

THE SEYCHELLES LAW REPORTS

**DECISIONS OF THE SUPREME COURT,
CONSTITUTIONAL COURT AND COURT OF APPEAL**

2016

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THE SEYCHELLES JUDICIARY

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THE SUPREME COURT (AND CONSTITUTIONAL COURT)

Hon M Twomey, Chief Justice
Hon D Karunakaran
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Hon F Robinson
Hon E De Silva
Hon C McKee
Hon D Akiiki-Kiiza
Hon S Govinden
Hon S Nunkoo
Hon M Vidot
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REPUBLIC v HOSSEIN

G Dodin J
20 January 2016

[2016] SCSC 129

Piracy – No case to answer

The accused were charged with piracy. At the close of the case defence counsel questioned the credibility of the evidence adduced. The defence submitted that the prosecution had established no case to answer.

JUDGMENT Plea rejected.

HELD

- 1 If a prima facie case against the accused is established, the plea of no case to answer is liable to be rejected.
- 2 A submission of no case to answer is entertained if the evidence is tenuous in nature ie an essential element of the offence charged is absent or there is inconsistency in the evidence adduced or the evidence is manifestly unreliable.
- 3 In determining whether the submission of no case to answer should succeed, the Court is not required to consider all the evidence adduced in detail or to consider whether the prosecution has proved its case beyond reasonable doubt. It suffices that the Court finds that the evidence adduced is sufficient to establish a prima facie case against the accused persons. If there is some doubt as to the veracity or accuracy of the evidence against any accused, the Court should leave such consideration to be made in its final judgment at the end of the trial.
- 4 Where the evidence being considered has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case would succeed.

Legislation

Penal Code, ss 4(a)(b), 22, 65(1)

Cases

Green v R (1972) SLR 54
Nur Robble and Ors v Rep SCA 19/2013
R v Marengo (2004) SLR 166
R v Matombe (2006) SLR 32
R v Olsen (1973) SLR 188
R v Stiven (1971) SLR 137

Foreign Cases

R v Galbraith [1981] 1 WLR 1039

Counsel D Esparon for the Republic
 S Muzaffer State Counsel
 M Vidot for the accused

DODIN J

[1] The five accused persons Mohammed Ali Hossein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan and Salad Dahir Jimaale stand charged as follows:

Count 1

STATEMENT OF OFFENCE

Piracy, contrary to s 65(1) and 4(a) of the Penal Code, as read with s 22 of the Penal Code.

PARTICULARS OF OFFENCE

Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dahir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the *Shane Hind*.

Count 2

STATEMENT OF OFFENCE

Piracy, contrary to s 65(1) and 4(b) of the Penal Code, as read with s 22 of the Penal Code.

PARTICULARS OF OFFENCE

Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dahir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention, committed an act of piracy, by voluntarily participating in the operation of a ship, namely the *Shane Hind*, with knowledge of fact making it a pirate ship.

Count 3

STATEMENT OF OFFENCE

Piracy, contrary to s 65(1) and 4(a) of the Penal Code, as read with s 22 of the Penal Code.

PARTICULARS OF OFFENCE

Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dahir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the M/T *Nave Atropos*.

[2] Counsel for the accused persons moved the Court at the close of the case for the prosecution to find that the accused persons have no case to answer and to acquit them of all counts accordingly. Counsel submitted that the principles for the consideration of a submission of no case to answer is grounded in the English case of *R v Galbraith* [1981] 1 WLR 1039 in which it was held that for such a submission to succeed, the court should be satisfied that:

- 1 there is no evidence that the crime was committed by the accused; or
- 2 the evidence adduced is so inconsistent and tenuous in nature, or
- 3 a jury properly directed could not properly convict upon such evidence.

[3] Counsel submitted that the principle laid down in *R v Galbraith* has been adopted in numerous cases in Seychelles and referred the court to the cases of *R v Stiven* (1971) SLR 137, *R v Olsen* (1973) SLR 188, *R v Marengo* (2004) SLR 166 and *R v Matombe* (2006) SLR 32.

[4] Counsel submitted that in the present case the accused persons are not contesting the alleged attack on the *Nave Atropos*, but they are denying that they carried out such an attack. They maintain that they are being wrongly accused. In all there has been no evidence that has been laid before the court that conclusively establishes that the accused persons perpetrated the attack on the *Nave Atropos* and committed an act of piracy against the *Shane Hind*.

[5] Counsel submitted that the prosecution called a number of French naval officers. They included Jean-Marc Le Quilliec, Guillaume Marin, Benoit Prioul, Romain Lacoste and Louis Marie Leroy. They were all on the *Siroco*. Jean Marc Le Quillet was the Commanding Officer whilst others were helicopter pilots or formed part of the boarding team, save for Louis Marie Leroy who is the legal advisor.

[6] The alleged attack on the *Nave Atropos* happened in the evening as Alan Tweed and Oliver Faulkener, both security officers on board the *Nave Atropos* confirmed. They stated that they had to use night vision goggles after they had heard gunshots in order to see what was happening. They concluded that there were four or five people on board a skiff firing the shots but they could not make out the identity. Neither did they suggest that the attackers resembled Somalis. Messrs Tweed and Faulkener were the ones who came the closest to the alleged attackers.

[7] Counsel submitted that the Japanese pilots who made depositions before Court also confirmed that it was night time and that night vision goggles and infrared equipment had to be used due to limited visibility. They only spotted the *Shane Hind* and the attack and the vessel that had reported the same had already been repulsed.

[8] Counsel submitted that the prosecution's case that the attack on the *Nave Atropos* must have been carried out by the skiff found alongside the *Shane Hind* is based on the testimonies of the Japanese and French pilots that their search suggested that there were no other vessels within the proximity of the *Nave Atropos* that could have launched the attack.

[9] Counsel submitted that the French and Japanese navy personnel gave evidence to the effect that from the radar and GPS plotting the only vessel within proximity of the *Nave Atropos*, able to have mounted the attack was the *Shane Hind*. Counsel submitted that even if such is admitted by court as credible evidence, it does not conclusively establish that the accused were the ones who launched the attack as there were several other men on the *Shane Hind*. The defence contention is that the French naval officers who made depositions that the attackers were Somalis were being prejudicial to simply assume that the accused persons conducted the attack.

[10] Counsel submitted that it should never be assumed that acts of piracy are carried out by Somalis only. He submitted that there is need for conclusive evidence that link the accused persons to the crime. He submitted that in this case the prosecution failed to establish the connection of the attack on the accused persons.

[11] With respect to the exhibits, counsel submitted that the several items produced did not in any material and conclusive way link them to the accused. The mobile phones were produced but not with any SIM cards that would make a connection with Somalia. Two rifle butts were produced and 28 bullets but with no connection to the accused persons.

[12] Counsel submitted that even though Jean-Marc Le Quilliec and Louis-Marie gave evidence to the effect that the accused were fingerprinted no prints were lifted from the aforementioned items that could connect the accused persons to the crime. Romain Lacoste who led the boarding team stated that the items were shown to the Indians who alleged they belonged to the Somalis and yet the Somalis were never confronted with the various items seized. There were not only Somalis on the *Shane Hind* but Indians in majority and to conclude that these items belonged to the accused persons was prejudicial and unsafe.

[13] Counsel submitted that according to Benoit Prioul, after the joint operation with the Japanese was mounted to have the *Shane Hind* stopped so that the French boarding team could board it "the crew" stopped the boat. However, according to the prosecution's case, the accused had mounted an act of piracy on that dhow and that the crew had been suppressed and not in control. Therefore if it was the crew that stopped the dhow, this suggests that the crew were in complete control of the dhow and not the Somalis, thus dispelling suggestions that the Somalis had committed an act of piracy against the *Shane Hind*.

[14] Counsel submitted that with regards to the items that were seen thrown overboard, the inference made by the prosecution was that the items were arms thrown overboard by the accused persons and apart from such inferences there is nothing more to lend credence to this hypothesis. Counsel submitted that the defence maintains that such allegation of items being thrown overboard was not supported by the video evidence that was produced. Counsel submitted that even if the Court was to conclude to the contrary there is complete uncertainty as to who threw and what items were thrown overboard.

[15] Counsel submitted that the testimony of the French witnesses that according to the Indians on board the *Shane Hind*, the Somalis had attacked their vessel and were in control, not one Indian from the *Shane Hind* has been called to give evidence. That in itself weakens the prosecution's case tremendously as the prosecution failed to link the accused to the crime.

[16] Counsel concluded that based on the evidence adduced before the Court, a reasonable jury properly directed will not be in a position to convict the accused persons. Therefore, counsel moved the Court to uphold the defence's submission and to declare that the accused persons do not have a case to answer.

[17] Counsel for the prosecution submitted that it is trite law that a submission of no case to answer may properly be upheld when there has been no evidence to prove an essential element of the offence charged or when the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict relying on it.

[18] Counsel submitted that in this case the prosecution has established a prima facie case in respect of the offences charged and that the above principles established in the case of *R v Stiven* have not been established by the defence in its submission of no case to answer.

[19] Counsel submitted that the attack on the *Nave Atropos* was witnessed by Allan Tweed and Oliver Faulkener who gave evidence that the attack came from a skiff having four to five people on board. The skiff came from a dhow, the *Shane Hind*, which was being used by the Somalis at the time as a mother ship. There is evidence that after the attack the skiff and the dhow were monitored visually and on radar until the Japanese navy vessel the *Samidare* and the helicopter from *Samidare* arrived and the position of the dhow and skiff were relayed to them.

[20] Counsel submitted that the evidence of Nozaki Tetsuya Hata Yusuke and Yasue Daisuke and Yamaguchi Hiroshi from the Japanese navy established the continuity of evidence from the time the *Nave Atropos* was being attacked until the French vessel the *Siroco* took over the scene. The evidence showed that there was no other vessel in the vicinity that fits the description of the dhow but only large vessels like cargo vessels.

[21] Counsel submitted that Lieutenant Benoit Prioul, the French helicopter pilot, gave evidence that he took over the surveillance of *Shane Hind* and the skiff from the Japanese navy aircraft which had transmitted the position of *Shane Hind* to him and the description of the dhow and skiff and kept both under surveillance until the boarding team from the *Siroco* had boarded. He was also the witness who observed that there were objects being thrown overboard. He also maintained that there were no other vessel in the vicinity that fits that description of the dhow in that position given by the aircraft from the Japanese navy although there were other large cargo vessels.

[22] Counsel submitted that there is also the evidence of the boarding team led by Romain Lacoste that objects being were being thrown from the deck of the dhow. The said Roamin Lacoste testified that he heard calls made in English through the VHF radio saying "help me", repeated several times. He testified that when they boarded the vessel everyone was on deck and the Indian crew were separated from the Africans.

[23] He gave evidence to the fact that 2 rifle butts were seized on the ship and 9 cartridges 7.62 mm calibre. Jan Marie Le Quilliec, the Captain and commanding officer of the French naval vessel *Siroco* gave evidence to the fact that when the dhow stopped he could hear the radio VHF 16 request "11 Indians on board and five Somali people please help" and Somali surrender, "Sir, please help". He then ordered the boarding team to board the *Shane Hind*.

[24] Counsel referred the Court to the case of *Nur Robble and Ors v Rep* SCA 19/2013 maintaining that in that case the Republic has established a prima facie case against all accused persons to answer the charges in respect to the attack against the *Nave Atropos* and the attack against the *Shane Hind*.

[25] Counsel hence move the Court to find that all accused persons in this case has a case to answer and to dismiss the submission of no case to answer.

[26] In determining whether the submission of no case to answer should succeed, the Court is not required to consider all the evidence adduced in detail or to consider whether the prosecution has proved its case beyond reasonable doubt. It suffices that the Court finds that the evidence adduced is sufficient to establish a prima facie case against the accused persons and if there is some doubt as to the veracity or accuracy of the evidence against any accused, the Court should leave such consideration to be made in its final judgment at the end of the trial.

[27] Nevertheless where the available evidence being considered has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case would succeed.

[28] Lord Lane CJ made a very pertinent statement on this issue in the case of *R v Galbraith* [1981] 1 WLR 1039:

How then should a judge approach a submission of ‘no case’?

If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will, of course, stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

See also the cases of *Green v R* [1972] No 6, *R v Stiven* [1971] No 9 and *R v Olsen* [1973] No 5 where the same principles have been applied and maintained.

[29] In this case Jean-Marc Le Quillec, the commanding officer of the French navy vessel *Siroco*, testified that on 17 January 2014 at around 2100 hours his vessel received information that a vessel *Nave Atropos* was under attack by pirates in a skiff. The next day they received information that a dhow towing a skiff had been located by a Japanese helicopter and the position was given to the *Siroco*'s helicopter crew which also subsequently located the dhow now known to be the *Shane Hind*. He testified that from the time they were informed of the attack to the time the boarding team boarded the *Shane Hind* there were no similar vessels within a 60 nautical mile radius of the *Shane Hind*.

[30] A boarding team from the *Siroco* was sent to board the *Shane Hind* the next day and the boarding team did so unopposed. The *Shane Hind* was searched and several objects were found and seized. The five accused persons were also detained and taken on board the *Siroco* and were eventually taken to Seychelles where they were handed over to the Seychelles authorities.

[31] Guillaume Marin, a crew member of the helicopter from the *Siroco* testified that the helicopter took off from the *Siroco* at around 1116 hours on 18 January 2014 and located the dhow *Shane Hind* at position 16°38N 0553° E at 1156 GMT and they observed at a distance until 1215 GMT when they approached the vessel at the same time as the boarding team. He also took photographs and filmed the activities on the *Shane Hind*.

[32] The witness testified that he witnessed at least five objects being thrown overboard but he could not identify what these items were. He also clearly identified 2 groups of people on the *Shane Hind* with five persons in one group and 10 persons in another group. The helicopter crew placed one smoke marker to mark the position where items were thrown overboard and after the boarding team was on board, the helicopter returned to the *Siroco*.

[33] Lieutenant Benoit Prioul testified that he was the pilot of the helicopter that carried Guillaume Marin and other crew members to recuperate the vessel *Shane Hind*. He maintained that even if he was aware that photographs and recordings were being made he was more focused on maintaining the helicopter's position and piloting the same than conducting observations of the operation.

[34] Romain Lacoste testified that he was the boarding team leader from the vessel *Siroco* and that he led a team of 7 persons to board the dhow *Shane Hind*. On approaching the *Shane Hind*, he witnessed objects being thrown overboard. He could not identify what the objects were but he could also see the splashes. He testified that as they got closer to the *Shane Hind* they contacted it by radio. The *Shane Hind* stopped its engine and the words "help me sir" were heard over the radio.

[35] He testified that upon boarding the *Shane Hind* he observed one group of 10 persons of Indian origin and a separate group of five who were of African origin on the deck. Another man approached him and informed him that he was the master of the *Shane Hind*. He ordered his team to secure the vessel and then to search the vessel. The search found amongst other items, a plastic container which contained cigarettes, torches, a pouch containing nine bullets and medicines. In a plastic bag on a bed there was a piece of a gun. All the persons were kept on board the *Shane Hind* until the legal officer had interviewed them and taken statements. The five Somalis were then taken to the *Siroco* and the Indians were left on the *Shane Hind*.

[36] Louis-Marie Leroy testified that he is a legal adviser 1st class in the French Navy and that in January 2014 he was ordered by the captain of the *Siroco* to go onto the *Shane Hind* to conduct investigations which he did with an assistant. He boarded together with the second group of the boarding team after the boat had been secured by the 1st group of the boarding team. He also noticed two distinct group of persons on board; one group of five persons of African origin and one group of Indian origin and two other persons of Indian origin, one of whom later identified himself as the captain of the *Shane Hind*, were talking to the boarding team leader.

[37] His investigation showed that the documents of the *Shane Hind* were all in order and the vessel was properly licensed. He was given an ammunition shell and he also found cell phones, a satellite phone and a GPS device. The satellite phone was returned to the Indian crew who claimed it was theirs and the other items were kept as exhibits. When he returned to the *Siroco* he was handed other items including two rifle butts, nine bullets in a red plastic. All were marked and produced as exhibits.

[38] The witness also interviewed the five accused persons whom he identified as the same persons who were apprehended on board the *Shane Hind*, namely Mohammed Ali Hossein, Abdulkader Mohamed Hassan, Abdule Ali Abdullahi, Ali Dhir Hassan, and Salad Dahir Jimale. He also took possession of the photographs and recordings made during the operation which were viewed and admitted as exhibits by the Court.

[39] Tetsuya Nozaki, and Lieutenant Yasuke Hata both Japanese navy helicopter pilots based on the Japanese vessel *Samidare* testified that they were tasked with locating a dhow and a skiff which had attacked the vessel *Nave Atropos* around 9 pm on 17 January 2014. Tetsuya Nozaki took off 20 minutes later and located the *Nave Atropos* about 2 hours later whilst Lt Hata remained on the *Samidare* and co-ordinated the operation as well as attempted to contact the vessels.

[40] From the information gathered by the helicopter they concluded that there was no other vessel in the vicinity of the *Nave Atropos* except one dhow towing a skiff. They took photographs and at 2040 hours they lost sight of the dhow. They took the helicopter back to the vessel for refuelling and then returned to the location and after some time located the dhow and again, the radar revealed no other similar vessel in the area. After they returned a second time to the *Samidare*, another crew went out to continue the mission.

[41] Petty Officer Yamaguchi Hiroshi and Lieutenant Commander Yasue Daisuke were both based in Djibouti and took part in the operation to locate the *Nave Atropos* and the vessel that had attacked it. They were conveyed to the area of the attack by a P3C Orion aircraft. Petty Officer Yamaguchi Hiroshi took photographs and was the lookout. He testified that at the co-ordinates they were given he observed a dhow towing a skiff and there were about 13 persons on the dhow but much of its deck was covered with a blue sheet and a yellow or orange sheet.

[42] Lieutenant Commander Yasue Daisuke maintained that they did not observe anything being thrown overboard and that they observed some other vessels in the area but none similar to the *Shane Hind* or towing any skiff. All the information was passed to the French vessel *Siroco* which they had been informed had been tasked with the interception of the dhow.

[43] Dr Sameera Anuruddha Gunawardena, Dr Asela Mendis, Dr Jayanie Bimalka Weeratne and Dr Udari Apsara Liyanage testified that they were tasked with establishing the approximate ages of the five accused persons through forensic and radiology analysis. At this stage their findings are not relevant to determine whether any of the five accused persons has a case to answer. Their testimonies will only be considered if the Court finds any accused persons to have a case to answer and their ages have a bearing on their culpability.

[44] Alan Robert Tweed testified that in January 2014 he was escorting the *Nave Atropos* from the Port of Eden through the Suez Canal and on 17 January at around 2205 hours he was called to the bridge where he met the operator and suddenly he heard gunfire. Together with the watch officer, they used night vision devices and as it was a full moon,

the visibility was good. He observed a dhow about 3 nautical miles away with no lights and a skiff approaching their vessel. The skiff was splashed with laser and in return the persons on the skiff fired their weapons at the *Nave Atropos* in bursts of three to five rounds. As an ex-marine in the Royal Navy, he was trained to identify different weapons being fired and he identified the sound of the weapons as AK47.

[45] The witness added that immediately after they were fired upon he issued the person on the watch with a weapon and ammunition as well as the other members of the team who had arrived. There were further bursts of gunfire and from the noise it was obvious that the firing was getting very close so he gave orders to the team to return fire which they did and the skiff then changed direction. They observed the skiff return to the dhow and they also kept monitoring the position of the dhow by radar and communicated the position to the centre of operations in the UK.

[46] The other witnesses were Seychelles police officers who participated in the handing-over of the five accused persons and the exhibits to the Seychelles police and they conducted the formalities required to arrest, detain and charge the accused persons. Their respective testimonies were not challenged or contradicted.

[47] Having considered the evidence, the Court must determine whether the prosecution has established a prima facie case against all five accused persons. Two main issues need to be addressed in making this determination. The first is whether a prima facie case of piracy has been established and the second is whether the prosecution has established a prima facie case that the five accused persons are the five persons who attacked the *Nave Atropos* and the *Shane Hind*.

[48] The offence and definition of piracy under s 65 of the Penal Code as amended by Act 2 of 2010 of the Penal Code are as follows:

- (1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.
- ...
- (4) For the purposes of this section “piracy” includes –
 - (a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
 - (ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State.
 - (b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or
 - (c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within the maritime zone of Seychelles, would

have been an act of piracy under either of those paragraphs.

- (5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if-
- (a) It has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
 - (b) It is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

[49] Although in a criminal trial, the standard that must be met by the prosecution's evidence to prove guilt is proof beyond reasonable doubt that the accused person committed the offence charged, when an accused seeks an acquittal on account of having no case to answer, the standard of evidence to be assessed by the Court is not proof beyond reasonable doubt but whether the prosecution has established a prima facie case against the accused person.

[50] In the actual case there is evidence that all five accused persons were on board the *Shane Hind* in a separate group from the other persons of Indian origin. There is also evidence that an armed attack was made against the *Nave Atropos* by 4 men in a skiff and that that same skiff returned to the *Shane Hind*. The *Shane Hind* was kept under observation from that point onwards until it was boarded by personnel from the French vessel *Siroco*. There is evidence, although I agree with counsel for the accused persons that the evidence in this regard is weak, that the five accused persons were in control of the *Shane Hind*. I am satisfied that the evidence of all the prosecution witnesses was not so seriously discredited that the Court could not rely on such evidence.

[51] At this point it is immaterial whether it was the five persons charged who actually fired weapons at the *Nave Atropos* or whether they formed part of a larger group with common intention who conducted the actual attack. Whether there is enough evidence to link the five accused persons to the offences charged so as to secure a conviction should be left to be determined at the end of the trial when the weight of the evidence would be assessed.

[52] Consequently, I am satisfied that the prosecution has established a prima facie case that all five accused persons were participants in committing the offences charged, namely:

- i. That Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dajhir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the *Shane Hind*.
- ii. That Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dajhir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention,

committed an act of piracy, by voluntarily participating in the operation of a ship, namely the *Shane Hind*, with knowledge of fact making it a pirate ship; and

- iii. That Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dajhir Jimaale between 1 January 2014 and 18 January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the M/T *Nave Atropos*.

[53] I, therefore, find that the five accused persons have a case to answer on each count. Consequently this motion to declare that all five accused persons have no case to answer fails. The accused persons are hence called upon to make their defence accordingly.

REDDY v RAMKALAWAN

M Twomey CJ
26 January 2016

[2016] SCSC 31

Succession – Donations - Quotité disponible

The plaintiffs sued the defendant for their share in land comprised in the estate of their mother. They sought a declaration that the transfer of the property to the defendant was a gift *inter vivos* disguised as a sale and that three quarters of the total asset value of the property be returned to the hotchpot pursuant to art 922 of the Civil Code to be shared equally between the plaintiffs and defendants and an order that the Land Registrar rectify the register. In the alternative, they sought monetary compensation from the defendant to reflect the shares they would have been entitled to.

JUDGMENT For the plaintiffs.

HELD

- 1 An action for the reduction of a gift and its return to the hotchpot is an action relating to the value of the donation to the succession, and not the actual donation itself. It is not the immoveable property that is the subject of the action but the value of the immoveable property.
- 2 There is no question of returning the immoveable property itself to the hotchpot. It is the value of the property in excess of the *quotité disponible* that must be returned.

Legislation

Civil Code, arts 526, 913, 918, 920, 922, 931, 1048, 2262, 2271(1)

Cases

Clothilde v Clothilde (1976) SLR 247

Hoareau v Contoret (1984) SLR 151

Pragrassen v Vidot (2010) SLR 163

Foreign Legislation

French Civil Code

Loi n°2006-728 du 23 juin 2006, art 9

Counsel B Hoareau for plaintiffs
 B Georges for defendant

TWOMEY CJ

[1] In an amended plaint dated 15 January the 1st and 2nd plaintiffs, the sister and half-brother of the defendant respectively, sued the defendant for their shares in land comprised in Parcel V12164 of the estate of their mother, the late Eva Kitty Ramkalawan, (the deceased). The property had been transferred by the deceased on 31 January 2008 to the defendant.

The Claim

[2] The plaintiffs averred that that the transfer of the property to the defendant purported to be a sale but was in reality a disguised sale (*donation déguisée*). As only one quarter of the estate could be legally disposed by gift *inter vivos*, the transfer of all the property to the defendant had effectively disinherited them of their share in their mother's estate.

[3] They prayed for a declaration that the transfer of the property to the defendant was a gift *inter vivos* disguised as a sale, that three quarters of the total asset value of all property existing at the time of death of the deceased be returned into the hotchpot pursuant to art 922 of the Civil Code of Seychelles to be shared equally between the plaintiffs and the defendant, and an order that the Land Registrar rectify the register of Parcel V12164 to give effect to the declaration as prayed for. In the alternative, they prayed for monetary compensation from the defendant to reflect the shares they would have been entitled to in the property existing at the time of death of the deceased. Or any order the Court would be pleased to make in the circumstances of the case.

[4] The defendant in his statement of defence stated that the plaintiffs' claim was time-barred. He also denied that the transfer was a *donation déguisée* and that the transfer was in respect of the land only as the house belonged to the defendant. He added that the sale of the land was valid and for value and prayed for dismissal of the suit.

The Evidence

[5] The 1st plaintiff testified. She gave evidence that the defendant had been appointed executor of their mother's estate and that he had sent an inventory of the accounts of the estate to her. The total value of the estate according to the inventory was R116, 52.17 but the expenses amounted to R101, 180. The transfer of their mother's property was dated 31 January 2008. She produced e-mails from the defendant dated August 2008 informing her of the demolition of the old family home and the progress of the new house being built. She testified that she did not know the property had been transferred to the defendant and that she brought the court case in an attempt to regain her rightful share of the property.

[6] In cross-examination, the 1st plaintiff admitted that she had not been on speaking terms with her mother at the time of her death and that she had previously fallen out with her brother, the defendant, as well. She also admitted that she was fully aware that the family home was being demolished and a new house constructed by the defendant with his own funds.

[7] Mr Stanley Valentin, a quantity surveyor with about eight years' practical experience also gave evidence. He testified that he was requested to carry out a valuation of the property at Serret Road, St Louis and that although he valued the land, he included the existing retaining and boundary walls in the valuation as these had been built before the defendant constructed the new house. He stated that he made two valuations, one for the property in 2008 and another for 2012. His valuation for the property in 2008 was made based partly on photographs provided to him. The 2008 valuation included the house standing on the property at the time before it was demolished to make way for the new house built by the defendant. Mr Valentin also valued the property without the house in 2012. For reasons that will become obvious the valuation of the property in 2008 has no consequence for this case.

[8] At this stage of the proceedings the trial judge de Silva left the jurisdiction. Both parties elected to have the case heard by a different judge but adopting the evidence already led in the matter. Transcripts of these proceedings were produced formally by the Deputy Registrar. The cross-examination of Mr Valentin was therefore conducted before me. He was a voluble witness given to long explanations perhaps best summarised in the words of Blaise Pascal, the French mathematician and philosopher:

Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.

[9] He was challenged as to the valuation he had carried out. The difference between market value and property value was at issue. The defendant's counsel, Mr Georges put to him that he had been asked to value the property but instead his report gave a market value for the property. As I understand it, properly put the difference between market value and appraised value is that the former is largely dependent on the asking price at the time of sale whereas the latter is based on gathered data and the judgement of the professional conducting the appraisal. The former is consumer driven, the latter is expert driven. He would not commit on the difference between the two. He also gave valuable and devaluable factors for his valuation although these factors or their impact were not satisfactorily explained.

[10] Mr Valentin was adamant that the valuation he had submitted would remain the same even if the values for the boundary and retaining walls were also deducted. This is evident in his testimony as recorded at Page 15 -16 of the court transcript of the proceedings of 24 November at 10 am:

Q. Here is what the court ordered you to do: "this court authorises Stanley Valentin in his capacity as an expert in evaluating properties to inspect only the land comprised in the title number for the purpose of evaluating the land and to

ascertain the market value of the land.” Why didn’t you do that what the court asked you to do...?

A. My excuse. I didn’t see the court order.

Court: Mr Valentin I need to interject at this stage. Having heard the contents of the court order would you be willing to change the valuation?

A. It will change my presentation but will not change the quantities of pricing.

...

Q. ...The value of the land as reached by you will not change because you removed the boundary wall and the house.

A. No.

Q. It will remain the same.

A. Yes.

Q. So the court can work with that figure.

A. It is justified yes.

And in re-examination by Counsel, Mr Hoareau at Page 21:

A. If I am asked to minus the external works, remove the external works, remove the dwelling house, we are left with the land only.

[11] No other valuation was produced by either party and the court is left with the unenviable task of making its own assessment of an unsatisfactory valuation report and a witness that was equivocal to say the least. His valuation of the property in 2012 without the frills mentioned above is R1,546,600 and that is the only figure this court can take into account for the purposes of this case and also given what he was ordered to do.

[12] The defendant was then called on his personal answers. He testified that the payment of R50, 000 for the land he purchased from his mother was done in instalments - she would ask for sums of money and would use them as gifts to her grandchildren or for the purchase of a bed. He added that in the end the price paid was much more than the transfer price described in the deed.

[13] The defendant then gave evidence in support of his case. He testified that he was an Anglican priest and after getting married lived in the priest’s house at Bel Eau, then went to university and on his return moved in with his mother. The family home they lived in had been built by his father from scratch. After his father passed away they took the decision to pull it down as it was in a bad state. He built the new house with his own funds and built separate quarters therein for his mother. His sister, the 1st plaintiff, was kept informed of the progress of the construction. He did not tell his brother, the 2nd plaintiff, as they were not on speaking terms. The new house was meant to be a family home whenever the family came to Mahé. He added that they were still welcome to build on the land.

[14] In cross-examination, he was adamant that the transfer price of R50, 000 for the property was genuine, that the transfer was not a gift disguised as a sale. In answer to a question put by the Court he stated that if there had been no court case his siblings would have had access to the house during their life time.

The Law – Prescription

[15] Before addressing the issue of whether or not the transfer from the *de cujus* to the defendant was a disguised sale, I must address the issue of prescription as raised by the defendant. In a plea in *limine litis*, Mr Georges for the defendant submitted that since the transfer of Parcel V12164 from the deceased to the defendant was effected on 31 January 2008 and the plaintiffs deemed to have had notice of it, the cause of action in this suit would have been prescribed five years thereafter, that is 31 January 2013. This is not a valid argument as before registration the transfer only bound the parties to the transfer. However, the argument would be better made if the date of registration of the transfer, that is 8 May 2008, was used as the starting point for deemed notice to the plaintiffs. As the suit was filed on 14 November 2013, the plaintiffs were, it would seem, clearly out of time. Presumably Mr Georges is relying on art 2271(1) of the Civil Code which provides:

All rights of action shall be subject to prescription after a period of five years except as provided in arts 2262 and 2265 of this Code.

Article 2262 provides:

All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.

[16] To ascertain the correct prescriptive period applicable to an action it is necessary to classify it. At first blush, Mr George's submission is untenable since it would appear that this is a case involving property and therefore it would be the prescriptive period for immoveables that should apply. Title I of Book II of the Civil Code distinguishes between immovable and moveable property. Article 526 provides:

Immoveable by reason of the property to which they apply are:
A usufruct relating to immovable property;
Easements;
Actions to recover immovable property.

But art 918 states:

The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This

calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line. [Emphasis added]

[17] The perceived conflict between arts 526 and 918 has been the cause of much argument in establishing the prescriptive period in actions for excessive gifts where the gift is immovable property. The Civil Code does not state the position clearly. In the absence of clear legislative direction, the Court has sought to balance the conflict between what may be perceived as an action to recover property and an action to recover the value of the property.

[18] There is now a *jurisprudence constante* not only in France and in Seychelles but in other countries where the French Civil Code has formed the basis of civil law to the effect that an action for the reduction of a gift and its return to the hotchpot or collation as it is called in Louisiana, is regarded as an action relating to the value of the donation to the succession, and not in terms of the actual donation itself. Hence it is not the immovable property that is the subject of the action but the value of the immovable property. In France the prescriptive period is now statutorily fixed by art 9 of the Loi n°2006-728 du 23 juin 2006 which specifies

Le délai de prescription de l'action en reduction est fixé à cinq ans à compter de l'ouverture de la succession, ou à deux ans à compter du jour où les héritiers ont eu connaissance de l'atteinte portée à leur réserve, sans jamais pouvoir excéder dix ans à compter du décès.

[19] It might be an opportune time for our laws to specify the same. In any case Mr Georges has therefore rightly submitted in terms of Seychellois jurisprudence that the twenty year prescription provision does not apply. He has relied on the decisions in *Clothilde v Clothilde* (1976) SLR 247 and *Hoareau v Contoret* (1984) SLR 151.

[20] But that is not the end of the matter. As submitted by Mr Hoareau for the plaintiffs, the five year prescriptive period is not triggered by the transfer of the property but rather by the death of the *de cujus*. Both *Contoret v Contoret* (1971) SLR 257 and *Hoareau v Contoret* (supra) are authority for the principle that the heirs' rights vest at the moment of death. Hence it was only on the death of the *de cujus*, Mrs Eva Ramkalawan, on 18 February 2012 that the five year prescriptive period began to run. As the suit was first filed in 2014 and amended in 2015 it was clearly within time.

The Law – Donations *inter vivos* and rules of succession

[21] An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see art 931, Civil Code of Seychelles). Similarly the *de cujus*

can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the heirs are not satisfied. These rules are distilled from the provisions of the following articles of the Civil Code:

Article 913: Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1. Nothing in this article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

Article 918 : The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.

Article 920: Dispositions either inter vivos or by will which exceed the disposable portion shall be liable be reduced to the size of that portion at the opening of the succession.

Article 1048(1). The property of which fathers and mothers are at liberty to dispose may be given by them, as a whole or in part, to one or more of their children, whether by an act *inter vivos* or by will, subject to their obligation to pass that property on to the children born or to be born of the said donees in the first degree only.

(2). It shall also be lawful for any person by deed inter vivos or by will to give, devise or bequeath to his legitimate child the whole or part of the reserved portion accruing to such legitimate child or to give, devise or bequeath to his natural child the whole or part of the portion which would have accrued to such child upon intestacy....

[22] Article 918 creates an irrebuttable presumption in favour of disinherited heirs – a donation to one entitled to succeed to the exclusion of others who are also entitled to succeed shall be reduced if it exceeds the disposable portion (*quotité disponible*). Nothing more, nothing less. It is nigh impossible to disinherit one's child under Seychellois law.

[23] In the circumstances, the submission made by counsel for the defendant in respect of proof that must be met to rebut the presumption of validity of a deed in respect of a donation has no application to this case. The fact that a donation is made to an heir in excess of the disposable portion does not amount to a fraud, it only amounts to a disinheritance disguised as a donation. That is the meaning of *donation déguisée* in this case. Hence, the question of fraudulent donation or its proof where it concerns disinherited heirs does not arise and is completely immaterial. To that extent the case of *Pragrassen v Vidot* (2010) SLR 163 was wrongly decided. This is rightly so since it is not the deed itself that is being attacked but the alienated inheritance.

[24] The question that follows is the nature of the inheritance that has been alienated. As I have already explained it is the value of the donation that matters in actions such as the present one. There is therefore no question of returning the immoveable property itself to the hotchpot but rather it is the value of the property in excess of the *quotité disponible* that must be returned.

