CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2019] SCCC 9
CP10/2019
Arising in MC30/2019

In the matter between:

PRESIDENT DANNY FAURE — **Petitioner**
Acting in the capacity of Minister responsible for Public Administration
(rep. by A Madeleine along with S Aglae)

and

MR NICHOLAS PREA — **1st Respondent**
In the capacity of Speaker of the National Assembly
(rep. by J Camille along with C Andre)

ATTORNEY GENERAL — **2nd Respondent**
(rep. by Mr Kumar)

Neutral Citation: *Faure v Prea & Anor* CP10/2019 [2019] SCCC (17 September 2019)

Before: Govinden J, Dodin J, Pillay J

Summary: Referral of a question for determination under article 130 (6) of Constitution by the Supreme Court to the Constitutional Court. In its final determination on the referred question, the Constitutional Court declared that a Supreme Court Judge, may, sitting alone, in certain circumstances and under the conditions set out in this judgment, determine the lawfulness of an act of the National Assembly carried out in pursuant to an Act of the National Assembly. However, on the specific facts of this case, a Supreme Court Judge, sitting alone, may not, determine the lawfulness of the act of annulment of a statutory instrument by the National Assembly.

Heard: 23 July 2019
Delivered: 17 September 2019

ON A REFERENCE MADE UNDER ARTICLE 130(6) OF THE CONSTITUTION OF THE REPUBLIC OF SEYCHELLES

JUDGMENT

Introduction

[1] The Supreme Court whilst exercising its functions under the provisions of article 130 (6) of the Constitution of the Republic of Seychelles (hereinafter also called *"the Constitution"*) has referred for the determination of the Constitutional Court the following question:

"Whether a Supreme Court judge may, sitting alone, determine the lawfulness of an action of the National Assembly carried out in pursuant to an Act of the National Assembly".

[2] A referral to this court by the Supreme Court under article 130 (6) takes place if the latter is of the opinion that a question has arisen before it with regards to whether there has been or is likely to be a contravention of the Constitution other than chapter II; that the question is not frivolous or vexatious and that it has not been the subject matter of a decision of the Court of Appeal or this court.

The background facts

[3] The Petitioner is the President of the Republic of Seychelles. The executive authority is vested in him and it is exercisable in accordance with the Constitution and the laws of Seychelles. This function conferred on the President is exercisable by him or through his subordinate officers, including Ministers. The President is politically responsible for a ministry or department that he has not specifically assigned to the Vice President or a Minister. In this case he appears as the Minister responsible for Public Administration, as he has not specifically assigned that portfolio to a Minister.

[4] The 1st Respondent is appearing in his capacity as the Speaker of the National Assembly. He is elected as Speaker by virtue of the provision of article 83 of the Constitution. He presides over the meetings of the National Assembly and acts as its head by virtue of the provisions of the Constitution and the Standing Orders of the National Assembly.

[5] The Public Service Salary Act (hereinafter referred to as *"the PSA")*, was promulgated in 2014. This Act gives to the Petitioner the power to make regulations in order to amend its 1st schedule after every five years and change the salary structure of public servants listed in that schedule. The Act did not remove the Petitioner's power to amend any of its provisions through an Act of the National Assembly. The next revision was scheduled to be carried out in April 2019. Accordingly, on the 22nd of February 2019, the Petitioner caused to be published in the Official Gazette the Public Service Salary Act (Amendment) Bill 2019, which was tabled in the National Assembly for approval.

[6] In the course of debates on the Bill in the National Assembly, the Leader of Government Business move to withdraw the Bill from the house was defeated by a vote on a motion filed against the withdrawal of the Bill. In another ensuring motion the National Assembly voted against the withdrawal of the Bill. Thereafter, in an apparent attempt to circumvent this second motion, the Petitioner, pursuant to the provision of the PSA, issued a statutory instrument in the form of Public Service Salary (Amendment of the first Schedule) Regulations, 2019. These regulations, which bear the number SI 18 of 2019, were gazetted on the 2nd of April 2019. It sought to amend the 1st schedule of the PSA in similar terms as the Bill already tabled before the National Assembly.

[7] SI 18 of 2019 was laid before the National Assembly on the 3rd of April 2019 in accordance with the provisions of s 64 (1) of the Interpretation and General Provisions Act , (hereinafter referred to as *"the IGPA").* On the same day that it was laid the Leader of the Opposition introduced a motion to quash the regulations. The Assembly debated on this motion and following a vote in favour of it, purported to annul the regulations on the 4th of April 2019.

[8] The Petitioner, as a direct consequence of this act of the National Assembly, filed a Judicial Review petition before the Supreme Court. The petition is brought under the provisions of article 125 (1) (c) of the Constitution as read with the provisions of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995. (Hereinafter referred to as *"the Supreme Court Rules*"). The thrust of the Petition is that the action of the National Assembly as represented by the 1st

Respondent was illegal and/or was unreasonable. It is the contention of the Petitioner that the National Assembly's legislative powers are limited by the Constitution and the law and that the annulment of the Statutory Instrument was done contrary to the powers given to the National Assembly. It is the case of the Petitioner that the Assembly took irrelevant matters in consideration and ignore relevant matters.

