. On these grounds the 1st Respondent moves that the application to file the petition out of time be dismissed with costs.

**Second Respondent's Objections**

[11] In his affidavit dated 17.05.2022, Mr. George Thachett states on behalf of the 2nd Respondent that the said application be refused by Court on the following grounds set down below:

a. the Applicant has not demonstrated sufficient reasons for the Court to exercise its discretion and that the Applicant's affidavit does not give a reasonable cause of action or arguable contravention of the Constitution and therefore amounts to an abuse of process.

b. the Applicant has a heavy burden to demonstrate sufficient reasons and refers to the case of *Mellie v Government of Seychelles & Anor (CP 04/2018) [2019] SCCC 05 (24 June 2019)* to show that the Applicant's failure to recognize that he may bring the matter to the Constitutional Court is not enough to excuse the delay.

c. the Applicant has been represented before in the Court of Appeal and therefore there is no reason for him to have been unaware of his rights and has no proper explanation for the 6 months' delay from the first contact with his Counsel and the filing of the Notice of Motion.

d. there is no reasonable cause of action/arguable contravention of the Constitution and, as a result, the proposed petition had to be struck out. The issues had either not been raised before the Court of Appeal or the Court has already dealt with them. Therefore the matter has been decided conclusively and any attempt to reopen it would be an abuse of process.

**Findings of this Court in accordance with the relevant Law and Case law**

*[12]* Rule 4 (1) (a) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules states: *"Where the petition under Rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court – in a case of an alleged contravention, within 3 months of the contravention"*.

[13] The factors to be taken into account when exercising the discretion are length of delay, reasons for delay, degree of prejudice to the defendant, and whether there is an arguable case on appeal (*Parcou v Parcou* (1996-1997) SCAR 109, *Germain v R* (2007) SLR 25, emphasis added).

[14] It is clear and admitted by the Applicant that the delay in this case is not a few days or a month but a period of over one year ten months. In the case of *Darrel Green v Seychelles Licensing Authority and Government of Seychelles* CA 43/1997 it was held that leave to file an application out of time is not the norm, but the exception and shall be granted *"not as of course but only if the applicant shows sufficient reasons to justify an extension of time"* (emphasis added). Further an extension of time will be granted if the court is satisfied that there is good and sufficient cause for the delay. *The longer the delay the greater the burden on the applicant.* The court will consider whether the circumstances that cause delay are attributable to the applicant or not (*Tarnecki v R* SCA 4/1996, LC 89, emphasis added).

*[15]* The main ground for his delay is that he was unaware of what he should do and became aware that he could go to the Constitutional Court only after hearing the Human Rights Commissioner say so on the television. A similar argument was taken up in the case of *Mellie v Government of Seychelles & Anor* (CP 04/2018) [2019] SCCC 05 (24 June 2019), where the Applicant had filed an application in the Constitutional Court 20 years after the legal limit under circumstances that are very similar to this case claiming he was unaware he could seek redress in the Constitutional Court and instead as held by the Constitutional Court *"embarked on an over twenty year-long odyssey, during which he approached almost every other conceivable institution except the Constitutional Court"*.

[16] In that case, the Court stressed that the Applicant was not granted the desired leave, as *"the availability of the Constitutional Court at any time as a forum in which a Petitioner can seek redress for perceived injustices* *is not some secret, hidden-away possibility that one needs to be told of. The availability is stated in the Constitution in plain and simple terms, for everyone to see"* (emphasis added). The Court also relied on the fact that the Applicant had been represented throughout his trial by Learned Counsel, who, in the eyes of the Court, could and should have advised him on this option. In this case too, the Applicant has been represented by an Attorney at Law throughout and further as pointed out by learned Counsel for the first Respondent been in litigation since 2006 against the 1st Respondent and cannot now claim that he was unaware of the existence of a Constitutional Court or what his legal rights were, having been represented by a Counsel continuously not only in the Supreme Court since 2006 but also in the Seychelles Court of Appeal.