[25] The application of the provisions of art 913 (supra) to the particular circumstances of this case, that is, where there are three children, dictates that the gift *inter vivos* should not have exceeded one quarter of the property of the *de cujus*. The three quarters transferred in excess has to be brought back into the hotchpot for redistribution into three equal shares. The value of the property now becomes significant.

[26] Mr Valentin's valuation of the property in this respect must be utilised in the light of art 922 of the Civil Code which provides:

The reduction shall be made by taking into account the total asset value of all the property existing at the death of the donor or the testator.

After a deduction of the debts, the assets given by way of a gift *inter vivos* according to their condition when the gift was made and their value at the opening of the succession are added together. If the property has been alienated, its value at the time of the alienation and, if there is subrogation, the value of the converted property is taken into account when the succession opens."

The disposable portion of which the deceased was entitled to dispose shall be calculated on the basis of all these assets having regard to the class of heirs whom the deceased has left.

[27] Using this formula, I find that the value of the land at the death of the donor was R1,546,600. The house which was built solely from the funds of the defendant cannot be taken into account. Nor can the value of the home which was demolished prior to the building of the defendant's house. The disposable portion of one quarter is also granted to the defendant for the legal reasons already given. Out of the remaining three quarters of the reserve, each heir must receive an equal portion that is one quarter each. Hence the defendant is under the law entitled to half of the value of the property that is R 773,300 and the 1st and 2nd plaintiffs a quarter each, that is, R 386,650 each.

[28] The defendant is also the executor of the estate of the deceased. Article 922 provides that it is the total asset value of all the property existing at the death of the donor or the testator that is taken into account for the reduction. Debts must also be deducted. I am of the view that six months is sufficient time both for the completion of such an assessment and for the reduction to be effected.

[29] I therefore order the defendant to carry out the reduction as stated in para [27] of this judgment and to pay the plaintiffs their shares of the estate of Eva Kitty Ramkalawan on or before 26 July 2016.

[30] The plaintiffs are entitled to the costs of this action.

CLAUDE v DU BOIL

D Karunakaran (Presiding), B Renaud, G Dodin JJ
29 January 2016

[2016] SCCC 1

Appeal – Stay of execution

JUDGMENT Execution of judgment stayed by consensus.

Counsel Ms Chetty for the petitioner
F Ally for the 1st respondent
D Esparon for the 2nd respondent

Ruling of the Court

[1] In the former motion, the applicant Josephine Claude and Marise Berlouis applied to this Court for a stay of execution of the judgment which was delivered by this Court in constitutional case number 10 of 2011 on 27 October 2015.

[2] In the second motion, the Honourable Attorney-General applied to this Court on behalf of the Government of Seychelles again for a stay of execution of the said judgment.

[3] By consent of parties, we unanimously grant both applications. That means the judgment delivered by this Court on 27 October 2015 in constitutional case number 10 of 2011 is stayed until the final disposal of the appeal before the Seychelles Court of Appeal.

[4] Both applications are granted accordingly.

[Ed – to similar effect see *Attorney-General v Du Boil* [2016] SCCC2 judgment of 19 January 2016]

MONNAIE v WAYE-HIVE

M Twomey CJ
3 February 2016

[2016] SCSC 57

Family – Concubinage – Property division – Licitation – Unjust enrichment – Equity

The parties in the case were in a concubinage relationship. As the relationship was over, a dispute arose about the division of a house that the parties built together out of a bank loan. The plaintiff claimed that he paid off the loans; the defendant denied by making a counter claim of payment of the same. The court found that plaintiff actually contributed four-fifths and the defendant contributed one-fifth of the cost of the home. Question arose about the legal basis of the plaintiff's claim.

JUDGMENT The plaintiff is entitled to a remedy on the basis of equity.

HELD

- 1 No enforceable legal rights are created from the mere existence of a state of concubinage, but if a concubine suffers an ascertainable loss and the other party correspondingly enriched an action of unjust enrichment shall lie.
- 2 A co-owner of an immovable property may bring a petition for licitation if division in kind appears impossible.
- 3 The Court acts on the basis of equitable principles if no sufficient legal remedy is available under the law of Seychelles.

Legislation

Civil Code of Seychelles, arts 553, 554, 555, 1376, 1381-1
Courts Act ss 5, 6
Immovable Property (Judicial Sales) Act, s 107(2)

Cases

Dodin v Arrisol (2003) SLR 197
Hallock v d'Offay (1983-1987) 3 SCAR (vol) 1 295
Michel Larame v Neva Payet (1983-1987) 3 SCAR (vol 1) 355
Monthy v Esparon (2012) SLR 104
Vel v Knowles (1998-1999) SCAR 157

Counsel K Dominique for plaintiff
J Camille for the defendant

TWOMEY CJ

[1] The plaintiff filed a suit on 22 March 2011 praying for a valuation and apportionment of his share in a property (Parcel PR 2124) and a house situated at Marie Jeanne Estate, Praslin which he had bought and built together with the defendant with a bank loan and asked for the first option to purchase the defendant's share. In her statement of defence,

the defendant admitted that the property had been purchased and built together with the plaintiff by way of a bank loan but stated that she was solely making the loan repayments for the preceding two years. She also stated that the plaintiff had vacated the house. She prayed for the court to declare that each party had a half share in the property.

[2] The hearing of this matter was much delayed since it proved difficult to obtain a valuation report for the property although it is nowhere explained why such a difficulty was encountered. The matter was further delayed as attempts were made to settle the matter out of court which in the end proved to be a fruitless exercise.

The Evidence

[3] The trial started before de Silva J in 2013. Page 5 of the court transcript of 3 October 2013 records the following:

Chief Examination by Ms Domingue
Ms Domingue to the plaintiff

There is no evidence that the plaintiff Mr Monnaie was sworn in but there followed a question and answer session conducted by Ms Domingue with some questions from the court as well. I can only comment that this was a most unorthodox way of proceeding and renders the testimony of the witness open to challenge. It would appear that questions were put to the plaintiff to ascertain whether the house and the loan were in the joint names of the parties or not.

[4] In any event, the plaintiff testified that he had borrowed R 200, 000 from the Savings Bank for the construction of the house and in addition to that had spent another two hundred and twenty thousand for its completion. He stated that in the first seven to eight years of the life of the loans he alone made monthly repayments of R 2000 as he was working as an operator with the Public Works Department at night and during the day had a business as a welder and earned quite a bit from the job. He stated that the defendant had made R 1000 monthly repayments for only 2 years and he had continued paying the monthly balance. The repayments that he made were in the form of direct debits from his salary.

[5] He testified that in 2007 he opened a shop and the defendant was paid a salary of R 3000 to work in the shop. The arrangement did not work and in 2010 he transferred the shop into the defendant's name. There was at the time R 75,000 of stock in the shop. Even as their relationship broke down he continued contributing towards the house, utility bills and the maintenance of their son.

[6] He also tendered receipts (Exhibit 14 a-i) to show that he had from his own funds paid the purchase price of the property at Praslin amounting to R 33,000 (R 20,000 in one lump sum payment and five instalments of R 2000) whereas the defendant had only contributed R 3000. He tendered receipts (Exhibits P15 a-j, P16, P17, P18, P19, P20,

P21, P22a-d) amounting to R 74,380.74 evidence of the materials he had purchased for the construction of the house.

[7] It is only in cross-examination that the story is given perspective and the relationship between the parties explained—again a most unsatisfactory way of proceeding. The parties met in 1998 when the defendant was in Praslin on a hotel training course. She returned to live with him at his mother's house in 1999 and worked as a waitress. She stopped working in 2002 to have their baby. Subsequent to that the defendant received small contributions from her father and then helped out in a shop where she received the small salary of R 1000 monthly. The title deed of the property on which both parties appear as the purchasers of Parcel PR 2124 and the loan agreement for R 200,000 with the Seychelles Savings Bank on which both parties appear as the borrowers were produced.

[8] The plaintiff agreed that the money was disbursed by the bank into his account but denied that that was the source of the funds from which he purchased the building materials for the house. He insisted that money from the loan was used to pay for labour costs only. He conceded that one receipt for materials for the ceiling was made by a cheque from the bank from the loan monies. There was other evidence in terms of the purchase of the shop that had first belonged to the plaintiff and then the defendant but they are not taken into account in terms of the repayments towards the housing loan. Evidence was led as to different loan repayments made by both parties.

[9] At this stage of the proceedings, the trial judge left the jurisdiction and the parties applied to have the matter heard before a different judge but adopting the evidence already led. I, therefore, proceeded to hear and complete the matter.

[10] James Camille, a Legal Officer with the Seychelles Commercial Bank testified on behalf of the plaintiff. He explained that the Seychelles Commercial Bank was the successor of the Seychelles Savings Bank and all the assets and debts of the latter were transferred to the former. He stated that there was an agreement on 26 November 2002 between the Bank and the plaintiff and the defendant to borrow R 200,000 in joint names from the Bank. It was a term of the agreement that the money was to be repaid jointly. However, in this particular case, the account of Mr Monnaie in the same bank was used to service the loan. His personal account was credited with his salary every month from which the monthly loan instalment was paid out to the bank. The interest on the loan varied at different times and the repayments he made reflected these fluctuations. The last salary paid into the account was in February 2007, after which cash payments were made to service the loan. Some of these payments were made in the name of the defendant. Mr Camille stated that there was an outstanding sum of R 47,959.73 on the loan as of the end of December 2015.

[11] The defendant then testified. She stated that at the time they jointly purchased the land she was working as a waitress, earning R 2,500. She could not recall how much she had contributed towards the purchase of the land. She then became pregnant and had their son. She could not work but got some contributions from her father every month.

She returned to work when their son was three years old. She stated that her contributions to the loan for the house are evidenced by the receipts she submitted. She stated that she continues to make repayments on the loan. She added that her contributions towards the house were also in kind, in that she cooked, cleaned and ironed the plaintiff's clothes.

[12] I find on the documentary and oral evidence that the land comprised in Parcel PR2124 was purchased by the parties in 2001 for R 36,000. It is not seriously contested that the plaintiff paid R 33,000 and the defendant contributed the rest of the R 3000 for its purchase. It is also not contested that the plaintiff paid the bulk of the housing loan taken out in 2002. Withdrawals were made from the account into which his salary was paid from 2002 until 2007. He paid the full monthly loan instalment until then amounting to over R 130,000. Thereafter, the repayment of the monthly loan instalment was shared by both parties, each paying about R 1000 monthly. This amounts to about another R 109, 000 totalling R 239,000. It is also clear from the evidence that the house was completed with more contributions from the plaintiff. This is supported by the receipts produced amounting to R 74,380.74.

[13] I also find on the documentary evidence and oral evidence that the defendant has made monthly cash deposits towards the repayment of the housing loan averaging about monthly R 1000 starting on 1 April 2010 and continuing. This amounts to about R 73,000. She testified about the repayment of loans in relation to the shop transferred to her by the plaintiff. This evidence is not relevant to the present proceedings and is disregarded.

[14] I find that the plaintiff has proved a contribution of R 346,380.74 (R 33,000 + R 239,000 + R 74,380.74) to the property and the defendant R 76,000 (R 3000 + R 73,000). These are crude figures I have distilled from the receipts and other documentary and oral evidence and from which I am able to work out a rough ratio representing the parties' share of the property. I am forced to resort to this rudimentary arithmetic in the absence of evidence brought by the parties. It would appear that the plaintiff has contributed about four-fifths of the cost of the home and the defendant about one-fifth.

[15] Both parties have tried to bring evidence about a shop that was transferred from one to the other and has attempted to include that as part of the valuation to be considered in this case. It must be noted that the plaintiff's prayer only concerns the house and Parcel PR2124. This Court cannot adjudicate on the matters relating to the shop transferred by the plaintiff to the defendant.

The Law

[16] The defendant has also testified that she cooked, washed and ironed for the plaintiff. The question arises as to whether as unmarried parties, I can take into account this payment in kind together with her financial contributions into the equation when working out her contribution in the home.

[17] In *Monthy v Esparon* (2012) SLR 104, the Court of Appeal held that where property legally held in joint names of concubines whose relationship ends and the parties no longer wish to remain in division, they may proceed on actions either for a sale by licitation, partition, or by action *de in rem verso* (based on unjust enrichment) to recover their shares in the co-owned property.

[18] The Immovable Property (Judicial Sales) Act provides in s 107(2) thus:

Any co-owner of an immovable property may also by petition to a judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation.

No division in kind or a sale by licitation was petitioned by the plaintiff in this case and in my view, such remedy would not have been available in this case.

[19] Ms Domingue, counsel for the plaintiff has submitted that the right of action, in this case, is unjust enrichment. She stated that the plaintiff had contributed far more than the defendant both in the acquisition of the property and in the house that was constructed thereon and yet he had moved out of the house in 2010.

[20] Article 1381-1 of the Civil Code provides:

If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it.

An action *de in rem verso* or unjust enrichment is maintainable so as long as all the five conditions specified in art 1381-1 are fulfilled: an enrichment, a corresponding impoverishment, a connection between the enrichment and the impoverishment, the absence of lawful cause, no other remedy being available [see *Dodin v Arrisol* (2003) SLR 197].

[21] It is clear that the circumstances of this particular case do not meet the conditions of the provisions of art 1381-1. The defendant has not evicted the plaintiff. She has not been enriched as she has not alienated his rights *in rem* or *in personam*. He has in any case been the source of his own detriment in the sense of not enjoying his own house in that

he has left it of his own accord. Similarly, the defendant cannot ask for a share of the property over and above what she has financially contributed in this case. In the case of *Michel Laramé v Neva Payet* (1987) SCA 4, Eric Law JA stated:

No enforceable legal rights are created or arise from the mere existence of a state of concubinage, but the cause of action "de in rem verso" can operate to assist a concubine who has suffered actual and ascertainable loss and the other party has correspondingly enriched himself by allowing the party who has suffered loss to recover from the other party who has benefited.

[22] A case under quasi-contract (art 1376) would also not succeed as neither party has received something that is not due. There is also no possible action under arts 553, 554 and 555 of the Civil Code as the "third party" involved in the present matter since both parties are owners of the property.

[23] Mr Camille for the defendant has submitted that there is no cause of action in this case and that the court should not formulate one for the plaintiff. He relies on the authority of *Vel v Knowles* SCA41/1998. I do not agree that no cause of action arises. I also note that the defendant has asked for a half share in the home. In my view, this is a case where no legal remedy exists and one where only equity would assist the parties.

[24] In the circumstances ss 5 and 6 of the Courts Act are applicable. They provide that:

5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.
6. The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.

[25] This is a case where the dissenting judgment of Sauzier J in *Hallock v d'Offay* (1983-1987) 3 SCAR vol 1 295 should have proper application. He stated:

... it would be a denial of justice if the Supreme Court were to decline to use such powers on the ground that there is no remedy and that the solution to these problems is better left to the legislator.

[26] Having established that there is no legal remedy applicable to the facts of this case, I, therefore, propose to make an order to bring justice and settle the material issues between the parties. The plaintiff has spent R 8,000 on a valuation of the property (towards which cost the defendant owes R 4000). Based on this report the parties have in court agreed that the land is currently valued at R 242,000 and the house at R1, 492,000, a total of R1, 734,000. They both would like their share in the property ascertained. The evidence adduced bears out the fact that both parties would like exclusive ownership of the property.

[27] I, therefore, order that the plaintiff pay the defendant the sum of R 346,800 which represents her one-fifth share in the home. On this payment, the property (Parcel PR2124) shall be registered in the sole name of the plaintiff. This amount should be paid on or before the 2 July 2015. Thereafter, if the amount has not been paid the defendant will have the right to pay the plaintiff the sum of R 1,387,200 on or before the 2 January 2017. If on that date neither party has been able to make payment as ordered, the house will be sold by public auction and the proceeds of sale shared out in the ration of four-fifths to the plaintiff and one-fifth to the defendant.

[28] The defendant shall pay the plaintiff the sum of R 4000 towards the cost of the valuation report of the property and house.

[29] I make no order as to costs.

(2016) SLR

BRADWELL INVESTMENTS CORPORATION v FINANCIAL INTELLIGENCE UNIT

G Dodin, C Mckee JJ
9 February 2016

[2016] SCCC 7

Constitution – Evidence – Duty to testify

The petitioner claimed contravention of arts 26(1) and/or 19(7) of the Constitution claiming declarations to that effect and costs. The respondents filed a motion supported by affidavit requesting the Court to direct the representative of the petitioner to appear before the court for cross-examination.

JUDGMENT Motion declined.

HELD

- 1 There will be no direction to appear for cross-examination when the reasons provided for requesting the order do not show that it would assist the court in determining the issues before it.
- 2 Since the petition is under art 46 of the Constitution the petitioner is only required to establish a prima facie case. The burden of proving that a contravention has not taken place or is not likely to occur is on the respondents.

Legislation

Anti-Money Laundering Act, s 10(7)
Constitution, arts 19(7), 26(1), 46
Seychelles Code of Civil Procedure, s 169

Counsel F Ally for petitioner
D Esparon for respondents

RULING

[1] The petitioner, Bradwell Investment Corp, petitioned the Constitutional Court claiming;

- i. Contravention of art 26(1) of the Constitution by reason of the extension of the freezing Order for another 180 days pursuant to s 10(7) of the AML Act.
- ii. Contravention of art 26(1) and/or art 19(7) of the Constitution by reason of the extension having been granted *ex parte*, without any service or notice to the petitioner hence infringing the notion of impartiality of the Court.
- iii. Contravention of art 26(1) and/or 19(7) of the Constitution also for reason that the freezing Order was extended *ex parte*.

The petitioner prayed for the following relief from this Court:

- i. Declare that art 26(1) has been contravened by the 1st respondent or the Attorney-General or Acting Chief Justice.
- ii. Declare that art 19(7) has been contravened by 1st respondent or Attorney-General or the Acting Chief Justice.
- iii. Declare the 2nd application (for the extension of the freezing Order) and the 2nd Court Order (extending the freezing Order) unconstitutional.
- iv. Declare s 10(7) of AML Act or part of it unconstitutional and void.
- v. Make any other Orders, Declarations, issue such writs, or directions as necessary to dispose of this case.
- vi. To be awarded costs.

[2] Counsel for the respondents moved the Court for an Order pursuant to s 169 of the Seychelles Code of Civil Procedure directing the representative of the petitioner, Malcolm Moller to appear before this Court for cross-examination by the respondents. The Court initially ruled that no sufficient or compelling reasons had been established to properly ground the application and declined the application.

[3] Subsequently, the respondents filed fresh motions supported by affidavit requesting the Court to direct the said Malcolm Moller to attend Court for cross-examination by the respondents. The affidavits sets out a series of perceived defects, inconsistencies or suspicions that the respondents would want to question the said Mr Moller about by cross-examining him.

[4] Having carefully studied the motion and affidavit in support, we can safely say that none of the reasons laid out requiring the cross-examination of the said Malcolm Moller would assist this Court in determining whether there has been constitutional violations by the respondents or the Acting Chief Justice.

[5] Further, the Constitutional Court is not being moved to declare that the funds in question are or are not proceeds of crime or related to some criminal conduct. This is a matter for the Supreme Court to determine if relevant application is made before it.

[6] Consequently, the truthfulness of the affidavit of Mr Moller has no bearing on the constitutionality of the procedures adapted by the Supreme Court in determining whether or not to grant further freezing orders or the constitutionality of s 10(7) of the AML Act.

[7] We also find that since this petition is under art 46 of the Constitution, the petitioner is only required to establish a prima facie case and the burden of proving that a contravention has not taken place or is not likely to occur lies on the respondents. Consequently, the petitioner cannot be compelled to testify or be cross-examined for the benefit of the respondents.

Bradwell Investments v Financial Intelligence Unit

[8] Consequently, not only do we find the respondents to have been misguided in this motion, but also the reasons disclosed in the affidavit do not amount to sufficient or compelling reasons to require the petitioner to testify or be cross examined in order for the Constitutional Court to determine the real issues before it.

[9] This motion is therefore declined accordingly.

(2016) SLR

HOAREAU v HOAREAU

M Twomey CJ
12 February 2016

[2016] SCSC 78

Succession – Burden of proof – Holograph will

The plaintiffs were co-heirs of a property with the defendant's testator. The co-owner bequeathed his entire property to the defendant through a will and died. The plaintiffs challenged the validity of the will.

JUDGMENT Petition dismissed

HELD

- 1 The onus of proving the validity of a will is on the heir who wants to dispossess an executrix.
- 2 No prescribed form and language are necessary for making a holograph will.
- 3 There is nothing to prevent a person bequeathing their share of property.
- 4 A holograph will may contain several signatures as long as that of the testator is clearly indicated.
- 5 Mere non-performance of a condition does not invalidate a will unless it is specifically indicated in it.

Legislation

Civil Code of Seychelles, arts 970, 975, 1006-1008, 1322-1324
Land Registration Act

Cases

Barbier and Anor v Barbier (1966) SLR 236
De Speville and anor v Pillieron (1939) 1936-1955 SLR 52
Didon v Gappy (1947) 1936-1955 SLR 148

Foreign Legislation

French Code Civil, arts 1006, 1008

Counsel N Tirant-Gherardi for plaintiffs
K Shah for the defendant

Twomey CJ

The Pleadings

[1] The plaintiffs are the heirs of Émilie Julina Hoareau and the defendant is the estate of the late Émile Serge Hoareau (the deceased) who was also an heir of Émilie Julina Hoareau.

[2] The deceased died without issue or spouse on 25 July 2010 and at the time of his death was a co-heir with the plaintiffs of land at Anse Aux Poules Bleus, Mahé, having inherited the same from their grandmother, Émilie Julina Hoareau.

[3] On his death on 25 July 2010, the deceased left a document purporting to be his last will and testament in which he bequeathed his entire property to one Léon Kim Koon.

[4] On 8 July 2015, the plaintiffs filed a plaint in which they claimed that the purported last will and testament of the deceased was deficient in form and content so as not to constitute a valid holograph will.

[5] The deficiencies alleged by the plaintiffs can be summarised as follows:

1. The will was drawn up in the form of a letter.
2. The wording in the will set out conditions precedent indicating a prospective contractual and business relationship and not a will.
3. The subject matter of the will, namely the property bequeathed cannot be verified as it indicated property over and above what was owned by the deceased.
4. The purported will is signed by both the deceased and the beneficiary which does not indicate that it was intended to be a will.

[6] The defendant in its statement of defence stated that the document in issue was the holograph will of the deceased which had been transcribed in vol 85 No 149 of the Register of Transcriptions.

[7] It averred that the document met the conditions of a holograph will and was valid in that:

1. A holograph will do not have to be in any specific form and could be drawn in the form of a letter and dated numerically.
2. There was no conditions precedent contained in the will, the provisions of which were clear and unequivocal.
3. There was no ambiguity in terms of the property bequeathed as the deceased bequeathed his share in the undivided property.
4. Whether the will is signed by the deceased and the beneficiary is insignificant as this fact does not affect the validity of the will.

The Evidence

[8] The 4th plaintiff testified. He stated that the deceased was his cousin and they shared a common grandmother, Julina Hoareau née Isnard who had died in 1962. He stated that she had had eight children and they were all deceased. He produced a family tree in which he was depicted as being the son of Michel Hoareau and the deceased as the son of Émile Hoareau, grandchildren of Julina Hoareau. They had both inherited shares in the undivided land through their respective fathers from their grandmother.

[9] The 4th plaintiff insisted that he had never seen the will of the deceased, Émile Serge Hoareau.

[10] Francoise Savy, the executrix of the respondent's estate testified. She stated that she had known the deceased for over thirty years and that she had witnessed him writing and signing his will. She stated that the beneficiary of the will, Léon Kim Koon was her partner. She explained that Léon Kim Koon had also signed the will to reassure the deceased that he would indeed pay for his funeral after his death.

[11] She testified that Léon Kim Koon had arranged for the funeral of the deceased, bought flowers and had honoured the deceased's wishes apart from erecting his grave which she stated had not been done as the ground was still unstable. She stated that the deceased wanted to give his property to Léon Kim Koon as he had no family. She stated that he had been concerned that his family should get nothing from him as when he was sick no one from his family had visited him. She added that none of his family came to his funeral.

[12] She stated that she knew where his land was as she had often driven him home. She also stated that the deceased had wanted to marry her but when she told him she had a partner in Léon Kim Koon he told her he would give his land to him instead as they had been friends for some time. She explained that despite the will mentioning that a book would be kept recording payments from Léon Kim Koon to the deceased, this had not been done as there was no necessity for the money to be paid and entered in the book. She stated that it was sufficient that her partner had the money and would pay for the funeral. She agreed that she did not know the extent of the deceased's land and as executrix had not ascertained that fact.

The Issues

[13] At the start of the trial both parties agreed that the issue to be decided by the Court was whether the document as written and signed by the deceased on 6 October 2003 constituted a holograph will and if so was it valid, in effect whether there was a valid will.

Discussion

[14] The word "holograph" is derived from two Greek words meaning "whole" (*holós*) and "to write" (*graphos*). Hence art 970 of the Civil Code provides: "A holograph will shall only be valid if it is wholly written, dated, and signed by the hand of the testator; it shall be subject to no other form".

[15] It is important at this stage to set out the contents of the will as contained in the document produced before the Court. It states:

In the name of the Holy Father, Son and Holy Ghost. Here with my Will. In full mental health and healthy individual. I bequeath my house and all its contents

and freehold to Mr Léon Kim Koon on the day of my death. He will take possession of my belongings; he will start paying me the sum of R 1500 monthly. A book will be kept, same endorsed by the solicitor Mr Kieran Shah –when the land deeds will have been settled and my share of 3.45 hectares of land divided and beacon marked by qualified surveyors—He will also inherit my share of the land—when the case will have been settled in court and valid certificate of inheritance secured; a second supplementary will—will be made, Mr Kim Koon will start paying me sum of R 3000 monthly until my death—If I die before eight years have elapsed it will be his responsibility for the cost of my funeral and building my gravestone two and a half years later.

Signed by Mr Serge Hoareau

Signed by Mr Kim Koo [sic]

Endorsed by solicitor and stamp date.

* All the other relevant and unsettled details will be included in the second Will
+ signed

[16] There is a signature entered next to where it is written: "signed by Mr Serge Hoareau" and a different one where it is stated, "signed by Mr Kim Koo" on the document. The will was presented to Court on 26 August 2010 by Léon Kim Koon in the presence of his counsel Mr Kieran Shah. The judge, Mohan Burhan, marked the envelope and the will "Ne Varietur" and directed that it be registered. This was duly done and transcribed by the Registrar General on 30 September 2010 in Registration vol 1755 No 3182.

[17] Mrs Tirant-Ghérardi for the plaintiffs has made several submissions in relation to the validity of the will. She has submitted firstly that it is incumbent on the party claiming the will to be valid to prove its validity.

[18] French *jurisprudence constante* is to the effect that where a testator dies without issue and any reserved heir (*héritier réservataire*), the universal legatee having been seized of the property by virtue of arts 1006 -1008 of the French Code Civil is therefore in its possession.

[19] Article 1006 of the French Civil Code provides –

Lorsqu'au décès du testateur il n'y aura pas d'héritiers aux quelles une quotité de ses biens soit réservée par la loi, le légataire universel sera saisi de plein droit par la mort du testateur, sans être tenu de demander la délivrance.

Article 1008 of the French Civil Code provides

Dans le cas de l'art1006, si le testament est olographe ou mystique, le légataire universel sera tenu de se faire envoyer en possession, par une ordonnance du président, mise au bas d'une requête, à laquelle sera joint l'acte de dépôt.

[20] Since the universal legatee is therefore in possession of the property it is therefore not up to the possessor but rather up to the heir who wants to dispossess him to prove that the will is not valid. See Henri Capitant, Alex Weill and Francois *Terré Les Grands Arrêts de la Jurisprudence* (7^{ed}, at 1016) and (Req 10 jan 1877, DP 77.1.159, S 77.1.303; 21 avr 1902, DP 1.310, S 1902.1.340; 29 mai 1904, DP19041.311; 28 fév 928, DP1928.1.8.

[21] Mrs Tirant-Ghérardi has relied on the cases of *Didon v Gappy* (1947) SLR 1936-1955 148 and *De Speville and anor v Pillieron* (1939) SLR 1936-1955 52, for authority that the French jurisprudence does not apply to Seychelles specifically because arts 1006-1008 had been repealed and also because of the provisions of arts 1322, 1323 and 1324 of the Civil Code of Seychelles which shifts the burden of proof on to the person claiming to benefit from a document under private signature.

[22] The case of *Barbier and Anor v Barbier* (1966) SLR 236 confirmed this position. I am however not persuaded by these authorities given the fact that there is no distinction in Seychelles in *saisine* of the estate between heirs and legatees. Once the inheritance or legacy is transcribed or inscribed as the case may be and registered at the Registry of Land in the prescribed form and an executor appointed if required, the beneficiary of the will has *saisine* of the property albeit through an executor in some circumstances. The position that obtains in Seychelles is similar to a regime operating through arts 1006-1008 of the French Civil Code.

[23] In this case the will was presented to the Court and all formalities completed at the Registry of Land. An executrix was appointed. This suffices to give *saisine* to the legatee and it is my view therefore that the onus of proving the authenticity of the will lies with the plaintiffs.

[24] In any case even if this is incorrect it was not contested that the will was made by the *de cujus*. Indeed, if I understand the case for the plaintiffs it is rather that the will has a number of deficiencies going to form and substance (see para [5] above).

[25] Mrs Tirant-Ghérardi for the plaintiffs has submitted that the will is in the form of a letter. Mr Shah for the defendant has cited from *Jurisprudence Général, Code Civil* on art 970, note 22 as follows: “Une lettre missive écrite, datée et signée par celui qui l’a faite peut être considérée comme testament olographe”. As is evident from the second limb of art 970 supra, no specific form is prescribed for a holograph will. It could be written on stone tablets in bullet points and still be valid. This submission therefore fails.

[26] Mrs Tirant-Ghérardi has also submitted that the wording of the will sets out conditions precedent indicating a prospective contractual and business relationship and not a will. Mr Shah has countered this argument by submitting that the will contains a clear and unequivocal bequest to Léon Kim Koon. I tend to agree with Mr Shah for the defendant in that a fair reading of the will lends more to the view that this was a layman not versed

in the more sophisticated wording of an authentic will making provisions for his friend who had evidently promised to look after his burial. In any case, the evidence of Francoise Savy who witnessed the making of the will was unchallenged.

[27] I am also unable to agree with the plaintiffs that the property bequeathed cannot be verified. It is common in Seychelles for people to have shares in the undivided property. It is clear to me that the deceased was indicating that he wanted his share of the property whenever it was partitioned to be given to Léon Kim Koon.

[28] The plaintiffs are even on the weaker ground in their averment that since the will has been signed by both the testator and the beneficiary, the indication, therefore, is that it was not a will. In the case of an authentic will, a beneficiary cannot witness the will being drawn up (see art 975 of the Civil Code). There is no such condition as far as a holograph will is concerned. Hence a holograph will can contain several signatures as long as that of the testator is clearly indicated. This is supported by the authority of *Jurisprudence Général, Code Civil* on art 970, note 22 which states: “Le simple fait de la présence sur un testament d’ailleurs régulier de signatures ne saurait par lui-même le vicier de nullité”.

[29] On the issue as to why the beneficiary of the will did not complete the construction of the tombstone within two and half years of the death of the testator as had been promised, I am inclined to believe the explanation of the executrix. I do not, in any case, see any evidence to conclude that the legacy should be revoked on grounds of non-fulfilment of charges imposed on the legatee.

[30] Similarly, although much is made of payments set out in the will and not honoured by the beneficiary, its significance is not pursued by the plaintiffs in terms of invalidating the will. The executrix explained that the money specified was to be accumulated to pay for the funeral costs of the deceased. She went on to state that since the beneficiary had enough money for this undertaking, there was no need to make this monthly payment or to have it recorded in a ledger.

[31] It must be noted that some legacies are *sub modo*. This is in circumstances where “the legatee who takes this legacy must take it either subject to the burden of performing some act or making payment indicated by the testator” (FH Lawson, AE Anton and L Neville Brown *Amos and Walton’s Introduction to French Law* (3rd ed, OUP, 1966) at 327-328.

This, however, does not invalidate the will but rather the court will consider if the acts or payments might not be discharged without invalidating the will. In any case, as has been submitted by Mr Shah since the testator has himself impliedly waived its application, the non-discharge of the payment cannot in any way invalidate the will.

[32] The Court itself raised the issue of whether the document grants a sale on a *rente viagère*. I am grateful to both counsel for their submission on this issue. I am persuaded that the document does not amount to such an agreement mainly since as pointed out by both counsel it would have run afoul the provisions of the Land Registration Act.

Decision

[33] I am of the view that the will is valid and its provisions are clear and unambiguous. I find on the evidence that the testator willed his property to his friend Léon Kim Koon on certain conditions, namely that the latter would provide for his funeral and erect his tombstone.

[34] In the circumstances and for the reasons set out extensively above I have no hesitation in dismissing this action with costs.

RAMKALAWAN v AGENCY OF SOCIAL PROTECTION

M Twomey CJ
15 February 2016

[2016] SCSC 88

Civil procedure – Discovery – Norwich Pharmacal Order

The petitioner sought certain information which the respondent failed to provide. The petitioner applied for an order of discovery under the *Norwich Pharmacal* principles.

JUDGMENT Application refused.

HELD

- 1 The prescribed form of originating summons in England and that of a notice of motion in Seychelles are similar and achieve the same purpose.
- 2 The party against whom the *Norwich Pharmacal* Order is sought must have an active engagement with the wrongdoing.
- 3 The applicant needs to make a full and frank disclosure of all facts of his case in order to obtain a *Norwich Pharmacal* Order.
- 4 *Norwich Pharmacal Order* is intrusive in nature and is only granted in the absence of any other practicable means of obtaining the essential information.

Legislation

Agency for Social Protection Act 2012
Courts Act, ss 5, 6 & 17
Elections Act
Seychelles Code of Civil Procedure, ss 30, 84, Form 17
Social Security Act 2010

Cases

Ablyazov v Outen & Ors (2015) SLR 279
Danone Asia Pte Limited and ors v Offshore Incorporations (Seychelles) Ltd CS 310/2008
Gill v Film Ansalt (2003) SLR 137
Global Energy Horizons Corporation v Victoria Corporate (Proprietary) Limited (2014) SCSC 10
Mary Quilindo and Ors v Sandra Moncherry and Anor SCA 29 of 2009
Otkritie Securities Ltd v Barclays Bank (Seychelles) Ltd (2012) SLR 67
Shchukin v Mayfair Trust Group Limited (2015) SCSC

Foreign Cases

Arab Satellite Communications Organisation v Al Faqih & Anor [2008] EWHC 2568 (QB)
Arsenal Football Club PLC v Elite Sports [2003] FSR 26
Axa Equity and Law Life Assurance Society Plc and others v National Westminster Bank (PLC) [1998] CLC 1177
CHC Software Care v Hopkins and Wood [1993] FSR 241

Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511
Norwich Pharmacal v Commissioners of Customs and Excise [1974] AC 133
Toomany and Anor v Veerasamy [2012] UKPC 13
Various Claimants v News Group Newspapers Ltd [2014] 2 WLR 756

Foreign Legislation

Civil Procedure Rules of the Supreme Court of England, rr 4, 31.16

Counsel B Georges and A Georges for the petitioner
 Attorney-General for respondent

TWOMEY CJ

[1] This is an application for an order of discovery under *Norwich Pharmacal* principles as provided for in Rule 31.16 of the Civil Procedure Rules of the Supreme Court of England (White Book).