[9] The 1st Respondent acting in pursuant to the provisions of Rule 7 of the Supreme Court Rules took notice of the filing of the Petition, intervened at the leave stage and raised a number of Preliminary Objections against it and objected to leave being granted for the Petition to proceed.

[10] The learned Judge heard the Objections and the 1st Respondent's reply thereto and thereafter granted leave to proceed to the Petitioner. However, the court upon granting of the leave, was also concerned that the matter before him could also have a bearing upon the doctrine of separation of powers and that if he was to proceed to a hearing of the case on the merits he could be determining the lawfulness of an act of one branch of the state against another under the Constitution. As a result he was of the view that a Constitutional Court decision was warranted on this issue and he referred the question to this Court for determination under the provisions of article 130 (6) of the Constitution.

Submissions of Counsel

[11] In accordance with the settled practice and procedure of this court in matters of reference made under article 130 (6) of the Constitution, we invited counsel to make written submissions on the question forwarded for our determination.

[12] The learned counsels for the Petitioner filed two written submissions in support of their case. A document entitled, *"Petitioner's written submissions"* and one bearing the title *"ADDITIONAL WRITTEN SUBMISSION ON BEHALF OF THE PETITIONER"*. In both written submissions the learned counsels for the Petitioners argued that the question referred for determination by this Court should be answered in the positive. It is their submission that an act or a decision of the National Assembly can be judicially reviewed by a single Judge of the Supreme Court.

[13] The Petitioner's counsel submitted that article 125 (1) (c) of the Constitution, which confers judicial review powers on a single judge of the Supreme Court, does not limit a judge's power to review the decision making process of an adjudicating authority. An adjudicating authority includes but is not limited to a body or authority established by law performing judicial or quasi- judicial function. In this regard it is their submission that because the question involved purely one of review of the decision making process of the National Assembly leading to the annulment of SI 18 of 2019, a single judge, sitting alone, can determine the question. It is their submission that the case before the Supreme Court can be distinguished from cases in which the question to be determined by the Court is one alleging a constitutional contravention. That is one where the court is called upon to determine whether an act of the National Assembly is in violation of the Constitution. In the latter cases it is their submissions that article 129 of the Constitution will require that it be determined exclusively by the Constitutional Court. In this regard the learned counsels of the President relies on the case of ***Michel v Danhjee (2012) SLR p 258.***

[14] Counsels for the Petitioner further submitted that contrary to the submissions of counsel for the 1st Respondent the definition of *"adjudicating authority"* under article 125 (7) of the Constitution does not oust the supervisory jurisdiction of the Supreme Court over the National Assembly. In this respect it is submitted that the definition is not exhaustive as the word *"includes"* in the definition enlarges the scope of what is an adjudicating authority and to the extent that the National Assembly acted illegally and or took into account irrelevant considerations and ignored the relevant considerations in its annulment of the statutory instrument, then its action is subject to judicial review.

[15] On the subject of immunity of the National Assembly, it is the Petitioner's submission that the immunity of the Assembly is not absolute but is subject to the Constitution and the constitutional concept of separation of powers. Referring to the National Assembly's privileges and immunities guaranteed in ***National Assembly (Privileges and Immunities and powers) Act (CAP 287),*** counsels submitted that the immunity enjoyed by the members of the National Assembly exist whilst they exercised their freedom of speech and debate while performing the functions of the National Assembly. If, however, it goes

beyond this function the Assembly would not be immune and would be subject to the review of either the Supreme Court or that of the Constitutional Court.

[16] In respect of the merits of the case, it is the submission of counsel for the Petitioner that the National Assembly had delegated its powers to the President of the Republic, but retained its public oversight role by virtue of section 64 of the IGPA. It is their contention that the grounds raised for annulling SI 18 of 2019 were beyond the exercise of the functions of the National Assembly, as the National Assembly resolution affected the public employees in the public service and the President in the exercise of the powers of the Minister responsible for Public Administration. Therefore, they submitted that the Court can and should step in, as the National Assembly has lost its immunity, by straying from its functions.

[17] On the other hand, the learned counsel for the 1st Respondent, in a written submission entitled *"HEAD OF ARGUMENTS OF THE RESPONDENT ON THE REFRERRAL ISSUE TO THE CONSTITUTIONAL COURT"*, submitted that article 125 of the Constitution applies to a body carrying out judicial or quasi- judicial functions only and that the National Assembly is clearly not created as a body to perform a judicial or quasi-judicial function. The National Assembly, being the third arm of government under the Constitution derives its powers by virtue of Article 85 and 86 of the Constitution and regarding this power, in his submission, it rules supreme.

[18] Learned counsel further submitted that s 64 (2) of the IGPA gives the National Assembly the authority to strike down statutory instruments by virtue of its legislative mandate under article 85 of the Constitution. Referring to the cases of ***Smith v Mutasa and another (1910) LRC*** and that of ***De Lille and another vs Speaker of the National Assembly (1998) SA 430,*** the learned counsel contended that though the National Assembly is subject to the Constitution, articles 85 and 86 prevent legislative acts of the National Assembly from being subject to judicial interference and that this is rooted in our democratic principle of separation of powers. Relying on the Malawian case of ***Nangwale v Speaker of the National Assembly and Another (220) MWHC 80,*** in which it was held that where the decision taken by the National Assembly was a legislative process resulting in a decision,

the decision cannot be reviewed, learned counsel therefore submitted that the power of the Seychelles National Assembly to quash the Statutory Instrument in this case is not reviewable by the court.

