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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Second Seminar for Liaison Officers from

Highest Courts of the Southern African Region (SADC)

(Windhoek, Namibia, 28-29 November 2003)

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Malawi

Summary

The two plaintiffs, who were members of the National Assembly disobeyed a court order of injunction and were subsequently convicted of contempt of Court. They were each sentenced to pay a fine or in default to a term of imprisonment. They both did not appeal against the conviction or the sentence.

On 13th December,2002 a motion that had been moved in the National Assembly was passed declaring that the contempt of court of which the

plaintiffs had been convicted was a crime involving dishonesty and moral turpitude. The seats of the two plaintiffs in the National Assembly were then pronounced vacant by the speaker of that Assembly by operation of S.51 and S.63 (1) (e) of the Republic of Malawiconstitution. That S.51 of the Republic of Malawi constitution provides that a person convicted of crime involving dishonesty and moral turpitude within the last seven years shall not be qualified to be elected a member of parliament.

And S.63 (1)(e) of the same constitution provides that a seat of a member of the National Assembly shall become vacant if any circumstances arose that, if he or she were not a member of the National Assembly, would cause that person to be disqualified for election under the constitution or any Act of Parliament.

The High Court considered the question whether contempt of court was a crime involving dishonesty and moral turpitude warranting the declaration of a vacancy in seats of the two plaintiffs in the National Assembly. And whether

such a declaration was a violation of the plaintiffs' right to engage in political activity as guaranteed by S.40 of the Republic of Malawi constitution or a violation of article 21 (1) of Universal Declaration of Human Rights.

HELD

1. that the contempt of court of which plaintiffs were convicted was a crime involving dishonesty and moral turpitude.

2. that the expulsion of the plaintiffs from the National assembly was not an infringement of either S.40 of the Republic of Malawi constitution that guarantees political rights or article 21(1) of the Universal Declaration of Human rights as it was compliant with S.44 (2) of the constitution on limitation of rights.

CIVIL CAUSE NO. 1861 OF 2003

HIGH COURT OF MALAWI

BETWEEN:

THE REGISTERED TRUSTEES OF THE PUBLIC AFFAIRS COMMITTEE
……PLAINTIFF

AND

THE ATTORNEY GENERAL ……1ST DEFENDANT

AND

THE SPEAKER OF THE

NATIONAL ASSEMBLY ……2ND DEFENDANT

THE MALAWI HUMAN RIGHTS

COMMISSION…….AMICUS CURIAE

CORAM: HON. JUSTICE A C CHIPETA

Kasambala, of Counsel for the Plaintiff

Ngwira, of Counsel for the Plaintiff

Fachi, S.C., Attorney General, for Defendants

Matenje, Solicitor General, for the Defendants

Nyirenda, Assistant Chief Parliamentary Draftsman,

For the Defendants

Tembenu, of Counsel for the Amicus Curiae

Kapindu, of Counsel for the Amicus Curiae

SUMMARY

The Republic of Malawi Constitution, that came into force in May, 1995, by its Section 65 (1) empowered the Speaker of the National Assembly to declare vacant the seat of any member of that Assembly, if, on election, he was a member of a political party represented in that Assembly upon his voluntarily ceasing to be a member of that party and joining another political party also represented in the same Assembly.

In the year 2001 by Constitution (Amendment) (No. 2) Act, 2001, the Section was amended by Parliament empowering the Speaker of the National Assembly to declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of a political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly or has joined any other political party or association or organization whose objectives or activities are political in nature. The plaintiff, a non-governmental organization concerned with the protection and enforcement of human rights, challenged the constitutionality of this amendment at two levels.

Firstly, that Parliament did not follow the proper procedure in effecting this amendment since no referendum was held before the amendment was effected contrary to the provisions of Section 196 and 197 of the Malawi Constitution. And secondly, that the amendment directly abridged the right to freedom of association under Section 32 of the Malawi Constitution and the right to freely participate in political activities under Section 40 of the same constitution by unduly limiting members of the National Assembly in their exercise of those rights. The defendants took up a preliminary issue that the plaintiff had no *locus standi* in the matter in terms of Section 15 (2) and Section 46 (2) of the Constitution which grant locus standi to any person or group of persons with sufficient interest in the protection and enforcement of the rights conferred by the Constitution of the Republic of Malawi. The court heard arguments by the plaintiff, defendants and Amicus Curiae.

HELD

1 That the plaintiff had locus standi as a group of persons having interest in the protection and enforcement of rights conferred by the Republic of Malawi Constitution in terms of Section 15 and Section 46 (2) of the Constitution.

2 That Parliament followed the right procedure in amending Section 65 (1) of the Constitution since Section 196 and 197 of the

Constitution do not prescribe a referendum before an amendment can be effected to Section 65 of the Constitution.