[2] It is not disputed that the Supreme Court of Seychelles has jurisdiction to make such an Order. This is by virtue of the fact that since the Seychelles Code of Civil Procedure does not provide for such an Order, the Supreme Court being vested with all the powers, privileges, authority and jurisdiction capable of being exercised by the High Court of Justice may exercise its equitable jurisdiction to grant such relief (See, Courts Act, ss 5, 6, 17).

[3] The applicant is the petitioner in an election petition filed before the Constitutional Court.

[4] The respondent is not described in the application or affidavit but this court takes judicial notice of its functions as contained in the Agency for Social Protection Act 2012, namely that it administers social assistance and payments of benefits in accordance with the Social Security Act 2010.

[5] The applicant has averred in this application that by letter dated 28 December 2015 his attorneys acting on his instructions wrote to the respondent seeking information in its possession and that it had received a response to the letter. As will become evident in the course of this ruling, such letter was not sent to the respondent.

[6] The information sought by the applicant is contained in the notice of motion for this application namely:

The number of payments per day and the total daily value of these payments made to recipients in the period of 1 to 17 December 2015, both dates inclusive, the categories of these payments; and the same information for the same period in 2014.

Ramkalawan v Agency of Social Protection

[7] The other averments contained in the affidavit of the applicant are to the effect that the respondent may well be an innocent party to the payment of monies to recipients, acting on orders of the government.

[8] The Chief Executive Officer of the respondent agency, one Marcus Simeon, has sworn a counter-affidavit in which he avers that the action as filed is not maintainable in law as it was not made in connection with any main case as is required by s 84 of the Seychelles Code of Civil Procedure.

[9] He further avers that on the advice of his legal advisers the applicant's pleadings amount to seeking judicial relief in the nature of a writ of mandamus and is, therefore, incorrectly brought.

[10] He also avers that a *Norwich Pharmacal* Order normally issues where the disclosure sought is from an innocent third party who has nothing to do with the principal suit whereas in the present suit the respondent has already been cited in an election petition case as allegedly carrying out illegal practices tantamount to the commission of criminal offences under the Elections Act.

[11] He adds that the application is an attempt to fish for information.

[12] He also avers that the information sought would if disclosed breach the constitutional rights of individuals namely the protection of their privacy.

[13] He concludes that in the circumstances the application is an abuse of court process and that if such order were to issue on an application that is bad in law, the result would be the opening of flood gates for similar bad applications with the aim of accessing information about others.

[14] Before considering the merits of the application for the order I must consider the objections of the respondent relating to alleged procedural irregularities of the application.

[15] As I have already outlined above *Norwich Pharmacal* Orders are unknown to the Seychelles Civil Code of Procedure. In England, an application for a *Norwich Pharmacal* Order is commenced by originating summons either as an application for sole relief or ancillary to other relief.

[16] An originating summons is defined in r 4 of Order 1 RSC 1965 (White Book) as "every summons other than a summons in a pending cause or matter". It is clear, therefore, that no parent pleading is necessary for an application for a *Norwich Pharmacal* Order. The reason is obvious: the respondent in an application for a *Norwich Pharmacal* Order is not intended to be a respondent in the action for which the information is sought.

[17] There is no originating summons known to the civil procedure laws of Seychelles. Summons are issued in Seychelles at the entering of complaints in the registry. Section 30 of the Seychelles Code of Civil Procedure provides:

When the plaint has been entered in the register of civil and commercial suits, the Registrar shall issue a summons, under the seal of the court and signed by him, to each defendant calling upon him to appear in the Supreme Court at a date and time therein stated, to answer the claim.

[18] Notices of motions in accordance with Form 17 of the Seychelles Code of Civil Procedure have been used in previous applications for *Norwich Pharmacal* Orders. They are supported by affidavits of the applicants. In comparing the prescribed form of originating summons in England and that of a notice of motion in Seychelles, I am of the view that they are similar and achieve the same purpose.

[19] In the first application in Seychelles for a *Norwich Pharmacal* Order in the case of *Danone Asia Pte Limited and ors v Offshore Incorporations (Seychelles) Ltd* CS 310/2008, the suit was instituted by way of notice of motion supported by affidavit. The same procedure has since been followed [see *Otkritie Securities Ltd v Barclays Bank (Seychelles) Ltd* (2012) SLR 67, *Shchukin v Mayfair Trust Group Limited* (2015) SCSC, *Global Energy Horizons Corporation v Victoria Corporate (Proprietary) Limited* (2014) SCSC 10].

[20] I am loathe to allow a departure from procedure when this is clearly established by rules but there are some circumstances where procedures to be followed are not entirely clear. In such cases, as Domah JA has pointed out in *Ablyazov v Outen & Ors* (2015) SLR 279: "...procedure is the hand-maid of justice and should not be made to become the mistress even if many hand-maids would aspire to become mistresses". On this point see also *Gill v Film Ansalt* (2003) SLR 137; *Mary Quilindo and Ors v Sandra Moncherry and Anor* SCA 29 of 2009; *Toomany and Anor v Veerasamy* [2012] UKPC 13.

[21] In so far, therefore, that the respondent objects to the form by which these proceedings are brought I am of the view that these objections cannot be sustained.

[22] I now turn to the substantive issues raised by this application.

[23] *Norwich Pharmacal* Orders are grounded in equity and emanate from the case of *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133. As is stated in *Halsbury's Statutes* (2013) vol 11(3), under the *Norwich Pharmacal* jurisdiction, where wrongdoing has, or is thought to have, occurred, upon an application by the claimant, a court may make an order compelling a third party who is involved in the wrongdoing, however innocently, to disclose any information that may be relevant to the case. (See title Courts, Judgments and Legal Services and s 20(1) and the note "Orders under this section").

[24] The conditions which must be satisfied before a *Norwich Pharmacal* Order may be granted were summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511 at 21, namely:

- (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

[25] Although Lightman J's formulation of the test refers to 'facilitation' of the wrongdoing, Mann J held in *Various Claimants v News Group Newspapers Ltd* [2014] 2 WLR 756, after a detailed review of the authorities, that the true principle is that the third party's engagement with the wrongdoing must have been such as to make him more than a mere witness and that facilitation of the wrongdoing is just one way in which that test might be satisfied.

[26] It is in the light of these propositions that I intend to examine the averments of the affidavit. Let me state categorically from the outset that the affidavit supporting the application is sadly lacking in essential particulars. It is sketchy and does not display full and frank disclosure by the applicant which is required for orders of this kind.

[27] The following are the only essential averments sworn by the applicant.

1. That based on information made available to the applicant and from his own observation, extraordinary payments were made by the respondent in the lead up to the December 2015 elections.
2. That a letter dated 28 December 2015 was sent to the respondent requesting the information in respect of the payments.
3. That a response to the letter was received.
4. That the information sought is relevant to prove the allegation made.
5. That the respondent may well be an innocent party to these payments.

[28] One of basic tenets of a *Norwich Pharmacal* Order is that full and frank disclosure of all facts pertaining to the applicant's case must be made. This is one of the traditional safeguards the courts have put in place for the protection of respondents. The applicant also has to show an extremely strong case given the draconian nature of the remedy.

[29] In respect of the first averment as set out above, it is not stated what information was received by the applicant and what he observed and what payments were made or suspected to be made. This averment lacks detail.

[30] In respect of the second and third averments the attachments show that the letter of 28 December was not sent to the respondent but to a third party. These averments lack accuracy.

[31] In respect of the fourth averment it is not explained how the information sought will prove the allegation that extraordinary payments were made. This averment lacks detail.

[32] In respect of the fifth averment an equivocal statement is made. This averment lacks accuracy.

[33] The Attorney-General has submitted that the information sought in this application is linked to the election petition filed by the respondent in CS1/2016 and relates to its para [25] where it seeks to establish illegal practices by one of the respondents in the election petition.

[34] The applicant for this order has averred that the respondent, that is the Agency for Social Protection, may well be an innocent party in this case. The inverse is also true, that is, that the respondent and/or its employees may also be wrongdoers. In this respect, the Attorney-General has submitted that *Norwich Pharmacal* Orders are made against third parties who are mere witnesses not wrongdoers themselves.

[35] That may well have been the position when Lord Reid was considering the *Norwich Pharmacal* case itself. The courts have, however, been very flexible in granting such orders and case development has resulted in the approach now being that the third party from whom information sought not necessarily being an innocent third party: he may be a wrongdoer himself (see *CHC Software Care v Hopkins and Wood* [1993] FSR 241, *Arsenal Football Club PLC v Elite Sports* [2003] FSR 26).

[36] However, two matters weigh against the granting of the order.

[37] Firstly, in dismissing the application for a disclosure order in *Mitsui & Co Ltd* (supra) Lightman J stated that since the *Norwich Pharmacal* Order is a remedy of last resort, there must be a necessity to grant the order, in that: “[t]he necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information”.

[38] Counsel for the applicant, Mr Georges has himself admitted that he can think of two ways of obtaining the information he needs. I dare say that the most obvious way of obtaining the information sought is by writing to the respondent. This has not been done. Another way is by summoning the party to give evidence. Given these alternatives and others, the application for a *Norwich Pharmacal* Order in this case may be akin to using a sledgehammer to crack a nut, a precedent which if set will result in the court being flooded with such applications where parties simply absolve themselves of the need for pre-litigation work.

[39] Secondly, as has been submitted by the Attorney-General, given the sketchy affidavit and the lack of cogent information and full and frank disclosure it may well be that this application is a fishing expedition, an enterprise not permitted for orders of this nature

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(see *Axa Equity and Law Life Assurance Society Plc and others v National Westminster Bank (PLC)* [1998] CLC 1177, *Arab Satellite Communications Organisation v Al Faqih & Anor* [2008] EWHC 2568, QB).

[40] The application in this case is far from what was conceived in the original *Norwich Pharmacal* Order. In that case the applicants could not sue the infringers because they did not know who they were, and all they wanted was names and addresses. Here the applicants know the alleged tortfeasors. They want to assess if the information is enough to sustain a case being made out against a respondent in an election petition. It is clearly a fishing expedition.

[41] For these reasons, the application is refused with costs.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, C McKee, D Akiki-Kiiza JJ
15 February 2016

[2016] SCCC 3

Election petition – Joinder of parties – Attorney-General

This was an election petition of constitutional importance and the Attorney-General joined the case as a party. The petitioner objected to such joinder and applied to the Court to remove the Attorney-General from the proceedings.

JUDGMENT Application rejected.

HELD

- 1 The Attorney-General is a mandatory party to election proceedings.
- 2 By being joined as a respondent to the proceedings, the Attorney-General may choose to respond fully to a petition or remain as a spectator.
- 3 The Attorney-General's role is to provide an independent perspective to the Court and remain silent on matters falling outside his or her knowledge.

Legislation

Constitution, arts 51(4), 76(4)(10)

Constitutional Court (Application, Contravention, Enforcement or Interpretation of The Constitution) Rules 1994, r 3(3)

Elections Act, s 45(3)

Presidential Election and National Assembly Election (Election Petition) Rules 1998, r 7(4)

Seychelles Civil Code, art 376

Seychelles Code of Civil Procedure, ss 115, 170

Cases

Gappy v Dhanjee (2011) SLR 294

Michel v Talma (2012) SLR 95

Counsel

B Georges for petitioner

S Aglae for the 1st respondent

B Hoareau and L Valabhji for the 2nd respondent

R Govinden and A Subramanian for the 3rd respondent

Order on Application

[1] This is an application for the removal of the 3rd respondent, the Attorney-General, from an election petition case, *Ramkalawan v The Electoral Commission and others* CP 01 of 2016 which concerns certain alleged irregularities in the recent Presidential elections held in December 2015. The Attorney-General is cited in those proceedings as the 3rd respondent and is joined as is required by r 7(4) of the Presidential Election and National

Assembly Election (Election Petition) Rules 1998 (Election Petition Rules). The other respondents are the Electoral Commission (1st respondent) and Mr James Alix Michel (2nd respondent).

[2] In this application, Mr Wavel John Charles Ramkalawan, the petitioner, is applying for the Attorney-General to be struck out of the proceedings. The legal basis on which this application is brought is s 115 of the Seychelles Code of Civil Procedure which provides that “any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before the trial by motion or at the trial of the action in a summary manner”. The remedy to remove a party is most usually relied upon when a party has been incorrectly joined to an action or where their presence is no longer required in the proceedings.

[3] The petitioner submitted that the Attorney-General ought to be struck out of the proceedings because the Attorney-General’s supporting affidavit takes a stand on the petition in support of the other two respondents, adopting the pleadings and evidence of the 1st and 2nd respondents prior to it even being led. The petitioner argues further that the Attorney-General has taken a position on matters not in his knowledge and that the Attorney-General had placed himself in a partisan position akin to those whose interests were affected by the petition. Moreover, the petitioner raised objection to the fact that the affidavit of the representative of the Attorney-General, Mr David Esparon, which, on oath, denies that there were any irregularities in the election process. The petitioner argues that this places the Attorney-General in a conflict vis-à-vis his duty in terms of art 76(4) of the Constitution as the principal legal advisor to the Government and the power to institute and undertake criminal proceedings.

[4] The petitioner therefore argued that the Attorney-General has over-stepped his duties and the responsibilities of his office by openly siding with the other two respondents to the extent that he has and in advance of the leading of evidence. The petitioner argues further that the Attorney-General’s duties when joined as a mandatory party are to represent and advise the Government and to assist the Court in the determination of this petition. The role, therefore, requires independence and impartiality which is reinforced by art 76(10) of the Constitution which provides that “[i]n the exercise of the powers vested in the Attorney-General by cl (4), the Attorney-General shall not be subject to the direction or control of any other person or authority”.

[5] The petitioner argues that the Attorney-General may be removed because he has no direct interest to protect in the proceedings, in that he is a party simply joined because of the Election Petition Rules. The petitioner drew a distinction between a legal respondent (one joined to an application as a matter of law) and a respondent in fact (one whose interests were directly affected by the outcome of the case). The petitioner argued that the rationale of joining the Attorney-General to the proceedings was so that he could assist the Court, and ensure that the Government’s interests were represented.

[6] In response, the 1st respondent has argued that the Attorney-General is a necessary party to the petition before the Court as per r 7(4) of the Election Petition Rules, and that the partiality of the Attorney-General does not in any way cause any prejudice to the petitioner. Moreover, the 1st respondent raised objection to the form of the application, stating that the notice of motion does not set out the ground upon which the application is being made.

[7] The 2nd respondent also opposed the application stating that the Attorney-General is a mandatory party to the petition and that the application to strike out has no legal basis at all.

[8] The Attorney-General argued that the ambit of his role is not strictly as a legal respondent but as a respondent in fact and that he was entitled to take a stance on the facts known to him as to whether an illegal practice had taken place or whether the election laws had been infringed. The Attorney-General argued further that the fact that an Attorney-General may take a partisan position is supported by the fact that the Attorney-General is empowered by art 51(4) of the Constitution to institute proceedings, and further that under s 45(3) of the Elections Act, the Attorney-General is given the power to cross-examine witnesses. Further, the Attorney-General stated that his position taken in the pleadings was not outside of his knowledge but that he had consulted all the relevant stakeholders and had come to the conclusions which underlie his pleadings.

[9] The legal issue at the core of this application is whether this Court can strike out the Attorney-General from an election petition on the basis that the Attorney-General has taken on a partisan viewpoint in siding with one or more of the parties to the petition.

[10] The Attorney-General is a constitutionally appointed position created by art 76 of the Constitution. The mandate of the Attorney-General is laid out in cl (4) of art 76 which provides as follows:

The Attorney-General shall be the principal legal advisor to the Government and, subject to clause (11), shall have power, in any case in which the Attorney-General considers it desirable so to do -

- (a) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken under sub-clause (a) or by any other person or authority.

[11] By appointing the Attorney-General directly through the Constitution and the Constitutional Appointments Authority, the intention of the drafters is that the role has political autonomy, allowing the Attorney-General to provide the Government with

independent legal advice. This is further reinforced by clause (10) of art 76 which provides that “[i]n the exercise of the powers vested in the Attorney-General by cl (4), the Attorney-General shall not be subject to the direction or control of any other person or authority”.

[12] In all criminal matters, the Attorney-General represents the Republic of Seychelles and is responsible for prosecuting the case. In civil matters, the Attorney-General represents the government and government agencies when they are litigants in court proceedings. In the past, the Attorney-General has appeared for both other respondents to this case from time to time. At such times, the Attorney-General is seen by the Court as representing the interests of those government agencies or persons. In the case of *Michel v Talma* (2012) SLR 95, the Court of Appeal held that when the Attorney-General appears in constitutional cases representing the Government the presumption is that his views are not at variance with the Government. In *Gappy v Dhanjee* (2011) SLR 294 the Court of Appeal held further that “when the Attorney-General decides to undertake the defence of another independent authority, a court does not have to be wary in accepting the submissions of the Attorney-General on the basis he is partisan”. It is presumed that the Attorney-General will put forward the interests of the party he represents and he has no further duty to the Court. The corollary of this statement, however, is that when the Attorney-General is not representing another party, the Court should be wary in accepting the submissions of the Attorney-General where they are partisan.

[13] Furthermore, the Attorney-General can appear in court without representing a government department or agency when enabled or required to attend by legislation. Specific pieces of legislation permits the Attorney-General to intervene in a civil matter, such as under the Civil Code of Seychelles, where the Attorney-General may intervene in public interest matters, such as in guardianship matters (see for example art 376).

[14] In rare situations, the Attorney-General is joined as a respondent to the proceedings by virtue of a piece of legislation. Rule 7(4) of the Election Petition Rules, which is at the heart of today’s application, provides that “where the petitioner is not the Attorney-General, the Attorney-General shall be made a respondent to the petition”. Similarly, in Constitutional Court cases the Attorney-General is joined by virtue of r 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994. When the Attorney-General is joined as a respondent in a Constitutional Case, the Court of Appeal has held in *Michel v Talma* that “his appearance is indeed amicus curiae as he is not representing any party but is there to advise the court independently”. We adopt this reasoning in the context of an election petition.

[15] We accept the Attorney-General’s point that the Attorney-General is not anticipated to be a mere spectator in an Election Petition. This is why he is granted the power to cross-examine, and the power to institute a petition should he wish. Moreover, in order to exercise those powers, it is necessary for the Attorney-General to take a view on the facts and law in the petition. However, his constitutionally appointed role is to remain independent in his point of view. He has a duty not to align himself with a side or particular

interest of one of the parties but to arrive at his position independently. This is the approach that best assists the court and best fits with the constitutional mandate of the Attorney-General to be independent.

[16] When the Attorney-General is named as a respondent in terms of these rules, his overall duty is to his client which is the Government of Seychelles. It must be borne in mind that the interests of the government as a whole may be distinct from the interests of the President or from those of another agency of the Government. In an election petition, the best interests of the Government are possibly separate from those of the individual hopeful candidates, the President elect, or the incumbent President.

[17] We adopt the reasoning of the courts before that the role of the Attorney-General when not representing a client is to represent the interests of the government, and to provide assistance to the court. Therefore, we are of the opinion that the Attorney-General was incorrect to align his response with the pleadings and the evidence to be presented by the 1st and 2nd respondent without independent grounds for doing so. Whilst it is not permissible for the Attorney-General to adopt the pleadings of another party, this does not preclude the Attorney-General from coming to a similar opinion as that held by one of the parties. By being joined as a respondent, the Attorney-General may choose to respond completely to a petition and thus enter the fray, or to abide the decision of the Court, and choose to remain a spectator in the proceedings.

[18] Furthermore, even if the Attorney-General has formed an independent opinion that there have been no irregularities in the election process, it does not follow that this information is within his personal knowledge and is, therefore, suitable or appropriate to be provided as evidence in the court's record. It is not essential for the Attorney-General to form an opinion on every aspect of the matter and indeed it would be inappropriate in many circumstances to even comment on some elements of the case, even where these affect the interests of the main parties to the case. In the present case, given the Attorney-General's role with regard to public prosecution and the fact that this case concerns election irregularities, many of which are crimes if committed, we agree with the petitioner that it is inappropriate for the Attorney-General to comment on whether there were or were not irregularities.

[19] Section 170 of the Seychelles Code of Civil Procedure restricts the contents of affidavits to the "facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted". In his defence to the petition, the supporting affidavit of Principal State Counsel, Mr David Esparon, places on record his belief that the elections were free from irregularities. Moreover, it adopts the pleadings and evidence of the 1st and 2nd respondents. This is clearly not within Mr Esparon's personal knowledge or ability to prove, and as such this affidavit fails to meet the requirements of s 170 and cannot be admitted into the court record.

[20] However, we agree with the respondents that the Attorney-General is a mandatory party to the proceedings in terms of r 7(4) of the Election Petition Rules, and therefore must be joined when he is not a petitioner in the matter. There is nothing in the present situation that suggests that the Attorney-General's role as amicus curiae to the court is lessened notwithstanding his partisan affidavit and we do not believe that it would be appropriate to remove the Attorney-General from a case of such importance. However, we wish to take this opportunity to remind the Attorney-General of his role to this Court to provide an independent perspective, and when matters fall outside his knowledge or expertise, to remain silent on such.

[21] Therefore, we make the following orders:

- 1 The application to strike out the Attorney-General is dismissed.
- 2 The affidavit of Mr Esparon is struck out of the proceedings.
- 3 The defence on the merits of the Attorney-General is struck out of the proceedings.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, C Mckee, D Akiki-Kiiza JJ
18 February 2016

[2016] SCCC 4

Elections – Striking out part of pleadings

This ruling arose out of an election petition. One of the respondents asked the Court to strike out certain paragraphs from the pleadings. It was claimed that those paragraphs did not sufficiently identify the person and particularise the material facts. The petitioner opposed the application.

JUDGMENT Application partially granted.

HELD

- 1 In cases of national importance, pleadings must be procedurally correct, clear and unambiguous.
- 2 The power of striking out averments should be exercised by the Court with due restraint.
- 3 The Court adopts a higher standard of scrutiny of the pleadings in election petitions than in other civil cases.

Legislation

Elections Act

Interpretation and General Provisions Act

Presidential Election and National Assembly Election (Election Petition) Rules 1998, r 7(1) (2)

Seychelles Code of Civil Procedure, s 92

Cases

Wavel Ramkalawan v Albert Rene CP 7 of 2001

Counsel

B Georges and A Georges for the petitioner

S Aglae for the 1st respondent

B Hoareau and L Valabhji for the 2nd respondent

Ruling on the Plea in Limine Litis

[1] This ruling arises out of a plea in limine litis raised by the 3rd respondent in this matter. The Attorney-General has submitted that several paragraphs of the petition fail to comply with rr 7(1) and 7(2) of the Presidential Election and National Assembly Election (Election Petition) Rules 1998 (the Election Petition Rules).

[2] We are guided by the provisions of r 7 of the Election Petition Rules which provide as follows:

- (1) An election petition shall contain a concise statement of the material facts on which the petitioner relies and the relief which the petitioner claims.
- (2) Where the petitioner alleges that an illegal practice has been committed in relation to the election, the petition shall contain the name and particulars of the person alleged to have committed the illegal practice and the date and place of the commission of the illegal practice.

[3] The Attorney-General for the 3rd respondent submits that the following paragraphs be struck out of the petition, namely: paras [25], [25](a), [25](b), [25](c), [25](d), [25](e), [25](f), [25](g), [26], [27], [28], [29], [30]; [30](i), [31](c), [31](d) and [31](f).

[4] Mr Georges for the petitioner resists the application. Furthermore, Mr Georges submitted that the Court does not have the power to strike out a mere part of a pleading but only the whole of a pleading under s 92 of the Seychelles Code of Civil Procedure.

[5] We have considered whether the persons who have allegedly committed the offences contrary to the Election Act have been sufficiently identified and whether the circumstances surrounding the allegations and material facts have been sufficiently particularised. This requirement, in our view, is to be interpreted against the general background that the hearing has to be fair and parties are to be given the opportunity to submit evidence of the facts on which they rely in order that the court can come to a just conclusion.

[6] We have considered the terms of the petition, the defence lodged by the 3rd respondent in respect, only, of the preliminary pleas, the legal authorities produced and the oral submissions of counsel.

Findings

[7] Firstly we find that we are entitled to strike out part only of the averments in the petition. The requirements of rr 7(1) and 7(2) must be read with s 92 of the Seychelles Code of Civil Procedure which provides that

[t]he court may order *any pleading* to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just. [Emphasis added]

[8] It would be nonsensical for the Court to be granted the power to strike out the entire pleading without being able to strike out non-compliant averments within the pleading. However, we exercise this power with due restraint.

[9] We adopt a higher standard of scrutiny of the pleadings in election petitions than in other civil cases. In the case of *Wavel Ramkalawan v Albert Rene* CP 7 of 2001 the Constitutional Court held (at 15) that:

It needs to be stressed that election petitions are not like any other civil actions. They are not matters of private individual interests. Persons presenting an electoral petition must be certain as to the averments they make and can prove and which they can reasonably expect the respondent or respondents to rebut. It is not sufficient to an electoral petitioner to make vague allegations and wait for a request for particulars in order to expand on the petitions.

[10] Though substantive justice must be done without undue regard to technicalities, it is our view that in a case holding this much national importance, pleadings must be procedurally correct, clear and unambiguous.

[11] We now proceed to the identification and examination of the averments in the light of the objections raised.

[12] We have considered para [25] *in toto*.

[13] We find the first four lines of this paragraph, to some extent, to be introductory in nature and are also to be read along with each of the sub-paras (a) to (g). We find that the phrases “During both ballots” and “Between both ballots” throughout the petition are sufficient to satisfy the requirement that the date of the alleged offence be stated. We find that in this paragraph and throughout the petition it is reasonable to infer and find that any alleged offences occurred within the jurisdiction of Seychelles. We find that the Agency for Social Protection in the Ministry of Social Affairs is a legal person as defined in the Interpretation and General Provisions Act, is sufficiently identified, and hence complies with r 7(2). We find that the averments at paras [25](a), [25](b) and [25](c) are to be allowed. Each complies with r 7(2).

[14] We accept that in para [25](d) the name of the individual person who allegedly distributed money at the District Administration Office at Perseverance is not averred, however, we are satisfied that the District Administration Office is an agency of the government and the persons employed therein are agents of the District Administration Office, which enjoys legal personality. Therefore, we are satisfied that this is sufficiently clear for the purposes of r 7(2) and hence this paragraph complies with r 7(2).

[15] We now look at paras [25](e) and [25](f). We find that the Principal Secretary of the Minister of Finance, Trade and Blue Economy is sufficiently identified. We find that the limited company, Indian Ocean Tuna Limited, is a legal person in conformity with the Interpretation Act and is sufficiently identified. Accordingly, we find that the averments in paras [25](e), [25](f) and also [25](g) comply with r 7(2).

[16] We have considered the averments in paras [26], [27], [28], and [29]. We find that these averments comply with r 7(2) and are to be allowed.

[17] We now turn to para [30] and para [30](i). The introductory four lines of para [30] will remain and have to be read with sub-paras (a) to (h) which we find to be compliant with r 7(2). In respect of para 30[i], the averment does not specify the particular officers of the National Drug Enforcement Agency who allegedly acted in breach of the Elections Act and hence this sub-paragraph does not comply with r 7(2) and is to be struck off the petition.

[18] The remaining paragraphs which are subject to objection are sub-paras [31](c), [31](d) and [31](f). The introductory paragraph remains; it stands on its own and also refers to sub-paras (a) and (b) to which no objection is lodged. In our opinion, sub-para (c) lacks specification in respect of the names of persons allegedly involved in offences and hence fails to comply with r 7(2). Sub-para (d) must remain since, on a wide interpretation of para [31] it may also refer to sub-paras (a) and (b). Paragraph [31](f) refers to para [23](h) to which no prior objection has been made. We find that para [23](h) complies with r 7(2) and para [31](f) remains in the petition.

[19] Therefore, we make the following order as follows:

Paragraphs [30](i) and [31](c) are hereby struck from the petition.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, C McKee, D Akiiki-Kiiza JJ
18 February 2016

[2016] SCCC 5

Election petition – Evidence – Personal answers – Constitution – President

The petitioner filed an election petition alleging the commission of illegal practices by the 2nd respondent in the 2015 election. The 2nd respondent denied the allegations. The petitioner made a request for a personal answer to be made by the 2nd respondent.

JUDGMENT Petition denied.

HELD

In granting a request for personal answers, a two-tier test is applied. At the first instance, the applicant is to show a strong ground for granting of the order and in the second place, the court is to exercise the discretion reasonably and judiciously.

Legislation

Constitution, art 19(1)(2)

Elections Act

Presidential Election and National Assembly Election (Election Petition) Rules 1998 r 7

Seychelles Civil Code, art 1341

Seychelles Code of Civil Procedure, ss 162-167, 170

Cases

Chez Deenu v Loizeau (1988-1993) SCAR 27

Loizeau, Ex parte (1948) SLR 166

Wavel John Charles Ramkalawan v Agency of Social Protection MC 8 of 2016

Foreign Cases

Bouvet v Mauritius Turf Club (1962) MR 213

Ex Parte Esmael (1941) MR 17

Ishwardas Rohani v Alok Mishra & Ors [2012] 13 SCR 297

New Goodwill v Mrs Tan Yan (1977) MR 329

Rey and Lenferna Ltd v Desiré Nicolas Duval (2012) SCJ

Foreign Legislation

French Code de Procédure Civile, art 324

Counsel

B Georges for petitioner

S Aglae for the 1st respondent

B Hoareau and L Valabhji for the 2nd respondent

R Govinden and A Subramanian for the 3rd respondent

Order on Application

[1] The petitioner petitions the Court to have the 2nd respondent, James Alix Michel of State House ordered to attend court for examination on his personal answers pursuant to s 163 of the Seychelles Code of Civil Procedure.

[2] His petition contains four paragraphs in which he shows that:

- 1 He has filed an election petition against the respondents alleging, inter alia, the commission of illegal practices during the December 2015 Presidential election by the 2nd respondent and his agents.
- 2 The 2nd respondent has denied these allegations.
- 3 He believes that the 2nd respondent is in possession of information relating to a number of the alleged illegal practices and wishes to ascertain the position of the 2nd respondent on these.
- 4 He desires to obtain the personal answers, not on oath of the 2nd respondent on some of the denied allegations.

[3] The petition is supported by a one-averment affidavit by the petitioner to the effect that the statements contained in the petition are true and correct.

[4] Upon receiving the petition, this Court ordered that it be served on the respondents and oral submissions were invited from the petitioner and the 2nd and 3rd respondents in this suit.

[5] It is important at this stage of the proceedings to bring to light the relevant provisions of the Seychelles Code of Civil Procedure. Section 162(1) of the Code provides: “Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties”. Section 163 of the Code, under which this application is made, provides:

Whenever a party is desirous of obtaining the personal answers not upon oath of the adverse party, he may apply to the Judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or *he may petition the court ex-parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party and the court on sufficient ground being shown shall make an order granting the application or petition.* And the party having obtained such order shall serve a summons, together with a copy of the order, on the adverse party to appear in court on the day stated therein. [Emphasis added]

[6] Mr Hoareau for the 2nd respondent, has submitted that the petition is brought out of time as it is brought at the hearing contrary to s 163 which specifies that the petition shall be brought "prior to the date fixed for hearing". He seeks, it would seem, to differentiate between the filing of the petition and the hearing of the petition proper. We respectfully cannot agree with this distinction. It is clear that suits or matters including petitions are

commenced by their filing in the Registry. The election petition was set for hearing on 15 February and the application for personal answers was filed on 12 February. It was, therefore, in our view, made in a timely manner. This procedural objection is dismissed.

[7] Calling an opponent on personal answers (*examen sur faits et articles*) is a procedure originating from art 324 of the French *Code de Procédure Civile* preserved by arts 162 – 167 in the Seychelles Code of Civil Procedure (see *Ex Parte Esmael* (1941) MR 17). Before the party calls or gives sworn evidence he is examined on acts, facts and circumstances pertinent to the cause of action, but not under oath. It is a well-established principle of jurisprudence in Seychelles that such a practice is used to obtain admissions with regards to the pleadings or to establish certain facts so as to adduce evidence excepted by the Civil Code. It is most often used to circumvent the strict application of art 1341 of the Civil Code which requires proof in writing of any matter, the value of which exceeds R 5000.

[8] The Attorney-General has submitted that we would be breaking new ground in adopting this procedure in an election petition as it has not been done before. In fact, it may well be that it has not been used in terms of a petition in Seychelles.

[9] There is clearly a distinction between a petition and a plaint in our law – a plaint is prosecuted by calling oral evidence while a petition is prosecuted by affidavit evidence. An election petition is subject to the provisions of the Presidential Election and National Assembly Election (Election Petition) Rules 1998 and must contain a concise statement of material facts and in cases where illegal practices are alleged to have been committed the names, particulars and dates and places of the commission of the illegal acts (see rr 7(1) and 7(2)).

[10] In this case the election petition was supported by an extensive affidavit of the petitioner. The 2nd respondent has filed a defence with no supporting affidavit. Had he filed an affidavit it is not disputed that he might have been called to be cross-examined as to its contents and this Court would have had to accede to such request.

[11] The question arises as to whether the procedure for personal answers can be extended to matters instituted by petition. Section 162(1) of Seychelles Code of Civil Procedure states clearly that: “Any party to a *cause or matter* may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties”. [Emphasis added]

“Cause” is defined in the Code as including “any action, suit or other original proceedings between a plaintiff and a defendant”. Matter is defined as “every proceeding in the court not in a cause”. “Suit or action” is defined as “a civil proceeding commenced by plaint”. It is, therefore, clear that a petition is caught by a combination of the definitions and while requests for personal answers are rarely if ever made in matters begun by petition one is certainly not precluded from doing so. In the circumstances, we accept that an application to call the 2nd respondent on his personal answers was correctly made in this case.

[12] In terms of the merits of the application, counsel for the petitioner, Mr Georges, has submitted that the petition should be granted on the threshold of “sufficient ground” being provided to the Court. He has admitted that the applicant has to put up a case as to why the personal answers are required. He has also relied on the case of *Chez Deenu v Loizeau* (1988-1993) SCAR 27. That case is authority that the right to refuse a party the opportunity to examine his opponent on personal answers cannot be taken away except on strong grounds. Such “strong grounds” for refusing the application include where physical attendance is impossible or dangerous to life, or if it is proved that the person to be examined has no connection with the issue (see *Chez Deenu v Loizeau* (supra) at 300 citing *Ex Parte Esmael* (1941) MR 17).

[13] We have already stated that the provisions for calling an opponent on his personal answers have French origins. These provisions came to us via Mauritius which administered Seychelles on behalf of the British Crown until 1903. Our rules in relation to personal answers are similar to those of Mauritius. In the Mauritian case of *Rey and Lenferna Ltd v Desiré Nicolas Duval* 2012 SCJ, the court held:

Regarding the calling of the respondent on his personal answers, it is a discretion which the Court applies judiciously and not for the mere asking just because the procedure of personal answers is obtainable in all cases.