[19] It is the submission of the learned counsel for the 2nd Respondent that the National Assembly is subject to judicial review as the National Assembly acted as an adjudicating authority when it exercised its powers under section 64 (1) of the IGPA.

Issues for determination

[20] The question referred for our constitutional determination is extensive. The way we read it, the learned trial judge's question relates to any acts of the Assembly carried out in pursuant to any enactments made by the National Assembly, including the specific act and Act arising out of this case. Therefore besides considering the competence of the Supreme Court to adjudicate on an act of the 1st Respondent under s 64 (2) of the IGPA, the question calls upon us to also consider the Supreme Court's review powers in respect of any other possible acts of the National Assembly carried out under the Constitution; statutes and regulations, including the National Assembly's Standing Order. All being enactments empowering the National Assembly in its myriad of roles and functions. We are able to make a determination on this question. However, in order to address the wide ranging issues arising from the question whilst at the same time not losing track of the question arising out of the specific facts of this case, we have decided to address the referred question in two parts. First, this Court will consider whether a Supreme Court judge, may, sitting alone, determine the lawfulness of an act of the National Assembly carried out in pursuant to an Act of the National Assembly. In answering this question we will address the role of judiciary in scrutinising legislative acts within the principle of balance of powers. Secondly, this Court will turn to the specific facts of this case by considering whether a Supreme Court Judge, may, sitting alone, determine the lawfulness of the act of the National Assembly in annulling SI 18 OF 2019. Having addressed these two questions we would then make our final determination on the question refer by the learned trial judge for determination.

[21] It is to be noted that the reference to an act of the National Assembly in this judgment also applies to an action or deliberation of a committee of the National Assembly, set up in terms of the Constitution.

(1) Whether a Supreme Court judge, may, sitting alone, determine the lawfulness of an act of the National Assembly carried out in pursuant to an Act of the National Assembly.

[22] As part of his written objections to this referral, learned counsel for the 1st Respondent submitted that the 1st Respondent's power to quash the statutory instrument was exercised pursuant to its legislative constitutional powers under article 85 and 86 of the Constitution, of which action was lawfully permitted by the IGPA and that accordingly on the basis of the principle of separation of powers, it cannot be made reviewable by a Court of law. This submission goes to the constitutional competence of this Court or other courts and it touches the underlying principle of balance of powers between the Legislature and the Judiciary and as such has to be addressed as a matter of preliminary importance.

[23] In the case of ***Herminie and anor vs Pillay and ors, CP02/17,CP06/17, CP07/17*** the Respondents in that case, being a number of members of the National Assembly, argued that provisions of the ***National Assembly (Privileges and immunities) Act*** prevented any action or suit being taken against the National Assembly. Especially given that the concerned acts of the members of the National Assembly originated out of and during the course of deliberations of members under article 102 of the Constitution.

[24] Article 102 of the Constitution provides that, *"There shall be freedom of speech and debate in the National Assembly and a member shall not be subject to the jurisdiction of any court or to any proceedings whatsoever, other than in proceedings in the Assembly, when exercising those freedoms or performing the functions of a member in the assembly".*

[25] It transpired that in that case the Respondents had set up a non- standing committee that the Petitioners had averred was unconstitutional on the ground that it was bestowed with judicial powers by the National Assembly. The Respondents, in giving a very liberal interpretation to article 102, argued that given that the committee was set up through

members giving speeches and making deliberations under the said article and as such they cannot be sued before the Constitutional Court as this would be subjecting them to the jurisdiction of this Court for actions that were covered by the immunity provision of the Constitution.

[26] This court dismissed the objection of the Respondents principally on the ground of a person's absolute constitutional right of action to petition the Constitutional Court under article 46 (1) and 130 (1) of the Constitution and the fact the judicial powers being strictly the preserve of the judicial branch of the Republic of Seychelles under the Constitution, it could not be exercised by the National Assembly.

[27] The objections raised by the learned counsel for the 1st Respondent in the case before us, however, appears not to be founded on article 102 immunity but one founded on the larger question of separation of powers. It is more focused on the exercise of legislative powers. It is the contention of the 1st Respondent that in accordance with our constitutionally enshrined principle of separation of powers any act or step taken by it in respect of the exercise of its legislative powers, being a power exercised solely by the Legislature, it is not amenable to review by the judiciary. This objection is strenuously denied by the Petitioner.

[28] We have considered this argument and reiterate the accepted position that the Constitution separates the powers of the three arms of the state through an intricate balance of powers. Article 47 of the Constitution in defining our bourgeoning democratic society creates a balance of powers between the three arms of the state in the following terms, *"democratic society means a pluralistic society in which there is tolerance, proper regards for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary".*

[29] We agree with the learned counsel for the 1st respondent that in this balance of powers, legislative power is given only to the legislature represented by the National Assembly. Article 85 of the Constitution provides that, *"The legislative powers of Seychelles is vested in the National Assembly and shall be exercised subject to and in accordance with this constitution."* The exercise of this legislative power is in turn governed by article 86 (1) of

the Constitution, which provides 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"*.