3 That the amendment of Section 65(1) of the Constitution by Constitution (Amendment) (No. 2) Act of 2001 was inconsistent with the constitution and was therefore invalid in terms of Section 5 of the Constitution to the extent that it deemed the joining of any other political party, or the joining of any association or organization whose objectives are political in nature by a member of the National Assembly conduct warranting the declaration of a vacancy in his or her seat in the National Assembly.

CASES CITED

- **Administrator of the Estate of Dr Banda v Attorney General**

Civil Cause Number 1839 (A) of 1996 (Unreported)

- **Amalgamated Society of Railway Servants v Osborne**
- **[1909] 1 Ch 163**
- **Attorney General v Malawi Congress Party and Others**

MSCA Civil Cause Appeal No. 22 of 1996 (Unreported)

Attorney General v Morgan [1985] L.R.C. 770

- **Attorney General of the Gambia v Jobe [1984] H.L. 689**
- **Attorney General of Trindad and Tobago and others v Mcleod [1985] L.R.C. (Const) 81**
- **Blackburn v Attorney General [1971] 1 W.L.R. 1037**
- **Chakuamba and Others v Attorney General**

MSCA Civil Appeal Number 2000 (Unreported)

- **Chissagnou and Others v France 7 BHRC 151**
- **Malawi Human Rights Commission v Attorney General**

MSC Civil Cause No 1119 of 2000 (Unreported)

- Minerva Mills Ltd and Others v Union of India and Others Air 1980 Sc 1789
- Minister of Justice v Borowsk 1[1981] 2 SCR 265
- New Patriotic Party v Attorney General [1999] 2 LRC
- Nseula v Attorney General and Others MSCA Civil Appeal No 32 of 1997 (Unreported)
- O Keke v Minister of Home Affairs and controller of Immigration MSC Civil application Number 73 of 1987 (Unreported)
- President of Malawi and speaker of National Assembly v Kachere and Others MSCA Civil appeal No. 20 of 1996 (Unreported)
- R v Foreign Secretary, ex Parte World Movement Ltd [1971] 1 W.L.R. 386
- R v Inland Revenue Commissioners ex parte National Federation of Self – Employment and small Businesses Ltd [1982] AC 617
- Republic v Kaunda Criminal Appeal No. 89 of 2001
- Richards and Walker v governor General and Attorney General [1990] Vol. 16 No. 2 Commonwealth Law
- Sidiropolous and Others v Greece 57/1997/841/1047
- State v Makwanyane and Mchunu Case Number CCT/3/94
- State v Registrar General and Minister of Justice, ex parte Civil Liberties Committee Civil Cause No. 55 of 1998 (Unreported)
- Tembo and Kainja v Attorney General Civil cause NO. 50 of 2003 (Unreported)
- Tuffour v Attorney General [1980] GLR 637
- United Democratic Front v Attorney General

Civil Cause No 11 of 1994 (Unreported)

- United Communist Party of Turkey and Others v Turkey

133/1996/752/951

Mauritius

GENERAL WORKERS' FEDERATION & ORS v/s THE COMMISSIONER OF POLICE

2003 SCJ 3

(a) Mauritius

(b) Supreme Court

(c) 10/01/2003

(d) Supreme Court Judgment 2003

(e) English

General Principle - Freedom of Assembly

KEYWORDS

Freedom of expression

Freedom of Assembly and Association

Public gathering

Non compliance of the law

SUMMARY

Applicants feeling aggrieved with the decision of the Commissioner of Police to prohibit a gathering have under Section 4(4) of the Public Gatherings Act, referred the matter to a Judge in Chambers. Conclusion has been reached that the decision of the Commissioner of Police was made in violation of the provisions of Section 4 of the Public Gatherings Act and of the spirit of Sections 12 and 13 of the Constitution.

HURNAM v/s Ww AH FOON CHUI YEW CHEONG & ORS

2003 SCJ 26

(a) Mauritius

(b) Supreme Court

(c) 06/02/2003

(d) Supreme Court Judgment 2003

(e) English

General Principle - Powers of DPP

KEYWORDS

Immunity,

Powers of the DPP,

Lawful discharge of DPP's duties,

Limits

SUMMARY

The District Court has referred this matter to the Supreme Court for its opinion as to whether the Director of Public Prosecutions could be constituted an accused party (albeit in a private prosecution). Held that though the Constitution does not specifically confer immunity on the DPP from Criminal Prosecution, the Constitutional Powers of the DPP to institute and discontinue criminal proceedings and the protection afforded to him under Section 72, leaves no doubt that he would not be amenable to prosecution in respect of a decision taken in the lawful discharge of his duties.