[17] We are therefore of the view that the lengthy delay in filing this case is inordinate and the reasons given for such delay in filing the case are puerile and unacceptable. Further to grant such a belated application would in the view of this Court seriously create a high degree of prejudice to the first Respondent who has been awaiting justice since 2006, that is since the date of filing the Supreme Court case, a period of over 17 years and still has not benefitted from the fruits of the judgment given in his favour. Granting the Application would only procrastinate the delay causing grave prejudice to the first Respondent in the Application.

[18] Further the delay in filing the Application in the Constitutional Court cannot be attributed to any delay in the machinery involved in the administration of justice. The Applicant received the Court of Appeal judgment promptly, he received legal aid within the period of one month, though his application for legal aid was again belated, and it was the Applicant's mistake to first file a complaint with the Human Rights Commission, wait for their reply and only then seek legal aid. He could have sought legal aid right away, greatly reducing the delay, therefore the delay in the view of this Court was due to laches on the part of the Applicant. An extension can be granted only for reasons which do not relate to laches on the part of the petitioner or the petitioner's representative (*Bodco v*

*Herminie* (2001) SLR 254, (emphasis added). Even taking into consideration Sections 3 (1) (a) and 5 (2) of the Suspension of Prescription and Time Limitation Period (Temporary Provisions) Act 2020 (Act 17 of 2020) and Official Gazette No. 351 of 2020, as the judgment he wishes to challenge has been delivered on the 24.01.2020 and his Notice of Motion has been filed on the 06.12.2021, his argument that the time period should start running from 24th June 2020 and the three month period should be excluded is not acceptable when one considers rule 4 (1) (a) of the Constitutional Court Rules which states that the time period to be calculated is from the date of the contravention. For the aforementioned reasons we are of the view that the applicant has failed to show sufficient reasons to justify an extension of time.

[19] It is the contention of both the 1st and 2nd Respondents that the Applicant does not have an arguable case in the Constitutional case.

[20] In *Airtel (Seychelles) Ltd v Review Panel of the National Tender Board & Anor* (SCA 70/2018 (Appeal from CS MC 43/2018)) [2021] SCCA 36 (13 August 2021) the Court of Appeal discussed the issue of arguable case at paragraphs [16]-[22] and [27]-[30], although in relation to granting leave to appeal out of time. The decision cites Lord Diplock in *Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd*:

> *[27] An arguable case is one that stands a realistic chance of success – certainly not one that is guaranteed to succeed. A classic statement of the law is found in the often cited case of Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd, where Lord Diplock stated the law in the following terms:*
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> > *"If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for the relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."*
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> *[28] It is settled law that at the leave stage the perusal of the material need not be thorough, it is sufficient, if on a quick perusal the court takes the view that there is an arguable case.*

> *[29] Lord Diplock puts it more succinctly, in the Inland Revenue Commission, when he stated that:*
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> > *"So this is a threshold question in the sense that the court must direct its mind to it and form a primafacie view about it upon the material that is available at the first consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself".*

[21] This Court finds that the issues raised by the Applicant relating to *"erroneous factual conclusions"* has already been dealt with by the Court of Appeal (see Court of Appeal Judgment paragraphs [26]-[37]) and by filing the constitutional petition, the Applicant now further wants the Constitutional Court to rehear the issues again.

[22] Furthermore, unlike in *Mellie v Government of Seychelles & Anor* (CP 04/2018) [2019] SCCC 05 (24 June 2019) where the Petitioner relied on a report filed by the Ombudsman to support the application, the Applicant in the present case has not enclosed any documentation supporting his averments that the complaint was lodged with the Human Rights Commission and that he was in fact advised that *"there were possible fair hearing issues with from the decision taken by the Supreme Court of Seychelles in CS 246 of 2006 and that the Court of Appeal could have, but did not remedy that decision"*.

[23] Therefore, this Court finds that there is no arguable case which amounts to a constitutional contravention. On the basis of the above reasoning, we decline the Application seeking leave to file the constitutional petition out of time, accordingly the constitutional petition stands dismissed.

Signed, dated and delivered at Ile du Port on 18 October 2022

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| Burhan J | Dodin J | Esparon J |