[14] We, therefore, agree with Mr Georges that the right to examine on personal answers cannot be lightly taken away but add that although this might be the case, the right is exercised subject to the judicious discretion of the court. This is evident from the wording of s 163 of the Seychelles Code of Civil Procedure.

[15] There are, therefore, two limbs to the test for permitting personal answers, which are to be weighed against each other: the first involves the applicant showing sufficient ground for the granting of the order and the second is the reasonable and judicious exercise of the court’s discretion that no strong grounds exist to nonetheless deny the request. This test will necessarily be applied on a case-by-case basis taking into account the totality of the circumstances surrounding the application.

[16] In the case in hand, the petitioner chose to make his application by way of petition supported by affidavit. Mr Hoareau, for the 2nd respondent, has submitted that the application lacks sufficient ground being shown as it is lacking in detail and the supporting affidavit, a one liner, is so “sketchy” so as not to meet the requirements of s 170 of the Seychelles Code of Civil Procedure.

[17] We have in a previous application related to the election petition case with which the present case is concerned outlined the law in relation to affidavits (See *Wavel John Charles Ramkalawan v Agency of Social Protection* MC 8 of 2016) and we do not see the need to repeat ourselves. We only wish to reiterate that affidavits are evidence made under oath and it is required that they contain facts that the deponent is able of his knowledge to prove. In this respect Mr Georges’ submission that in this case the affidavit

is necessarily vague so as not to unduly reveal his whole case to his opponent is unsustainable, particularly due to the fact that the petition itself lays out detailed averments relating to the alleged practices by the 2nd respondent or his agents.

[18] To show sufficient grounds for an application one must make full and frank disclosure to the Court of facts known to the applicant and how these relate to the application. If one opts to do so by application and affidavit it is in those pleadings that sufficient ground should be shown. This ultimately permits the Court to exercise its discretion fairly. In ordinary civil litigation, especially contractual situations where this procedure is most frequently used, the reasons underlying the application to call an adverse party on his or her personal answers are often self-evident to the Court and require little justification. Where it is not plainly apparent to the Court, a more detailed explanation is required in order to show sufficient grounds.

[19] Mr Hoareau has also submitted that, insofar as the petitioner made allegations that the 2nd respondent is in possession of information relating to a number of alleged illegal practices and that he wishes to ascertain the position of the 2nd respondent on these allegations, these are also unsustainable as the 2nd respondent in his defence has extensively denied these allegations. In Mr Hoareau's submission there would, therefore, be nothing to be gained by calling the 2nd respondent on his personal answers. It is relevant to the Court that the 2nd respondent has filed a defence denying knowledge of the acts in question, and that being called to testify, not under oath, in relation to the denied allegations is not likely to render results which may possibly negate the need for the grant of an order summoning him on personal answers.

[20] Mr Hoareau has also relied on the Mauritian cases of *Bouvet v Mauritius Turf Club* (1962) MR 213 and *New Goodwill v Mrs Tan Yan* (1977) MR 329 to further submit that the procedure under s 163 of the Seychelles Code of Civil Procedure is only permitted where a party to a suit is unable to supply adequate proof whether written or verbal of the averments made in the pleadings. In the present proceedings he submitted there is no such disclosure. We agree that this is a relevant factor in the balancing exercise performed by the Court in considering whether sufficient ground is shown in order that it may exercise its discretion to grant or refuse the order.

[21] The Attorney-General has supported Mr Hoareau's submission and has added that the aim of calling a person on personal answers is to obtain a judicial admission from them especially to overcome the hurdle of a beginning of proof in writing as provided in the Civil Code for some actions.

[22] He has further submitted that since the petition is alleging an illegal practice by a respondent, the proceedings are of a quasi-criminal nature especially since the Elections Act contains provisions imposing penalties where one is found to have been involved in illegal practices and persons may face subsequent criminal prosecution for the illegal practices. In such circumstances, he has submitted, the Court should be slow to allow a civil procedure that might breach the constitutional right of the person called to testify, namely the rights to a fair trial and the right against self-incrimination of the 2nd respondent

under art 19(1) and 19(2) of the Constitution respectively. He has relied on several Indian authorities including *Ishwardas Rohani v Alok Mishra and Ors* [2012]13 SCR 297. He has further likened these proceedings to the case of *Loizeau, Ex Parte* (1948) SLR 166 where proceedings were instituted to strike a barrister off the roll on grounds of misconduct and the court refused the application for the respondent to be called on his personal answers.

[23] Mr Georges has conceded that he might ask the 2nd respondent questions about the illegal practices or he might not, and this failure to disclose fully the grounds on which the application is sought further frustrates our analysis in this application. We can only rely on the application which clearly states that the petitioner wishes to ascertain the position of the 2nd respondent with regard to his denial of the commission of illegal practices during the December 2015 Presidential elections by the 2nd respondent and his agents.

[24] While we are not convinced that arts 19(1) and 19(2) of the Constitution apply to completely shield witnesses from testifying in quasi-criminal proceedings, it is a fundamental tenet of law that a person is protected against self-incrimination, subject to certain restrictions. However, this was a point which was not fully argued before us. We are, nevertheless, of the opinion that a court should be hesitant to compel a witness to give testimony the sole purpose of which is to question him on his knowledge of illegal practices which could lead to the imposition of quasi-criminal penalties and criminal prosecution.

[25] We are cognisant of the fact that the 2nd respondent is the President of the Republic and for reasons of decorum and respect for the position some would urge us to be hesitant to summons the 2nd respondent to court. However, we are required by the Elections Act to take our mandate seriously which is to determine whether a person has been validly elected to the office of the President. We cannot therefore treat any person in this process as being above the law or worthy of special treatment. Merely having won an election does not grant an individual immunity from the scrutiny of the Court in an election petition.

[26] However, in terms of the two stage test outlined above and, in the totality of the circumstances, we are not satisfied that the petitioner has shown sufficient grounds for the granting of the order in the application. We are compelled by the strong grounds against granting the application, namely the fact that the relevance of the 2nd respondent's testimony to proving the allegations in the petition is not clear to the court; the interrogation centres around illegal practices with a stated aim being the self-incrimination of the 2nd respondent (either in person or as an accessory with knowledge of illegal acts); and that the 2nd respondent has already denied all knowledge of the facts in official pleadings. In the circumstances, this application is refused.

DIRECTOR OF SOCIAL SERVICES v P & S

S Govinden J
4 March 2016

[2016] SCSC 149

Civil procedure – Child custody – Leave to appeal – Extension of time

The appellant's application for getting the caring duties of a minor was ruled out by the Family Tribunal. The appellant sought a leave to appeal against the ruling. An objection was raised about the delayed submission of the leave application.

JUDGMENT Leave granted.

HELD

- 1 The procedural requirements of exercising a right to appeal should be strictly complied with.
- 2 The Court, however, enjoys a wide discretionary power in granting an extension of time. It should not apply the time provision rigidly and should consider circumstances peculiar to each case in the interest of justice and fairness.

Legislation

Children Act 1982, ss 78(1), 80(1)(b)
Appeal Rules, rr 5, 6, 27

Foreign Cases

Hawkins [1997] Cr App R 234
Howard v Bodington (1877) 2 PD 203

Counsel K Karunakaran for the appellant
M Vidot for respondents

GOVINDEN J

[1] This is a motion dated and filed by State Counsel for the appellant on 29 February 2016 seeking "leave to appeal out of time" against a final ruling of the Family Tribunal (the Ruling) delivered on 3 February 2016.

[2] The impugned ruling is about an application by the Director of Social Services (DSS) under s 80(1) of the Children Act, 1982 ("the Act"). In the application, the DSS prayed the Family Tribunal to exercise its statutory jurisdiction under s 78(1)(b) of the Act, as amended by Act 14 of 1998, to make a compulsory measure of care order in favour of Z, a minor, for the DSS to take her in their care in a place of safety.

The conclusion of the Tribunal in issue is found more particularly in paras [23] to [26] of the Ruling which I shall not reproduce at this stage of the proceedings, for this is but a motion for leave to appeal out of time only but the contents of which is duly noted for the purpose of this motion.

[3] According to the extract of the Ruling, present at the time of its delivery was the representative of DSS as well as the respondents and their named legal representative.

[4] Now, counsel for the appellant Mr K Karunakaran, submitted on an affidavit attached in support of the motion duly sworn by one Michelle Marguerite, Senior Legal Officer with the Ministry of the Social Affairs, Community Development and Sports on behalf of the DSS, which in short relates to information and evidence collected by the DSS in respect of the subject matter of the Ruling more particularly as averred at paras [2] to [6] of the affidavit.

[5] At para [7] thereof, Ms Marguerite avers specific to this motion that on 3 February 2016, the Family Tribunal gave a Ruling dismissing the application made by DSS on 6 July 2015 for an order of compulsory measure of care in favour of the second minor Z and further ruled that the order of 31 December 2014 be varied, in that the minor Q be returned to the care and supervision of the 1st respondent.

[6] She further avers that a copy of the ruling was made available by the Tribunal to the DSS only on 24 February 2016, resulting in the current delay in being able to appeal against the ruling. Furthermore, that this provided little time for the appellant to reach a decision and instruct counsel. That the appeal filed by the appellant, if entertained, has a great chance of success and would be in the interest of the children that is, the two female minors being the victims of sexual assault.

[7] Reference has been made to the matter of *Hawkins* [1997] Cr App R 234 wherein the Court of Appeal commented that “the practice of the Court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done”.

[8] The said deponent has further urged the Court to be pleased to condone the delay in the filing of the notice of appeal and to allow the appeal to be heard out of time in the interest of fairness and justice.

[9] Counsel for the appellant emphasised that the main delay in filing of the said notice of appeal was primarily due to the fact that the copies of the ruling and related documents were made available to the DSS on 24 February 2016 as attested by the stamps inserted on the ruling and that in fact the notice of appeal and memorandum of appeal together with notice of motion for all ancillary matters to be heard as a matter of urgency more particularly the current motion, the motion for stay of execution, were filed before the Registry of the Supreme Court on 29 February 2016 the earliest possible time after obtention of the ruling and 2 March 2016 was set for the hearing.

[10] Counsel Mr M Vidot on behalf of the respondents chose to submit *viva voce* in the absence of a written reply to the current motion and submitted in essence as follows.

[11] Counsel submitted that the Ruling was delivered on 3 February 2016 when the representative of the DSS was present and hence knew of the Ruling and they maybe did not make an effort to get a copy of the Ruling in time. That he was able to get one even before 14 days and he was just wondering why DSS did not manage to do so, and the Ruling of the Tribunal by the DSS only indicates the date that the report was sought by the DSS.

[12] Further, that DSS could have at least filed a notice of appeal pending obtention of the copy of the ruling within 14 days of its delivery and then sought time from the Court to file a memorandum upon obtention of all other relevant Rulings and documents.

[13] It was admitted that there is a pending criminal charge of sexual assault as against the 2nd respondent and another before the Supreme Court in CR No 79/2015 vis-a-vis the relevant children.

[14] It was neither denied that the Family Tribunal did not serve a copy of the ruling on the respondents within 14 days of the delivering of the ruling but rather it is the respondents themselves who went to search for a copy of same hence their objections.

[15] Now, the governing legislation pertinent to this application is the Appeal Rules, more particularly rr 5 and 6 read with r 27.

Rule 6(1)

Every appeal shall be commenced by a notice of appeal

Rule 6(2)

The notice of appeal shall be delivered to the Clerk of the Court within fourteen days from the date of the decision appealed against unless some other period is expressly provided by the law which authorises the appeal.

Rule 5

Any party desiring an extension of the time prescribed for taking any step may apply to the Supreme Court by motion and such extension as is reasonable in the circumstances may be granted on any ground which the Supreme Court considers sufficient.

Rule 27(1)

Where an Act allows an appeal to the Supreme Court from an order or decision of any commissioner or other tribunal or officer the procedure in such an appeal be in accordance with such Act and regulations thereunder and subject thereto, and in respect of all matters for which they do not provide, in accordance with these rules. [Emphasis added]

[16] Now, the latter rule applies in this case in view of the absence of specific procedures under the Act.

[17] The main reason adduced by the appellant in seeking an extension of time as per the affidavit of the deponent on behalf of the DSS justifying this motion is in short that a copy of the ruling was made available by the Tribunal to DSS only on 24 February 2016,

resulting in the current delay in being able to appeal against the ruling. Further, that this provided little time for the appellant to reach a decision and instruct counsel. That the appeal filed by the appellant, if entertained, has a great chance of success and would be in the interest of the children that is, the two female minors being the victims of alleged sexual assault.

[18] The Court notes also the motion that the appeal is to be heard out of time in the interest of fairness and justice in view of the averments at paras [2] to [7] of the affidavit in support of the motion which relate to a brief but succinct history of the matter leading to the impugned ruling of the Tribunal.

[19] I have, in the light of the above background which has not been denied by the respondents (excepted the obligation falling on the applicant to obtain a copy of the ruling from the Tribunal within fourteen days of its delivery as above-illustrated) and consideration of submissions of both counsel vis-à-vis this motion, found that this motion was filed on 29 February 2016, 26 days after the delivery of the ruling of the 3 February 2016 hence 12 days in excess to the fourteen days provided for appeal by the provisions of r 6(2) (supra).

[20] I note further that in the case of *Howard v Bodington* (1877) 2 PD 203 Lord Penzance stated that “the continuance of a suit itself was a harm which causes prejudice, and that disability of the petitioner is not what the court is called upon to consider, but material prejudice caused to the respondent.” The Judge further stated that: “if we desert the 21 days, the question arises how long may the matter hang over the head of the respondent”.

[21] In line with the above statement, the following passage from *Maxwell on Interpretation of Statutes* (11th Edition) at 367 is relevant:

Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. If, for instance, a right of appeal from provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances or transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal.

[22] Now, r 5 of the Appeal Rules (supra), gives this Court a wide discretion in the matter of granting an extension of time. To depart from the set-out procedures, the Court needs to have good reasons to do so. Albeit the overriding consideration being the prejudice caused to the respondent by such a delay as above-enunciated, at the same time a Court should also be prepared in the interest of justice and fairness to consider circumstances peculiar to each case and not apply the time limits rigidly in all cases.

[23] Now, in this case, as it is transpired from the records of proceedings and documents filed in support of this motion, the Tribunal secretariat did not provide the parties with the relevant copies of the Ruling within the prescribed time limit for filing of a notice appeal as provided under r 6 (supra) and this is apparent as duly attested by the very stamps on

the Ruling attached to the motion wherein the Secretary to the Tribunal only certified a true copy of the original Order of the Tribunal (delivered on 3 February 2016), on 23 February 2016 and delivered to the DSS as attested by stamp on the Ruling on 24 February 2016. It is, in my opinion, the administrative duty and obligation of the Tribunal secretariat to ensure that copies of proceedings are certified on the same date the Ruling is delivered and served on the relevant parties within a reasonable time. Hence, the shifting of the administrative duty and obligation of the Tribunal onto a party is, with due respect to counsel for the respondent's arguments, untenable in all the circumstances of this case.

[24] Further, the practice of the Court in comparable situations shall be to eschew undue technicality and ask based on peculiar circumstances of each case as to whether any substantial injustice has been, is being or likely to be done to the respondent hence justifying the exercise of the discretionary powers of the Court under r 5.

[25] In the instant case, the Court is making it clear that it is not in any way condoning the delay for the filing of the notice of appeal by the DSS but noting that there is a pending criminal charge against the 2nd respondent vis a vis the minors the subject of the appeal proper and also the lapse of only 26 days out of time for the reasons as clearly illustrated and analysed above. I find that in the instant case, the delay has not been too long and the reason adduced for the delay is sufficient for this Court to grant an extension of time.

[26] Further, the Court considers that a motion that the intended notice of appeal and appeal properly to be heard as a matter of urgency has already been granted by this Court on 2 March 2016, hence no material prejudice is being or likely to be caused to the respondents by such a delay.

[27] Leave to appeal, therefore, is granted.

DIRECTOR OF SOCIAL SERVICES v P & S

S Govinden J
8 March 2016

[2016] SCSC 154

Family – Child custody – Stay of execution

The respondents were the parents of two minor girls and a boy. One of the girls was allegedly sexually molested by the 2nd respondent and the boy. A criminal charge was brought against them. The appellant obtained the custody of the victim girl by an order from the Family Tribunal. Later on, the appellant also applied for the custody of the other girl. The respondents opposed this application and also asked the court to vary the earlier custody order. The Tribunal rejected the appellant's application and restored the custody of the victim girl to the respondents. Pending an appeal, the appellant sought a stay of the ruling.

JUDGMENT For the appellant

HELD

- 1 The question whether or not to grant a stay is entirely in the discretion of the Court.
- 2 The court will not grant a stay unless there are good reasons for doing so.
- 3 In considering a stay application, the Court needs to take into account any likelihood of irreparable loss to be sustained by the applicant and the relevant circumstances of the case.

Legislation

Children Act 1982, ss 78(1)(b), 80(1)

Cases

Falcons Enterprise v David Essack & Ors (CS No 139 of 2000)

La Serenissima Limited v Francesco Boldrini & Ors (CS No 471 of 1999)

Macdonald Pool v Despilly William (CS No 244 of 1993)

Foreign Cases

Akins v GW Ry (1886) 2 TLR 400

Becker v Earl's Court (1911) 56 Sol. Jo 206

Sokkallal Ram Sait v Kumaravel Nadar and Others (13 CL W 52)

Counsel K Karunakaran for the appellant
M Vidot for the respondent

GOVINDEN J

[1] This is an application for stay of execution of the Ruling of the Family Tribunal in Case No 1/2016 (Tribunal's Ruling"), pending the determination of an appeal filed by the applicant (DSS), before the Supreme Court in CA 3 of 2016 (Appeal), which appeal has been fixed for filing of written submissions (in view of its urgency) on 11 March 2016.

[2] The respondents are resisting the current application for stay.

[3] This application originates from the Ruling wherein the DSS under s 80(1) of the Children Act 1982 ("the Act") prayed before the Family Tribunal, to exercise its statutory jurisdiction under s 78(1)(b) of the Act, as amended by Act 14 of 1998, to make a compulsory measure of care order in favour of Z, a minor, for the DSS to take her in their care in a place of safety.

[4] In support of its application, the DSS has attached thereto an affidavit of 29 February 2016 of one Michelle Marguerite, Senior Legal Officer with the Ministry of Social Affairs, Community Development and Sports also being the legal officer in charge of this matter on behalf of the DSS and she *clearly avers in no uncertain terms that the averments in the affidavit are based on the information and evidence collected by the Department of Social Affairs of which statements are true and correct to the best of her knowledge, belief and information.* [Emphasis added]

[5] Now, in support of the application, the DSS through the above-named, states, that on 7 November 2014, the 1st respondent P filed a report with the police alleging that her minor daughters had been sexually assaulted by the 2nd respondent, their father, S, and also by their brother K.

[6] That as a result of evidence collected pursuant to the above-mentioned report, *the 2nd respondent and the brother were charged with the offence of committing an act of indecency towards a child, in Criminal No 79 of 2015 before the Supreme Court, which matter is currently ongoing.* [Emphasis added]

[7] That on 29 December 2014, the DSS filed an application before the Family Tribunal for an order of compulsory measures of care in favour of Q pursuant to s 78(1) of the Act.

That the 1st respondent consented to the application. On 31 December 2014, the Family Tribunal made an Order for the compulsory measures of care thereby placing Q under the care and supervision of the DSS. [Emphasis added]

[8] That in July 2015, there was a growing concern in the Social Services Department about the safety of Q who was at the time available for access by the 1st respondent. *An application was made by the DSS to the Family Tribunal to prohibit the 1st respondent from having access to Q. The basis of this application was that the Social Services suspected that the 1st respondent had turned hostile towards the Social Services.*

Furthermore, the 1st respondent was using her access to Q to influence her to convince her not to give evidence in the forthcoming trial against her father, the 2nd respondent. Pursuant to above-mentioned application, the Family Tribunal granted the Order of 1 July 2015, prohibiting the 1st respondent from having access to the minor Q. [Emphasis added]

[9] *That based on concerns similar to those set out above, in that Z was also being influenced not to give evidence or commit perjury and in an unsafe environment. On 6 July 2015, the DSS further filed an application before the Family Tribunal for an order of compulsory measures of care in favour of the second minor, Z, pursuant to s 78(1) of the Act. This application was opposed by both respondents who also filed a counter application for the Family Tribunal to vary the Order made on 31 December 2014, placing Q under the care and supervision of the DSS. [Emphasis added]*

[10] *That on 3 February 2016, the Family Tribunal gave the Ruling dismissing the application made by the DSS on 6 July 2015 for an order of compulsory measures of care in favour of Z, and further that the order of 31 December 2014 be varied, in that the minor Q be returned to the care and supervision of the 1st respondent.*

[11] *That the Ruling also required the 1st respondent to undergo a programme of counselling and parenting in preparation for her to receive the children by the end of February, which she has so far failed to do. [Emphasis added]*

[12] *That the respondents may seek to enforce part of the Ruling relating to the transfer of the said children from the custody of the DSS to the 1st respondent, while not having complied with the recommendations of the Family Tribunal, since it is now the end of February. [Emphasis added]*

[13] *That the DSS has filed an appeal before the Supreme Court on 29 February 2016, against the Ruling and hence, it is humbly prayed that the Ruling be stayed pending the determination of the Appeal for the DSS believes that there is a great likelihood that the minors Q and Z may be subjected to unnecessary suffering and further the DSS has reasonable suspicions to believe that if the Ruling of the Family Tribunal is not stayed, there is a great likelihood that both minors may be interfered with as witnesses in the criminal charge against the 2nd respondent and his son as named, thus obstructing the course of justice. [Emphasis added]*

[14] *Finally, it is averred on behalf of the DSS, that the appeal has a great chance of success and it is in the interest of justice for the Ruling be stayed. [Emphasis added]*

[15] *The 1st respondent submitted on her part in the form of a counter affidavit dated 4 February 2016 resisting the application in toto for stay and avers in essence as follows.*

[16] *That she is the mother of the relevant children and the 2nd respondent their father and K is their 21 year old brother.*

[17] In November 2014, *the 2nd respondent and herself were experiencing serious matrimonial problems and she was very depressed and that was affecting her physically and mentally, it was also having an adverse effect on the family that finally the best solution was according to her for her to vacate the family home and she decided that it would be in relevant children's best interest that they come with her rather than leaving them with their father and brother as they needed a more secure, calm and loving environment.* [Emphasis added]

[18] She has ceased all man-woman relationship with the 2nd respondent for sometime since 2014 and is not cohabiting with him *save that they communicate on matters pertaining to the children whom he helps to maintain.* [Emphasis added]

[19] *She has been informed and overheard in the Family Tribunal that criminal charges have been filed against the 2nd respondent and her son and the latter with whom she does not enjoy a good relationship with and which relationship is rather tensed and there is hardly any communication between them. Furthermore, that she has never discussed the pending criminal charges with the 2nd respondent or her son* [Emphasis added]

[20] *She is aware that at the time when her daughter Q was residing with one M, she was very concerned and approached the Social Services and as far as she is aware an application was made to the Family Tribunal to remove her therefrom and she was asked by the Social Services to sign a consent form that would allow the return of her child to her. That at the time she had just ended her common law relationship with the 2nd respondent and moved out of the family home. That she was very distressed and under severe physical and emotional pressure and received negligible assistance from Social Services. That she struggled on her own and secured permanent accommodation where she and her children were happy and flourished until 24 June 2015 when Q was removed by Social Services.* [Emphasis added]

[21] That there is no manipulation by the 2nd respondent of the children when in her care and the allegations of the DSS are a fabrication and unfounded and unsupported by evidence.

[22] *She confirms at para [12] of her affidavit that when it was brought to the attention of the Family Tribunal that she was allowing the 2nd respondent supervised access to the children, the DSS raised to objection.* That she is informed that the Tribunal encouraged the DSS to organise supervised access. Hence, she claims that what she did was merely promoting request recommended by the Tribunal and that the Tribunal will be going against its own recommendation should it decide to hold with the DSS unsubstantiated averments and would make a mockery of justice. [Emphasis added]

[23] *At para [16] of her affidavit, she, inter alia, confirms that she has allowed the 2nd respondent access to Z.* [Emphasis added]

[24] *She further confirms at para [18] of her affidavit inter alia that in line with the recommendation of the Family Tribunal, she met with Mrs Bernadette Payet on at least two occasions and on 29 February 2016 when Q was to be returned to her she contacted her to query if she should pick her up to her or that Social Services would deliver her to the 1st respondent and she was reassured that Q would be brought to her but it did not happen. [Emphasis added]*

[25] In essence, the whole basis of the affidavit of the representative of DSS is being denied and considered as unsubstantiated by the 1st respondent and not in the best interest of the children hence the stay is vehemently objected to as above-illustrated.

[26] Now, at this stage of the proceedings to consider a stay application, would be like putting the cart before the horse because if the Court was to venture to analyse the grounds of appeal as per the memorandum of appeal and give a prelude of the outcome of the appeal and analyse evidence before the Family Tribunal, for this is the subject matter of an appeal which is pending before this same Court and hence suffice to say at this stage that the relevant considerations in such an application for stay of proceedings as stated in the above-cited cases and the case of *Becker v Earl's Court* (1911) 56 Sol Jo 206 is that "the question whether or not to grant a stay is entirely in the discretion of the Court".

[27] Locally, the relevant considerations in an application for a stay of execution of judgment have been often rehearsed in our local case laws of inter alia: *Macdonald Pool v Despilly William* (CS No 244 of 1993), *La Serenissima Limited v Francesco Boldrini & Ors* (CS No 471 of 1999), *Falcons Enterprise v David Essack & Ors* (CS No 139 of 2000).

[28] Further being guided by the guidelines in the above-cited local authorities, I hold that it is incumbent on the applicant to disclose in its affidavit the grounds relied upon in support of the application for stay of execution and objections of the respondents in the same light. The said requirement finds emphasis in the case of *Akins v GW Ry* (1886) 2 TLR 400, where the Court held thus: "As a general rule the only ground for stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds". Albeit the facts being different in this matter, the principle remains the same.

[29] The Courts of England, have also accepted that "the court will not grant a stay unless there are good reasons for doing so".

[30] Further, the Sri Lankan case of *Sokkhalal Ram Sait v Kumaravel Nadar and Others* (13 CL W 52), it was also stated vis-à-vis stays of proceedings that "the usual course is to stay proceedings ... only when the proceedings would cause irreparable injury to the appellant and that mere inconveniences and annoyance is not enough to induce the Court to take away from the successful party the benefit of its decree."

[31] It is thus abundantly clear that in Seychelles and in other cited jurisdictions, “irreparable loss and where special circumstances of the case so require should be paramount considerations to be taken into account by the Court in such applications for stay as the let alone chances of success on appeal or otherwise.”

[32] Now, having set out the position of the law in regards to such applications, I will directly address the issues as raised by the DSS in terms of the objections of the 1st respondent in line with the final findings and analysis of the Family Tribunal which is found more particularly in paras [19] to [26] of the Ruling contents of which are reproduced below for the purpose of this Ruling:

- [19] We take judicial notice, that, both, the 2nd respondent S, and his son, K, have both been charged before the Supreme Court with sexual offences allegedly committed against Q.
- [20] ... in respect of the latter, although Z is a female and the alleged sexual assault has been allegedly caused against her sister Q, we see no risk to her health and well-being given that the alleged perpetrators of the offences no longer live within the same household with Z.
- [21] ... to succeed in obtaining a care order or a supervision order, one has to establish the ground by proving two elements. The first is the presence of risk of a significant harm to the child. The second is the attribution of this harm or risk to parental upbringing, or to loss of parental control. We keep in mind that the underlying principle in both, our domestic law found in the Children Act 1982, as amended, and the principle in the English Children Act 1989. The principle in both pieces of legislation is to safeguard the best interest of the child.
- [26] The family should be given another opportunity to make a fresh start. We therefore recommended that P improve her relationship with the office of the Director of Social Services to enable her to undergo a programme of counselling and parenting sessions that would be specifically designed to meet her needs so as enable her to receive back in her care her daughter Q by the latest end of February 2016. [Emphasis added]

[33] I wish to point out at this stage, that the Family Tribunal does not mention at paras [19] and [20] thereof of its Ruling (supra), the alleged indecent assault on the child Z, this Court for the purpose of this Ruling takes judicial notice as admitted by both counsel before Court that the criminal charge relates to both children.

[34] Now, firstly, the applicant through the averments as cited at paras [5] to [14] of this Ruling (supra), illustrates through clear and concise information and evidence collected by the Department of Social Services through a mandated legal officer, with respect to alleged sexual assaults against the children which culminated in a charge in Criminal Side No 79 of 2015 and of which judicial notice is taken as earlier noted and which charges are against the 2nd respondent as one of the accused as well as his son and brother of the children. This averment has not been denied by the 1st respondent though there were

attempts to try and pretend that she is unaware of its inception and core elements. It should be noted at this stage, that it raises great concern for the purpose of this application that the 1st respondent has not even addressed this issue with the 2nd respondent albeit admittedly allowing him access to Z and being on speaking terms with him.

[35] Secondly, it is also abundantly clear that the Family Tribunal through an order of 29 December 2014 made an Order for the compulsory measure of care of Q under the care and control of the DSS of which contents have not been denied by the respondent.

[36] Thirdly, it is also not denied that through an application of the DSS of July 2015 for denial of access Q to the 1st respondent due to growing concern of safety of Q at the time of supervised access in that the 1st respondent was allowing the 2nd respondent access to the child Q hence culminating in the prohibited access to the 1st respondent.

[37] The 1st respondent neither denies the application of the DSS of 6 July 2015 for an order of compulsory measure of care and control of Z on the basis of being influenced to not give evidence or commit perjury and in an unsafe environment but rather again admits allowing Z access to the 2nd respondent on the premise of what was said to her by her lawyer that the Tribunal encouraged the same when no specific order of the Tribunal in his support.

[38] Further, the DSS specifies as one of the main ground for the stay application, that the 1st respondent has not observed the recommendation of the Family Tribunal so as to give effect to the Ruling and this is again not denied by the 1st respondent. The averments of her affidavit as above stated are in essence that she simply accepts having talked to a social worker twice, seeking the date of the return and picking up of Z.

[39] Now, having carefully noted the averments in the affidavit of both the DSS's representative as named based on the very strong information and evidence in their possession as clearly rehearsed in the affidavit and to the strong likelihood of interference to R and Q, especially noting the criminal charge pending as against the 2nd respondent and the brother of the children, it is clear (without prejudice and or prejudging of the main issues on appeal more particularly the Ruling), that there is a continued danger that the children would be faced with if they remain in the custody of the 1st and 2nd respondent especially in that the 1st respondent does not deny having given access to him upon her lawyer's advice.

[40] In the best interest of the children which is of course the paramount and special consideration being taken into account by this Court in this application, (let alone the chances of success on appeal or otherwise), this Court finds based on the constant denial of the 1st respondent of the several material facts as traversed on the records of proceedings before the Family Tribunal and also admission of flouting the very Ruling of the Tribunal of 3 February 2016, that should the stay not be granted it shall impact

severely on the physical, mental and emotional well-being of the children hence grave danger to the children as victims of the alleged sexual assaults in the pending criminal matter and hence injustice to the appellant which has as a mandate to safeguard the well-being of the children and also grave danger to the outcome of the pending criminal trial.

[41] Additionally, weighing the balance of prejudice and the special circumstances of this case and the real likelihood of the danger to the children pending the final determination of the criminal charge and also the continued lack of cooperation of the 1st respondent towards the DSS as recommended by the Family Tribunal in its Ruling which in effect is a precondition to the implementation of the Ruling per se, I find in that regard that the stay of execution of the Ruling of the Family Tribunal should be granted in view of the specific circumstances of this case and interests of the children and to avoid irreparable prejudice being caused to their well-being and safety.

[42] Hence, it follows, in the interests of justice and for reasons as enunciated above, this application succeeds and the Court hereby rules that the Family Tribunal's Ruling of the 3 February 2016 of No 1 of 2015, is stayed, pending the final determination of the appeal against it in CA 3 of 2016 before the Supreme Court.

[43] All the above said, the present application is hereby allowed accordingly.

BONIFACE v ATTORNEY-GENERAL

C McKee J
11 March 2016

[2016] SCSC 72

Constitution – Criminal procedure – Arrest – Failure to give name

The plaintiff failed to give his name to a police officer when requested. He was taken to a police station then arrested and detained till identified. The plaintiff's claim for compensation for false arrest and illegal detention failed in the Magistrates' Court. The plaintiff appealed.

JUDGMENT For the plaintiff.

HELD

- 1 A person deprived of the liberty to move beyond a police officer's control, is under arrest.
- 2 It is not an offence to refuse to provide one's name on request.

Legislation

Constitution of Seychelles art 18(3)(10)
Civil Code of Seychelles s 1382
Criminal Procedure Code s 2, 18(c), 20(1)
Police Force Act s 25(2)

Cases

Cesar Marie v Attorney-General Civil Side No 424 of 1998
Namasivayam v Gunawardena (1989) 1 SLR 394
R v Fred [No 1]1974 SLR 6

Foreign Cases

Holgate Mohammed v Duke [1984] 1 All ER 1056
Murray v Ministry of Defence [1988] LRC [Const] 519

Counsel A Derjaques for appellant
H Muninadhan for respondents

MCKEE J

[1] This is an appeal against the judgment of a Magistrate in exercise of the civil jurisdiction of the Magistrates' Court ("the Court").

[2] I have had the opportunity of reading the Notes of Proceedings and the judgment of the Magistrate.

Circumstances of the Case

[3] The appellant, Mr Francis Boniface, fifty five years of age, lives at Anse Boileau and was, at the time, employed at the Ephilia Hotel in the agricultural department. On 8 July 2013 around 3.30pm the appellant was a passenger in a bus with fellow employees of the hotel who had all completed their work for that day. When the bus reached Grand Anse it was stopped by a group of police officers, including police officer Bistoquet.

[4] Officer Bistoquet and the other police officers had received instructions to trace a man with surname "Savy", who had a connection with the hotel, in respect of enquiries relating to an offence of a sexual nature. Bistoquet did not know Savy by sight. Officer Bistoquet entered the bus. The appellant was seated close to the door of the bus. It was the evidence of Officer Bistoquet that he asked the appellant to provide his name since he was looking for a particular person. The appellant, in his evidence, stated that he was only asked for his name. In any event the appellant refused to provide his name to the police officer. It is fair to say that most, if not all, of the remaining employees provided their names to police officers. As a result of his refusal the appellant was told to leave the bus, which he did. There then followed a further confrontation between the appellant and police officers with the appellant still refusing to provide his name. The incident outside of the bus came to a close when the appellant was put in a police vehicle and transported to Anse Boileau Police Station. It was the evidence of Officer Bistoquet that, following his arrival at the police station, the appellant was informed that he was under arrest for failing to provide his name to a police officer. The appellant was detained in a cell overnight but released the following morning when another police officer gave a positive identification of the appellant. The police authorities took no further action against the appellant.

[5] The appellant initiated a civil claim for damages against the Commissioner of Police and the Attorney-General of Seychelles [the defendants]. He sought damages in the amount R 100,000 alleging false arrest, unlawful detention and a failure by the police authorities to tell him the reasons for his arrest and detention. Following the consideration of the evidence by the Magistrate, it was held that no fault attached to the defendants through their vicarious responsibility for the actions of their servant or agent, namely police officer Bistoquet, and the action was dismissed.