BASSET-ROUGE Mrs M.C. v/s THE STATE OF MAURITIUS

2003 SCJ 143

(a) Mauritius

(b) Supreme Court

(c) 22/05/2003

(d) Supreme Court Judgment 2003

(e) English

General Principle - Protection of Law

KEYWORDS

Leave to appeal,

Drug Trafficker,

Visible, measurable and palpable,

Right to the protection of the law and due process

SUMMARY

Applicant has sought leave to appeal to the Judicial Committee of the Privy Council on the ground that under Section 10 of the Constitution he has not been afforded a fair hearing. It was held that Section 10 of the Constitution in so far as the applicant's right to the protection of the law and due process is concerned, should not be submitted to the Judicial Committee since the lower Court did address its mind to the issues raised and the finding of that Court has not been the subject of the applicant's appeal to the superior Court.

POLICE v/s JEAN PASCAL RUDY MARIE JOSEPH

2003 SCJ 195

(a) Mauritius

(b) Supreme Court

(c) 11/07/2003

(d) Supreme Court Judgment 2003

(e) English

General Principle - Constitutionality of Section 47 of the District and

Intermediate Courts (Criminal Jurisdiction) Act

KEYWORDS

Fair hearing,

Opportunity to cross-examine,

Bench must hear all evidence,

Infringement of law

SUMMARY

The Intermediate Court referred this matter to the supreme Court for a decision as to whether Section 47 of the District and Intermediate Courts (Criminal Jurisdiction) Act was not in breach of Section 10(1) and (2)(e) of the Constitution.

Held that the sort of evidence taken under the provisions of Section 47 of the D.I.C.A could be produced in evidence and that such a course of action did not infringe Sections 10(1) nor 10(2)(e) of the Constitution.

Seychelles

Mr. Abdool Rashid Kaidoo & Mrs Gisele Sarah Poris Khaidoo v. The Director of Immigration, The Government of Seychelles - (rep. by Attorney General), The Attorney General

SEY-2002-D-002

a) Seychelles / b) Constitutional Court / c) / d) 21.05.2002 / e) 11/2001 / f) Mr. Abdool Rashid Kaidoo & Mrs Gisele Sarah Poris Khaidoo v. The Director of Immigration, The Government of Seychelles - (rep. by Attorney General), The Attorney General / g) / h) CODICES (English).

Headnotes:

The Petitioners' claim is that the refusal of the Director General of Immigration to revoke the prohibitant immigrant status of the first Petitioner contravenes their rights to be protected as a family as enshrined under Article 32 of the Constitution. Held - that the decision not to revoke the 'prohibited immigrant status' of the first Petitioner is within the ambit of the restrictions prescribed under Article 32(2) of the Constitution and as is strictly necessary in the circumstances of the present case.

Summary:

[A. R. Perera J (Presiding) with N. Juddoo & D. Karunakaran JJ, concurring]

The first Petitioner is a Mauritian national whilst the second Petitioner is a Seychellois national. On 21 July 2000, the first Petitioner arrived at the Seychelles International Airport in an attempt to enter the country. He was checked at the immigration desk and declared a 'prohibited immigrant.'

On 17 October 2001, the first Petitioner married the second Petitioner in Mauritius. By virtue of a letter dated 30 October 2001, addressed to the first Respondent, Counsel for the first Petitioner sought to ascertain whether his client's status as a 'prohibited immigrant' had changed. By letter, dated 16 November 2001, the first Respondent replied that - "Mr Khaidoo (first Petitioner) is a prohibited immigrant and this statutes has not changed despite his marriage to a Seychelles citizen. Therefore, Mr. Khaidoo will not be allowed to enter Seychelles until such time that the prohibited immigrant status is revoked....."

The Petitioners' claim is that the refusal of the Director General of Immigration to revoke the prohibitant immigrant status of the first

Petitioner contravenes their rights to be protected as a family as enshrined under Article 32 of the Constitution.

Article 32 of the Constitution (which forms part of what is referred to as "The Charter') reads as follows:-

"32. (1) The State recognizes that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.

The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees."

The Court observed that the right to 'family life' also involves a consideration of the safeguard of the right of the state to control the entry of non-nationals into the country.

On the facts of the present case, the first Petitioner made five visits to Seychelles in between January to July 2000. In the year 1999 and 2000, the Immigration Division was faced with an array of foreign nationals who entered the country on a visitors visa and were illegally carrying out trade on the island.

The first Petitioner was declared a prohibited immigrant under Section 20(1) as read with Section 19(1)(e)(iii) of the Immigration Decree (Cap 93). There is no claim that the decision of the first Respondent to declare the first Petitioner a prohibited immigrant was without merit and neither can it be said that the facts and circumstances which led to the decision became non-existent merely by virtue of the fact that the first Petitioner is now married to the second Petitioner. The decision not to revoke the 'prohibited immigrant status' of the first Petitioner is within the ambit of the restrictions prescribed under Article 32(2) of the Constitution and as is strictly necessary in the circumstances of the present case. The petitioners were aware that the first petitioner was a prohibited immigrant when they entered into matrimony and that he would not be allowed to enter the

Seychelles. There is no obstacle to the petitioners leading a family life in the country of origin of the first Petitioner.

