

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2023] MA 205/2023
(Arising in CP 09/2022)

In the matter between:

MUKESH VALABHJI
(rep. by France Bonte/Samantha Aglae)

Applicant

and

THE REPUBLIC

1st Respondent

MR WAVEL RAMKALAWAN

2nd Respondent

MR AHMED AFIF

3rd Respondent

MR ROGER MANCIENNE

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

THE ATTORNEY GENERAL
(rep. by Georges Thachett)

6th Respondent

THE ANTI-CORRUPTION COMMISSION
(rep. by Michael Skelley)

7th Respondent

THE DEFENCE FORCES OF SEYCHELLES
(rep. by Georges Thachett)

8th Respondent

Neutral Citation: *Valabhji v The Republic & Ors* (MA 205/2023 (Arising in CP 09/2022))
[2023] (21 November 2023)

Before: Burhan J Presiding, Adeline and Esparon JJ.

Summary: Application for a stay of proceedings

Heard: 09 November 2023

Delivered: 21 November 2023

ORDER

The Application for stay is granted and proceedings in CP 9 of 2022 are stayed pending the determination of the Notice of Motion to amend the existing charges in CR114 of 2021.

RULING OF THE COURT

BURHAN J (PRESIDING), ADELINÉ and ESPARON JJ

Background

[1] The Applicant in this application, Mukesh Valabhji filed as Petitioner, a constitutional petition pursuant to Articles 46 (1) and 130 (1) of the Constitution based on Articles 18, 19, 27 and Article 48 of the Constitution. The Respondents in the petition are: the Republic (1st Respondent); the President of the Republic of Seychelles Mr Wavel Ramkalawan (2nd Respondent); the Vice President of Seychelles Mr Ahmed Afif (3rd Respondent); the Speaker of the National Assembly Mr Roger Mancienne (4th Respondent); the Attorney General representing the Government of Seychelles (5th Respondent); the Attorney General (6th Respondent); the Anti-Corruption Commission of Seychelles (7th Respondent); and the Defence Forces of Seychelles (8th Respondent).

[2] Mr Valabhji seeks the following reliefs in his petition and prays that this Court:

“A. Interpret The Charter:

i) in such a way as not to be inconsistent with any international obligations relating to Human Right and freedoms, particularly the Covenant on Civil and Political Rights which Seychelles acceded to in 1992, the European Convention on Human Rights and the American Convention on human Rights

ii) in line with Article 4 (a to d) of the Constitution.

B. To grant the following orders:

i) A Declaration that Act 9 of 2022 is inconsistent with and contravenes Article 19 of the Charter, in the alternative the relevant provisions of Act 9 of 2022 that contravenes Article 19.

ii) A Declaration that section 3(8) of the Anti-money Laundering Act, 2006 is inconsistent with the Constitution and therefore void.

iii) A Declaration that the consequential amendment to section 3(8) of the Anti-Money Laundering and Countering the Financing of Terrorism Act, 2020 is inconsistent with the Constitution and therefore void.

iv) A Declaration that the process of enacting Act 9 of 2022 contravenes Article 85, 86 and 87 of the Constitution.

v) A Declaration that **the acts and omissions** of the 1st, 2nd, 3rd, 4th, 5th and 7th Respondents as particularized contravene the Constitution and provisions of Article 19 and 27 of the Charter.

vi) Order the repeal Act 9 of 2022.

vii) A Declaration that the charges against the Petitioner namely Counts 7,8,13 are inconsistent with Articles 19 and 27 of the Charter and therefore void.

viii) A Declaration that all the charges against me be withdrawn as the actions and omissions of the 1st, 2nd, 3rd, 4th, 5th and 7th Respondents as particularized contravene the Constitution and provisions of Article 19 and 27 of the Charter.

ix) A Declaration that the Petitioner is being denied a fair hearing.

x) Declare that the restrictions entered against all assets of the Petitioner and of all entities which he has an interest therein to be contrary to Article 19 and 27.

xi) Order the removal of all restrictions entered against all assets of the Petitioner and of the entities that he has an interest therein.

xii) Make such declaration, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application.

xiii) Make such additional order under this Constitution or as may be prescribed by law.

xiv) Award a token compensation of Seychelles Rupee One only, to the Petitioner for miscarriage of justice as given the state of the current economic situation of the country, the Petitioner does not wish to claim any compensation from tax payers.

xv) Grant any remedy available to the Supreme Court against any person, or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate.

xvi) Award cost of this Application to be payable by the 2nd, 3rd, 4th Respondents and the Commissioner of the 7th Respondent.”