[6] It is against this decision of the Magistrate that the appellant now appeals.

[7] In coming to a decision the Magistrate found that Officer Bistoquet had given truthful evidence, the appellant had given an exaggerated version of what had occurred that day and the appellant had brought suspicion upon himself by refusing to give his name to the police officers. Furthermore the police officer had not committed any error of conduct in following the procedure that he did and as such was not in breach of s 1382 of the Civil Code of Seychelles. The Magistrate found that the appellant had obstructed Officer Bistoquet in the due execution of his duty.

Findings

[8] In my opinion this matter turns on whether the arrest of the appellant by Officer Bistoquet was lawful.

[9] The Magistrate differentiated between the evidence of Officer Bistoquet and the appellant. In my opinion there is no great divergence in the two versions given as to what occurred within the bus save that while Bistoquet stated in evidence that he asked the appellant for his name and stated that he was “looking for someone”, the evidence of the appellant was that he was only asked to provide his name, which he refused to do. However I can see no evidence that Officer Bistoquet mentioned the name “Savy” to the appellant. In any event, when the appellant failed to give his name he was told to get off the bus, which he did. The appellant again refused to divulge his name. The appellant was then placed in a police vehicle and transported to Anse Boileau Police Station where he was told he was under arrest and detained overnight but released the following morning when another police officer properly identified him. Throughout the material period of time the appellant did not provide Officer Bistoquet or any other police officer with his name.

[10] On arrival at Anse Boileau Police Station it was the evidence of Officer Bistoquet that the appellant was formally arrested for failing to provide his name to a police officer.

[11] My first comment would be that the arrest of the appellant was not effected at the Anse Boileau Police Station but at the point in time when he was detained outside of the bus and placed in the police transport. I refer to the case *Cesar Marie v Attorney-General* Civil Side No 424 of 1998 and the final paragraph on page 2 and following on at page 3 which reads as follows –

An arrest can occur without any procedural formality. In *Holgate Mohammed v Duke* [1984] 1 All ER 1056 – Lord Diplock took the view that where a person is detained or restrained by a police officer and he knows that he is detained or restrained, that amounts to an arrest of him even though no formal words of arrest were spoken by the officer. Lord Griffith in further clarifying this concept in the case of *Murray v Ministry of Defence* [1988] LRC [Const] 519 stated:

It should be noted that the arrest is a continuing act; it starts with the arrestor taking a person into custody [by actions or words restraining him from moving anywhere beyond the arrestor’s control] and it continues until the person so arrested is either released from custody or having been brought before a Magistrate is remanded in custody by the Magistrate’s Judicial Act.

In a Sri Lankan case similar to the present case [and I would suggest is similar to the case before me] *Namasivayam v Gunawardena* (1989) 1 SLR 394 a person was arrested while travelling on a bus. The police officer admitted the incident but stated that he did not arrest that person but only required him to accompany

him to the police station for questioning, and released him after recording a statement. The Supreme Court held that when the police officer required him to accompany him to the police station, that person was, in law, arrested as he was prevented by that action from proceeding on his journey in the bus. Hence, whenever a person is deprived of his liberty of movement, he is under arrest.

[12] I accept that while at the Anse Boileau Police Station the appellant was informed of the reason for his arrest. Officer Bistoquet informed the appellant that he was being arrested because he refused to give his name and he is not allowed to refuse to give particulars to a police officer. It is worthy of note at this stage that Officer Bistoquet did not inform the appellant that he was arrested for obstructing a police officer in the due execution of his duty contrary to s 18(c) of the Criminal Procedure Code.

[13] The delay in advising the appellant of the reason for his arrest is not fatal. I refer to art 18(3) of the Constitution which reads as follows –

A person who is arrested or detained has a right to be informed at the time of arrest or detention or *as soon as practicable thereafter*, in, as far as practicable, a language that the person understands, of the reason for the arrest or detention....[Emphasis added]

Article 18(3) goes on to state that the arrested person is also to be advised of his right to remain silent, a right to be defended by a legal practitioner of the person's choice and in the case of a minor, a right to communicate with the parent or guardian. The appellant stated in evidence that his constitutional rights were not explained to him but Officer Bistoquet said in evidence that he asked the appellant to contact his relative or lawyer and said that other police officers "did the other procedures". In the light of this evidence it appears possible that the appellant was advised of his rights. In any event that issue is not central to this matter.

[14] I find that Officer Bistoquet arrested the appellant at the Anse Boileau Police Station for failing to provide his name when asked to do so by a police officer. Officer Bistoquet may well have had in mind s 20(1) of the Criminal Procedure Code. It has the marginal note "Refusal to give name and address" and reads as follows –

When any person who in the presence of a police officer has committed or has been accused of committing a non-cognisable offence refuses on demand of such officer to give his name and residence, or gives a name and residence which such officer has reason to believe to be false he may be arrested by such officer in order that his name and residence may be established.

[15] A non-cognisable offence is defined in s 2 – the interpretation clause – of the Criminal Procedure Code. A "non-cognisable offence" means "an offence for which a police officer may not arrest without a warrant".

Boniface v Attorney-General

[16] It is also of value to consider the corresponding definition in the interpretation clause of a “cognisable offence”. A “cognisable offence” means “any offence for which a police officer may in accordance with the third schedule or under any law for the time being in force, arrest without warrant”.

[17] I consider also s 25(2) of the Police Force Act and s 18(c) of the Criminal Procedure Code.

[18] Section 25(2) of the Police Force Act reads as follows –

It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and *to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist.* [Emphasis added]

[19] Section 18(c) of the Criminal Procedure Code reads as follows –

Any police officer may, without an order from a judicial officer and without a warrant, arrest any person *who obstructs a police officer while in the execution of his duty*, or who has escaped or attempts to escape from lawful custody. [Emphasis added]

[20] The underlying principle is that an arrested man is entitled to be told what is the act for which he is arrested [R v Fred [No 1]1974 SLR 6]. In my opinion Officer Bistoquet is bound by the words used at the time of the arrest, namely that the appellant was arrested for failing to provide his name. It follows, in my view, in order to succeed, that there must be compliance with the provisions of s 20(1) of the Criminal Procedure Code before the arrest is lawful.

[21] The appellant was never informed at the time of his arrest that he was arrested for obstructing a police officer in the due execution of his duties and was in breach of s 18(c) of the Criminal Procedure Code. In the judgment the Magistrate seems to have made a finding that Officer Bistoquet had arrested the appellant for this particular charge. With the greatest respect to the Magistrate, this is not the case. This appellant was arrested for failing to provide his name to Officer Bistoquet.

[22] Section 20(1) of the Criminal Procedure Code envisages two possible scenarios which must be present before a police officer can demand the name and residence or address of a person and, in the event of a refusal, arrest that person. Firstly, it is when the person has committed a non-cognisable offence in the presence of the police officer, or secondly, when in the presence of the police officer the person has been accused of committing a non-cognisable offence.

[23] In the present matter there was no evidence either during the initial confrontation in the bus, nor later outside of the bus, nor during his transportation to the police station nor at the police station that the appellant had committed or been accused of committing a non-cognisable offence in the presence of Officer Bistoquet. Consequently, in my view, Officer Bistoquet was not entitled to rely on the provisions of s 20(1) of the Criminal Procedure Code to justify the arrest of the appellant when he refused to give his name to the officer.

[24] Officer Bistoquet cannot rely on s 18(c) of the Criminal Procedure Code. The appellant was not informed that he was arrested for obstructing a police officer in the due execution of his duty.

[25] Consequently Officer Bistoquet could not rely on s 25(2) of the Police Force Act since he was not legally authorised to apprehend the appellant and insufficient grounds existed for his apprehension.

[26] In my view there is no need to refer to art 1382 of the Civil Code of Seychelles.

[27] In my opinion Officer Bistoquet fell into error by founding his arrest wholly on the refusal of the appellant to provide his name on request. So far as I am aware there is no such criminal offence in Seychelles.

[28] Consequently I find that the arrest of the appellant by Officer Bistoquet was unlawful.

[29] It follows that the Appeal succeeds and I set aside the judgment in the lower court.

[30] The appellant is entitled to receive compensation under the provisions of art 18(10) of the Constitution.

[31] There is little doubt, in my view, that this whole episode was conducted with some ill-feeling on both sides. To an extent the appellant was the author of his own misfortune by taking the stand he did. He failed to keep in mind that a citizen has a general duty to assist the police authorities in carrying out their duties.

[32] I find that the Respondents in this appeal are vicariously liable for the acts and default of their servant and agent, Officer Bistoquet. If I had found that the police officer was entirely to blame for the outcome of this incident I would have awarded damages of Rs 30,000. However I find that the appellant is 50% to blame for the development of this incident and its eventual outcome.

[33] I award damages to the appellant in the sum of R 15,000.

[34] There will be judgment in favour of the appellant against the 1st and 2nd Respondents jointly and severally for the sum of R 15,000.

[35] Mr Derjaques appeared for the appellant [and original plaintiff] under the Legal Aid Scheme and hence there will be no Order for Costs.

(2016) SLR

PILLAY v PILLAY

D Karunakaran J
16 March 2016

[2016] SCSC 171

Delict – Abuse of right – Principle of de minimis—Right to property

The plaintiff and the defendant were siblings and owned land adjacent to each other. The plaintiff alleged that the defendant illegally and intentionally encroached on her property by constructing a wall. She prayed for an injunction to demolish the wall and asked for damages.

JUDGMENT Plaintiff's claim partly allowed.

HELD

- 1 The court will apply Seychellois case law in order to meet the changing needs of the society even if it is in conflict with the French law.
- 2 If a demolition order appears to be oppressive in the sense that a grave injustice would occur if the order was made, an order of damages can be made as an exception.
- 3 The principle of *de minimis* demands that injuries of a trivial nature should not be entertained by the courts unless there is a compelling reason to do so.
- 4 A plaintiff who refuses to accept compensation for a negligible encroachment and insists on demolition commits an abuse of right.

Legislation

Constitution of Seychelles, art 26

Civil Code of Seychelles, arts 4, 5, 545, 555, 681-685, 1382(2)(3)

Cases

Mancienne v Ah-Time (2013) SLR 165

Nanon v Thyroomooldy (SCA 41 of 2009)

Counsel B Hoareau for the plaintiff
B Georges for the defendant

KARUNAKARAN J

[1] The plaintiff is the owner of a parcel of land Title H8368 with a residential house situated thereon at Ma Constance, Mahé, where the plaintiff is living with her family. The defendant, who is none other than the brother of the plaintiff, is the owner of an adjoining parcel of land Title H856 with a residential house thereon, where the defendant is also living with his family. The defendant's property is located on the higher level of terrain, whereas the plaintiff's property is lying on a lower level. Both parcels have a common boundary across the sloping terrain between two common beacons namely, ME144 and ME150.

[2] The defendant has built a retaining wall on his property along the common boundary line between the said two parcels of land. This retaining wall was built by the defendant to protect his house from possible collapse if soil movements occur due to natural disasters or heavy rainfall. According to the plaintiff, the defendant has illegally and intentionally encroached onto the plaintiff's parcel of land by constructing part of the said retaining wall in 2009 crossing the common boundary line of the properties close to Beacon ME150. Hence, the plaintiff has entered the instant suit seeking a judgment to:

- (i) declare that the defendant has illegally constructed part of a wall on parcel H8368;
- (ii) issue a mandatory injunction compelling the defendant to demolish part of the wall illegally constructed on parcel H8368;
- (iii) order the defendant to pay the cost to the plaintiff; and
- (iv) make any other order this Court deems fit and necessary in the circumstances of the case.

[3] On the other side the defendant does not dispute any of the material facts except the allegation of illegal and intentional encroachment. According to the defendant, it is true that there is a slight encroachment of a few square centimetres by the retaining wall on one end of the boundary line near Beacon ME150. But, it is very slight and a negligible encroachment that has occurred due to a technical error in ascertaining the exact location of beacon ME150 as it had been in dispute. The slight unintentional overlapping though technically called encroachment, happened accidentally as there was a slight variation by a few centimetres in the original location of the beacon at the time of the construction of the wall in 2009. The problem originated from a small discrepancy between two surveys dated 1973 and 1975 by the survey division. According to the defendant, he constructed the retaining wall in good faith and the negligible encroachment was not deliberate but was done as per the then location of the beacon ME150 that was unascertainable at the time of constructing the wall.

[4] In any event, it is the case of the defence that the alleged encroachment is *de minimis* and was accidental rather than deliberate. Besides, the defendant's estranged sister, the plaintiff always had an acrimonious relationship with him and his family. They were not on speaking terms for many years. Therefore, she has brought this action in 2012 against him for an encroachment that had occurred in 2009 asking the court to order demolition of part of the wall out of malice, abusing her rights as owner of the adjoining property. This mala fide act of the plaintiff amounts to *abus de droit* in law. For these reasons, the defendants urged the Court to dismiss the suit with costs.

[5] At the hearing of the case, after the plaintiff had started to give her testimony, both parties agreed not to call further evidence since all relevant facts and the alleged encroachment are admitted. On 11 January 2013, the surveyor Mr D Barbe conducted the resurvey of the property in dispute and submitted the report to Court. The said survey report with a sketch plan was produced from the bar and admitted in evidence – in Exhibit P1 – with the consent of both parties. This report, which was commissioned by the Court,

depicts the encroachment and the wall in question built on parcel H856, which slightly encroaches onto parcel H8368. Therefore, both counsel invited the Court to consider only the points of law and their written submission presented to Court. Since the fact of encroachment is based on the discrepancy on the location of a common beacon ME150, the Court has to completely rely and act only on the expert report on facts in this matter. Indeed, it is important here to rehearse the entire contents of the report, which reads:

Overview

The parcel in question is located at Ma Constance in an area known to have numerous boundary issue, most of which had been attended to in the past by the Survey Section. The source of the problem originated from a small discrepancy between two surveys dated 1973 and 1975 respectively. The results obtained from a survey in 1975 were used to correct the inconsistency but not all boundary beacons values were adjusted accordingly.

On-site observations and solution

It was observed that there were two sets of beacons at both MEt44 and ME150, with close proximity to each other. The correct assumption at this point was not to adopt any one as the correct boundary beacons as we had no knowledge of how their position on the ground was determined, given the past history of the area.

In such cases, the best solution is to use sets of beacons from original surveys, in that case, that of the 1975 survey, to determine the correct position of the beacons in question. Field work was carried out to that effect and checks carried out on all four beacons found on the ground.

Findings

From the two beacons found on the ground at the location of where ME144 is supposed to be, only one beacon yields the correct value as per the survey plan of both Parcels. The other beacon, which was off by 20 cm was removed and disposed of.

From the two beacons found on the ground at the location of where ME150 is supposed to be, only one beacon yields the correct value as per the survey plan of both Parcels. The other beacon which was off by 25 cm was removed and disposed of.

Small encroachments by the retaining wall was observed and mapped (see attached site layout)

Recommendations

At the time of writing, there is only one beacon on the ground which denotes the exact position of ME144 and one beacon for ME150. Both have been accurately checked and comply with the laws governing position fixing of boundary beacons in regards to established boundaries (approved parcel diagrams).

I, therefore, recommend that the current position of ME144 and ME150 as per the findings be adopted as the correct position of the boundary between H8368 and H856."

[6] I meticulously perused the entire pleadings and the documentary evidence including the exhibits on record. I carefully went through the written submissions presented by counsel on both sides and also examined the relevant provisions of law as well as the case law applicable to the issues on hand. To my mind, the following are the fundamental questions, which require determination in this matter:

- 1 Does the cause of action namely, the alleged encroachment in the instant case fall within the scope of *de minimis* in law?
- 2 Does the action of the plaintiff seeking demolition of the retaining wall amount to *abus de droit* or abuse of right in law?
- 3 Is the application of French doctrine *abus de droit* in our jurisdiction inconsistent with or in derogation of the fundamental right to property guaranteed under art 26 of the Constitution of Seychelles? and
- 4 What relief is the plaintiff entitled to in the entire circumstances of the instant case?

[7] The material facts relevant to the issues in this matter are not in dispute. The parties are sister and brother. Admittedly, there is family hostility and bitterness between them. The defendant has built the retaining wall on the boundary between the two parcels in 2009. It has been built along the northern boundary of parcel H856, on the line between beacons MEI44 and MEI50. At either end, the wall is within the boundary of the defendant's parcel; in the middle, it bulges slightly into the plaintiff's parcel H8368. At its maximum, the encroachment is about 22 cm (less than a foot) into the plaintiff's land. The extent and the nature of encroachment are negligible covering a small triangular area of a few square centimetres. The minimal nature of the encroachment is supported by the surveyor's report, which reveals that on the part of the plaintiff's unusable terrain there is a small unintentional encroachment. This report also reveals that this might have occurred due to inaccurate positioning of the beacons on the ground in previous surveys. These discrepancies had given rise to numerous boundary issues in the past. On a balance of probabilities, it could be the only reason why the wall along the boundary between the two parcels has strayed into parcel H8368 in its middle section. Obviously, this retaining wall has been built by the defendant in good faith with the intent to protect his house from possible collapse, if soil movement occurs due to natural disasters such as heavy rainfall, mudslide etc. This wall will also protect the plaintiff's property from consequences of such disasters. In any event, as I see it, this negligible encroachment will in no way affect the use, occupation and enjoyment of the plaintiff's property in any manner whatsoever, nor will it reduce its value in the market.

[8] Now, the plaintiff is adamant that the encroachment should be removed simply because she has the legal right to do so, whatever be the consequential loss or detriment her brother, the defendant may suffer or the balance of justice demands. This adamant affidavit will definitely entail demolishing the wall and rebuilding it 22 cm back breaking the wall in the middle. The cost of this will obviously be significant. On the other hand, I also note that the plaintiff indeed benefits from having a wall on the southern boundary of her parcel H8368. This wall secures that boundary and supports the land above that boundary. The survey plan produced by the surveyor shows clearly that the plaintiff's

dwelling-house built on parcel H8368 is located at a distance relatively far away from the wall in question. Therefore, as submitted by Mr Georges, counsel for the defendant, it cannot be said that the encroachment reduces the use by the plaintiff of her land as it would, for instance, if the encroachment were reducing the ability to access the plot, or causing a nuisance of a permanent nature. Considering the entire facts and circumstances of the case, I find that the plaintiff's instant action seeks less to vindicate a right to property than to cause the defendant to spend money to remedy an insignificant wrong. Besides, I note that any loss to the plaintiff of a negligible area of land at one end of her plot is compensated by the security of the boundary and retaining wall in question.

[9] To my mind, it is clear from her demeanour and deportment in Court that the plaintiff is only trying to settle an old score with the defendant by instituting the instant action and seeking a legal remedy for a *de minimis* act. In my judgment, the common law principle of *de minimis non curat lex* is wholly applicable in this case. Incidentally, this principle applies to all civil, criminal and even to constitutional claims and its function is to place outside the scope of legal relief the sorts of injuries that are so small that they must be accepted as the price of living in society peacefully sharing our resources with our neighbours for a common good, rather than making litigation out of it. In my view, judges will not and should not sit in judgment of a minor transgression of the law particularly, when it is committed by one family member to the other – as has happened in the instant case – for the sake of administering a mere technicality of the law unless justice demands otherwise. Law ought to be steered towards the administration of justice rather than the administration of the letter of the law. In doing so, the courts cannot remain oblivious to the moral roots of the law, equity and good conscience and resort to mechanical application of the law simply focusing on its niceties and technicalities. Any reasonable man, who is not connected to the law but to equity and good conscience would deem cases of this nature an utter waste of time and resources for all concerned.

[10] As rightly submitted by Mr Georges, the plaintiff may even be guilty of abusing her right to obtain a remedy for a triviality that would amount to committing a fault in terms of art 1382(3) of the Civil Code, even if it appears to have been done in the exercise of a legitimate interest.

[11] Needless to say, the plaintiff's action alleging encroachment by the defendant in essence is based on the concept of fault. Hence, the principles of law applicable to this case are that which found under art 1382(2) & (3) of the Civil Code of Seychelles. This article reads:

- (2) Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.
- (3) Fault may also consist of an act or an omission *the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.* [Emphasis added]

[12] In fact, this article incorporates a subtle definition of *abus de droit* or abuse of rights. The Seychelles Court of Appeal in the recent case of *Mancienne v Ah-Time* (2013) SLR 165 has clearly formulated the law regarding encroachments thus:

Article 555 of the Civil Code only applies to constructions entirely erected on someone else's property. It has no application where constructions are partly built on someone else's property. Article 545 applies to such cases of partial encroachments. The encroached owner can insist on the removal of the encroachment and the court must accede to this demand and cannot force the encroached owner to accept damages in lieu. Good faith or mistake do not excuse an encroachment and the court cannot take these into account.

Where grave injustice will result from an order for demolition, the court will not so order, so long as the encroacher can show that he acted in good faith and within the law. Instead, the court will order damages commensurate with the encroachment. If the encroached owner insists on demolition in such a case, the encroacher may plead abuse of right on the part of the encroached owner and seek an order that the encroached owner be compensated in damages for the encroachment.

[13] The foregoing formulation of the law is well set out in the judgment at pages 175-176 as follows:

This Court in *Nanon v Thyroomooldy* (SCA 41 of 2009) has attempted to bridge a gap in our law so as to bring our jurisprudence in line with what obtains in this area in comparable jurisdictions. It has done so by developing further—to art 545 of the Civil Code—a doctrine of *abus de droit* which already exists in our law: namely, art 1382(3) of the Seychelles Civil Code and art 54 of the Commercial Code, labour law etc largely influenced by the dire need of the particularities of our social and historical set up and the insight of Justice Souzier.

[14] Post-*Nanon*, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows:

Where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of art 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an *abus de droit*.

[15] Applying the above yardstick of case law to the facts of the case on hand, I find that the nature and extent of the encroachment falls within the scope of *de minimis* or negligible as enunciated in *Mancienne* supra. I also find that the demand of the plaintiff

for demolition of a high stone retaining wall to resolve an encroachment at the base of the wall for a couple of centimetres amounts to a clear abuse of right as subtly defined in art 1382(3) of the Civil Code. The plaintiff cannot be in need of the small strip of encroached area for any practical use and enjoyment. Rather, her dominant purpose in seeking the removal of the negligible encroachment by requiring the demolition and rebuilding of the wall, which serves as a protective boundary of part of her land, can be none other than to cause harm to the defendant.

[16] As rightly pointed out by Mr Georges, there is no cogent and practical benefit which the plaintiff can obtain through demolition and reconstructing the retaining wall back by a few centimetres. Her motivation in insisting on her right must therefore be to cause the defendant to spend money for little benefit to anyone.

[17] On the strength of the reasoning in *Mancienne* (supra), I also note that this court can make an order that the encroachment be compensated in damages as opposed to demolition.

[18] I, therefore, uphold the contention of Mr B Georges and endorse the position of case law, which he cited pertaining to *abus de droit* and on the application of the common law principle *de minimis* in matters of this nature.

[19] Now, what is the argument on the other side? Only this: that our law is no good. Mr Basil Hoareau, counsel for the plaintiff argued that this Court should depart from the precedents and the case law relied upon by the defendant in this matter pertaining to *abus de droit* and *de minimis* because according to him, they are bad precedents and not making good law.

[20] It is the case of the plaintiff that the decision of the Court of Appeal in *Mancienne* (supra) based on our jurisprudence grown on our own soil, is not good law. For, it is in conflict with the source of French jurisprudence. According to Mr Hoareau, the French civil law has clearly established that when it comes to property, the doctrine of *abus de droit* is not applicable. In support of this proposition, he cited some excerpts from the book entitled *Les Biens Droit Civil* by Philippe Malaurie and Laurent Aynes and also from *Dalloz* (2003). Hence, Mr Hoareau urged this Court to deviate from *stare decisis* of our jurisprudence as it is in direct conflict with that of the French and therefore, invited the Court to follow the latter.

[21] With due respect to Mr Hoareau, the source of our civil law shall be the Civil Code of Seychelles and other laws from time to time enacted—vide art 4 of the Civil Code of Seychelles. This obviously, includes our home grown jurisprudence. Since we repealed the French Civil Code and enacted our own Civil Code in 1975, we have been developing our own indigenous jurisprudence in order to meet the changing and challenging needs of our time and Seychellois society. Our Civil Code is tailor-made for Seychelles by altering the French one to fit our size, frame, peculiarities and specificities. In the process, we have simply altered and ironed out the creases without changing the French material with which it was woven. Consequently, our indigenous jurisprudence has evolved over

several decades from precedent to precedent to suit our special needs and peculiarities. Our own jurisprudence has adapted to the changing social opinion and necessities and thus has adopted and extended the application of *abus de droit*, to property rights over many years, through the growth of judicial exposition nurtured by the insight of Justice Sauzier as rightly observed by the Court of Appeal in *Mancienne* (supra). Obviously, this Court is duty bound to accept and apply the principles grown in our own soil of indigenous jurisprudence, even if they are or appear to be in conflict with that of the French. When our growth leads to conflicts with our past, let us embrace growth with equanimity without labelling it as not good law. As the old order changes, a new comes in and bridges the gap in our law so as to advance our jurisprudence in line with the advancements taking place in the rest of the legal world.

[22] Assimilation and unquestionable acceptance had been the ideological basis of French colonial policy in the Seychelles of the 19th and 20th century but no longer now in the sovereign Seychelles of the 21st century. Should we continue to remain stagnant with colonial jurisprudence of the past or should we grow? Mr Hoareau's argument that our case law is no good because it was neither approved by the French nor adopted in the past, does not appeal to me in the least. Stagnancy is a sign of death, whereas growth a sign of life. Which is to be preferred?

[23] Mr Hoareau also submitted that this Court can depart from the precedents as art 5 of the Civil Code provides that judicial decisions shall not be absolutely binding upon a court but shall enjoy a high persuasive authority from which a court shall only depart for good reason. With due respect, I do not find any good reason to depart from them and so I completely reject his submissions in this regard.

[24] Furthermore, it is the submission of Mr Hoareau that the only constitutional or legal limitation on the right to private ownership of property is that it can be compulsorily acquired by specific law, through a specific procedure and for a public purpose. This is the rationale behind the rule that demolition of an encroachment is the proper order to be made and *abus de droit* cannot be used to infringe the right to property of an individual guaranteed by art 26 of the Constitution.

[25] It is trite to say that right to property guaranteed in the Charter is not an absolute right. Whatever be the provisions of law contained in the Civil Code and other legislation relating to ownership of an immovable property, the fact remains that the constitutional provision under art 26 of the Constitution, the supreme law of the land supersedes all other laws. This article reads thus:

Right to property

- (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

Pillay v Pillay

- (2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-
- (a) in the public interest;
 - (b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;
 - (c) in satisfaction of any penalty, tax, rate, duty or due;
 - (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
 - (e) in respect of animals found trespassing or straying;
 - (f) in consequence of a law with respect to limitation of actions or acquisitive prescription;
 - (g) with respect to property of citizens of a country at war with Seychelles;
 - (h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
 - (i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

[26] It is evident from art 26(2)(b) above that the exercise of one's right to property is subject to limitations as may be prescribed by law and necessary in a democratic society. In my considered view, the concept of *abus de droit*, which is subtly defined as a fault and incorporated in art 1382(3) of the Civil Code (vide discussion supra) is one among such limitations prescribed by law as contemplated by the framers of our Constitution and found necessary in a democratic society. In my judgment this is the current and correct position of *abus de droit* vis-à-vis the fundamental right to property guaranteed by our Constitution. This position has been well set by case law through judicial exposition in our jurisdiction. This concept has indeed, been repeatedly applied in deserving cases with equity and good conscience and enforced by the judgment of the courts in civil proceedings posing limitations to the exercise of one's right to property as the courts normally do in matters of right of way in terms of art 681-685 of the Civil Code. In my considered view, the application of the French doctrine *abus de droit* is in line and consistent with art 26 of the Constitution. Hence, I decline to agree with the contention of Mr Hoareau to the contrary in this respect.

[27] Besides, Mr Hoareau has in his final submission, raised issues alleging that the defendant has failed to comply with the procedural rules in respect of pleadings in the written statement of defence on material facts and on the lack of evidence in support of the line of defence taken by the defendant.

[28] Indeed, when the plaintiff was giving evidence in chief, half way through hearing, both counsel mutually agreed on all factual issues and jointly invited the Court only to determine the questions of law based on our case law and jurisprudence. Hence, both counsel agreed to halt further proceedings and adduction of evidence and requested the Court to determine only the two points of law canvased by the defendant in the statement of defence. This agreement in court between parties in my considered view, constitutes

a *contract judiciaire* which is binding upon both parties and counsel. With due respect, the plaintiff's counsel is now estopped from reopening such issues in his final submission to the surprise of all. Hence, I decline to entertain any fresh issue/s factual or procedural raised in the submission of Mr Hoareau, in breach of the said agreement.

[29] For the reasons stated hereinbefore, I find answers to the fundamental questions in the same numerical order (vide supra) as follows:

- 1 Yes; the cause of action namely, the alleged encroachment in the instant case falls within the scope of *de minimis* in law.
- 2 Yes; the action of the plaintiff seeking demolition of the retaining wall amount to an *abus de droit* or abuse of right in law.
- 3 No; the application of the French doctrine *abus de droit* in our jurisdiction is not inconsistent with or in derogation of the Fundamental right to property guaranteed under art 26 of the Constitution of Seychelles or any other law.
- 4 The plaintiff is entitled to have a minimal compensation from the defendant proportionate to the nature and extent of the loss and damage if any, suffered by the plaintiff having regard to the entire circumstances of the case on hand.

[30] Then, what should be the measure of compensation? Indubitably, the encroachment is *de minimis*. It is equally clear that the encroachment was as a result of unclear beacons in the area of the encroachment. There had been no bad faith behind the accidental encroachment. Hence, I hold that quantum of compensation awarded should be of a token nature. In my considered assessment, the sum of R 2000 would be just, reasonable and proportionate to the nature and extent of the encroachment.

[31] In the final analysis, the court enters judgment as follows:

The Court declines to grant any relief of declaration or demolition order as sought by the plaintiff in the plaint.

The defendant is ordered to pay compensation to the plaintiff in the sum of R 2000.

The defendant shall also pay the costs of this action to the plaintiff.

JOUBERT v PHILOE

S Govinden J
5 April 2016

[2016] SCSC 243

Civil procedure – Cause of action – Public Officers (Protection)

The plaintiff purchased a vehicle from the 1st defendant. The payment was made by a loan obtained from the 2nd defendant. For the loan, a pledge was registered with the 4th defendant. The vehicle was later seized by the 3rd defendant at the instance of the 2nd defendant and was sold to a third party. Fault or negligence was alleged against the 3rd and 4th defendants. Pleas in *limine litis* were raised.

JUDGMENT Plea dismissed.

HELD

- 1 If a pleading reasonably sets out a cause of action, it should not be struck out.
- 2 A right of action accrues with the existence of the essential facts and not with the awareness of the party unless it is shown that a fraud was practised to conceal the fact.

Legislation

Civil Code, art 1382

Code of Civil Procedure, ss 92

Public Officers (Protection) Act, s 3

Cases

Albest v Stravens (1976) SLR 158

Attorney-General v Ray Voysey and Others (SCA No 12 of 1995)

Yvon Camille v Government of Seychelles (SCA No 57 of 1998)

Gemma Contoret v Government of Seychelles, SHDC & Another (CS No 101 of 1992)

Gerome v Attorney-General (1970) SLR 57

Joseph Labrosse v Seraphin Allisop and Government of Seychelles (CS No 285 of 1996)

Roderick Larue v Osman Leggaie & Attorney-General (Civil Appeal No 19 of 2011)

Lorraine Lewis v Government of Seychelles (Civil Side No 17 of 2000) *Jusheila Cecile*

Madeleine v Land Transport Agency represented by CEO & Attorney-General representing the Government of Seychelles (Civil side No. 67 of 2013)

Oceangate v Monchouguy (1984) SLR 111

Foreign Cases

Auto Garage v Motokov [1971] EA 514

Counsel

C Andre for the plaintiff

F Elizabeth for the 1st defendant

Mrs Burian for the 2nd defendant

D Esparon for the 3rd and 4th defendants

GOVINDEN J

[1] The 3rd and 4th defendants, in this case, have raised a two-fold plea in *limine litis* dated 24 June 2015 to the following effect:

- 1 Firstly, that the plaint does not disclose a reasonable cause of action against the 3rd defendant and the 4th defendant; and
- 2 Secondly, that the action is prescribed by law against the 4th defendant as provided for in the Public Officers (Protection) Act.

[2] Both counsel filed written submissions on behalf of their respective clients as to their legal stance *vis-a-vis* the points of law as raised on 1 December 2015 and 3 February 2016 respectively the contents of which have been duly considered for the purpose of this ruling.

[3] A resume of the facts giving rise to the plaint as transpired on pleadings filed thus far, reveals that the plaintiff became the legal owner of vehicle Hyundai Accent registered as S 14733 upon purchase of same from the 1st defendant on or during the month of March 2012. That the purchase was possible through a Government of Seychelles loan giving rise to payment voucher of 14 March 2012 directly to the 1st defendant in the sum of R 67,000. In furtherance to the loan, a pledge was registered on 14 March 2012 bearing CB No 3017 in favour of the Government of Seychelles, by the 4th defendant. Change of ownership was effected on 13 March 2012. On 17 February 2014, at the instance of the 2nd defendant process server Tony Alcindor assisted by C Freminot, seized the vehicle from the plaintiff. It was subject to a judicial sale and subsequently transferred to a third party by the 3rd defendant. Now, for the specific purpose of this ruling, I will treat only the salient cause of action as regards the 3rd and 4th defendants. The plaintiff reproaches the 3rd defendant of having committed a “faute and/or negligence” towards her in view of the transfer to a third party without her consent or signature upon judicial sale. The plaintiff further reproaches the 4th defendant for “faute and negligence” arising out of the registration of a pledge for the plaintiff in favour of the Government of Seychelles without giving proper attention as to whether the vehicle was already pledged or not which pledge was effected as above indicated on 14 March 2012.

[4] Counsel, Mr D Esparon, submitted in support of the pleas in *limine litis* as raised at para [1] of this ruling on behalf of the 3rd and 4th defendants as follows:

1. Firstly, as to the first plea in *limine litis* in that, ‘the plaint does not disclose a reasonable cause of action against the 3rd defendant and the 4th defendant’, it is submitted that, *ex-facie* the pleadings the plaintiff has averred at paragraph 3 of her plaint that the 1st defendant informed her verbally that the 2nd defendant had given him permission to sell the said vehicle. Therefore, the plaintiff was well aware that the car was subject to a loan agreement and she should have shown due diligence and verified whether the vehicle was subject to a pledge before purchasing the said

vehicle. Further, since it is clear that the vehicle had been sold by way of judicial sale and as such the 3rd defendant was obliged to make the transfer of the vehicle in accordance with the law in the absence of a stay order. Hence it follows, that the 3rd defendant acted bona fide and in good faith in the discharge of its statutory duties.