[30] However, we also find that the exercise of the legislative power as compared to the legislative power itself is sometimes delegated by the legislature to the other arms of the state, subject to the legislature exercising its supervisory powers over those enactments and having powers to revoke this delegation. Article 89 provides that article 85 and 86 shall not operate to prevent an Act from conferring on a person or authority power to make subsidiary legislation. Accordingly, the National Assembly can through the approval of an Act give to the Executive or Judicial arm of the state, powers to make regulations. Nonetheless, the Legislature can cancel this delegation of legislative power by repealing this Act, which will effectively repeal all Statutory Instruments made under the said enactment, unless saved by the repealing Act. When it comes to supervision of delegated legislative powers, this is done under s 64 (1) of the IGPA.

[31] We also note that there are certain instances where the Constitution makes aspects of the process of exercise of the legislative power not subject to restrictions, including judicial interference. Where this is the case the Constitution specifically and explicitly provides that the exercise of those powers is not subject to any restrictions. An instance of such unrestrained exercise of powers is found in article 102 of the Constitution, which restricts judicial powers to curtail or restrict the freedom of speech or debates on the floor of the National Assembly. The Constitution has seen it fit to leave their management and control with the internal regulation of the National Assembly.

[32] This said, however, the Constitution in granting the legislative power to and the exercise of the power by the Legislature, does not otherwise oust the jurisdiction of the Court. The National Assembly being a creature of the Constitution is subject to the Constitution in accordance with the principle of the Rule of Law. All its actions or omissions should be in accordance to and in conformity of the Constitution. This is the dictate of article 5 as read with article 46 (1) and 130 (1) of the Constitution. Therefore, whilst it is enjoined with powers to legislate, it has to do it within the four corners of the Constitution.

[33] The Constitution has set the Judiciary, acting through the Constitutional Court, as its guardian. Article 129 (1) grants this Court powers to decide on matters relating to the application, contravention, enforcement or interpretation of the Constitution.

[34] Under article 130 (1) of the Constitution a person who alleges that any provisions of the Constitution, other than chapter II, have been contravened and that the person's interest is being or is likely to be affected by the contravention, may, apply to the Constitutional Court for redress. The ***"any provisions of the Constitution, other than chapter II,"*** that may be alleged to have been breached under article 130 (1), includes the provisions relating to the Assembly's legislative powers under article 85 and 86 of the Constitution. It stands to reason therefore to say that the use of and the extent of the use of the legislative power by the National Assembly is reviewable by the Constitutional Court, provided that the person making the allegation of contravention fulfils the requirements of article 130 (1) of the Constitution.

[35] It would be the Legislature, depending on the facts and circumstances raised in the Petition, to take up any defence in the suit, including that in the particular instance, the Constitution has given to it unfettered powers to act, such as provided under article 104 (1). What the National Assembly cannot say is that their legislative power is not subject to the review of the Court.

[36] It is for this reason that we hold that a legislative act of the National Assembly is subject to the scrutiny of the Constitutional Court. Any acts of the National Assembly carried out under any enactments of the Assembly are reviewable by the Constitutional Court in terms of their constitutionality, except where this court is expressly denied any power of review by the Constitution. This right to intervene would relate to matters even regarding the internal deliberations of the legislature, given the supremacy of the Constitution.

[37] On the other hand we also have the Judicial Review process in this jurisdiction. This procedure has been aptly defined by Lord Fraser **in *RE Amin (1981) 2 ALL ER P 868*** , he captured the essence of this process in the following phrase, *"Judicial review is not concerned with the merits of a decision but with the manner in which the decision was made, thus, the judicial review is made effective by the court quashing an administrative*

decision without substitution of its own decision and is to be contrasted with an appeal where the appellate tribunal substitute its own decision on the merits for that of the administrative officer".

[38] The Seychelles Supreme Court is the only court that has constitutional competence to carry out judicial review. This jurisdiction is conferred by virtue of article 125 (1) (c) of the Constitution. The review is done by a judge sitting alone and the learned judge scrutinizes the decision making process of subordinate courts; tribunals and adjudicating authorities as compared to the merits of their decisions. Article 125(1) (c) of the Constitution reads as follows;

"(1)There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this constitution, have-

> *(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction"*

[39] The Learned Judge who referred the question for our determination was exercising this judicial review competence when he did so. In order for him to exercise that supervisory jurisdiction he needed to be convinced that the National Assembly's action of quashing SI 18 of 2019 is reviewable by the Supreme Court. Here the court would not be looking at constitutional contraventions but rather at whether the National Assembly acted within the law; the legal propriety and reasonableness of its decision by virtue of article 125 (1) (c) of the Constitution.

[40] We agree with the counsel of the Petitioner that there is no express constitutional restraint in the Constitution that prohibits a single judge of the Supreme Court from exercising judicial review over an act of the National Assembly. However, this said, the powers of the Supreme Court in supervising the internal affairs of the National Assembly would be more circumvented than the powers of the Constitutional Court in reviewing its constitutionality.