In conclusion, Juddoo, J, with Judges A. R. Perera and D. Karunakaran (concurring) held that the decision of the first respondent not to revoke the prohibited immigrant status of the first Petitioner subsequent to his marriage with the second Petitioner does not constitute a contravention of the Petitioners right to a 'family life' as envisaged under Article 32(1) of the Constitution.

Cross-references:

Abdulaziz, Cabales and Balkandani v U.K 7 ECHR 471;

Gul v Switzerland (1996) 22 ECHR 93;

Regina (Mahmood) v. Sec. Of State for Home Dept. (2001) 1 WLR 840.

Languages:

English.

Philip Amukhobe Imbumi v. The Republic

SEY-2002-D-001

a) Seychelles / b) Constitutional Court / c) / d) 07.05.2002 / e) 8/2001 / f) Philip Amukhobe Imbumi v. The Republic / g) / h) CODICES (English).

Keywords of the alphabetical index:

Rebuttable presumption of intent / Reverse burden on accused / Constitutional matter.

Headnotes:

Section 14(d) of the Misuse of Drugs Act (Cap. 133) contains a rebuttable presumption that "a person who is proved or presumed to have had in his possession more than 25 grammes of cannabis, or cannabis resin, shall

until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug contrary to Section 5." Article 19(2)(g) of the Constitution of Seychelles provides that - "Every person who is charged with an offence shall not be compelled to testify at the trial, or confess guilt."

Article 19(1)(g) of the Constitution provides that - "Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of Clause (2)(a) (Presumption of Innocence) to the extent that the law in question imposes the burden of proving particular facts or declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof."

Constitutional challenge of Section 14(d) of the Misuse of Drugs Act as violating Article 19(2)(g) of the Constitution.

Held - Both Articles 19(2)(g) and 19(2)(a) have to be considered together. Accordingly Article 19(2)(g) in particular and Article 19(2)(a) in general, do not fetter the powers of the legislature to impose a reverse burden on the accused to rebut the presumption contained in Section 14(d) of the Misuse of Drugs Act on a balance of probabilities.

Summary:

[Per A. R. Perera J (Presiding) with N. Juddoo & D. Karunakaran JJ, concurring]

In the Misuse of Drugs Act of Seychelles, "trafficking" in a controlled drug (Section 5) and "possession" of a controlled drug (Section 6) are two distinct offences. Section 14(d) contains only a presumption of "trafficking" where the accused is proved or presumed to have had in his possession more than 25 grams of cannabis or cannabis resin. Section 38(1) of the Act gives a wide discretion to the Court to "make a finding whether the accused person is a trafficker in drugs." In this respect the Court can consider all the circumstances of the case and determine whether it could reasonably be inferred that the accused was engaged in trafficking. Section 14(d) specifies the quality that attracts the presumption, and covers both

commercial and non commercial transactions. In that respect the Mauritian case of DharmarajenSabapathee v The State (1999) 1. W.L.R. 1836 distinguished. The decision of the Seychelles Court of Appeal in Philip Cedras v R (S.C.A. No. 11 of 1988) applied for the proposition that if a person is in possession of a dangerous drug in excess of the prescribed limit such possession itself was an act for the purpose of trafficking, and if he fails to rebut the presumption, will be convicted for trafficking. The Singapore case of Lee Ngin Kiat v Public Prosecutor (1993) 2 S.L.R. 551 considered in respect of the reasonableness of the presumption of trafficking.

Perera J also considered in that respect the Hong-Kong case of A.G. of Hong-Kong v Lee Kwong-Kut (1993) 3 A.E.R. 939 where the Privy Council held that the placing of the onus on the accused to give an explanation as to his innocent possession of the property, was the most significant element of the offence and that it reduced the burden on the prosecution to proving possession by the accused and facts from which a reasonable suspicion could be inferred that the property had been stolen or unlawfully obtained, and that was a violation of the right to a presumption of innocence.

Considering whether Section 14(d) of the Misuse of Drugs Act violated the right against self incrimination, that is, the "right to remain silent," and the general presumption of innocence until proven guilty, Perera J held that what is relevant is not the various judicial pronouncements but the nature of the constitutional provisions in each country, and the approach to the right of equal protection of the law. He expressed the view that presumptions against accused persons should pass the test of proportionality by being reasonable and justifiable, and also that the relation between the limitation and the object should be proportional.