[3] Preliminary objections on behalf of the Anti – Corruption Commission Seychelles (ACCS) the 7th Respondent dated 25th January 2023 and on behalf of 1st, 2nd, 3rd, 4th, 5th and 8th Respondents dated 30th January 2023 were filed in reply. Prior to the ruling on preliminary objections in relation to the petition, on the 14th April 2023 the ACCS filed a Notice of Motion before the Trial Judge to amend the existing charges in CR114 of 2021, the subject matter of this petition. On the 3rd of May 2023, the Petitioner consequently filed an application for a stay of proceedings in this matter, pending the determination of the Notice of Motion to amend the existing charges in CR114 of 2021. This is a ruling in respect of the application for a stay of proceedings.

Submissions

[4] Mr Valabhji in his affidavit supporting his application for stay of proceedings dated 2nd May 2023 avers that the ACCS has filed a Notice of Motion to amend the existing charges in CR114 of 2021 and that he is advised by his Counsel that they have filed objections to the said motion and both parties are to submit written submissions for determination by the Trial Judge. Mr Valabhji further avers that should a motion to amend the charges succeed, necessary amendments will be required to be made to the constitutional petition filed by him (CP 9 of 2022) as certain counts in the proposed amended charges directly affect the pleadings in the petition in respect of Article 19 of the Constitution and that certain of the proposed amended charges relate to the Anti-Money Laundering Act 2006 which provides for retrospective application of the said Act, a subject matter in the petition.

[5] Therefore, Mr Valabhji moves that the proceedings in relation to the petition should be stayed pending the determination of the motion to amend the charges. He avers that without a stay being granted, the Court’s time would be wasted, his right to properly challenge the infringement of his right to a fair hearing will be hindered/violated and irreparable harm would be caused to his right to a fair hearing causing him to suffer great prejudice. Annexure A, containing existing criminal charges, and Annexure B, containing

proposed amended/substituted criminal charges filed by the ACCS in CR 114 of 2021 are attached to Mr Valabhji's affidavit.

[6] Deputy Commissioner of the ACCS, Mr Denis Joubert on behalf of the 7th Respondent ACCS has filed an affidavit in response to the application for a stay dated 15th May 2023. Mr Joubert states that the application is ill-founded and the applicant should have brought a stay of proceedings application in CR 114/2021 pending the decision of the Constitutional Court in CP 9/2022 rather than stay application of these proceedings.

[7] The basis of the ACCS's submissions is that, firstly, Rule 5 (3) of the Constitutional Court (Application, Contravention, enforcement or Interpretation of the Constitution) Rules 1994 ("the Rules") does not permit amendment to include new matters. Secondly, it is averred that the Petitioner is challenging the ACCS' jurisdiction to prosecute in CR114 of 2021 and the lawfulness of those proceedings; and, if it is found by this Court that the ACCS does not have jurisdiction to prosecute, it follows that it will not have jurisdiction to amend the charges before the Supreme Court. Thirdly, it is averred that the proposed amended charges contain no new alleged offences in terms of the supporting legislation and contain only alleged offences under the same pieces of legislation such that the same alleged constitutional contraventions apply to the proposed amended charges. Mr Joubert avers that the only distinction between the current charges and proposed amended charges is that it is proposed to replace the allegation of conspiracy to launder money under the Anti-Money Laundering Act 2006 by substituting it with substantive offences under the same Act.

[8] It is further averred by Mr Joubert that he has read the written submissions filed on behalf of Mr Valabhji, dated 11th May 2023, in CR114/2021. Mr Joubert avers that the Petitioner in the said written submissions is relying on the same alleged contravention, namely allegation that section 64 of the Anti-Corruption Act 2016 is inconsistent with Article 76 of the Constitution; and challenge of the lawfulness of the charges under the Anti-Money Laundering Acts 1996 and 2006 alleging 'retrospective application'.