[41] The limitation of the powers of the Supreme Court arise, first of all, as a result of the difference in terms of the nature constitutional review under article 46 (1) and 130 (1) and article of the Constitution as compared to judicial review under article 125 (1) (c) of the Constitution. All law; acts and or omissions of the National Assembly are measured against the strict standard of the Constitution when it comes to review by the Constitutional Court. However, when it comes to judicial review such objective standard is absent, instead, there is a judicial assessment of a decision making process in the light of parameters set down by case law. In this regard a certain amount of subjective judicial assessment arises both in terms of framing of the case and the determination of the court. These assessments may eventually conflict with that of the person that the Constitution has appointed to preside over the making of Acts of the National Assembly. When one couples this with the fact that the Legislature, as an independent arm of the state, should be enjoying a certain amount of autonomy in its decision making process, it becomes apparent why the courts have hesitated in reviewing the internal process of the National Assembly.

[42] Another limitation of judicial review is a result of the legal autonomy given by the Constitution, the laws and the standing orders of the Assembly when it comes to the internal deliberations of the National Assembly. We have seen this in article 102 of the Constitution. As a result of this institutional autonomy the Legislature have enacted the ***National Assembly (Privilege and Immunities) Act.*** A law designed to consolidate the independence of the Legislature and to protect the legislature from over interference from the other two arms of the state. Under this law members of the National Assembly have many of their constitutional privileges and immunities particularized and reinstated. These relates to their freedom of speech and debate; freedom from arrest and process service; immunity from proceedings, amongst other privileges and immunities. Section 33 of the Act, provides as follows, *"Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in the exercise of any power conferred on or vested in the Assembly, the Speaker or such officer by or under this Act".* Whilst this ouster clause will not be enough, in itself, to remove the jurisdiction of the court, it does go a long way to show how the law has attempted to limit the questioning of decisions relating to the internal deliberations of the Assembly, so as to secure the independence of the Legislature.

[43] We also find that although adjudicatory functions or power to adjudicate is something that usually lies beyond the remit of the Legislature or the Executive, they sometimes delegate to the Executive in Acts of the National Assembly, when it comes to quasi -judicial functions. Once this power is given to the Executive by an Act the latter is obliged to act judiciously, as it is given quasi- judicial powers as an adjudicating authority. The Legislature is very rarely called upon by statutes to act in that capacity. Though we note that in its executive oversight function, by summoning and questioning members of the Executive before the National Assembly a duty to act fairly and judiciously may arise.

[44] As a result, we see that the precedent of cases in which citizens have sought judicial recourse against acts of the Legislature shows that litigants have preferred the Constitutional Court route rather that the Supreme Court avenue when it comes to the scrutiny of the legislature.

[45] In this regard the following jurisprudence is instructive. In the case of ***Mathew Servina vs Speaker of National Assembly (SCA 13 /95)***, the Petitioner had sought a declaration from the Constitutional Court that the word *"Minister"* in article 69 (5) of the Constitution should be interpreted to include any person who, like himself, served as a minister under the previous constitution. In the case of ***Wavel Ramkalawan vs Republic and anor (CC1/ 2001),*** the Petitioner sought a declaration from the Constitutional Court that he had satisfied the requirement of section 15 (1) of the ***National Assembly (Privileges, Immunities and Powers) Act***, so as to be lawfully entitled to a certificate of Immunity under this Act. In another case concerning the decision of the Speaker in the case of ***Elizabeth vs Speaker of the National Assembly and another (CC 9 of 2007)***, the Petitioner invoked the jurisdiction of this court under article 130 of the Constitution alleging a contravention of Article 81 (6) thereof seeking, inter alia, a declaration that he was and continued to be a proportionately elected member of the National Assembly despite the existence of a certificate of vacancy issued by the Speaker stating the contrary. In ***Prea vs Speaker of National Assembly and anor (CC 9/2011)*** the Petitioner, being a member of the National Assembly, filed a petition before the Constitutional Court averring that the purported dissolution of the National Assembly was in contravention of article 111 of the Constitution, in that contrary to this provision, the National Assembly did not take a

resolution at a meeting summoned for this purpose. In ***Herminie and anor vs Pillay and ors(CP/02/17),*** the Petitioner had filed a Petition before the Constitutional Court seeking a declaration that the act of the National Assembly in setting up a non- standing committee usurped the function of the Judiciary. In all those cases the Constitutional Court assumed jurisdiction.

[46] Though in many of those cases issues arose with regards to the legality of the action of the Speaker of the National Assembly under an Act or the Constitution, no attempts were made by the Petitioners to seek a remedy through the supervisory jurisdiction of the Supreme Court. We have not come across any attempt by litigants to seize the jurisdiction of the Supreme Court in similar cases as this one before the court.

[47] The principle of judicial non-intervention into the internal affairs of the legislature falls within our scenario of balance of powers. The autonomy of legislative proceedings is the corollary of the autonomy of judicial proceedings. Just as the Legislature cannot make judicial decisions or attempt to intervene in the process of the making of a judicial decision, the courts cannot make laws or attempt to intervene in the process of the making of a law in an attempt to influence its final outcome. There is a fine line to be drawn between intervention to ensure procedural fairness and the Judiciary jumping into the political arena. This is shown by the following South African cases.