Examining the provisions of the Criminal Procedure Code, Perera J came to the conclusion that there was no compelling of the accused to testify, either directly or indirectly as at the end of the prosecution case, the Court rules whether the prosecution has established a prima facie case against the accused, and the accused is then informed of his right to give evidence on oath, or to make a statement from the dock, or to call witnesses on his

behalf. Hence as the indictment would contain the presumption against him, and he is given the choice of defence, it was held that a constitutional challenge under Article 19(2)(g) was not maintainable. In that respect the Court cited the case of Bombay v Kathi Kalu Ogad (1962) S.C.R. 10, where the Indian Supreme Court held that "In order that a testimony of an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such character that by itself, it should have a tendancyof incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

Perera J also held that Section 14(d) gives an opportunity to the accused to exculpate himself and not to inculpate himself and hence there was no violation of either Article 19(2)(g) in particular or the presumption of innocence in general.

Considering whether the legal burden on the accused was violative of the presumption of innocence, Perera J distinguished several decisions from the Courts in Canada and South Africa. He held that Article 19(10)(g) of the Constitution of Seychelles has in the interests of society granted power to the legislature to enact any law imposing on an accused person the burden of proving particular facts or to make declarations that the proof of certain facts shall be prima facie proof of the offence or of any element thereof, and hence under the Constitution of Seychelles presumption of innocence was not an absolute right.

Judges N. Juddoo and D. Karunakaran concurred with the determination of the presiding Judge A. R. Perera.

Cross-references:

Dharmarajen Sabapathee v The State (1999) 1. W.L.R. 1836;

Lee Ngin Kiat v Public Prosecutor (1993) 2 S.L.R. 551;

A.G. of Hong-Kong v Lee Kwong-Kut (1993) 3 A.E.R. 939;

Bombay v Kathi Kalu Ogad (1962) S.C.R. 10.

Languages:

English.

The Seychelles National Party v. The Government of Seychelles & The Attorney General

SEY-2001-D-002

a) Seychelles / b) Constitutional Court / c) / d) 29.05.2001 / e) 6/1999 / f) The Seychelles National Party v. The Government of Seychelles & The Attorney General / g) / h) CODICES (English).

Keywords of the alphabetical index:

Media, television.

Headnotes:

Appointments to the Seychelles Broadcasting Corporation Board made by the Executive President of the Republic in terms of Section 4(1) of the Act. Of the 10 members appointed, 7 were public officers, and 1, the wife of the President. Article 168 of the Constitution of Seychelles enjoins the State to ensure that all Broadcasting Media Boards are so constituted and managed in a way that they operate independently of the State, political or other influences of other bodies, persons or political parties. Held - that the "independence" required in Article 168 would be the impartiality in presenting or discussing public issues, and the dissemination of news, news features, current affairs and other programmes, impartially, accurately and with due regard to public interest. Hence appointment of persons who happen to be public officers or even the wife of the President as members of the Board only provides an appearance of impropriety and does not violate the spirit of Article 168 as regards the need for independence and impartiality.

Summary:

[A. R. Perera J (Presiding) with N. Juddoo & D. Karunakaran JJ, concurring]

Section 4(2) of the Seychelles Broadcasting Act provides that any person is qualified to be a member of the Broadcasting Corporation Board if he is not an office holder or a member of the executive committee of a political party. Article 168(1) of the Constitution of Seychelles provides that "the State shall ensure that all broadcasting media are so constituted and managed in a way that they may operate independently of the State and of the political or other influences of other bodies, persons or political parties."

The Petitioner, a political party, challenged the appointments of the Seychelles Broadcasting Board on the ground that, in appointing members overwhelmingly made up of public officers paid by the State and answerable to the State, and containing the President's spouse as vice-chairperson, as well as three members employed in the President's office, the State represented in the appointments by the person of the President, had failed to ensure that the Board can operate independently of the State or the influence of the President in that there can be no guarantee that public officers will remain outside the influence of the State which employs them or that of the President who is head of the executive, the husband of one of them, and the Minister effectively in charge of three of them.

Held by Perera J, that the "independence" envisaged in Article 168(1) of the Constitution is not "personal" or "individual" independence of members of the Board, but the appointing of members in such a way that the functions of the corporation are discharged impartially by them without influence of the State or political parties. The only disqualification for membership in the Board is the holding of office as executive committee member in a political party. Checks and balances needed to maintain independence, in the sense of non interference by the State or political parties differ from country to country according to the Constitution and laws in force and the system of Government which is based on it.

Perera J distinguished the case of Atukorale and Others v The Attorney General (1999) 2 CHRLD 221, where the Sri Lanka Broadcasting Authority Board consisted of 5 ex-officio principal secretaries of Government Ministries and the Chairman of the National Film Corporation, the Supreme Court of Sri Lanka held that the possibility of interference by the Minister

who appoints them was "real and not a merely speculative possibility or likelihood", and held that in the Seychelles Broadcasting Corporation Board, the appointment of persons who happen to be public servants or even the wife of the President "only provides an appearance of impropriety, but doe not violate the spirit of Article 168 of the Constitution as regards the need for independence and impartiality." In Seychelles, persons appointed to the Board hold office for two years, irrespective of whether they ceased to be public officers or not during that period.