[9] It is averred that this demonstrates the need for the Constitutional Court petition to be determined before the Supreme Court rules on the motion to amend the charges.

Reference is made to page 12 of the written submissions in CR114/2021 suggesting that if the amendments are allowed, the trial court should stay the proceedings and refer the case (CR114/2021) to the Constitutional Court for a determination of whether the counts are unconstitutional or not.

[10] Mr Joubert therefore avers that the Applicant's current application for stay of proceedings is ill founded and he moves the Supreme Court to note that his submissions are the subject of existing proceedings before this Court and then goes on to invite the Supreme Court to stay the CR114/2021 in the event that it rules in favour of the amendment. It is therefore averred that the Supreme Court should await the determination of the alleged constitutional contraventions already raised in CP9/2022. Mr Joubert concludes that the present application for stay is vexatious and likely to cause unnecessary delay of the criminal litigation and that the logic of the Applicant's position requires an application to stay the Supreme Court proceedings pending the outcome of the constitutional petition.

[11] The Attorney General of Seychelles, Mr Frank Ally filed an affidavit dated 22nd May 2023 in reply on behalf of the 1st, 2nd, 3rd, 4th, 5th, and 8th Respondents. The Attorney General in his reply states that the stay application should be dismissed on the basis that a stay of proceedings in the main proceedings is unnecessary, wrongly brought and would otherwise give rise to delay that should otherwise be avoided. He agrees with the reasoning contained in paragraphs 5 (ii) and (iii) of the affidavit of the 7th Respondent. Further, it is averred that the proposed amended charges contain no new alleged offences in terms of the supporting legislation and contain alleged offences under the same pieces of legislation such that the same alleged constitutional contraventions apply to the proposed amended charges. It is averred further that it is in the interests of justice to proceed with the petition in order that there is a final ruling as to whether the criminal prosecution in CR114 of 2021 can proceed and whether there have been any constitutional contraventions by the State.

[12] During the Proceedings on 3rd October 2023 the parties made their oral submissions. Learned Counsel for the Applicant Mrs Aglae, submitted that the proposed amended charges are substantially different from the existing charges which will affect the

arguments raised in the petition. Learned Counsel submits that for example the offence under the existing Count 8 was brought pursuant to the Anti-Money Laundering Act 2006 as amended in 2008 whereas in the proposed amended charges under Count 10 the charge in relation to the offence with the same subject matter is brought pursuant to Anti-Money Laundering Act 1996. Further it is submitted that Count 11 in the proposed amended charges appears to be a new allegation of substantive money laundering; that Counts 14, 16, 18 and 22 are also new allegations of substantive money laundering charges.

[13] Mrs Aglae further submits that the ruling of the Chief Justice in respect of the amended charges in CR114 of 2021 is pending and should the motion to amend be successful, the amended charges directly affect the pleadings in the petition in respect of Article 19 of the Constitution. It is submitted that certain amended charges relate to the Anti-Money Laundering Act 2006 which provides for the retrospective application for the said Act and subject matter in the petition.

[14] It is further submitted that allowing a stay in the proceedings would be prudent and necessary as it will allow the Applicant to put before the Court the final issues that would be considered in the petition, therefore, granting the Applicant his right to properly challenge the infringement of his right to a fair hearing. Learned Counsel submits that should this Court proceed to determine the preliminary objections to the petition before the Chief Justice makes a determination in CR114 of 2021 regarding the motion to amend the charges, it would prevent the Applicant from filing another constitutional petition with respect to the constitutionality of the amended new charges.