[48] In the South African case of ***Doctors for life International v/s Speaker of National Assembly and ors CCT12/05***, the South African Constitutional Court took the bold step of invalidating four health statutes because the National Council of Provinces had failed to fulfil its constitutional obligation to ***"facilitate public involvement"*** as a requirement of the law making process under section 72 (1) (a) and 118 (1) (a) of the South African Constitution. Acknowledging that separation of powers and the autonomy of the South African Parliament the judiciary should not interfere in its process unless mandated to do so by the Constitution. The South African Constitutional Court drew the outer boundaries of judicial powers at determining whether there has been the degree of public involvement in the law making process required by the Constitution, but leaving to Parliament the discretion how the duty is to be fulfilled. This judgment was reaffirmed in the case **of**

United Democratic Movement v Speaker of the National Assembly and ors CCT 89/17, in which the principle of intervention in parliamentary proceedings being subject to express judicial permission in the Constitution was upheld.

[49] We are of the view, therefore, that the power of judicial review by a single judge of the Supreme Court, would not be present if an Act of the National Assembly, read with the Constitution, leans in favour of autonomy of the decision making process of the Legislature. This will depend on the specific circumstances of the case, bearing in mind that limitations to judicial review by the Supreme Court may be express or by necessary constitutional implication. In these instances the Supreme Court must defer to internal oversight mechanisms within the National Assembly and constitutional privilege and immunity guaranteed to the National Assembly and its members. Where judicial review is precluded, this does not necessarily bar the initiation of a Constitutional challenge and this may require the constitutionality of enabling legislation to be clearly established and laid out, if need be, by the Constitutional Court. Judicial reviewability of decisions and acts of the National Assembly by the Supreme Court are therefore, and understandably, more limited. However, the Supreme Court does retain its jurisdiction in instances where the National Assembly acts as an adjudicating authority, in terms of article 125 (7) of the Constitution. Outside of these circumstances, the only remedy available to an aggrieved litigant would be through the jurisdiction of this Court, by the avenue of article 130 (1) and 46 (1) of the Constitution.

[50] The Supreme Court would have to decide on this issue of jurisdiction during the leave stage of the judicial review proceedings whilst considering the good faith-arguable case requirement. The Petitioner must establish as part of showing his or her utmost good faith that the Supreme Court is empowered to hear the Petition. In the event of doubt that court may refer the question for a constitutional determination under article 130 (6) or article 46 (7) of the Constitution to the Constitutional Court.

Determination

[51] We are therefore of the opinion that a single judge of the Supreme Court may in limited circumstances, sitting alone, make a determination on the lawfulness of an act of the

National Assembly carried out in pursuant to an Act of the National Assembly, provided that an Act as read with the Constitution allows him or her to make the determination. The reviewability will depend on the facts of each case, and decision, act and/or conduct in question.

(2) Whether a Supreme Court judge, may, sitting alone, determine the lawfulness of the act of the National Assembly of annulling SI 18 of 2019.

[52] Having clarified the circumstances in which the Supreme Court, sitting alone, may review the lawfulness of an act of the National Assembly, we now turn to determine whether, on the facts of the present matter, the National Assembly's annulment of SI 18 of 2019 is reviewable by the Supreme Court.

[53] This question calls for us to scrutinise the facts of this case in the light of article 125 (1) (c) of the Constitution and the provisions of the 63 and 64 IGPA in the light of the test that we have proposed in this judgment and answer the following questions,

a) Was the National Assembly acting as a subordinate court or tribunal when it purport to annul SI 18 of 2019?
b) Was the National Assembly acting as an adjudicating authority when it purport to annul SI 18 of 2019?

(a) Was the National Assembly acting as a subordinate Court or tribunal when it purport to annul SI 18 of 2019?

[54] Subordinate courts and tribunals are creatures of the Constitution. They are created and obtain their jurisdiction under the provisions of article 119 (1) (c) of the Constitution as read with article 137 of the Constitution. Article 119 provides as follows;

"119 (1) The judicial power of Seychelles shall be vested in the Judiciary which shall consist of-

(c) Such other subordinate courts or tribunals established pursuant to article 137."

[55] On the other hand article 137 lays down what should be the content of the enabling legislation which sets up those subordinate courts and tribunals. Any such enactment must be in strict compliance to the provisions of this article. Some of those constitutional constraints are for example, that those bodies must be subordinate to the Court of Appeal and the Supreme Court and that they must provide for the mechanism for appointment and removal of members of the subordinate court and tribunals.

[56] A prominent example of a subordinate court is the Magistrate's Courts established pursuant to the ***Criminal Procedure Code (CAP 54)*** and an example of a tribunal would be the Family Tribunal established by the provisions of the ***Children Act (CAP 28).***

[57] It is abundantly clear that by virtue of the provisions of article 119 (1) (c) of the Constitution that subordinate courts and tribunals are part of the Judiciary of Seychelles and not part of the Legislature. Hence, when the National Assembly, through its annulment motion, quashed the Statutory Instrument in this case, it was not and it could not have been acting as court subordinate to the Supreme Court and the Court of Appeal

[58] The National Assembly has no judicial function, it is the legislative arm of the Republic of Seychelles and at the material time was exercising its legislative power. The National Assembly's action therefore could not have been subject to a judicial review on this basis. At any rate it is not the case of any parties in this matter that this is so. This leads us to the next issue for determination.