Judges N. Juddoo and D. Karunakaran agreed with Judge Perera that the composition of the Seychelles Broadcasting Corporation Board did not affect the independence envisaged in Article 168 of the Constitution.

Cross-references:

Authukorale & Ors v The Attorney General (1999) CHRLD 221 (Supreme Court of Sri Lanka);

R v Camborne Justices, Exparte Pearce (1954) ALLER 850 - Court of Appeal of UK).

Languages:

English.

South Africa

National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another

RSA-2002-3-021

a) South Africa / b) Constitutional Court / c) / d) 13.12.2002 / e) CCT 14/2002 / f) National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another / g) / h) CODICES (English).

Keywords of the Systematic Thesaurus:

5.4.10 Fundamental Rights - Economic, social and cultural rights - Right to strike.

Keywords of the alphabetical index:

Labour law / Worker, collective bargaining / Union, representativeness / Organisational rights.

Headnotes:

An Act regulating labour organisational rights, which confers certain organisational rights on ajority unions, should not be interpreted so as to preclude minority unions from striking to acquire such rights, where the right to strike is constitutionally protected and there is no express limitation of the right to strike in the Act.

Summary:

In this judgment, the South African Constitutional Court upheld the legality of minority union strike action to acquire organisational rights. These rights, especially the right to have shop stewards recognised, are secured for majority unions by the Labour Relations Act 66 of 1995 (the Act). In the Court a quo, the employer/respondent had successfully obtained an order interdicting the minority union/applicant on the basis that such strike action is unlawful and unprotected. The Court a quo held that the Act confers the right to have shop stewards recognised only on a union representative of a majority of the workers in a workplace and that strike action by a minority union to obtain such a right is therefore unlawful.

The Act does not explicitly regulate the manner, if any, in which unions which are not sufficiently representative to obtain the organisational rights mentioned, are able to obtain these rights. The issue which the Constitutional Court had to determine whether the Act should be interpreted to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer, or through industrial action.

In reversing the order of the Court a quo, O'Regan J, in a unanimous judgment, emphasised the importance of the right to strike in achieving a successful collective bargaining system. The Act seeks to achieve four

purposes: first, to give effect to the constitutional right to fair labour practices, including the right to strike; second, to give effect to South Africa's international law obligations; third, to provide a framework for collective bargaining; and lastly, to bring about an effective resolution of labour disputes.

After examining the International Labour Organisation's jurisprudence and the constitutional right to fair labour practices, O'Regan J concluded that a reading of the Act which allowed strike action by minority unions to secure organisational rights is in line with South Africa's international law obligations and avoids a limitation on the constitutionally entrenched right to strike, a limitation which neither the State, nor the respondent, sought in argument to justify. In practice, the interpretation adopted by the Court should have a limited impact on industrial relations, since it is only a union which has reached a certain threshold of representivity which will be able to launch an effective strike against the employer to secure the organisational rights in question.

In a separate concurring judgment, Ngcobo J - differing slightly in his reasoning but concurring in the order proposed - sought to classify the true nature of the dispute between the parties as the question whether the applicant was entitled to obtain organisational rights outside the ambit of the Act. He went on to conclude that the Act does not preclude an unrepresentative union from obtaining organisational rights and that such a union has a right to strike to secure these rights.

Cross-references:

- National Education Health and Allied Workers Union v. University of Cape Town and Others, 06.12.2002, Bulletin 2002/3 [RSA-2002-3-019].

Languages:

English.

Uganda

Ismail Serugo v Kampala City Council, Attorney General

UGA-1998-D-001

a) Uganda / b) Supreme Court / c) / d) 30/04/1998 / e) C.A 2/1998 / f) Ismail Serugo v Kampala City Council, Attorney General / g) / h) CODICES (English).

Keywords of the Systematic Thesaurus:

1.3 Constitutional Justice - Jurisdiction.

1.4.1 Constitutional Justice - Procedure - General characteristics.

Keywords of the alphabetical index:

Constitutional complaint, contents / Constitution, interpretation / Right, enforcement.

Headnotes:

A cause of action in a constitutional petition is not the same as a cause of action in an ordinary suit because a petitioner need not prove liability. However, it must be shown on the face of the petition that parts of the Constitution have been infringed.

The jurisdiction of the Constitutional Court, which is to interpret the Constitution, is exclusively derived from Article 137 of the Constitution.