[15] Mrs Aglae on behalf of the Applicant further challenges Mr Joubert's authority to file an affidavit in support on behalf of the ACCS, arguing therefore that the Court cannot consider and rely on points raised by the ACCS in the said affidavit. Reference was made to section 9 of the Anti-Corruption Act in relation to powers to sign document on behalf of the ACCS, which, as argued, is that of the Commissioner and cannot be delegated to other employees. Counsel further referred the Court to the decision in *Intershore Consult (Propriety) v Govinden* (CS 127/2010) [2013] SCSC 79 (6th November 2013), *Hill View Resorts (Seychelles) Limited v Intendnacne Retreat Limited* (MA 7/2021, MA10/2021,

MA15/2021) [2021] SCSC 295 (9th June 2021) and *Daniella Lablace De Charmoy v Patrick Lablache De Charmoy*).

[16] Learned Counsel for the Applicant further informs this Court that it is not the Applicant's intention to request a stay in CR114/2021 and that the ACCS cannot argue that the Applicant should stay proceedings in CR114/2021 instead of this petition as they are trying to use a backdoor to halt and "*do whatever they want with the petitioner in CR 114/2021*".

[17] It is submitted by Mrs Aglae that the ACCS is making assumptions in paragraph 5 of the affidavit as they have not yet seen any amendments to the petition and such amendments in any case would depend upon the decision of the Chief Justice whether the charges in CR114/2021 can be amended. It is submitted that it would therefore be wrong in principle for the Court to proceed to consider and determine constitutional arguments by reference to a legal and factual context, which is liable to change.

[18] Learned Counsel for the Republic Mr Thachett submits that their first main argument opposing the stay application is that under the Rules, the petition cannot be amended to include any new facts and if there is a change in circumstances or a new charge the proper cause for the Petitioner would be to withdraw or refile a new petition. The second argument is in relation to jurisdiction of the ACCS, which was referred to above in the affidavit of the Attorney General.

[19] Learned Counsel for the ACCS Mr Skelley submits that the matter was firstly delayed by recusal application and now with the current application the ACCS is of the view that the Applicant is further using the delaying tactics. The ACCS submits that they seek a resolution of this petition because it has important ramifications on the trial in CR114 of 2021. It is further submitted that the stay is not actually in the interest of the Applicant if he wants his alleged constitutional contraventions litigated. Further, learned Counsel submits that the application for stay is premature because the Supreme Court has not yet decided whether the amended charge sheet would be accepted. He further argues that the constitutional contraventions arise from the alleged charging or mischarging or unlawful charging of the Applicant on the indictment and although there is a change of wording,

dates and some new factual allegations, the alleged offences are the same. He submits that even if there are amendments to the particulars, the arguments that the Applicant seeks to put forward apply in the same way to new petition as it would to the old charges. The amended set of charges are still brought under the same Acts, namely, the Penal Code, 1996 Anti-Money Laundering Act and 2006 Anti-Money Laundering Act, amended in 2008. He submits that the Applicant is seeking to attack the ACCS' ability to prosecute under that legislation and that proposed amendments to the indictment make no difference to those arguments because it is the same law that the Applicant is challenging.

[20] Mr Skelley too submitted that Rule 5 (3) of the Constitutional Rules doesn't permit substantive amendment of a petition and that in case the Applicant considers that the Chief Justice would be wrong in allowing the amendment, the Applicant would have a new three months to bring the constitutional petition if he needs to and that would be the Applicant's remedy. Further, the ACCS submits that small changes are allowed to be brought under Rule 5 (3) but any new matter not pleaded in the petition cannot be brought. It is submitted that in any case there is no new matter that Applicant is seeking to bring as same alleged constitutional contraventions apply. Therefore, it is submitted a stay is not necessary and not in the interest of justice and will only cause more delay of the current case and potentially trial itself.

[21] With regard to the authority of Mr Joubert to swear an affidavit on behalf of the ACCS, he submits that the Anti-Corruption Act has been amended in 2021 and pursuant to section 9 (1) (b) the Commissioner "*may delegate any function of the Chief Executive Commissioner to any employee of the Commission*". Therefore, Mr Joubert as the Deputy Commissioner has authority to swear an affidavit. He further submits that if the Applicant is raising the alleged constitutional contravention to stop the amendment, it shows that this Court needs to decide this issue and resolve the petition as the Applicant is raising the point before the Chief Justice that charges should not be amended as he has made a Constitutional challenge. Counsel concluded his submissions by stating that this Court should refuse the stay and proceed to hear the preliminary objections and should the case go on and move on to the merits by then perhaps the trial court in CR114/2021 would have decided whether amendment to the charges will be permitted.