Vis-a-vis the 4th defendant, it was further submitted that the 4th defendant's duty is to maintain such registration of public documents being the custodian of such public documents so that the public has access to the said documents and records and it is not the obligation of the 4th defendant to inform the plaintiff whether there is a pledge on the vehicle of which the duty was on the plaintiff to verify such documents the more so that the plaintiff had knowledge that the vehicle was subject to a loan and as such the action should be dismissed against the 4th defendant for not disclosing any reasonable cause of action against the 4th defendant since ex-facie the pleadings it is apparent that no averment of bad faith has been pleaded against the 4th defendant and in support of the latter submission Court was referred to the case of (*Jean Louis Dugasse v Sylvette Hoareau and Gustave Dodin*, Civil Side No 103 of 2003)

2. Secondly, in respect of the second plea in limine litis as raised in that, the action is prescribed by law against the 4th defendant as provided for in the Public Officers (Protection) Act', it is submitted that again, ex-facie the pleadings, it is clear in paragraph 5 of the plaint that the pledge was fully registered on 14 March 2012 in favour of the Government of Seychelles by the 4th defendant and in paragraph 13 of the same plaint, the plaintiff avers that it was the fault of the 4th defendant who registered a pledge for the plaintiff in favour of the Government of Seychelles without giving proper attention as to if the vehicle was already pledged or not. As such, it is clear that the cause of action arose on 14 March 2012 and the plaint filed on 11 August 2014. In that instance, s 3 of the POPA provides that no action to enforce any claim in respect of any act done or omitted to be done by a public officer in execution of his office or any act done or omitted to be done by any person in the lawful; performance of a public duty shall be entertained by a Court unless the action is commenced not later than six months after the claim arose. As such, an action was filed more than six months after the claim arose, such action should be dismissed against the 4th defendant since it is prescribed by law.

[5] Counsel Mr C Andre on his part on behalf of the plaintiff, objected to both points of law as raised and briefly submitted in respect of the first plea in limine litis that, there is a good cause of action pleaded in the plaint and that the plaintiff pleaded fault as against both 3rd and 4th defendants which need to be disposed of and judgment accordingly given. In respect of the second plea in limine *à l'égard* the 4th defendant, it is further submitted that the matter on which the plaint is based arose on 17 February 2014 and not from the date that the plaintiff registered the vehicle in 2012 hence that plea in limine litis should be dismissed.

[6] With the above background in mind, I will firstly treat the first plea in limine litis namely that the plaint does not disclose a reasonable cause of action against the 3rd defendant and the 4th defendant.

[7] Now, a motion for striking out pleadings which discloses no reasonable cause of action under s 92 of the Code of Civil Procedure (Code) is to be decided solely on the pleadings. It has been further decided that “where the non-existence of a reasonable cause of action is not beyond doubt *ex facie* the pleadings, the pleading ought not to be struck out” [*Gerome v Attorney-General* (1970) SLR 57]; *Albest v Stravens* (1976) SLR 158; and *Oceangate v Monchouguy* (1984) SLR 111].

[8] Section 92 of the Code provides that:

The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in such case ... the Court may order the action to be stayed or dismissed or may give judgement on such terms as may be just.

[9] The Court of Appeal for East Africa considered the meaning of cause of action in the matter of *Auto Garage v Motokov* [1971] EA 514, where at page 519, Spry P, ruled:

I would summarise the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right that has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed.

[10] Now, in the current matter, it is evident at paras [12], [13] and 14 of the plaint, the plaintiff alleges that the 3rd and 4th defendants have committed a ‘faute’ as against her based on the background highlighted at para [3] of this ruling.

[11] The Court of Appeal's decision in the case of *Attorney-General v Ray Voysey and Others* (SCA No 12 of 1995) held on the very issue that:

Fault is defined by art 1382(2) as an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission. When a party claims a right of action under art 1382(1) the two elements of the cause of action are fault and damage which must have been caused by the fault alleged. It is thus clear that the earliest time an action in delict can be maintained is that earliest point in time when fault and damage co-exist.

[12] The plaint in this instance clearly sets out a statement of the material facts and circumstances constituting the cause of action and a description of the relief sought which with respect does not necessitate the specific averment of bad faith because that is not required for the relief sought as against the 3rd and 4th defendants. In that respect, the

case law as cited (para [4] of this ruling) by counsel for the relevant defendants does not apply unless and until such a defence is proved to be permissible under a legal provision and same is proved at the stage of hearing of the case on the merits.

[13] It follows, therefore, that the first plea in limine litis at this stage cannot be entertained without the Court having heard the matter on the merits.

[14] As for the second plea in limine litis as raised in respect of the 4th defendant namely that the action is prescribed by law against the 4th defendant as provided for in the Public Officers (Protection) Act, s 3 of the Act provides thus:

No action to enforce any claim in respect of –

Any act done or omitted to be done by a public officer in the execution of his office;

Any act done or omitted to be done by any person in the lawful performance of a public duty ...

shall be entertained by a Court unless the action is commenced not later than six months after the claim arose.

[15] In that regards, the Court has considered the case of *Joseph Labrosse v Seraphin Allisop and Government of Seychelles* (CS No 285 of 1996), where the Supreme Court quoted its own previous decision in the case of *Gemma Contoret v Government of Seychelles, SHDC & Another* (CS No 101 of 1992) as follows:

The Government exercises its executive functions through its Ministers and Public officers. It is therefore clear that this section limits any action either against the Government or a Public officer when the claim is based on the act of a public officer and therefore admits no ambiguity as counsel for the plaintiff sought to establish. The action against the 1st defendant, therefore, is prescribed as it has not been filed within six months after the alleged claim arose.

[16] Normally, a right of action accrues when the essential facts exist and barring statutory intervention does not arise with the awareness, for instance, of the attributability of the injury to the fault of the other party unless there has been a fraudulent concealment of facts.

[17] Now, it is, *ex facie* the pleadings, abundantly clear upon a careful scrutiny of the averments at para [12] as read with para [13] of the plaint, that the action for which the 4th defendant is being reproached on the basis of faute arose on 14 March 2012, when the pledge was as stated “duly registered in favour of the Government of Seychelles” and not on 17 February 2014 as claimed by the plaintiff. This would be so as against the 3rd defendant as admitted by the 3rd defendant’s counsel but not *vis-à-vis* the 4th defendant, with respect.

[18] The existence of facts essential to the accrual of a right of action must be distinguished from the evidence of such facts. There is no statutory provision that confers power on the Court in this jurisdiction to postpone the accrual of a right of action by reason of ignorance of the plaintiff of material facts relating to the cause of action. The same principle of interpretation as to the accrual of a right of action subject matter of s 3 of the Act, arose and was endorsed as set in the case of *Voysey* (supra), in the case of *Yvon Camille v Government of Seychelles* (SCA No 57 of 1998), *Lorraine Lewis v Government of Seychelles* (Civil Side No 17 of 2000); *Roderick Larue v Osman Leggaie & Attorney-General* (Civil Appeal No 19 of 2011) and *Jusheila Cecile Madeleine v Land Transport Agency represented by CEO & Attorney-General representing the Government of Seychelles* (Civil side No. 67 of 2013) amongst others.

[19] On the above basis, I do not believe there is a need to elaborate further on this argument and hence I allow the second plea in limine litis as raised on behalf of the 4th defendant and hence it follows that the 4th defendant shall be struck off the plaint as a defendant.

[20] As indicated earlier, since the first point of law has not been entertained at this stage of the proceedings in favour of the 3rd defendant, then the matter shall proceed to a hearing on the merits as against the 2nd and 3rd defendants noting that judgment has been entered as against the 1st defendant.

MOUMOU v JOSEPH

M Twomey CJ
5 April 2016

[2016] SCSC 237

Public Utilities Corporation Act – Water supply – Easement

The plaintiff obtained water from a public utility source for 13 years through a pipe that traversed the defendant's land over which the plaintiff had a right of way. The defendant damaged the pipe and disconnected the water line. The pipe was relocated at a distant place by the Public Utility Company (PUC), but was not working properly according to the plaintiff's need. The plaintiff wanted it to be reinstalled at the previous place. The plaintiff, therefore, sued the defendant asserting his easement.

JUDGMENT Plaintiff rejected.

HELD

- 1 The PUC is legally mandated to provide a water supply to a home owner. PUC may fix the location to avoid any friction between the neighbours.
- 2 The supply of water is an easement for the benefit of the public and is created by law.
- 3 A private right of easement relating to a water pipe requires registration.

Legislation

Civil Code of Seychelles, arts 637, 639, 649-652, and 686

Land Registration Act, s 25(b)

Public Utilities Corporation Act, ss 5(1), 5(2), 6

Public Utilities Corporation (Miscellaneous) Regulations 1986, reg 3

Counsel B Hoareau for the plaintiff
 L Pool for the defendant

TWOMEY CJ

Agreed Facts

[1] The following facts are not in dispute. The plaintiff is and was at all material times the owner of the land comprised in title number C5755 situated at Pointe au Sel, Mahé and the defendant is and was at all material times the owner of an adjoining piece of land, namely the parcel of land comprised in title number C4145.

[2] The plaintiff for a period of about thirteen years obtained his water from the Public Utilities Company (PUC) through a water pipe that traversed the defendant's land on its southern boundary abutting a driveway positioned on a right of way.

Case for the Plaintiff

[3] In his plaint filed on 25 March 2014, the plaintiff claims that in April 2012 the defendant damaged the water pipe and disconnected the water supply to the plaintiff's water tank and to his house.

[4] He states that as a result he has had to have a temporary arrangement whereby the water pipe had to be relocated on Parcels C2539 and C 5239 belonging to third parties and the pipe consequently runs a longer distance to reach his water tank.

[5] He states that it would be just and equitable to have the pipe located in its original position.

[6] He prays therefore for a declaration that he has a right to locate the water pipe on Parcel C4145 and for an order for a perpetual prohibitory injunction against the defendant prohibiting the defendant from damaging or tampering with the water pipe.

Case for the Defendant

[7] In her statement of defence filed on 20 October 2014, the defendant admits that there is a right of way in favour of the plaintiff on the southern boundary of her property but that there is no encumbrance in relation to the water pipe registered against her land.

[8] She denied damaging or disconnecting the water pipe and stated that she had no obligation to accommodate the plaintiff's water pipe on her land.

[9] She prayed for a dismissal of the case with costs.

The Evidence

[10] The plaintiff testified. He produced documents of title relating to his land and that of the defendant. He pointed to the fact that presently the water pipe traverses the properties of an Italian man named Marco and a lady named Erica Sidonie. He stated that previously the pipe supplying water to his house had been laid on the defendant's land but had been buried under the ground next to the access road. He stated that it had lain there for sixteen years until it had been damaged by a vehicle carrying out work on the defendant's land.

[11] On being questioned by the Court, he stated that the pipe had been laid across the defendant's land by the PUC. In cross-examination he explained that his land, namely Parcel C5755 was bought from the defendant's father. He had cohabited with the defendant's sister and when their relationship had ended there had been a division in kind and he bought out the defendant's sister's share.

[12] He admitted receiving a letter from Mr John Renaud, a lawyer retained by the defendant in which letter he had been asked to remove the water pipe from her property.

[13] He stated that after the pipe was damaged he did not have a water supply for one month and eventually because of objections from the defendant, the PUC laid the pipe in its present position.

[14] He admitted that the defendant and he were not on good terms.

[15] Mr Yvon Fostel, a land surveyor with over twenty years' experience was called as a witness for the plaintiff. He stated that he had been instructed by the plaintiff to survey the land in issue and to draw up a survey plan to show the location of the water pipe. He visited the site in April 2012. He produced his report dated 4 May 2013 in which he observed that a water pipe crossed a concrete drive leading to the plaintiff's land.

[16] He specified that the water pipe crossed the defendant's land and then entered onto the plaintiff's land but was on the existing right of way. He stated that the extent of the area occupied by the pipe on the defendant's land was less than one square metre. He stated that the pipe could be located under the ground.

[17] The defendant also testified. She produced a certificate of search from the Land Registry in relation to her land, Parcel C4145 and indicated that her land was not burdened by any encumbrance or easement.

[18] She explained the incident in which the plaintiff's water pipe had been damaged. Her son, since deceased, had been stricken with sickle cell anaemia and had suffered a stroke. He needed continuous medical intervention and was transported from her house to the hospital by ambulance which needed to have motorable access to her house. It was for this reason that she had undertaken the work on widening the road. In the process the water pipe was damaged.

[19] She explained that there had been bad blood between herself and the plaintiff which started with the work on her property in the course of which the plaintiff complained that the construction work had resulted in water being diverted to his property. She admitted that the water pipe had been similarly located when her sister was living on the land now solely occupied by the plaintiff.

[20] She produced a letter dated 7 March 2012 which she had asked her then lawyer to send to the plaintiff in which she asked him to remove his water pipe from her land.

[21] She stated that he refused and the PUC were involved in relocating the pipe. Although the plaintiff wanted it located in the same place PUC decided to relocate the pipe on the other side of the land to prevent it from being damaged again as work was being undertaken on her land.

[22] She stated she did not want the pipe to be relocated onto her land as she did not want to be involved in further altercation with the plaintiff.

[23] In cross-examination it was pointed out to her that the letter to the plaintiff stated that it was the plaintiff who had dug up her drive way. She insisted that the water pipe was not under the ground as claimed by the plaintiff.

[24] Mr Steve Mussard, the Managing Director for Water and Sewage at PUC was called as a witness by the defendant. He explained that in general, water pipes are not relocated unless prone to damage. He also stated that when water pipes are run along rights of way PUC does not seek the consent of the land owners concerned. He stated that he could not see any reason why the water pipe going to Parcel C5755 should now be relocated.

[25] When questioned by the Court, he admitted that PUC are mandated by law to lay water pipes across land anywhere. He stated they do so forcefully whenever consent is sought but refused.

Submission by Counsel

[26] No submissions oral or written were received from the plaintiff's counsel. The defendant's counsel submitted that the law applicable are the provisions applicable to easements in the Civil Code, namely arts 637, 639 and 686. She also referred the Court to the Regulations of the Public Utilities Act.

The Law

[27] The provisions cited by Ms Pool for the defendant are applicable when easements arise from the position of land. They are not applicable to this case. This is a case concerning easements established by law. The applicable provisions of the Civil Code are the following:

Article 649

Easements established by law have for their object the public or local benefit or that of individuals.

Article 650

Those established for the public or local benefit relate to the building or repairing of roads and other public or local works.

Everything that concerns this type of easement is determined by laws or special regulations.

Article 651

The law shall bind owners to various obligations towards one another, independently of any agreement.

Article 652

A part of these obligations is laid down in the laws.

Moumou v Joseph

The rest relate to walls and partition ditches, to cases in which a retaining wall is necessary, to ancient lights over neighbouring property, to roof drains and to rights of way.

[28] Such easements include the provision of water to home owners. The provision of treated or untreated water to home owners is regulated by the Public Utilities Corporation Act. The applicable provisions to this case are the following:

- 5 (1) the functions of the Corporation shall be -
 - (a) the supply of electricity;
 - (b) the supply of water;
 - (c) the provision of sewerage;
 - (d) such other functions as may be conferred on the Corporation by any other Act or by any regulations made under this Act.
- (2) Regulations may provide for all matters in respect of the functions of the Corporation.
- 6 (1) Subject to this Act, the Corporation shall have power to do all the things necessary or convenient to be done for or in connection with, or incidental to the exercise of its functions.

[29] The Regulations referred to in s 5(2) (supra) applicable to this case are to be found in the Public Utilities Corporation (Miscellaneous) Regulations 1986:

3. (1) Any employee of the Corporation, with such assistance as and is necessary, may, at any reasonable time, enter upon any land or land premises for the purpose of exercising the functions of the Corporation and may occupy such land to carry out thereon any prescribed operation.

[30] The prescribed functions referred to include:

- (b) in relation to the supply of water and the provision of sewerage –
 - (i) constructing, building, placing or laying plant, machinery, equipment, pipes, sewers or mains;
 - (ii) maintaining, removing, demolishing or replacing plant, machinery, equipment, pipes, sewers, mains or buildings whether or not constructed, built, placed, laid or erected by the Corporation;
 - (iii) provision of dams, treatment works, reservoirs, pump stations, service pipes and other apparatus as may be necessary for the supply of treated and untreated water;...
- (c) in relation to matters dealt in paragraphs (a), and (b) –
 - (i) breaking open roads, bridges, sewers or drains;
 - (ii) making cuttings or excavations;
 - (iii) felling or removing trees or vegetation;
 - (iv) carrying out any inspections, surveys or tests.

- (3) Before exercising any power under sub-regulation (1), the Corporation shall –
 - (a) give the occupier or owner of any land on, under or over which any prescribed operation is intended to be carried out 14 days' notice in writing setting out the nature and extent of the operation intended to be carried out unless such operation is carried out with the consent of the owner or occupier or, due to the urgency of the circumstances necessitating such operation, it is not practicable to give such notice; and
 - (b) where a prescribed operation referred to in sub-regulation (2)(i)(ii) or (iii) is intended to be carried out, obtain the approval of the Ministry responsible for Environment.
- (4) Notice under sub-regulation (3) may be given to the occupier or owner by sending it by post to his last known address or, if his address cannot be ascertained, by affixing it to a conspicuous part of the land or premises on, under or over which the operation, is intended to be carried out.

[31] The Land Registration Act also provides:

Overriding interests

Section 25: Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register: -

...

- (b) easements for the benefit of the public or arising by law

Discussion

[32] I have laid out the law *in extenso* only to show the futility of this suit.

[33] It is clear from the laws cited that the supply of water is an easement for the benefit of the public and is created by law.

[34] The defendant produced a certificate of search of her land title to show that there was no registration of an easement relating to the water pipe on her land. It must be noted that the positioning of public water pipes on land is not one that needs registration. This is clear from s 25(b) of the Land Registration Act.

[35] PUC is mandated to provide a water supply to a home owner. It is however entirely its decision and its decision alone as to where water pipes should be laid especially where such an exercise may exacerbate tempers and fraught neighbour relations.

[36] Indeed the evidence of Mr Steve Mussard the Managing Director for Water and Sewage at PUC bears this out. He explained that the consent of the owners is usually sought when water pipes are to be laid, that they are relocated for specific reasons and that there is a reluctance on the part of the Corporation to subsequently relocate the pipes unless there is good reason.

[37] It would appear from the rest of the evidence that this whole saga arose purely out of bad neighbour relations. It was never a question of whether consent should have been given for the laying of the pipe in the first place. The water pipe is laid by PUC. It chooses the best location for the pipes given the circumstances on site. This pipe was located in a right of way and no consent from anyone was necessary. It would appear that the pipe was damaged when building work was being carried out.

[38] While the pipe should have been repaired and re-laid in its original position in 2012 this was not possible due to the fact that the building work was still ongoing. A decision was taken to lay it on the opposite side of the road in the same right of way. That it traverses a longer distance to the plaintiff's house is neither here nor there. No evidence has been brought by the plaintiff to indicate why that should be a disadvantage to him. In any case, the position of the water pipe is the executive decision of the PUC taken in its discretion after observing the circumstances of the case. Its decision should not be interfered with.

Decision

[39] In the circumstances this Court finds that the plaintiff has failed to establish his case and the plaint is hereby dismissed with costs.

**FREGATE ISLAND PRIVATE LTD v DF PROJECTS PROPERTIES PROPRIETARY
LIMITED**

F Robinson J
7 April 2016

[2016] SCSC 289

Civil procedure – Interlocutory order – Grounds for leave to appeal

The applicant sought provisional attachment and seizure orders. The Supreme Court made those orders pending final determination of the head suit. The respondent sought leave to appeal the orders to the Court of Appeal.

JUDGMENT Appeal denied.

HELD

Leave to appeal will be granted where it is shown that the interlocutory order is manifestly wrong and irreparable loss would be caused to the party if the head case were to proceed without the interlocutory order being corrected. Otherwise it would not be in the public interest to delay trials before the Supreme Court by the grant of such a right to appeal.

Legislation

Seychelles Code of Civil Procedure s 280, 281
Courts Act s 12(2)(a) (b)

Cases

Beitsma v Dingjan (No. 2) (1974) SLR 302
Cable & Wireless Seychelles Ltd v Innocente Alpha Ventigadoo Gangdoo SCA MA: 2 of 2013
Islands Development Company Ltd v EME Management Services Ltd SCA 31/09
Pillay v Pillay (No. 2) (1970) SLR 79

Counsel D Sabino for petitioner
B Hoareau for respondent

ROBINSON J

Introduction

[1] The question is whether or not this court may in the exercise of its discretion grant leave to the applicant to appeal from Civil Side: MA32/2015 arising in CC29/2014 under s 12(2)(a) and (b) of the Courts Act.

Background to MA32/2015 Arising in Head Suit

[2] The applicant in MA32/2015 arising in CC29/2014 is the plaintiff in CC29/2014 filed in the Supreme Court of Seychelles on 26 September 2014. CC29/2014 is hereinafter referred to as the Head Suit. The respondent in MA32/2015 arising in the Head Suit is the defendant in the Head Suit.

[3] In MA32/2015 arising in the Head Suit, the applicant sought as against the respondent provisional attachment and seizure orders under s 280 of the Seychelles Code of Civil Procedure CAP 213. The Seychelles Code of Civil Procedure (the "SCCP"). On 6 November 2015, this court basing itself on s 281 of the SCCP, and the jurisprudence of the Supreme Court granted the relief prayed for by the applicant as against the respondent pending the final determination of the Head suit or pending further orders of this court.

[4] The respondent in MA32/2015 arising in the Head Suit (now applicant) being dissatisfied with the orders of this court has applied for leave to appeal to the Seychelles Court of Appeal under s 12(2)(a) and (b) of the Courts Act.

[5] The application was commenced by way of Notice of Motion supported by an affidavit sworn by Wayne Ronald Kafcsak, the Managing Director of the applicant.

[6] The respondent filed affidavit in reply. The affidavit was sworn by one Tiffany Jane Andraos, who averred in the affidavit that she is a Director of the respondent.

Case for the Applicant

[7] Wayne Ronald Kafcsak averred the following in the affidavit in support of the application for leave to appeal to the Seychelles Court of Appeal –

5. That the respondent had applied to the court in MA No. 32 of 2015 for the provisional attachment of funds belonging to the applicant in bank accounts in Barclays, Seychelles International Mercantile Banking Corporation and the Mauritian Commercial Bank and for the provisional seizure of the applicant's movable assets, with particular reference to the applicants' sea vessels.
6. That on 6 November 2015, the learned Judge Robinson granted the respondent's application for provisional seizure and attachment: (i) ordering the above mentioned banks not to allow any payments from or withdrawals from the applicant's bank accounts held with them; (ii) ordering the Registrar to provisionally seized all movable property in the possession of or belonging to the applicant and (iii) costs.
7. Being dissatisfied with the Court's ruling, the applicant wishes to appeal. The case proper has been set on 27 November 2015 for a ruling on another application of the applicant.

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8. I am advised and I verily believe that the learned Judge erred in both the law and on the facts in her ruling. An indicative draft of the grounds of appeal is herewith attached as Exhibit WK1.
9. I am therefore advised and verily believe that the intended appeal discloses important issues relating to our law concerning the provisional seizures and attachments upon which further argument and a decision of the Court of Appeal would be in the public interest. The Court of Appeal is invited to consider the draconian effects of such orders, especially where it could lead to great difficulties and hardship to a party.
10. I accordingly pray this Honourable Court to grant the reliefs sought in the applicant's motion.

[8] In short the applicant will be inviting the Seychelles Court of Appeal to consider, "the draconian effects of such orders [provisional seizures and attachments] to a party". Exhibit WK1, "Draft Grounds Of Appeal", among other things, lists the "draconian effects of such orders".

Case for the Respondent

[9] Tiffany Jane Andraos, informed by counsel, Mr Hoareau, verily believes that (i) the application of the applicant is baseless and without merits whatsoever, and (ii) the indicative, "*Draft Grounds Of Appeal*" do not disclose important issues relating to the written laws of Seychelles concerning the provisional seizure and attachment upon which further argument and a decision of the Seychelles Court of Appeal would be in the public advantage and interest.

Submissions of Counsel

[10] Mr Sabino and Mr Hoareau were in agreement that two conditions must be satisfied before this court may exercise its discretionary powers to grant leave to appeal to the Seychelles Court of Appeal under s 12(2)(a) and (b) of the Courts Act. Counsel submitted that this court must be satisfied, "(a) that the interlocutory judgment disposes so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and (b) that there are grounds for treating the case as an exceptional one and granting leave to bring it under review": see *Pillay v Pillay (No. 2)* (1970) SLR 79 at page 80, *Beitsma v Dingjan (No. 2)* (1974) SLR 302, *Islands Development Company Limited v EME Management Services Limited* SCA 31/09 delivered on 11 November 2009, [*EME Management Services Limited v Islands Development Company Limited* CS. No. 90/09] and *Cable & Wireless Seychelles Ltd and Innocente Alpha Ventigadoo Gangadoo* SCA MA: 2 of 2013 delivered on 30 August 2013, [*Innocente Alpha Ventigadoo Gangadoo v Cable & Wireless Seychelles Ltd* CS No. 175 of 2011].

[11] Mr Sabino relying on the evidence of Wayne Ronald Kafcsak submitted that the interlocutory judgment or order of this court should come under review principally because irreparable loss would be caused to the defendant/applicant if the Head Suit was to proceed without the interlocutory judgment or order being corrected. The position of the applicant, as stated in the affidavit, is that such orders, which it termed, "*draconian*", could lead to great difficulties and hardship to a party. Counsel also contended that the orders of this court are manifestly wrong.

[12] Mr Hoareau did not accept the submissions for the applicant. Mr Hoareau relying on the evidence of Tiffany Jane Andraos submitted that an appeal from such a judgment or order is not looked upon favourably under the Courts Act since it is an obstacle to the ordinary course of the Head Suit, and will delay its progress amounting to a breach of the plaintiff's right to a fair hearing. This is why an appeal from such judgment or order is at the discretion of this court only when the criteria set out above are fulfilled. He referred this court to the case of *Pillay, supra*, wherein Judge Sauzier, as he then was, refused to exercise his discretion to grant leave to appeal to the Court of Civil Appeal for Mauritius against a ruling by the Supreme Court rejecting a plea in *limine litis* stating that -

[a]n appeal at this stage would entail unnecessary delay and expense and would be most prejudicial to the interests of the plaintiff. Granting leave to appeal to the defendant at this stage would in practice amount to a denial of justice to the plaintiff. As this case does not come within paragraphs (a) and (b) above I will not exercise my discretion to grant the application which is dismissed with costs.

[13] Further, Mr Hoareau submitted that the applicant has not shown that the judgment or order of this court is manifestly wrong and irreparable loss would be caused to the defendant/applicant. Relying on the Seychelles Court of Appeal ruling in the matter of *Islands Development Company Limited, supra*, he submitted that for a case to be treated as an, "*exceptional one*", in order to grant leave to appeal –

[...] one must be able to show that the interlocutory judgment or order is manifestly wrong and irreparable loss would be caused to him or her if the case proper were to proceed without the interlocutory judgment or order being corrected. It would not be in the 'public advantage and interest' to unnecessarily delay trials before the Supreme Court, otherwise.

See also the *Cable & Wireless Seychelles Ltd* case, *supra*.

Mr Hoareau referred this court to paras [14], [15] and [16] of the *Islands Development Company Limited* case, *supra*, which examine this criterion. Justice Fernando delivering the judgment of the Seychelles Court of Appeal stated –

[14] A challenge which goes to the merits of the Ruling of 20 July namely, that the learned Trial Judge failed to properly consider and weigh all evidence and facts placed before him and to correctly apply the law, is not ground for treating this case as an exceptional one and granting leave to bring it

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under review. Certainly there are likely to be interlocutory orders made in the course of a trial which are erroneous. If leave is to be granted to appeal against each such order, the procedural bar in s 12 of the Courts Act, which is in accordance with art 120(2) of the Constitution would be rendered meaningless. The appeal from the final decision would enable this court to correct any interlocutory order which it may deem erroneous.

- [15] The ground that the provisional order has drastic financial implications to the company as correctly argued by the respondent/plaintiff has not been substantiated. The averment that "the provisional order will only have the effect of financially strangling to death the company" in the affidavit filed before this court by the applicant-defendant casts doubts as to the ability of the applicant-defendant to pay the respondent-plaintiff if it were to succeed and therefore gives justification to the making of the provisional order.
- [16] The applicant-defendant has not clarified in his affidavit as to how the issue involved in this case is of 'national interest' or as to why Special Leave should be granted 'in the interest of justice'. Making broad statements in an affidavit without substantiating them, in a case which has to be decided purely on the basis of the averments contained in affidavits, does not espouse the cause of the party relying on such affidavit. All litigants filing cases before the courts do so "in the interest of justice", unless there has been a clear abuse of the process of the courts.

[14] Further, counsel submitted that the Supreme Court and the Seychelles Court of Appeal will take into account the same factors in their consideration of whether or not to grant leave to appeal. On the question of, "special leave" counsel referring to the case of *Islands Development Company Limited, supra*, submitted that the words, "special leave" have been used with a purpose -

[...] namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also to interfere with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal. In the opinion of this court "Special Leave" should therefore be granted only where there are exceptional reasons for doing so, or in view of reasons which may not have been in the knowledge of the applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the court should be such that the non-granting of "Special Leave" by this court is likely to offend the principle of fair hearing enunciated in the Constitution. It is to be noted however that an appeal against an interlocutory judgment or order has a tendency to delay the main action and contravene the rights of a person to a fair hearing "within a reasonable time" as stipulated by art19(7) of the Constitution.

[15] In light of the above, Mr Hoareau invited this court to consider the following.

[16] The applicant has made broad statements in para [9] of the affidavit, without substantiating them. The applicant should have put before this court the, "important issues relating to our law concerning the provisional seizures and attachments upon which further argument and a decision of the Court of Appeal would be in the public advantage and interest".

[17] The applicant is challenging the merits of the judgment or order. An appeal from the final decision would enable the Seychelles Court of Appeal to correct the order if it deems it erroneous.

[18] The ground that the provisional order, "could lead to great difficulties and hardship to a party" has not been substantiated. More importantly the affidavit does not state how the seizure and attachment orders could lead to great difficulties and hardship to the defendant/applicant. The position of the respondent is that such an averment in any event; "casts doubts as to the ability of the [defendant/applicant] to pay the [plaintiff] if it were to succeed and therefore gives justification to the making of the provisional order".

[19] The applicant has not averred in its affidavit as to how the question involved in this case is of national interest.

[20] The seizure and provisional orders made by this court do not dispose so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision.

[21] An appeal at this stage will delay the Head Suit and contravene the rights of the plaintiff/respondent to a fair hearing, "within a reasonable time".

[22] In light of all the above, this case is not an exceptional one, and the, "Draft Grounds Of Appeal" does not raise exceptional grounds.

The Law

[23] Section 12 of the Courts Act provides for appeal in civil matters. Section 12 of the Courts Act reads as follows -

Appeals in civil matters

- (1) Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine appeals from any judgement or order of the Supreme Court given or made in its original or appellate jurisdiction.

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- (2) (a) In civil matters no appeal shall lie as of right-
 - (i) from any interlocutory judgment or order of the Supreme Court; or
 - (ii) from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.
- (b) In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.
- (c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.
- (3) For all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the powers, authority and jurisdiction of the Supreme Court of Seychelles and of the Court of Appeal in England.
- (4) In this section the expression “civil matters” includes all non-criminal matters.

Discussion

[24] This court has considered the application of the applicant, the affidavit in reply of the respondent, and the submissions of both counsel.

[25] Applying s 12(2)(a) and (b) of the Courts Act and the jurisprudence which examines that section this court is of opinion that this matter does not dispose so substantially of the matters in issue as to leave only subordinate or ancillary matters for decision: see paras [18] and [19] of *Islands Development Company Limited*, case, *supra*. It is noted that the affidavit of the applicant does not contain any such averment. The applicant will be entitled as of right to question the decision in the interlocutory judgment if and when it exercises its right to appeal from the final judgment or order. It is also the considered view of this court that an appeal at this point in time would result in considerable delay and expense and would be most prejudicial to the interests of the plaintiff.

[26] Further, this court must be satisfied that there are grounds for treating this matter as an exceptional one and granting leave to bring it under review. This court having considered the evidence of the applicant is not satisfied that there are grounds for treating this matter as an exceptional one and granting leave to bring it under review. The submissions of Mr Hoareau on point, which I accept, have been of assistance to this court.

Decision

[27] In light of the above, this court will not exercise its discretion under s 12(2)(a) and (b) of the Courts Act to grant leave to the applicant to appeal to the Seychelles Court of Appeal against the ruling of this court delivered on 6 November 2015.

GEORGES v BENOIT

S Domah, M Twomey, J Msoffe JJA
12 April 2016

SCA 33/2013

Family – Divorce – Property division

Following a divorce, the wife petitioned for the division of matrimonial property, namely two houses plus other properties. The husband and wife both owned a half share in the houses. However, the wife claimed a further share from husband's portion. She also claimed a lump sum of R 2,000,000 as a full and final settlement of her share in other properties. The trial court ordered a half share for each in the property and rejected the claim of R 2,000,000. The wife appealed.

JUDGMENT Appeal allowed in part.

HELD

- 1 In dividing matrimonial property, the court should be guided by the principles of justice and equity. It should ensure that a party to a marriage is not put at an unfair disadvantage in relation to the other by reason of the breakdown of the marriage. The court should see that a fair and reasonable standard of living commensurate with the standard the parties had before the dissolution of the marriage is maintained.
- 2 In order to avoid any controversy regarding the value of the property, both parties should be involved in the sale as well as in the allocation of the proceeds of sale.
- 3 A party is entitled to have a first option of purchasing the other's share in the event of the sale of matrimonial home.

Legislation

Civil Code of Seychelles, art 1235

Courts Act, s 6

Matrimonial Causes Act, ss 20(1), 20(1)(g), 25(1)

Cases

Hallock v d'Offay (1983-1987) SCAR 295

Marie Andree Renaud v Gaetan Renaud (1998) SCAR 48

Lucine Vidot and Others v Jeanne Lesperance SCA 38 of 2013

Foreign Cases

M v M [2013] EWHC 2534 (Fam)

Counsel F Chang Sam for the appellant
C Lucas for the respondent

MSOFFE JA for the Court

[1] The parties in this matter got married on 8 December 1979 in Seychelles and lived at various places before settling down at their matrimonial home at Plaisance, Seychelles. The marriage was blessed with three issue all of whom are adults.

[2] In the course of time the marriage relationship went sour thereby prompting the appellant to petition for divorce. On 15 March 2012 the Supreme Court granted a decree nisi which was later followed by a decree absolute on 17 May 2012.

[3] In the meantime, pursuant to s 20(1)(b) and (g) of the Matrimonial Causes Act, on 12 January 2012 the appellant filed an application claiming, inter alia, a lump sum of R 2,000,000 as compensation, that land parcels V3849 and V6494 situate at Plaisance (the matrimonial property) together with the house thereon held in co-ownership be declared to belong and be transferred to her “after the respondent shall have caused all the charges burdening the said land parcels to be discharged”, and the respondent’s personal effects aside from all other contents of the house be declared as solely belonging to her.

[4] On 30 May 2012 the respondent filed an affidavit in reply opposing the application and praying for an order that titles V3849 and V6494 remain in joint ownership, that the appellant should continue to occupy the main house on title V3849 and that he should continue to occupy the attached self-contained studio apartment on the ground floor with modifications to stop access to the main house and to continue to have sole use of V16827 on which he has a garage and storage facilities for his car hire business.