Although the Constitutional Court is a competent court for the enforcement of the Bill of Rights, it may only exercise its jurisdiction after a petitioner has established that there is a question requiring the interpretation of the Constitution. In all other cases, a petitioner wishing to enforce the Bill of Rights must petition other competent courts under Article 50 of the Constitution.

Summary:

The appellant was arrested by officials of Kampala City Council on 5 September 1997 and was arraigned before a lay magistrate on two counts. On the first count, he was charged with the offence of dishonesty and vagrancy under section 163 of the Criminal Code. He pleaded not guilty. On the second count, he was charged under section 106 of the Criminal

Code with the offence of obstructing officers on duty. He pleaded guilty to that charge and was sentenced to four months' imprisonment.

The appellant brought an appeal against that conviction to the Chief Magistrate. The appellant's main ground for appeal was that even though section 106 of the Criminal Code made it a criminal offence to obstruct or resist a person "lawfully charged with execution of an order or a warrant of any court", the facts on which the appellant had been convicted, namely, obstructing a local law enforcement officer in carrying out his "duties of checking stickers of taxi motor vehicles", did not constitute a criminal offence under that section. The Chief Magistrate heard the appeal and allowed it with an order quashing the conviction and the sentence.

The appellant then filed a petition with the Constitutional Court challenging the acts of the officials of Kampala City Council (the "first respondent") on the ground that charging him with a non-existent offence, which led to his subsequent conviction and imprisonment, had infringed his constitutional rights. The appellant also alleged in his petition that the Attorney General (the "second respondent") was vicariously responsible for the acts of the judicial officers who tried and sentenced him.

When the petition was heard in the Constitutional Court, the respondents raised preliminary objections. The first respondent pleaded that the petition was inadmissible because the appellant's arrest was justifiable under the Constitution. The first respondent also argued that the cause of action in respect of the appellant's arrest was barred by the Statute of Limitations.

The second respondent argued that he was not responsible for the acts of the first respondent because the first respondent could be sued in its own right. The second respondent also argued that it could not be liable for acts of the judicial officers because judicial officers are protected by immunity while acting in the course of their duties. Lastly, the second respondent argued that the petition did not raise any questions requiring an interpretation of the Constitution and that the petition was, therefore, bad in law.

Firstly, the Constitutional Court ruled that the petition did not disclose a cause of action calling for the interpretation of the Constitution because the appellant was asking the Court to enforce the Bill of Rights.

Secondly, the Constitutional Court held that the second respondent was not liable for the acts of the judicial officers because they were protected by judicial immunity under the provision of section 4 (5) of the Government Proceedings Act. Lastly, the Constitutional Court held that the appellant's claim for wrongful arrest was time-barred.

The appellant then filed the present appeal with the Supreme Court, relying on ten grounds of appeal. However, in reference to this particular case, the appellant contended that the Constitutional Court had erred in law when it held that the petition did not disclose a cause of action and that the petitioner's action did not involve the interpretation of the Constitution so as to bring it within jurisdictional powers of the Constitutional Court under Article 137 (3) of the Constitution.

Mulenga JSC, who wrote the leading judgment for the court, held that (i) in order to determine whether the petition disclosed a cause of action, it had to be read in its proper perspective in that the right to petition the Constitutional Court, in so far as it was relevant to the appeal, was derived from Article 137(3) of the Constitution providing: "(3) A person who alleges that:- (a)……. (b)any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect and for redress where appropriate."

A petition brought under that provision, in his opinion, sufficiently disclosed a cause of action if it described the act or omission complained of; showed the provisions of the Constitution with which the act or omission was alleged to be inconsistent or which was alleged to have been contravened by the act or omission; and prayed for a declaration to that effect.

Mulenga JSC further held that a cause of action in a constitutional petition did not fall on all fours with the definition of an ordinary cause of action in which a plaintiff was required to prove that he enjoyed a right, that that

right had been violated and that the defendant was liable. Mulenga JSC reasoned that that did not apply to a constitutional petition because Legal Notice No. 4/96, governing the proceedings for the enforcement of the Constitution, did not require a petitioner to show that his rights had been violated by the alleged inconsistency or contravention. He stated that Article 137 (3) of the Constitution gave the right to petition not only to a person aggrieved by, but also to any other person who alleged, an inconsistency with or contravention of the Constitution. Moreover, he reasoned that it was unnecessary under Article 137 of the Constitution to prove liability of a respondent except where redress was to be granted against any other person; in such a case, that person would have to be made a party.

As to the issue of jurisdiction, the Supreme Court held that the jurisdiction of the Constitutional Court was exclusively derived from Article 137 of the Constitution. The Constitutional Court was empowered under that provision only to interpret the Constitution. Although the Constitutional Court was a competent court for the purpose of enforcing the Bill of Rights, it could only exercise that power after the petitioner had succeeded in establishing a cause of action under Article 137 of the Constitution, that is to say, that the petition required the interpretation of the Constitution before the Court could grant a remedy to enforce the claim.