(b) Was the National Assembly acting as an *"adjudicating authority"* when it purported to annul SI 18 of 2019?

[59] Article 125 (7) of the Constitution states that for the purposes of clause 125 (1) (c) *"adjudicating authority includes a body or authority established by law which performs a judicial or quasi-judicial function"*. This definition is not exhaustive as it does not exclude other bodies of different kinds not otherwise listed in this article. Nonetheless, from this

definition, we can exclude a body performing a judicial function as it would be a judicial body falling within the realm of a subordinate court or tribunals, being the preserve of the judiciary and specifically created as a separate category by article 125 (7).

[60] On the other hand, an adjudicating authority would first and foremost be one who engages in adjudications. According to the Cambridge English Dictionary *"Adjudication," "is the process or act of making an official decision about something, especially about who is right in a disagreement"*. On the other hand, *"Adjudicating"* is according to the same dictionary, *"to act as a judge in a competition or argument or to make a formal decision about something"*. The Court of Appeal of Sierra Leone in the case of ***All Peoples Congress and ors V/S Speaker of Parliament and ors (SLCA 3 OF 2002)***, in defining similar terms held, *"To adjudicate means to decide on; to settle; determine ;pronounce or give a ruling on. An Adjudicating authority means therefore a body exercising power to decide on; settle; determine; pronounce on or give a ruling on a particular sphere or activity"*.

[61] On the other hand the Seychelles Court of Appeal in the case of ***Doris Raihl vs Minister of National Development SCA 60 of 2009,*** citing the case ***of Chief Constable of North Wales Police v/s Evans (1982) 3 ALL ER p141,*** has given certain guidance as to how quasi- judicial powers should be exercised, albeit in the context of the Executive. It held:

> *"Administrative law is not about judicial control of executive power. It is not Government by judges. It is simply about judges controlling the manner in which the Executive chooses to exercise the power which parliament has been vested in him. It is about exercise of power within the parameters of the law and the Constitution. Such exercise of powers should be judicious. It should not be arbitrary, nor in bad faith, nor about taking into consideration extraneous circumstances."*

[62] Accordingly, we are of the view that an authority which performs an adjudication by deciding on competitive claims or disputes would be amenable to judicial review, especially if in doing so it would be affecting rights and freedoms. This may include a body or authority performing a quasi- judicial function. Such bodies or authorities are bound to act intra vires; with propriety; reasonably and generally are obliged to act with procedural fairness.

[63] Over the years the Supreme Court of Seychelles has had the occasion of pronouncing itself on whether or not a public body is or is not exercising a quasi- judicial function. This being a necessary precursor in all judicial review actions, in which the Petitioner has the obligation to prove that a person or body whose is being subject to review by the Supreme Court is exercising such kind of function before leave to proceed is granted. Though no such pronouncement has yet been made when it comes to the 1st Respondent.

[64] In the case **of *AG VS PSAB, no 2 of 1995***, the Supreme Court cited Chief Justice Woodman in the case of ***RV Superintendent of Excise and anor and the case of Ex parte Confait (1936-55) SLR 154*** and held *"That the question whether the discretion conferred is administrative, judicial or quasi- judicial is in every case a matter of interpretation of legislative enactment which confers the discretion"*. Therefore, in order for this Court to determine whether the National Assembly was exercising a quasi -judicial function or was an adjudicating authority at the time that it annulled SI 18 of 2019, we need to scrutinize the provisions of the Constitution and the IGPA under which it purported to act determine whether when it took that decision it was exercising that function as matter of its statutory obligations, whether expressly or by necessary implication.

[65] Part X of the IGPA deals with Statutory Instruments. Section 63 (1) states that, **"***A statutory instrument made after the commencement of this Act-*

(a) shall be published in the Gazette and shall be judicially noticed; and
(b) shall come into operation on the date of the publication or, if it is provided that the statutory instrument is to come in operation on some other date, on that date".

[66] Section 64 (1) on the other hand provides as follows, *"Subject to subsection (3) a statutory instrument made under an Act after the commencement of this Act shall be laid before the National Assembly"*.

[67] Section 64 (2) and (3) provide:

(2) *If the National 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 the, and approved by resolution by, the National Assembly before making of the statutory instrument."

[68] At the outset we wish to point out that though the IGPA was enacted on the 1st of September 1976, hence predating the Constitution, its provisions were saved by virtue of the 7th schedule of the Constitution. Paragraph 2(1) of this schedule saved all existing laws enacted prior to the promulgation of our democratic constitution, except laws that are inconsistent with the Constitution. Hence, the IGPA is constitutionally valid unless and until it is struck down under article 5 of the Constitution. At any rate it is not the case of the parties before us that this law is unconstitutional, therefore we do not see the need for us to consider the issue of its constitutional validity.

[69] We note also that the pertinent provisions of the IGPA has been amended and that *"the People's Assembly"* has been substituted by the term *"the National Assembly"* by virtue of the 7th schedule and that in pursuant to paragraph 5 of this schedule members of the Assembly under the previous constitution shall so far as it is not inconsistent with the Constitution continues to perform the function of their office as if they had been elected under and in accordance with the present constitution. On this issue, again, there appears to be no contest between the parties on the interpretation and effect of these transitional provisions.