[5] The parties gave evidence in support of their respective positions in the matter and in the process they were each subjected to thorough cross-examination. All along, the appellant reiterated that she was entitled to the whole matrimonial property plus R 2, 000, 000. On the other hand, the respondent stated that he was not agreeable to transferring his half share of the matrimonial property to the appellant nor to pay her a lump sum of R 2,000,000 as compensation.

[6] The trial judge, Dodin, J carefully analysed the evidence. In the end, he decreed the parties’ rights as:

- i. The petitioner and the respondent are entitled to half share each in parcels V3849 and V6494 upon which the matrimonial home is situated.
- ii. The petitioner’s claim to be entitled to the half share of the respondent has not been proved to the satisfaction of the Court and is hereby rejected accordingly.
- iii. The petitioner is further entitled to a lump sum of R 200, 000 as full and final settlement for her share in the car hire business King Cars.
- iv. The petitioner shall remain in the matrimonial house and shall have six months to pay to the respondent the sum of R 1,800,000, being R 2, 000,000 for his half share minus R 200,000 due to her as her share in the car hire business and the matrimonial house and the two parcels on which it is situated shall be registered into her sole name upon payment.

Georges v Benoit

- v. Should the petitioner fail to pay the respondent in full the amount stated above within six months, the respondent shall have the option of paying the petitioner a sum of R 2,200,000 being her half share in the matrimonial home plus R 200, 000 compensation for her share in the car hire business and the respondent shall have the matrimonial house and the two parcels upon which it is situated registered in his name and the petitioner shall vacate the matrimonial home forthwith.
- vi. The claim for a lump sum of R 2,000,000 by the petitioner as further compensation has not been proved to the satisfaction of the Court and is dismissed accordingly.
- vii. The respondent shall retain in his sole name parcel V16827 upon which the garage for the car hire business is situated with reasonable access to the same being built and maintained by the respondent without inconveniencing the petitioner. Further should the respondent wish to sell that land in future, the petitioner shall have the first offer to purchase provided that she is the owner of the matrimonial home.
- viii. The respondent shall have access to the matrimonial home to recover his personal properties from the same upon making suitable arrangements with the petitioner and if necessary with the assistance of the police.

[7] Aggrieved, the appellant is appealing. She has canvassed ten grounds of appeal. However, all the grounds essentially crystallise on two major aspects: That the judge did not properly consider and interpret s 20 (supra); and that he did not properly evaluate the evidence on record.

[8] Hence, the appellant is seeking an order quashing the decision of the Supreme Court in so far as it relates to:

- i. the respondent's undivided half share in land parcels V3849 and V6494 and the former matrimonial house thereon (the "Property");
- ii. the payment of the lump sum of R 2,000,000;
- iii. the removal of the personal belongings of the respondent.

[9] It is not in dispute that in dealing with a case of this nature the court has to be guided by the provisions of s 20(1)(g) of the Matrimonial Causes Act and its equitable powers under s 6 of the Courts Act to settle property. Fortunately, in the case of *Marie Andree Renaud v Gaetan Renaud* (1998) SCAR 48 (also cited by Dodin, J in his judgment) this Court had occasion to pronounce itself on the import and sense of s 20(1)(g) thus:

The powers of the Court pursuant to s 20(1)(g) of the Act must be read within the context of the totality of s 20 of the Act which is designed for the grant of financial relief. Such relief may consist of periodical payments [s 20(1)(d)] or a lump sum payment (s 20(1)(b) for the benefit of relevant child or property adjustment order [s 20(1)(e)].

The purpose of the provisions of the subsections is to ensure that upon dissolution of the marriage, a party to a marriage is not put at an unfair

disadvantage in relation to the other, by reason of the breakdown of the marriage and or as far as possible, to enable the party applying to maintain a fair and reasonable standard of living commensurate with or near the standard the parties have maintained before dissolution.

[10] We wish to observe that a look at the proceedings, and the judgment for that matter, will show that much effort was spent in considering whether or not each party should be awarded a half share of properties V3849 and V6494. With respect, this was uncalled for, unnecessary and time wasting because that was the position that obtained anyway. This is evident from the appellant's own averment under para [4] of her affidavit in support of the application and she was supported that much by the respondent under part of his averment in para [4] of his affidavit in opposition to the application. Thus, the properties are registered in the joint names of the parties, with each party listed as owning a half share of the properties and it was therefore needless for the court to repeat the same. It was not for the Court to give each party the half share of the properties, they already each own a half share anyway.

[11] What was in contention was whether the court could grant the appellant the half share owned by the respondent.

[12] Perhaps all this happened because no issues were framed by the court and agreed upon by the parties at the beginning of the hearing. As we pointed out in *Lucine Vidot and Others v Jeanne Lesperance* SCA 38 of 2013 the importance of drawing issues at the commencement of hearing is to focus the Court, and the parties for that matter, on only those matters on which the parties are at issue. In the process time, expense and energy would be saved.

[13] Reverting to the contention under para [11] (supra), it is our view that granting the appellant the half share owned by the respondent would not serve justice considering that no evidence was led to show the court that the respondent has another house. Depriving him of his half share may render him homeless.

[14] It is also our view that the car hire business is the source of livelihood of the respondent, the same way teaching is the source of livelihood of the appellant. The respondent had in an (earlier) affidavit admitted that he and the appellant co-owned the business. However, there were no books of account brought to the attention of the court to estimate the value of the business. Without books of account to estimate the worth of the business, it would be difficult to estimate what value if any, the respondent would be required to pay the appellant from the business.

[15] The parties had earlier agreed that the respondent would dispose of the properties H4038 and H6758, and pay the appellant a sum of R 3,000, 000.

[16] On 8 April 2011, the respondent had written to the appellant expressing his agreement to pay the appellant R 3,000,000 in full settlement of their division of the property. Consequently, on 18 April 2011, the appellant in her acknowledgement of the sealed offer and acceptance expressed her desire that the agreed amount would be paid in one lump sum.

[17] The parties had formally closed discussion on the amount of money to be paid to the appellant, and what remained to be discussed was the modalities of implementing the agreement, whether payment in instalments would be acceptable to the appellant, whether the respondent would allow the appellant to stay in the matrimonial home for a further 14 days after closure of the divorce and settlement etc.

[18] The respondent further swore an affidavit on 5 December 2011, in his application for the removal of restriction against the properties, explaining that much to the Registrar of Lands.

[19] In an affidavit sworn on 30 May 2012, five months after he had deposed that he needed to sell the properties to, inter alia, pay the appellant the sum of R 3,000,000, the respondent swallowed his words and denied that the appellant was entitled to any money from the sale of the properties or at all.

[20] In our view, the offer and acceptance to pay the R 3,000,000 to the appellant constituted a natural obligation as envisaged in art 1235 of the Civil Code of Seychelles and rightly held by Justice Sauzier JA in *Hallock v d'Offay* (1983-1987) SCAR 295 at p 306 in his dissenting judgment.

[21] What the appellant asked the court to do in her substituted divorce petition was to increase that amount from R 3,000,000 to R 4,000,000.

[22] The properties were sold, in the words of the respondent for: i) C 5234- sold at R 250,000, ii) H 4038 & H 6758 sold at R 3,000,000, iii) the respondent sold a boat they owned (to his attorney) at R 250,000.

[23] The total declared sale price for the properties was R 3,500,000. Landed property V 16827 and Kings Car Hire remained unsold.

[24] Although the offer stated for H 4038 and H 6758 was R 6,000,000, the respondent in his evidence said he could not remember how much he had sold the properties for and referred the court to the transfer documents. While it could be probable that the transfer documents reflect the purchase price as indicated, the attitude of the respondent and his answers raise questions as to the true value of the properties, the reasons behind the abrupt need to dispose of all his known properties, and his explanations as to how the proceeds were utilised.

[25] The proceeds were allocated by the respondent without the participation of the appellant. The appellant remains in doubt on the value of the property at the time of sale, as well as the actual sale price.

[26] In *Renaud v Renaud* SCA CA 48/1998 in respect of property disputes between the parties, following the divorce, the Court of Appeal held that the Supreme Court has jurisdiction pursuant to s 25(1)(c) of the Act, without prejudice to any other power of the court, on an application by a party to the marriage, to grant orders as it thinks fit in relation to the property of a party to the marriage or the matrimonial home. In addition, the Court may even exercise its equitable powers to make any order in the interests of justice under s 6 of the Courts Act. Section 20(1)(b) of the Matrimonial Causes Act further gives the court power to consider a lump sum payment to any one of the parties in divorce or separation proceedings.

[27] The description of matrimonial property is property owned by one or both parties who are married to one another, which upon the application of one of the spouses to a court, is subject to division between them. Both parties were working for most, if not the entire period of their marriage. All assets in issue were acquired during the course and subsistence of the marriage. The starting point must be that the assets are shared equally – See the case of *M v M* [2013] EWHC 2534 (Fam).

[28] It is our view that the properties listed as having been disposed of while divorce proceedings had commenced were jointly owned by the parties. Unless good reason is shown, the appellant should have been involved in the sale as well as in the allocation of the proceeds of sale, to the various needs that the respondent explained.

[29] We award the appellant R 1,000,000 from the proceeds of the sale of the boat, and property reference C5234, H4038 and H6758. The appeal is thus partly allowed to the extent that the appellant is awarded a lump sum amount of R 1,000,000. For the avoidance of doubt, this sum is in addition to her half share in the matrimonial home. Regarding the latter the appellant has the first option of purchasing the respondent's share in the matrimonial home situated on parcels V3849 and V6494 within six months. In the eventuality she fails to exercise this option within the time prescribed the respondent shall have the option to purchase the appellant's share in the matrimonial home within six months after the expiration of the appellant's option, failing which the matrimonial home shall be sold and the proceeds distributed between the parties in the shares indicated by our above decision.

[30] As was also ordered by the Supreme Court, we too order that each party shall bear its own costs.

ALLISON v FINANCIAL INTELLIGENCE UNIT

S Domah, M Twomey, J Msoffe JJA
22 April 2016

SCA 39/2013

Civil procedure – Amendment of petition – Abuse of process – Wasted costs order

The petitioner challenged the constitutional validity of certain provisions of the Proceeds of Crime (Civil Confiscation) Act 2008 alleging that they violated his right to property guaranteed by the Constitution. Subsequently, the petitioner sought to amend the petition. The Constitutional Court refused leave to amend. The petitioner appealed. The main issue was the extent to which a petition can be amended and within what timeframe.

JUDGMENT Appeal dismissed.

HELD

- 1 An amendment to a petition is not permitted where it seeks to include a matter not originally pleaded.
- 2 The timeframe depends on the given situation and can only be ascertained in the circumstances of the case.
- 3 Appeals that dislocate the course of trial and prolong the proceedings by various means are vexatious and frivolous.
- 4 In a case of abuse of process, the court has jurisdiction to grant an order as to the wasted costs.

Legislation

Constitution, arts 19(1), 19(2) and 26(1)

Application, Contravention, Enforcement or Interpretation of the Constitution Rules, rr 3(1), 4(1)(c), 5(1), 5(3)

Proceeds of Crime (Civil Confiscation) Act 2008, ss 3(1)(3), 4(1)(b), 9(1)(3)

Proceeds of Crime (Civil Confiscation) (Procedure) Rules 2016, r 12

Seychelles Code of Civil Procedure, s 146

Seychelles Court of Appeal Rules, r 31

Cases

Hackl v FIU [2012] SLR 225.

Foreign Cases

Prakash Boolell v The State of Mauritius [2006] UKPC 46.

Re a Barrister (wasted costs order) [1994] 3 All ER 429

Counsel

A Amesbury on pleadings

F Elizabeth at hearing for appellant

B Galvin for respondent

TWOMEY JA for the Court

[1] The appellant on 1 December 2010 petitioned the Constitutional Court challenging the constitutionality of ss 3(1) and 9(1) of the Proceeds of Crime (Civil Confiscation) Act of 2008 (POCA) on the grounds that these provisions breached arts 19(1), 19(2) and 26(1) of the Constitution. In brief he argued that interim orders preventing him from disposing of, or dealing with specific properties belonging to him breached his right to property and that the fact that the order was based on the belief evidence of the respondent amounted to a breach of his right to a fair hearing.

[2] Subsequent to filing the petition, the appellant moved the Court to amend his petition to challenge the constitutionality of ss 3(3), 4(1)(b), 9(3) in addition to s 9(1) which had already been pleaded in the previous petition, but also to seek a writ mandating the redrafting of POCA, and an award for damages and costs.

[3] In a decision given on 12 November 2013, the Constitutional Court refused leave to amend the petition on the grounds that the Constitutional Court Rules, although providing for circumstances where an amendment of a petition may be granted, precluded such amendment when it would amount to a new matter not sought in the original petition.

[4] He has now appealed this decision on the grounds summarised below:

1. The Constitutional Court erred in holding that s 146 of the Seychelles Code of Civil Procedure does not apply when specific and relevant provisions exist in the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.
2. The Constitutional Court erred in holding that the petition was time barred.
3. The Constitutional Court erred when it held that the amendment sought to introduce new matters.

We consider the grounds in the order in which they are raised.

Grounds 1 and 2

[5] The Rules in relation to a petition before the Constitutional Court provide:

3. (1) An application to the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be made by petition accompanied by an affidavit of the facts in support thereof.

...

Allison v Financial Intelligence Unit

4. (1) Where the petition under r 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court -
 - (a) in a case of an alleged contravention, within 3 months of the contravention;
 - (b) in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;
 - (c) in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law.
- ...
 5. (1) A petition under r 3 shall contain a concise statement of the material facts and refer to the provision of the Constitution that has been allegedly contravened or is likely to be contravened or in respect of which the application, enforcement or interpretation is sought.
 - (2) Where the petitioner alleges a contravention or likely contravention of any provision of the Constitution, the petition shall contain the name and particulars of the person alleged to have contravened that provision or likely to contravene that provision and in the case of an alleged contravention also state the date and place of the alleged contravention
 - (3) The Court shall not permit an amendment of a petition which seeks to include any new matter not pleaded in the petition. [Emphasis added]

[6] The appellant submits that since r 5(3) is silent on the question of the time within which an amendment to a petition before the court can be made, recourse must be had to s 146 of the Seychelles Code of Civil Procedure which permits a party to amend its pleadings at any stage of the proceedings.

[7] The respondents on the other hand submit that there was no ruling by the Constitutional Court on the question of time bar but rather an acknowledgement by the Court in passing that the proposed amended petition was sought to challenge the constitutionality of a legislative provision five years after its enactment.

[8] They also submit that as regards new matters being introduced into a petition, it is r 5(3) (supra) that applies and not r 4(1)(c) as inferred by the appellant's submissions.

[9] In the appellant's skeleton heads of argument, counsel argues that one cannot be expected to challenge the constitutionality of laws within only ninety days of it coming into force as the circumstances of the case indicate a continuing breach of a constitutional provision. Counsel also takes issue with the reverse burden of proof. We fail to understand why these arguments are being made when what is being challenged is the fact that one cannot make an amendment to one's pleadings. This is a classic case of mixing issues to drown the essence.

[10] In any case, it is our view that r 5(3) is not silent on the issue of when an amendment can be made. It states simply that an amendment shall not be permitted where it seeks to include a matter not originally pleaded.

[11] It is true that the word *shall* can be either imperative (mandatory) or directive (permissive) in any given situation and can only be ascertained by the context of its use. We are of the view that in the context in which it is used in r 5(3), it indicates that if one seeks an amendment to include a new matter that has not been pleaded in a petition, such amendment cannot be made, not then, not ever. There is in other words no futurity in the word *shall* in this context and therefore no question of imposing a time bar.

[12] In the circumstances we find no basis for the appellant's contention. Rule 5(3) applies and there is therefore no need to resort to the Seychelles Code of Civil Procedure on this issue. These grounds of appeal have no merit whatsoever and are dismissed.

Ground 3

[13] Again the submissions of counsel for the appellant on this ground are equally confused as they do not seem to relate to or support the ground of appeal filed. The ground of appeal filed concerns the introduction of new material. However, in the skeleton heads of argument counsel argues the merits of the present case against the authority of *Hackl v FIU* (2012) SLR 225. She then goes on to pose the question of whether it might be permissible for "a litigant to amend his pleadings when new counsel takes over".

[14] This is certainly a want of seriousness in advocacy but in any event this Court cannot entertain arguments that have absolutely nothing to do with the grounds of appeal filed.

[15] This ground of appeal is devoid of merit and is dismissed.

[16] This appeal was ill-advised—in our view frivolous and vexatious—and is a clear example of practices "bent upon dislocating the course of trial and prolonging the proceedings by every means", vide *Prakash Boolell v The State of Mauritius* [2006] UKPC 46. We want to discourage such appeals in the future and do so by exercising our powers under r 31(5) of the Seychelles Court of Appeal Rules which provides:

In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or *may make such other order in the matter as to it may seem just*, and may by such order exercise any power which the trial court might have exercised. [Emphasis added]

[17] We have on many occasions commented on the readiness with which some counsel start frivolous and vexatious cases in this Court at the expense of their clients. Should this practice continue, a list may be made public on their notoriety.

[18] The present matter has a long procedural history: In November 2008 cash amounting to Rs 551,350 was found in spare wheels of a car, a rice cooker and a cash box in the appellant's home. In June 2009 and December 2009, an interim order under s 3 of POCA and an interlocutory order under s 4 of POCA were granted respectively by the Supreme Court prohibiting the appellant or anyone from disposing of the cash.

[19] The appellant appealed the interlocutory order on 6 December 2010. In April 2012, the Court of Appeal dismissed the appeal against the interlocutory order granted by the Supreme Court.

[20] In November 2010, the appellant also filed an application challenging the constitutionality of POCA before the Constitutional Court. In December 2010 an amendment to the constitutional petition was sought.

[21] In December 2010, the appellant further applied for the partial release of the funds seized by the Court. This was declined by the Supreme Court on 4 March 2011.

[22] The appellant has had three attorneys (Juliette, Elizabeth and Amesbury).

[23] The dates for the hearing of the constitutional matter filed in 2010 were vacated on the request of the appellants' attorneys in November 2012, February 2013, May 2013, July 2013, August 2013 and October 2013 for various reasons which this Court does not find satisfactory, legitimate or reasonable. Finally the Constitutional Court on 12 November 2013 gave its decision declining to allow the amendment to the petition sought by the appellant.

[24] The appellant did not proceed to argue the merits of its original petition but instead chose to appeal the decision of the Constitutional Court on this interlocutory matter to this Court. This matter will still not be completed by our decision as our only option is to remit the matter to the Constitutional Court to proceed on the original petition for argument of the case on the merits.

[25] Hence, nearly seven and a half years after money was seized from Mr Allisop's rice cooker and car wheels, the courts of Seychelles are still seized of this matter. Yet, no counter-affidavit has ever been filed explaining the provenance of the cash seized as Mr Allisop had simply to do under POCA to have his funds released.

[26] As we have pointed out, this appeal was ill-advised. Under new POCA procedural rules published on 15 March 2016, interlocutory appeals are no longer permitted (vide r 12 Proceeds of Crime (Civil Confiscation) (Procedure) Rules 2016).

[27] Be that as it may, we are of the view that there has been an abuse of process in this case and we would like to send a warning in relation to wasted costs in the practice of law in the courts of Seychelles. Counsel should approach their work as officers of the

court and with professionalism at all times. It is incumbent on them to advise their clients of the futility of frivolous actions which may also be perceived as delaying tactics and which result in costs being incurred by the opposing side.

[28] Wasted costs are now granted by courts of many jurisdictions. In *Re a Barrister (wasted costs order)* [1994] 3 All ER 429 the court imposed a three-stage test to be adopted when considering a costs order: (1) Has there been an improper, unreasonable or negligent act or omission? (2) As a result, had any costs been incurred by a party? (3) Should the court exercise its discretion to order the lawyer to meet the whole or any part of the relevant costs?

[29] There is no statutory provision for wasted costs in Seychelles. However, we adopt the three stage approach of *Re a Barrister*. We are permitted to do this given our jurisdiction to make any order in the interests of justice based on our powers under r 31(5) (*supra*).

[30] We find on limb 1, of the test that it was unreasonable to pursue this appeal. It was a hopeless case. As regards limb 2, it is clear that substantial costs were incurred by the FIU in defending this matter. In relation to limb 3, we are emphatic that this is a case where the Court should exercise its discretion to order the lawyers in this appeal to meet the whole of the costs of this case so far.

[31] As to which of the appellant's lawyers should be charged the costs, we leave this matter to be sorted out between them. In any event should they not come to an agreement they shall each bear half of the costs.

[32] In the circumstances we therefore dismiss this appeal and order that counsel for the appellant pay the costs of this appeal and of the court below.

COUSIN v REPUBLIC

S Domah, A Fernando, J Msoffe JJ
22 April 2016

SCA 21/2013

Sentencing – Mitigating factor – Burden of proof

The appellant was charged with possession of heroin. He was convicted and sentenced to imprisonment for 5 years. On appeal, the question was raised about the proportionality of sentence relative to the seriousness of the offence committed.

JUDGMENT Appeal allowed.

HELD

- 1 A sentence must be proportionate to the seriousness of the offence.
- 2 A reduction in sentence may be considered on account of the age of the offender and in respect of a first time offender.
- 3 In determining the proportionality of the sentence the court should individualise the case and consider i) the evolving principles of sentencing, ii) the constitutional safeguards against torture, inhuman and degrading punishment, and iii) any amendment to the law after the commission of the offence.

Legislation

Misuse of Drugs Act, ss 6(a), 26(1)(a), 29(1) and 2nd Schedule

Cases

Godfrey Mathiot v The Republic, Cr Appeal No 9/1993

Kelson Alcindor v R (2015) SLR 81

Poonoo v Attorney-General (2011) SLR 423

Ignace v Republic (2006) SCCA 5

Foreign Cases

Aubeeluck Gangasing v The State of Mauritius [2010] UKPC 13

Bhinkah v The State [2009] SCJ 102

Pandoo v The State [2006] MR 323

S v Van der Westhuizen [1974] (4) SA 621 C

Counsel E Chetty for the appellant
H Kumar for the respondent

MSOFFE J for the court

[1] The appellant was convicted of two counts of the offence of possession of a controlled drug namely heroin contrary to s 6(a) with s 26(1)(a) of the Misuse of Drugs Act and punishable under s 29(1) and the Second Schedule of the said Act. In the first count it was alleged that on 30 January 2011 at Corgate Estate he was found in possession of a

controlled drug having a net weight of 2.34 grams containing 0.48 grams of heroin (diamorphine). The allegation in the second count was that on the same date he “was found in possession of a controlled drug in the form of two square tiles of which the brownish stains contained the presence of heroin (diamorphine)”.

[2] Briefly, PW2 Terry Florentine and PW4 Nichol Fanchette, both NDEA agents, testified that on the above date at around 3.00 pm they were informed that there was a drug transaction taking place at Corgate Estate opposite the Cemetery. PW2, PW4 and other agents went to the scene. On arrival, they saw a group of men sitting on a tombstone who decided to flee from the scene upon seeing the NDEA agents. The agents pursued the men. In the process, PW2 chased the man running towards a nearby river, the appellant in this case. As the appellant continued to run away, PW2 held his right hand. The appellant stopped running but continued to struggle with PW2. PW4 who was standing three metres away saw the appellant struggling with PW2. He went straight to PW2 to assist him in restraining or containing the appellant. On arrival he handcuffed the appellant. At that point in time both PW2 and PW4 saw the appellant dropping “a small red thing” on the river bank. PW2 picked up the “small red thing”, opened it and saw “hard stuff in the piece of red plastic”. The agents drove the appellant and the “stuff” to the NDEA office for purposes of further investigation. At the office, the appellant told the agents about his vehicle. The vehicle was driven to the office where upon search “two small pieces of glass, two small tiles coloured blue which was under his carpet in a small box” were found. PW2 put the red plastic wrapping the “stuff” and the two square tiles into a brown envelope, sealed it and kept it in his locker until he handed it over to Dr Purnaman for chemical analysis and report after PW3 Evans Seeward had prepared and signed a letter of request on 31 January 2011 to that effect. In the meantime, on 17 January 2013, PW3 prepared another letter of request for the purpose of re-analysis of the exhibits and took the exhibit evidence bag to PW1, Jemmy Bouzin for re-analysis. PW3 drew up a report (exhibit P1).

[3] Yet again, very briefly, the defence case went as follows: The appellant testified that on 30 January 2011 he was at Corgate Estate. He denied sitting on a tombstone dealing in drugs. He stated that he had gone to Corgate Estate to meet DW2 Mr James Bacco whom he had wanted to do some work for him. While explaining to DW2 the nature of work involved, he saw NDEA agents and policemen approaching him. As he walked towards his car he saw some people running. In the ensuing chain of events, PW2 jumped on him and wanted to handcuff him. He resisted and kept on asking PW2 what was going on. Subsequently, PW2 overpowered and handcuffed him. He denied possessing drugs at the scene of arrest and in the car in question. He was generally supported by DW2.

[4] After hearing both aspects of the case, the trial judge opined and held that the prosecution had proved its case against the appellant beyond reasonable doubt, hence the conviction on both counts. She, thereafter, sentenced the appellant to concurrent terms of five years imprisonment.

[5] Aggrieved, the appellant has preferred this appeal. In his notice of appeal 28 March 2016 the appellant raised six grounds of appeal challenging the conviction and an alternative seventh ground on sentence. Basically, the six grounds of appeal crystallise on one major ground of appeal. That, the evidence on record did not establish the prosecution case against the appellant beyond reasonable doubt.

[6] However, in a sudden change of events, when the appeal was called for hearing the appellant abandoned the six grounds of appeal and decided to canvass the appeal on the alternative seventh ground of appeal only. This judgment is therefore about the sentence and not the conviction of the appellant.

[7] In brief, in arguing the appeal the appellant's counsel was of the view that the concurrent terms of imprisonment were manifestly harsh and excessive in the circumstances of the case. He urged that the Judge ought to have taken into account the mitigating factors appearing at page 213 of the record. He further contended, inter alia, that the Judge should have considered that, as per the analyst's report, with respect to the first count the hard brown substance contained heroin with a purity of only 16% and a content of only 0.35 grams and in the second count the two square tiles contained only traces of heroin.

[8] In determining this appeal, this court is guided by the principle that sentencing is a matter pre-eminently falling squarely within the purview of the trial court's discretion, which should not lightly be interfered with. In the case of *Godfrey Mathiot v The Republic*, Cr Appeal No 9/1993, Adam JA, delivering a unanimous judgment held that –

...the proper approach for an appellate court in sentence appeals is only to intervene where (a) the sentence was wrong in principle; (b) the sentence was either harsh, oppressive or manifestly excessive; (c) the sentence was so far outside the normal discretionary limits; (d) some matter has been improperly taken into consideration or failed to take into consideration something which should have been; (e) the sentence was not justified in law.

[9] The mere fact that any or all the judges sitting on an appeal would have imposed another sentence, be it heavier or more lenient, if he presided in first instance, is not enough reason for a court of appeal to interfere with the sentence imposed.

[10] In determining whether the sentence qualifies for review by this Court, we looked at the quantity of heroin that the appellant was accused of possessing. It was 0.48 grams of heroin. The tiles found on the car used by the appellant had brownish stains, which when subjected to further tests, were found to contain presence of heroin.

[11] We further considered that when the appellant was arrested in 2011, the law required that he would be sentenced to a minimum term of 5 years if convicted of possession. However, that provision was repealed in the year 2012 and no minimum sentence was retained for a first offender in regard to possession. The appellant was sentenced on 7 August 2013. As was held in the case of *Kelson Alcindor v R* (2015) SLR 81, the appellant

should benefit from the change of law in his favour, on the principle of “la peine la plus douce.” – See *Aubeeluck Gangasing v The State of Mauritius* [2010] UKPC 13. The appellant was sentenced for the possession of the apparatus; the minimum sentence prescribed by the Act is three years.

[12] In *Poonoo v Attorney-General* (2011) SLR 423, this Court held that “Sentencing involves a judicial duty to individualise the sentence tuned to the circumstances of the offender as a just sentence”.

[13] In *S v Van der Westhuizen* [1974] (4) SA 621 C, Baker J, reaffirmed that consideration should be given to the crime, the criminal, society and the element of mercy. But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crimes. The sentence handed should be just and appropriate. It should not be either too harsh or too lenient as to meet the purposes of the punishment.

[14] In the case of *Poonoo* supra, this Court held in dealing with the issue of mandatory sentences that at 431:

While the legislature is concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender.

In *Poonoo* the mandatory jail term of 5 years given to the accused for breaking and entering into a building and stealing a pair of shoes therein, was reduced to 3 years.

[15] On the mitigating factors, the trial judge was right to consider the appellant’s age but in error when she did not take this into account. When she quotes this Court, in the case of *Ignace v Republic* (2006) SCCA 5 that special reasons (in mitigation) should relate to the facts of the offence and not the offender, she overlooked the fact that a lot of water has flowed under the bridge since 2006. Evolved principles of sentencing have emerged.

[16] The facts of the offence in this case being that the quantity of the drugs on which the appellant was found with was 0.48 grams and traces found on the surface of tiles in his car. The Privy Council in the Mauritian case of *Aubeeluck Gangasing v The State of Mauritius* supra held that:

The minimum penalty would be considered disproportionate in cases wherein the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise....

See also *Bhinkah v The State* [2009] SCJ 102. Similarly, in the case *Pandoo v The State* [2006] MR 323, the court held that the constitutional right against torture, inhuman and degrading punishment, incorporates the principle that the sentence must be proportionate to the seriousness of the offence. We would consider such quantity to be sufficiently minute that it would induce the trial court to consider a lenient punishment on the appellant.

[17] Accordingly, we reduce the sentence on count one from 5 years to 3 years. The sentence on count 2 is reduced from 5 years to 1 year. Both sentences shall run concurrently as had been previously ordered. And, the period spent in remand custody shall be taken into account as had also been previously ordered.

MATHIOT v ROSE

F MacGregor PCA, S Domah, M Twomey JJA
22 April 2016

SCA/2013

Family – Property – Unjust enrichment

The appellant and respondent lived together for 24 years. The parties differ on the nature and duration of their relationship. The respondent presented herself in the Supreme Court as the common law wife of the appellant which the appellant denied. The respondent claimed that she had contributed to the construction of a house, now possessed by the appellant. She alleged that the appellant was unjustly enriched at her expense. The dispute was largely on how the quantum for unjust enrichment should be calculated. The Supreme Court ordered the appellant to pay a sum higher than the respondent's actual contribution by taking the current value of the asset into account.

JUDGMENT Appeal dismissed.

HELD

- 1 The extent of an unjustifiable enrichment depends on the extent of enrichment of the defendant. The rule in *Edmond* is overruled.
- 2 In a claim for unjust enrichment, it needs to be shown that a) the defendant was enriched, b) was so enriched to the disadvantage of the plaintiff, and c) there was no legal reason for such enrichment.
- 3 The value is to be calculated as at the time the claim is instituted.

Legislation

Civil Code, art 1381-1

Cases

Edmond v Bristol (1982) SLR 353

Foreign Cases

Paschke v Frans [(SA 30/2012) [2015] NASC 9 (30 April 2015)]

Civ 1^{re}, 15 févr 1973, Defrénois 1975.235

Civ 3^e, 18 mai 1982, Bull Civ III, 86

Civ 1^{er}, JCP 1983.II.19992

Counsel

B Hoareau for the appellant

J Renaud for the respondent

MACGREGOR PCA

[1] The respondent in this case approached the Supreme Court claiming that the appellant had been unjustly enriched at her expense. She described herself as common law wife of the respondent, they having lived together for a continuous period of 24 years. Within that period, they had acquired a piece of land upon which they had constructed a house, their home.

[2] Her plaint was filed on 5 September 2008 and the appellant filed his defence on 19 October 2009. He denied that the appellant was his wife, and averred that he solely owned the property in issue. He went on to generally deny every statement made by the respondent in the plaint.

[3] At the hearing, the respondent gave evidence that she had lived with the appellant since 1984. They had started off without a house of their own. In 1990, they had applied, and were granted a licence to develop a government property. She took loans in 1990 and 1991 to help build the house. In 1998, the land, now with a house was transferred by the government to the appellant, in his sole name.

[4] The appellant had shifted to work in Praslin around 1998-1999, and would come to Mahe occasionally, and spend nights in the house. The appellant always lived in the house. Their relationship deteriorated and in 2008, after various unsuccessful attempts to get her share in the house, the respondent moved the Supreme Court for relief that the appellant pay her the sum of R 350,000 being her considered share in the house. One day in 2009, the respondent went out to spend a night at her friend's place. When she returned, the appellant had changed the locks to their house and thus the respondent was rendered homeless. She now lives at the home for the elderly.

[5] In a twist of events, on 27 January 2012, while the proceedings were still pending before the Supreme Court, the appellant transferred the property to one Zung Yian Zu, for R 750,000. The appellant, after filing his defence did not testify in Court and did not call any witness to testify on his behalf.

[6] On 4 October 2013, the Supreme Court found that the respondent indeed suffered detriment without lawful cause and the appellant was correspondingly enriched without lawful cause. It determined that the respondent was entitled to 30 per cent of the market value of the property. It considered the market value to be not less than R 750,000 and ordered the appellant to pay the respondent R 225,000 with interest and costs.

[7] Aggrieved, the appellant appealed the finding of the Supreme Court, on four grounds. The grounds of appeal are;

- i. The trial judge erred in law, in holding that the law in respect of "unjust enrichment" is that; "it is not the actual contributions that were made towards the acquisition of the assets that forms the basis of what needs to be adjusted, but the value of the assets in issue".

- ii. The trial judge erred in law in failing to apply the principle of ‘unjust enrichment’ and instead applied and relied on the principles and factors, relevant to the adjustment of matrimonial property, in divorce proceedings.
- iii. The trial judge erred in law and on the evidence, in failing to hold that the contribution of the respondent in the property was only in the sum of R 25,888.
- iv. The trial judge erred in law and on the evidence in holding that Exhibit P10 was evidence that the market value of the property was R 750,000.

[8] In his argument on ground 1, appellant’s counsel submitted that it is the actual contribution that must be adjusted but not the value of the assets. He referred us to the case of *Edmond v Bristol* (1982) SLR 353, where it was held that the plaintiff was entitled to recover such contributions to the extent which the defendant had been unjustly enriched. He submitted that the value of the assets is irrelevant in a case of unjust enrichment. The respondent on the other hand submitted that the trial judge was right in taking into account the value of the assets.

[9] Ground 1 of the appeal will be handled alongside ground 3. The appellant contends that the contribution of the appellant to the property was R 25,880 and seeks the order of this Court to pay the respondent as much. We consider the amount of R 25,880 to refer to the two loans, being R 7880 and R 18, 000 taken by the respondent in 1990 and 1991 respectively.

[10] This dispute is largely on how the quantum for unjust enrichment should be calculated. We are faced with a situation where the respondent invested her resources in a piece of land and for 24 years and did not consider her investment to be at risk.