[22] Mrs Aglae in response to Counsel’s submissions stated that to say that the Applicant is using arguments before the Chief Justice in CR114/2021 to delay and using another argument in the present case to delay both cases is a misleading submission. Mrs Aglae stated that the Applicant is not using an argument before the Chief Justice to say that as they are contesting amendments in the Constitutional Court the Chief Justice cannot rule on the amendments.

Determination

[23] We find the submissions of the Applicant’s Counsel persuasive. At the same time, upon perusal of the main petition in the case, it is apparent that this Court should focus on determining whether the impugned pieces of legislation are in violation of the Constitution. The fact that the charges arise from that law should not delay or postpone the decision of this Court on the constitutionality of the law. This is supported by the ACCS arguments that the new proposed charges are based on the same law, though some additional charges has been proposed in the Notice of Motion to amend the charges.

[24] However, this Court is compelled to exercise caution due to the wording of prayer B (vii), which reads: “(vii) *A Declaration that the charges against the Petitioner namely Counts 7,8,13 are inconsistent with Articles 19 and 27 of the Charter and therefore void.*” The prayer expressly refers to specific numbers of the charges under the current charge sheet. It is apparent from the affidavit of Kevin Stephenson enclosed to Mr Valabhji’s affidavit that the ACCS are seeking to introduce new charges, namely Charge 5-8, Charge 11, Charges 14-19, Charges 22 and 23 (reference to paragraphs 8.2 – 8.4, 8.7, 8.9, 8.11) and further to amend certain charges. Upon perusal of the present charge sheet and the proposed amended one, it is clear that Charges 7, 8 and 13 specifically mentioned in the prayer to the petition are not the same in current and proposed amended charge sheets.

[25] This Court is of the view that if this part of the prayer would have referred to charges under specific sections of the Acts instead of the charge numbers, it could have potentially encompassed all the charges (current or proposed amended ones) falling under the impugned legislation and since it is the legislation that is being challenged, a stay of

the proceedings would not have been necessarily needed. The prayer, nevertheless, refers to specifically numbered charges 7, 8, 13 in the charge sheet as being unconstitutional. The ACCS after the filing of the constitutional petition challenging these charges, have now decided to amend these particular charges in their amended charge sheet. It is our considered view that it is now for the trial court, which is better equipped with the facts of the case, to decide whether it is to accept these amended charges. This Court has to await its decision. If the trial court accepts the amended charge, prayer B (vii) would have to be dismissed simply for the reason that it would no longer apply to relevant charges. If the trial court does not, then this Court will proceed to decide on the existing constitutional challenge in respect of the said charges.

- [26] It is to be borne in mind that the ACCS who are best aware of the facts of the investigation have decided already on a constitutional challenge being made to amend the said charges 7, 8 and 13. What basically the ACCS is asking this Court to do is to make a ruling on a charge they themselves have decided to amend after a constitutional challenge and then once again make a further ruling on the amended charge in the event of it being accepted. For the ACCS to now make such a request that the Constitutional Court decide on charges they themselves have decided to amend is unacceptable. To make a decision at this stage on charges which the ACCS themselves have decided to amend would be an unnecessary, and fruitless exercise resulting in a waste of time and resources.
- [27] Further we cannot decide now or predict what the Applicant intends to do if the amended charge is accepted. The ACCS complains of delay in the hearing of the petition, however, we observe that it is the amended charges filed by the ACCS that has resulted in an impediment in the hearing of the main petition. They cannot now solely blame the Applicant for any delay in the hearing of this petition. For all the aforementioned reasons, it is the view of this Court that it is prudent and in the interest of justice to stay proceedings until the Supreme Court in CR114/2021 makes a determination regarding the motion to amend the charges.

[28] The Application for stay is therefore granted and proceedings in CP 9 of 2022 are stayed pending the determination of the Notice of Motion to amend the existing charges in CR114 of 2021.

Signed, dated and delivered at Ile du Port on 21st November 2023.

M Burhan J

B Adeline J

D Esparon J