The Supreme Court ruled that in all other cases where a petitioner sought to enforce the Bill of Rights, he or she had to petition the competent courts other than the Constitutional Court.

Lastly, the Supreme Court held that if a petitioner only sought a declaration without redress, his or her petition could be ex parte. However, if a petitioner sought redress, then the petition had to be inter partesbecause redress could only be sought against a party.

Languages:

English.

Zambia

Fredrick Jacob Titus Chiluba v. Attorney General - Respondent

a.) Zambia

b.) Supreme Court of Zambia

c.) N/A

d.) Fredrick Jacob Titus Chiluba – Appellant AND Attorney General - Respondent

APPEAL No. 125 OF 2002

"IT+ " The appeal from judgment of the High Court for Judicial Review. The events were that on the 11th of July 2002 the president of the Republic of Zambia Mr. Levy Patrick Mwanawasa S. C. addressed the national Assembly and made allegations against the appellant as former President so that the National Assembly could lift his immunity. Article 43 of the Constitution of Zambia states "The National Assembly may, in its absolute discretion remove from the Head of State, the veil or the protection shield placed on him by the Articles for purposes of facilitating investigations into his activities while he held the position of the President and subsequent prosecution for the same if such investigations establish the Prima facie case against him." The grounds for appeal are as listed.

1. That the learned trial Judge misdirected himself in Law by determining the motion without a hearing and without considering Affidavit evidence and submission and filled in support of the motion

2. The learned trial Judge erred in law when he held the Article 43.3 of the Constitution of Zambia is meant to empower the National Assembly to remove the immunity of a for Head of State for purposes of facilitating investigations into his activities while he held the office of the President.

3. The learned Judge in the court below erred in law when he held that there was no procedural impropriety in lifting the Apparent immunity based on allegations made against him by President LevyMwanawasa during a special address to the National Assembly and that the President acted as complaint on behalf of the people of Zambia.

4. The Learned Judge erred in Law when he held there was no requirement for Appellant to be given an opportunity to be heard by the National Assembly to rebut allegations made against him by the President Mwanawasa because he will be afforded a hearing during interrogations by the Police or Anti – Corruption Commission and later by the courts of law when he will be expected to defend himself.

5. The Learned judge in the court below erred in law when he held that there was no procedural impropriety in tabling and circulating the motion for the removal of the Appellant's immunity at less than 24 hours notice since the Appellant is not required to be heard by the National Assembly and therefore suffered no prejudice.

Both parties filed written heads of arguments by oral submissions based on these Five grounds of appeal. The first ground of appeal alleged misdirection in law on the part of the court below allegedly.

The first failed because the application of Judicial Review starts with notice of application for leave to apply for Judicial Review accompanied by an affidavit verifying the facts relied upon. Thus, the affidavit must contain all the basic factual material on which reliance will evidently be placed. The function of the is not to act as "a court of appeal" in Judicial review applications but to see that lawful authority is not abused by the unfair.

The basic power of High Court is to review discussion of the inferior courts or public bodies of tribunals is that it can make such bodies do their duties and stop them doing things which they have no powers to do.

The other is to control the jurisdiction of the public bodies by ensuring that they comply with their duties or by keeping them with the limits of their powers.

The principal source of evidence in Judicial Review is from affidavit. Only Writs that may give viva voce evidence on applications for Judicial Review are the deponent of the Affidavits on record.

Grounds 2 and 3 also failed as stated below. The decision was biased on the three grounds, i.e. of illegality, nationality, and procedural impropriety.

Irrationality is explained as a decision, which is so outrageous in its defiance of logic or of, accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Plus procedural impropriety is failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

The Supreme Court agreed that these were the three grounds on reviewability of decisions of public bodies.

43.3 states: -

"A person who has held, but no longer holds, the office of President shall not be charged with criminal offence or be amendable to the criminal Jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National assembly has, by resolution, determined that such proceedings could not be contrary to the interest of the state."

The head of state should have committed Acts while in office, which amounts to criminal offence.

The National Assembly properly exercised its powers with legality. There was noting irrational in the manner the resolution was passed. On procedural impropriety the articles does provide or the procedure For lifting immunity and thus the National Assembly debated the procedure to be followed.

Ground four and five also failed as the provisions of article 43.3 should not be read in isolation but together with other relevant provision, in the Constitution. The provision is that constitutional provisions cannot contradict each other. It is not correct, as argued that the National Assembly is obliged too religiously follow it's own rules of procedure.

The whole appeal was dismissed although the application for Judicial Review was not frivolous nor vexations "IT-"

(f.) Lusaka

(g.) N/A

(h.) N/A