[70] We are of the view that the overall effect of Section 63 and 64 of the IGPA is that all statutory instruments made under the provisions of an Act enacted by the National Assembly have to be laid before the National Assembly. Statutory Instruments are the principal form of delegated legislation or subsidiary legislations. It is a generic term and will include regulations; Rules; Notices and similar instruments made under the provisions of an Act. These sections, however, does not prescribe who lays down the instruments and when they are laid at the Assembly. The legal obligation is, nonetheless, to lay it after it

has been published. In this regard we are of the view that it has to be laid as soon as it is published in order to allow the Assembly to carry out its constitutional obligations in relation to the instruments.

[71] After it has been laid before the National Assembly, the latter has a duty to, within three months upon it being laid, vote that the statutory instrument is annulled. Once annulled the instrument ceases to be part of the laws of Seychelles and it has no effect. Nonetheless, according to section 64, whatever has been done under the instrument when it was in force continues to remain in force and having the force of law.

[72] In applying the adjudicatory test in this case, it is clear that the National Assembly was not acting as an adjudicating authority when it annulled SI 18 of 2019. To adjudicate is to make a determination on competitive claims or disputes by opposing parties. There were no claims or disputes before the Assembly which would have allowed it to make an adjudication either on the facts or the law. The Assembly as a political institution could have had "in house" competing interests, both for and against SI 18 of 2019. It appears that the Leader of Government Business was in favour of the instrument, whilst the party enjoying the majority support in the Assembly was not. However, the way that section 64 (2) reads, when a resolution is taken to annul an instrument there is no statutory obligation of weighing of those interests by the Speaker of the National Assembly. In accordance with the provisions of the IGPA, when the motion was put to vote, a vote was taken on political lines without an adjudication on the factual merits of the instrument, and source of enactment and delegation. This, we are of the view, was according to the legal provisions of section 64 of the IGPA. The only person who might have had a claim to be adjudicated upon was the Petitioner. However, the law does not give to the Minister responsible for the instrument the power to make a representation to the National Assembly that would have allowed the assembly to make an adjudication based on the merits of that representation.

[73] As regards the function of the Assembly, if its function in the particular circumstance was of a quasi- judicial nature, a right to fair hearing could have been created in favour of the proponent of the impugned statutory instrument. We have scrutinized the provisions of the Constitution and that of the IGPA in that regards. In this respect, it appears that the National

Assembly is not obliged by the Constitution or the IGPA to hear the Minister or even other third parties or members of the public before it takes a decision. And even if those persons had requested a right to be heard before a resolution was taken, the National Assembly would not have been under a legal obligation to hear them.

[74] Additionally, the provision of the Constitution or the law does not require reasons to be given before or after an annulment. The existence of the duty to give reasons for the decision may have provided sufficient grounds to the Petitioner to argue that no reasons had been provided or that the reasons show that the National Assembly acted improperly or took into consideration irrelevant considerations or failed to take relevant matters into consideration or acted otherwise unreasonably or unfairly. That again would have created quasi- judicial environment and hence attract judicial review.

[75] Statutory instruments are controlled by the National Assembly and the Supreme Court. This is done through the Assembly exercising its supervision of delegated powers given to the Executive and the Judiciary exercising its judicial powers to adjudicate on the decision making process, including the ultra vires, of the statutory instruments. These are two parallel review processes that involve both arms of government balancing the powers of the Executive. The National Assembly controls them through a negative resolution under s 64 (2) of the IGPA and the Supreme Court under article 125 (1) (c) of the Constitution. There is no allegation in the Petition that the motion that quashed the statutory instrument was ultra vires the provisions of the IGPA in this case. If that was the case this may have fallen within the Supreme Court's judicial review parameters. The allegation is, however, that the National Assembly was abusive in the exercise of its use of its constitutional powers to control the instrument and in that regard is judicially reviewable. These averments cannot be sustained in this case for the reasons given in this judgment. We are of the view that the most appropriate forum should have been the filing of a Constitutional Petition against the Legislature, something that has been done subsequently to the filing of the judicial review petition.

[76] We wish to highlight here that we are limiting our judgment to the question referred to us by the learned judge, which is limited to a question of constitutional competence. We have

not ventured to decide on the constitutionality of the merits act of the National Assembly in annulling a statutory instrument of the Executive, in the larger constitutional context of the Constitution, which is subject to the constitutional petition CC8 of 2019, that is *pedente litis* before this very bench of the Constitutional Court

Determination

[77] Therefore, we determine, based on the specific facts of the case, that the Supreme Court sitting alone could not have made a determination on the lawfulness of the action of the National Assembly in annulling SI 18 of 2019.

Final determination

[78] In our final determination we declare that a Supreme Court Judge, may, sitting alone, determine the lawfulness of an act of the National Assembly carried out in pursuant to an Act of the National Assembly, in certain circumstances and subject to certain conditions set out in this judgment. However, on the specific facts of this case, the Supreme Court, sitting alone, cannot determine the lawfulness of the act of the National Assembly carried out in pursuant to the Act of the National Assembly.

Signed, date and delivered at Ile du Port on the 17th day of September 2019.

R.GOVINDEN G.DODIN L.PILLAY