[11] The definition of land according to the Land Registration Act is: “Land includes land covered with water, all things growing on land and buildings and other things permanently affixed to land and also an undivided share in land”. The property in issue was only transferred to the appellant in 1998, long after the house had been constructed and the parties were already living in it. The land that was transferred by the government to the appellant fell under the description of the land as described by the Act. The appellant therefore was registered as the owner of land whose value included input of the respondent, which he does not deny.

[12] We consider this to be an action based on the advantage the appellant obtained, to the disadvantage of the respondent, in relation to the property V6529.

[13] Article 1381-1 of the Civil Code provides that:

If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him *to the extent of the enrichment* of the latter. [Emphasis added]

[14] Does the Court award her the exact amount she gave, the enhanced value that grew from her contribution or peg her disadvantage to the advantage that the appellant has obtained at her expense? The Court must consider the disadvantage suffered by the respondent, contrasted to the corresponding advantage obtained by the appellant. Article 1381-1 *supra* provides for a recovery “to the extent of the enrichment of the party enriched”. Thirty-four years have elapsed since 1982 when *Edmond v Bristol* [*supra*] was decided. The world has undergone major transformations since, including the Seychelles society. The mores of that time, rightly or wrongly, are not the ones of today. Even counsel for the appellant conceded that *Edmond v Bristol* needs to be revisited.

[15] In the Namibian case of *Paschke v Frans* [(SA 30/2012) [2015] NASC 9 (30 April 2015)], Kate O'Regan AJA, writing a unanimous judgment, had an opportunity to compare the different views of various scholars on the Dutch-Roman Law on unjust enrichment¹, especially the time of determination of quantum, as adopted and developed by various countries including South Africa. We agree with her conclusion that: “In my view, the appropriate date for the determination of the quantum of damages is when the stage of *litis contestation* is reached.... it seems to me that the approach is both practical and principled.” She goes on to say:

The shifting quantum of the claim arises because the amount of unjustifiable enrichment recoverable by a plaintiff at any time depends in large part on the extent of enrichment of the defendant. Accordingly, if the defendant is no longer enriched, no claim will lie. Unlike in the law of delict, *the focus is not on the plaintiff's loss. It is, in the first place, on the extent of the defendant's enrichment.* [Emphasis added]

[16] The following extracts from Terré, Sincler and Lequette *Droit Civil: Les obligations* (Dalloz, 10th ed, paras 1074 and 1074-10) are worth reproducing for guidance:

Lorsque l'obligation de restitution est reconnue dans son principe, comment calculer les sommes que l'enrichi doit restituer à l'appauvri?
La restitution est limitée par une double mesure. D'une part, elle ne peut pas dépasser le montant de l'enrichissement effectif, c'est-à-dire de la plus-value procurée au patrimoine du défendeur, même si l'appauvrissement est plus fort, car l'action de *in rem verso* ne doit pas appauvrir le défendeur. D'autre part, elle ne peut pas dépasser l'appauvrissement du demandeur, la valeur dont son patrimoine s'est trouvé privé, même si l'enrichissement est plus élevé. L'intérêt étant la mesure de l'action, l'appauvri ne saurait réclamer davantage que l'appauvrissement qu'il a subi. L'indemnité sera donc la plus faible de ces deux sommes.

¹ See S Eiselen and G Pienaar *Unjustified Enrichment: A Casebook* (Butterworths, 1993); JC Sonnekus *Unjustified Enrichment in South African Law* (LexisNexis, Durban, 2008) and Reinhard Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) at 896 and 899.

[17] Reference is made here to “Rappr en matière de récompense dans les régimes communautaires, l’art 1469, al 1 C civ”.

[18] The authors further make a distinction between the affairs in a common law relationship and those in business:

L’enrichissement sans cause se distingue sur ce point de la gestion d’affaires. Le gérant a droit au remboursement de ces dépenses utiles, même si le profit subsistant leur est, en définitive, inférieur (supra, no 1041). Il se distingue également de la responsabilité civile délictuelle qui indemnise en principe la victime de la totalité de son dommage.

[19] They apply a cut-off date for the evaluation of the accrued assets: it is at the date of the plaint. We read at para 1074-1 the following:

1074-1 Date d’appréciation: A quelle date faut-il se placer pour apprécier l’enrichissement et l’appauvrissement? On a hésité entre le jour de l’appauvrissement et celui de l’enrichissement, celui de la demande en justice et celui du jugement. Ces solutions sont propres à conduire à des résultats différents.

Supposons au’une personne ait réalisé des travaux sur le terrain d’autrui pour une dépense de 1 500, la plus-value étant à l’époque de 1 000. Dix ans plus tard, la plus-value est de 2,000, et il en coûterait désormais 3 000 pour réaliser ces travaux. A supposer qu’une demande soit formée sur le fondement de l’enrichissement sans cause, le montant de l’indemnité variera considérablement selon la date retenue.

L’appauvrissement s’évalue, en principe, à la date où la dépense a été réalisé.

[20] Reference is made here to Civ 1re 15 févr 1973, Defrénois 1975.235 et J Flour, *Pot-Pourri autour d’un arrêt*, Defrénois 1975.145, Civ 3e, 18 mai 1982, Bull Civ III at 86.

[21] How do the French courts mitigate the severity of the result where the contributions have been made in the past? By moving the date of the evaluation. We read as follows:

La jurisprudence l’atténue en reportant la date d’évaluation de l’appauvrissement au jour de la demande en justice, lorsque l’appauvri était dans « l’impossibilité morale » d’agir autrement:

[22] The authors refer here to an interesting case where the payment is calculated not as at the time the services were rendered but at the time the case was filed in court [see Civ 1er, JCP 1983.II.19992, note Terre, Defrenois 1983.474, note Champenois].

[23] Thus, there is no fault that can be ascribed to a claimant if by moral obligation or otherwise, she does not act at the time the services were rendered or the contributions made:

Il n'a alors commis aucune negligence en n'agissant pas plus tôt.

[24] The respondent filed her claim in 2008. The appellant filed his statement of defence a year later and failed to come to court to tender evidence that the sums claimed were beyond his unjust enrichment. In between the proceedings, in 2012, he disposed of the property at a price quoted in the deed of transfer, executed by himself and tendered to the Registrar of Lands for registration. The price quoted therein cannot be taken to be far from the value of the property as at 2008 when the claim was filed. Other than the money paid by the respondent for the construction of the house, there was no evidence brought to court of any corresponding money, paid by the appellant or anyone else for the construction of the house. And we cannot demean the value of R 25,000 in the years 1990-1991. We consider the court to have been lenient to reduce the claim of adjustment sought by the respondent.

[25] We therefore find no merit in grounds 1 and 3 of the appeal.

[26] On ground 2, the appellant submitted that in his judgment, it is clear that the trial judge has applied and relied on division of property in divorce proceedings. He submitted that the statement by the trial judge that he has been “guided” by such cases is proof that these cases very much influenced his judgment. The respondent on the other hand submitted that the trial judge was only guided and not influenced by matrimonial property proceedings.

[27] It is apparent from the pleadings that the parties lived together. The appellant claims they lived together for 4 years, yet the respondent claimed they had lived together for 24 years. Be it as it may, they lived together, in a concubinage arrangement. The underlying relationship of the parties was the concubinage. No need to stress the point that such arrangements can no longer be ignored in our society. The legislature is however yet to catch up with the reality and we hope in its time, it will enact laws to cater for situations of concubines and their partners. We are however not persuaded that matrimonial law influenced the trial judge.

[28] This ground has no merit as well and shall fail also.

[29] On ground 4 of the appeal, the appellant submitted before us that the trial judge relied on the document of transfer by which the appellant had sold parcel V6527 to a third party, on 19 January 2012 for the price of R 750,000 as proof that the value of the property was R 750,000. He submitted that the market value of the property could only have been established by an expert witness. Further, as a matter of fact, it is uncontroverted that the

respondent did not contribute to the acquisition of parcel V6527 but only towards the construction of the house situated thereon. The respondent on the other side submitted that the selling price indicated the increased value of the property and also its market value.

[30] We have already indicated the definition of land as provided by the Act. We further wish to repeat that in an action of unjust enrichment, the plaintiff can only be successful if they can show that the defendant was enriched, and was so enriched to the disadvantage of the plaintiff, and that there was no just cause to such enrichment and disadvantage to the plaintiff. As we have said in the preceding paragraphs, the value to be contrasted with is the value at the time the claim is instituted.

[31] The fluctuation of prices in the country within 4 years is small. We would consider that the purchase price quoted in the Deed of Transfer signed by the appellant and registered at the Land Registry was likely to be, in the circumstances, a fast-riddance underhand sale at a giveaway price of R 750,000. However, there is no cross-appeal for us to determine this and, if found true, to increase the award. This ground also fails.

[32] We further find it prudent to mention that for quite some time the cause of concubines in the country has been a cause of concern for the courts. As the Chief Justice rightly observed in a recent paper,

Legal remedies are not provided in statute directly for unmarried parties.... The remedies are as clear as mud –uncertain, unclear and unfair (right to equal protection of the law or equality before the law).

[33] Our hope is that in the new revised Civil Code, there will be a provision for equity in the management of assets that accrue when parties live together in concubinage relationships.

[34] We find no merit in any of the grounds of the appeal, and the submissions of the appellant. We consequently dismiss the appeal with costs and interest to the respondent.

NOLIN v NOLIN

S Domah, M Twomey, J Mosoffe JJA
22 April 2016

SCA 04/2014

Property – Co-ownership – Action en revendication – Prescription

The appellant filed a declaratory suit against the respondent claiming the rights of co-ownership over a property. The appellant submitted that the suit was related to a personal right and therefore, barred by limitation. The respondent claimed that the action is one of *revendication* and was not subject to any prescription. The trial court decided in favour of respondent. The appellant appealed.

JUDGMENT Appeal dismissed.

HELD

- 1 A claim for one's share in co-owned property is a personal action and is barred by a prescriptive period of five years.
- 2 In an action *en revendication*, the sole issue is the right of ownership between competing title-holders. Vindication of a right in co-ownership is a different cause of action and a personal one.

Legislation

Seychelles Civil Code, arts 2262, 2265, 2271

Cases

Jumeau v Anacoura (1978) SLR 180

Counsel B Hoareau for the appellant
 N Burian for the respondent

DOMAH JA for the court

[1] The appellant had sued the respondent before the Supreme Court for the latter to declare that appellant had rights of co-ownership over a landed property, parcel no H2200, which comprises parcels H4119 and H 4122. In his plea, the respondent had pleaded *in limine*: that the plaint disclosed no action known to the law; if action there were, it was barred by prescription; and the authentic title of the respondent over the parcel in question could not be challenged by oral averments and evidence. On the merits, the respondent denied the averments of the appellant, admitted that the family lived on a plot of land which the father had bought on a concessionary basis. This was later sub-divided into two: H2200 and H2244. He, for one, had bought for value before a Notary H2200 while H2244 was transferred into the name of the family members: namely, himself, the appellant, Ivan Nolin, Roland Nolin and Stella Nolin.

[2] The judge decided that the plea *in limine* of prescription of 10 years would apply as a bar to the action. The action was lodged 10 years and one day after it arose. He did not, accordingly, find it necessary to delve into the merits of the case and dismissed the action. This is an appeal by the then plaintiff, now appellant, against that order of dismissal.

[3] There is only one ground of appeal: namely, the trial judge erred in law in accepting the respondent's plea in *limine litis*, namely, that the plaint was prescribed on the basis of art 2265 as the said article was not applicable to the facts of the case.

[4] The respondent resists the appeal and supports the decision of the judge. In his submission, he stated that the action was a personal action and was barred by 5 years. He referred to the decision of *Jumeau v Anacoura* (1978) SLR 180 according to which a claim for one's share in co-ownership is a personal action as opposed to a real action.

[5] As against that stand, the appellant submits that the facts of the case do not attract the application of prescriptive time bars such as art 2265 simply because the action is one "*en revendication*" which is not subject to any prescription whatsoever.

[6] We have considered the submissions in law of both the parties. Our decision is as hereunder.

[7] With regard to the issue of the prescription, what the appellant is claiming is rights of co-ownership in Parcels H4119 and H4122. Clearly, these rights are personal rights on the authority of *Jumeau v Anacoura* [supra] where Sauzier J held that the right of a co-owner is not a real right over the property on which it is claimed. We endorse that view. As such, that right being a personal right, it is barred by a prescriptive period of five years as per art 2271 of the Seychelles Civil Code which reads:

1. All rights of action shall be subject to prescription after a period of five years except as provided in arts 2262 and 2265 of this Code.
2. Provided that in the case of a judgment debt, the period of prescription shall be 10 years.

[8] The first excerption, art 2262, reads:

All real actions in respect of rights of ownership of land or other interests in land therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.

[9] The second excerption, art 2265, reads:

If the party claiming the benefit of such prescription produces a title which has been acquired for value and in good faith, the prescription of article 2262 shall be reduced to ten years.

[10] This suit could only have been ventured under art 2265, on the assumption that it was a real action, and the defendant was invoking a title. However, it was brought after 10 years and one day too many. This leads us to the question whether or not the case brought by the appellant was touched by any prescriptive time bar. Counsel cited *Code Civil* (Daloz, 102e ed) which reads:

Le droit de propriété ne s'éteignant pas par le non-usage, l'action en revendication n'est pas susceptible de prescription [Civ 1ère, 2 juin 1993: D 1994.593, note Fauvarque-Cosson; D 1993 Somm, 306 obs A Robert; Defrénois 1994, obs. Souleau-Defrénois].

[11] The question is: Is this suit one “*en revendication*?” An action “*en revendication*” is an action where two aspirant owners are competing for title to the same property. As Note 21 of *Encyclopedie Dalloz* (2eme ed) vol VII, Recueil, “Revendication” explains:

En principe, l'action en revendication se déroule entre deux prétendants à la propriété: le revendiquant qui n'est pas en possession de l'immeuble et le défendeur qui le possède [V Mazeaud, t 2, 2ème vol, par Juglart, no 1468].

[12] The present action is not a realty claim of proprietorship by one competing aspirant owner against the aspirant owner. It is a personal claim of co-ownership by one occupier against another title-holder and occupier. It is not an action “*en revendication*”.

[13] In practical terms, a classic case of “*action en revendication*” would start off with each proprietor coming to court with a competing document of title where the court is called upon to determine which title overrides the other. There are variations of this standard scenario admittedly. As the doctrine lays down: “la question posée est uniquement celle de la preuve du droit de propriété” [Note 47 *Encyclopédie Dalloz* *ibid*]. In an *action en revendication*, the sole issue is the right of ownership between competing title-holders. A vindication of the right of co-ownership is a different cause of action and a personal one at that.

[14] There is another reason for which we would say that this action was misconceived from the very start. Since the case of the appellant has always been that the parcel was to be in the name of all the members of the family in being—the mother, the father and their eight children including the plaintiff—the other surviving members of the family should have been brought into the cause. They were not. Even procedurally this action was flawed.

[15] There is no merit in this appeal and it is dismissed with costs.

ERNESTA v PETROUSSE

F Robinson J
29 April 2016

[2016] SCSC 303

Debt – Acknowledgement – Procedure – Interest

The plaintiff sued the defendant on two acknowledgements of debt.

JUDGMENT For the plaintiff.

HELD

- 1 Articles 1142 and 1146 of the Civil Code are not applicable unless the claim is for damages for breach of contract.
- 2 In terms of art 1153 of the Civil Code, "demand" means a prayer for the principal sum.

Legislation

Civil Code, arts 1134, 1326, 1153
Civil Code Act, s 5

Foreign Cases

Baichoo v Fowdar 1975 MR 80 SCJ 76
Lewis Gerald v The New India Assurance Co. Ltd 1943 MR 109
Alleaume v Biram 1913 MR 44
Jean Louis v Jenkins 1907 MR 71

Counsel G Ferley for plaintiff

ROBINSON J

Introduction

[1] This suit is founded on arts 1134, 1326 and 1153 of the Civil Code of Seychelles (the Civil Code.)

[2] The plaintiff is suing on two acknowledgements of debt.

[3] The issues for the determination of this court are whether or not –

- (a) the defendant is bound by the two acknowledgements of debt, each under private signature, pleaded against him
- (b) a notice of "*mise en demeure*" is necessary before suit under art 1153 of the Civil Code.

Case for the Plaintiff

[4] This suit proceeded *ex parte*.

[5] The plaintiff, Mr Dolor Ernesta, is and was at all material times a businessman.

[6] The defendant, Mr Frankie Petrouse, was at all material times engaged in construction.

[7] On 15 June 2014, the defendant signed two acknowledgements of debt. In one of the said acknowledgements of debt, the defendant acknowledged owing the plaintiff a sum of Euro (€) 44,394 (exhibit P2). In the other acknowledgement of debt, the defendant acknowledged owing the plaintiff a sum of Seychelles rupees 147,455 (exhibit P3). In both acknowledgements, the defendant bound himself to the payment of interest in case of delayed performance.

[8] Exhibits P2 and P3 were drawn up by the defendant and witnessed by one Ms Bernadette Contoret. Exhibits P2 and P3 were registered and stamped.

[9] The defendant did not pay the plaintiff the sums of €44, 394 and SCR147, 455 lent to him in terms of the acknowledgements of debt, and is, therefore, in breach of the unilateral undertakings.

[10] The plaintiff demanded the immediate payment of the sums of €44,394 and SCR147,455 and 10% interest thereon in terms of the acknowledgements of debt.

[11] The defendant refused, failed and neglected to pay the plaintiff the sums of €44,394 and SCR147,45 and interests thereon in terms of the two acknowledgements of debt. The plaintiff did not plead any written notice of "*mise en demeure*".

[12] The plaintiff is asking this court to enter judgment in his favour and order the defendant to pay him:

- (i) EUROS 44,394;
- (ii) EUROS 4439.40 being interest due for the month of September 2014 and a similar amount for each month that the loan remains not paid;
- (iii) SR 147,455;
- (iv) SR14,745.50 being interest due for the month of September 2014 and a similar amount for each month that the loan remains not paid; and
- (v) Costs of this suit.

Discussion

[13] Firstly, this court determines whether or not the defendant is bound by the two acknowledgements of debt.

[14] Article 1326 of the Civil Code provides –

1. A note or promise under private signature whereby one party undertakes an obligation towards another to pay him a sum of money or something of value shall be written in full, in the hand of a person who signs it; or at least it shall be necessary that apart from his signature he adds in his own hand the formula "valid for" or "approved for" followed by the amount in letters or the quantity of the thing. This requirement shall not apply to tradesmen and employees acting within the scope of their trade or employment.
2. The requirement of the formula as in paragraph 1 of this article shall not apply to promissory notes which are regulated by the Bills of Exchange Act, Cap 15, or any law amending or replacing that Act.

[15] Two conditions are necessary for the application of art 1326 of the Civil Code -

- (a) that the undertaking must be unilateral; and
- (b) that the undertaking should contain an obligation towards another to pay a sum of money or something of value (*de choses appreciables*).

[16] I reproduce the content of exhibit P2:

I, Frankie Petrousse of Grand Anse, Mahe, Seychelles, acknowledged owing to Mr Dolor Ernesta of Sans Souci, Mahe, Seychelles, the sum of Euro Forty four thousand, three hundred and ninety four (Euro 44,394.00) which became due on 31st July 2013.

The outstanding amounts should be paid into the following Bank accounts:

Bank Name: Mauritius Commercial Bank – [...]

The total amount is to be paid on or before 31/08/2014. Failure to pay on or before the 31/08/2014. Shall bear interest at the rate of 10% monthly.

Dated this 15th day of June 2014.

Name Frankie Petrousse

Witness Ms Bernadette Contoret

(SD) Frankie Petrousse

(SD) Bernadette Contoret

Good for the sum of Euros 44, 394.00 fourty four Thousand Three Hundred and Ninety Four only

(SD) Frankie Petrousse"

[17] I reproduce the content of exhibit P3:

I, Frankie Petrousse of Grand Anse, Mahe, Seychelles, acknowledged owing to Mr Dolor Ernesta of Sans Souci, Mahe, Seychelles, the sum of One hundred and forty seven thousand, four hundred and fifty five (SCR 147, 455.00). which became due on 31st July 2013.

The outstanding amount should be paid into the following Bank accounts:

Bank Name: Nouvobanque – A/C Number: [...]

The total amount is to be paid on or before 31/08/2014. Failure to pay on or before the 31/08/2014. Shall bear interest at the rate of 10% monthly.

Dated this 15th day of June 2014.

Name Frankie Petrousse Witness Ms Bernadette Contoret

SD Frankie Petrousse SD Bernadette Contoret

Good for the sum of SR 147, 455. 00, one hundred and forty seven Thousand four Hundred and fifty five only.

(SD) Frankie Petrousse

[18] Exhibits P2 and P3 contained unilateral undertakings by the defendant, namely, the obligation towards the laintiff to pay him the principal sums of €44,394 and SCR147,455. Exhibits P2 and P3 were signed by the defendant. In terms of art 1326 of the Civil Code, the unilateral undertaking "shall be written in full, in the hand of a person who signs it; or at least it shall be necessary that apart from his signature he adds in his own hand the formula, "valid for" or "approved for" followed by the amount in letters or the quantity of the thing".

[19] I have examined the two acknowledgements of debt. The undertakings were not written in full in the hand of the defendant. The undertakings were typed out. In terms of art 1326 of the Civil Code, the defendant had at least apart from his signature added in his own hand the formula "*Good for the sum of*" followed by the amount in letters and figures. With respect to the formula the words "*valid for*" or "*approved for*" have been replaced by the words "*Good for the sum of*". In light of those defects, is the defendant bound by the two acknowledgements of debt?

[20] Section 5 of the Civil Code Act provides –

- (1) The text of the Civil Code of Seychelles as in this Act contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text.

- (2) Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles.

[21] This Court refers to *Dalloz Codes Annotés Nouveau Code Civil* III art 1168 à 1581 [Art 1326.] which reads –

Le billet ou la promesse sous seing privé par lequel une seule partie s'engage envers l'autre à lui payer une somme d'argent ou une chose appreciable, doit être écrit en entier de la main de celui qui le souscrit; ou du moins il faut qu'outre sa signature, il ait écrit de sa main un *bon* ou un *approuvé*, portant en toutes lettres la somme ou la quantité de la chose;

Excepté dans le cas ou l'acte émane de marchands, artisans, laboureurs, vigneron, gens de journée et de service....

[22] On this question, notes 227 and 241 of *Dalloz Codes Annotés Nouveau Code Civil* III Art 1168 à 1581 § 2. Forme de l'approbation are relevant:

227. 1. Lorsque l'acte n'est pas écrit de la main de celui qui le souscrit, la simple approbation ne suffit pas ; il faut qu'elle soit accompagnée de l'indication, en toutes lettres, de la somme ou de la chose ; l'approbation de l'écriture ne peut pas remplacer l'approbation de la somme. J. G. Obligat, 4157. J. G. S. v°1726. En ce sens : AUBRY ET RAU, 4^e édit, t. 8, § 756, p. 241, texte et note 72 ; Demolombe, t. 29, n° 450 ; Laurent, t. 19, n° 250.

241. Les expressions *bon* et *approuvé* peuvent être remplacées par des termes équivalents. Mais elle ne peuvent pas être entièrement supprimées, lors même que la somme est énoncée en toutes lettres au bas du billet. J. G. Obligat, 4158.

[23] In light of the above, this court is of the opinion that the acknowledgements of debt fulfil the requirements of art 1326 of the Civil Code. The undertakings were not written in full in the hand of the defendant, however, this court is satisfied that apart from the signature of the defendant, the defendant has added in his own hand the formula "*Good for the sum of*" followed by the amount in letters and figures. With respect to the "*forme*", this Court holds that the words "*Good for the sum of*" are words equivalent to the words "*valid for*" or the words "*approved for*".

[24] This Court holds that exhibits P2 and P3 serve as complete proof of the unilateral undertakings, namely the obligation of the defendant towards the plaintiff to pay he plaintiff the principal sums of €44,394 and SCR147,455.

[25] Second, this Court considers the question of damages arising from failure to perform.

[26] The plaintiff is claiming damages arising for delayed performance in terms of exhibits P2 and P3 as from the month of September 2014.

[27] According to exhibit P2 and P3 the rate of interest is ten percent (10%) monthly for delayed performance as follows –

The total amount is to be paid on or before 31/08/2014. Failure to pay on or before the 31/08/2014. Shall bear interest at the rate of 10% monthly.

[28] The plaintiff has not pleaded a written notice of "*mise en demeure*". The question to be considered is whether or not a notice of "*mise en demeure*" before the suit was necessary? This court states at this juncture that the principles enunciated in arts 1142 and 1146 of the Civil Code are not applicable because the plaintiff is not claiming damages for breach of contract, but is suing for the performance by the defendant of the obligation involving the payment of sums of money.

[29] Article 1153 of the Civil Code provides –

With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding.

These damages shall be recoverable without any proof of loss by the creditor. They are due from the day of the demand, except in cases in which they become due by the operation of the law.

However, the creditor who sustains special damage caused by a debtor in bad faith and not merely by reason of delay, may obtain damages in addition to those of delayed performance.

[30] In terms of art 1153 of the Civil Code, this Court is of the opinion that "demand" must mean a prayer for the principal sum. The "demand" is intended to play the part of a "notice" sufficient to set interest running in cases of non-fulfilment of obligations, by which "notice" the principal sum alone can be obtained. The "damages" must be claimed specifically in order to avoid the objection grounded on the prohibition of *ultra petita* decisions. Article 1153 of the Civil Code provides that the interest is due, that is to say, in my opinion, demandable. In view of the construction which I have placed on the word "demand", being due as from the date of the claim for the principal, interest should be granted as from that date : (see *Baichoo v Fowdar* 1975 MR 80 SCJ 76 Garrioch, SPJ, and de Ravel, J; *Lewis Gerald v The New India Assurance Co. Ltd* 1943 MR 109; *Alleaume v Biram* 1913 MR 44 and *Jean Louis v Jenkins* 1907 MR 71.)

[31] Having concluded that a notice of "*mise en demeure*" is not necessary in terms of art 1153 of the Civil Code, this court considers the rate of interest payable to the plaintiff. The rate of interest is ten percent (10%) monthly. Under art 1153 of the Civil Code the rate of interest is binding on the defendant.

Decision

[32] This court enters judgment for the plaintiff as against the defendant in the principal sums of €44,394 and SCR147,455 together with costs of this action and damages/interest on the principal sums of €44,394 and SCR147,455 in terms of the acknowledgements of debt due from the date of filing of the suit.

INTERSHORE BANKING CORPORATION LTD v CENTRAL BANK OF SEYCHELLES

M Twomey CJ

17 May 2016

[2016] SCSC 329

Constitution – Right to information – Confidentiality – Interpretation – Role of equity

The appellant unsuccessfully applied for a banking licence. The refusal was based amongst others on the confidential information received by the respondent. The appellant brought the issue to the Supreme Court after the Board of the Central Bank had confirmed the respondent's decision. The appellant requested the disclosure of the confidential information on which the Central Bank partly based its decision to refuse the bank licence.

JUDGMENT Appeal dismissed.

HELD

- 1 Confidential information relates to a communication in writing, visually, electronically or orally made in confidence between the discloser and the recipient.
- 2 The interpretation and application of law should promote the principles of the Constitution.
- 3 However, access to information is qualified by lawful derogation. The right to information includes, at its core, the principle of maximum disclosure.
- 4 Where provisions of the law exist they must be given effect and no exercise of discretion by the court or otherwise can obstruct its application. Equity follows the law.

Legislation

Constitution, arts 19(7), 27, 28(1), 28(2), 46(7), 129(1)

Anti-Money Laundering Act 2008, s 16.

Courts Act, ss 7, 8, 17

Financial Institutions Act 2004, ss 5, 6(1) (3), 16(1)(2), 69(1)

Financial Services Act, s 6

Seychelles Code of Civil Procedure, s 84

Foreign Legislation

African Charter on Human and Peoples' Rights

Civil Procedure Rules (England), r 5(4) B

International Covenant on Civil and Political Rights

Promotion of Access to Information Act 2000 (SA)

Universal Declaration of Human Rights

Counsel P Boulle for appellant
Attorney-General for respondent

TWOMEY CJ

[1] What stands before me are two cases that I intend to dispose of with one judgment. The first case is a remittance from the Constitutional Court to the Supreme Court to take a decision in an interlocutory application; this matter was heard under the case number MA 249/2014 and arose in the course of the second case, the appellant's appeal against a decision of the Board of the Central Bank, which matter is the main appeal in this action, CS 34/2013. Both cases concern a common central question which relates to whether the respondent has legal grounds to refuse the disclosure of information which pertains to the appellant and upon which it relied in the course of its decision. Due to the overlapping nature of the two central matters, I will dispose of both in the same judgment.

Background

[2] The appellant applied to the Central Bank of Seychelles for a banking licence pursuant to s 5 of the Financial Institutions Act 2004 ("the Act"). The application was refused on 17 July 2013 on the following five grounds:

- 1 That under s 69(1)(a) of the Act, the appellant had not fully disclosed information to meet the criteria for completeness in terms of necessary information submitted for the licence to be considered.
- 2 That under s 6(1)(b) of the Act, the disclosed amount of liquid capital available was not sufficient to meet unexpected losses in addition to expected losses should these arise.
- 3 That under s 6(1)(d) the Act, and based on confidential information received the identity and character of individuals holding a substantial interest in the appellant company did not fulfil the requirements necessary for a banking licence.
- 4 That under s 6(1)(j) of the Act and based on confidential information received, the corporate activities within the appellant group posed a risk or might affect the international standing or good repute of Seychelles.
- 5 That under s 6(1)(k) it was not possible to fully assess the financial soundness of the appellant as the appellant's director was also the beneficial owner of Intershore Aviation Ltd.

[3] The appellant appealed the Central Bank's decision to the Board of the Central Bank pursuant to s 16(1) of the Act.

[4] At the hearing of the appeal the appellant submitted that several persons had filed "rubbish" about him and questioned whether they should be allowed to discredit him. He submitted that his business, Intershore Consult Group (The Group) operated in the most "heavily regulated jurisdictions" namely in the British Virgin Islands, Belize, Panama, Anguilla, together with London and Hong Kong and opined that the "nonsense" filed about him was because "they believed he was committing some sort of crime and they thought

he would run away because they had got something about him". He produced a schematic outline of The Group and stated that he had disclosed information about sixteen international companies of The Group although such disclosure was not a requirement for the licence.

[5] He submitted that he had a right to all information about him so that he could ensure that "the culprits and cowards who conjured up the information under the obnoxious cover of confidentiality are made to swallow their venomous vomit".

[6] The appellant then relied on its written appeal in which it had emphasised the fact that the appellant and Mr Boullé had contributed the most in the early years of the financial services industry in Seychelles and had promoted and established the country as a financial centre. He found the conclusion of the Bank that The Group posed a risk to the international standing of good repute of Seychelles "not only farcical but an act of dangerous naivety and insolence". He pointed out that The Group had won many achievement awards in terms of the contributions to the offshore industry and as the provider of one of the highest number of International Business Company incorporations. As it conducts its business openly there could be no confidential information about it and if any existed it would have been concocted by persons seeking personal favours to discredit The Group.

[7] Mr Boullé also talked about his personal achievements and stated that he could not take the refusal from the Bank seriously as the Bank did not indicate "the faintest knowledge of the realities of the Seychelles financial sector and banking environment in its international comparative dimension".

[8] He also clarified the following issues:

- 1 He had answered questions in relation to capital structures of the company over and above what was statutorily necessary, namely that the appellant had unencumbered assets of SR139 million. He further explained that he would be bound by liquidity ratios.
- 2 He could divert assets of The Group to the Bank if the need arose.
- 3 He pointed out that the greatest cost to the appellant would be an office and that The Group would provide it with a fully equipped premises including a vault.
- 4 He added that R 7 million would be injected into the bank as capital thus creating a solid structure.
- 5 His aim was to have one of the most modern offshore banks in Seychelles which would therefore not necessitate customers going to Mauritius instead.

[9] His written appeal also pointed to the letter of refusal from the Bank in answer to his application and issued on 17 July 2013 to the effect that it had not met the statutory time limit of 90 days under s 6(3) of the Act.

[10] On 18 October 2013, the Board denied the appeal and communicated the reasons for its decision namely that:

- 1 The reason for the Central Bank's response being issued outside the requisite 90 day period as laid down in s 6(3) of the Act was as a result of the appellant's own non-compliance with the provisions. It had been requested to provide supplemental information but had not furnished the same. In the circumstances, a substantive and final decision on the grant of the licence could not be made within the statutory time limit.
- 2 The appellant had failed to satisfy the respondent on the validity of documents submitted as it failed to disclose two companies (Lazare Financial Services Ltd and Lazare Properties Ltd) in which it had an interest. Although the appellant claimed it had no relation to these companies, this was not a matter for the appreciation of the appellant but rather one for the respondent to consider. Further, the fact that Mr Boullé (the director of the two companies and the appellant) had neither disclosed the two companies nor his directorship of them raised doubts as to the credibility of the personal questionnaire completed by the appellant.
- 3 The respondent remained concerned that although the appellant had available unencumbered assets it could call on, these would be insufficient to raise capital immediately should the need arise.
- 4 The fact that Mr Boullé had personally held high office in Seychelles and Intershore Consult had accomplished many achievements in the offshore industry did not diminish the impact of the confidential information on establishing whether the appellant was a fit and proper person to hold a banking licence.
- 5 The fact that the appellant's director and the beneficial owner was also a director and beneficial owner of Intershore Aviation Ltd posed uncertainty in that it did not permit an assessment of the financial soundness of the appellant as Intershore Aviation was a new venture and its impact on the appellant was unknown.

[11] The appellant appealed the decision of the Board of the Central Bank to the Supreme Court pursuant to s 16(2) of the Act.

Appeal to the Supreme Court

[12] When this matter first came up for hearing in the Supreme Court, the trial judge de Silva J ruled that the procedure to be adopted for such appeals was that applicable to civil appeals from a Magistrate's Court to the Supreme Court. This therefore necessarily meant that the record of proceedings in relation to the application of the appellant and his appeal to the Board of the Central Bank would have to be served on the appellant in order that it might prepare its Memorandum of Appeal. On 1 July 2014, the Judge ordered that the Registrar of the Supreme Court call for all relevant documents pertaining to the decision of the Central Bank and conveyed to the appellant by its letter to serve both parties with a thus completed record by the 30 July 2014.

[13] On 25 August 2014, the appellant duly filed its Memorandum of Appeal relying on six distinct grounds of appeal which can be summarised as follows:

- a. That the reasoning pertaining to s 6(3) of the FIA the decision lacks juridical reasoning;
- b. That the finding pursuant to s 6(1)(a) of the FIA is not reasonable and justifiable and fails to take into consideration important and relevant facts;
- c. That with regard to s 6(1)(b)(i) of the FIA the finding of the respondent 'weighs against the appellant in a draconian and unjustifiable manner';
- d. That the use of confidential information allegedly disclosed to the respondent under conditions of confidentiality in terms of s 6(1)(d) of the FIA is devoid of any merit or legal basis;
- e. That the finding under s 6(1)(j) of the FIA based on confidential information is without juridical foundation; and
- f. That, with regard to s 6(1)(d) of the FIA, the refusal of the licence is frivolous and devoid of rational reasoning, and it falls on its irrationality.

[14] The Memorandum of Appeal also contained the following statement:

The appellant reserves its right, subject to leave of the court, to file additional grounds of appeal and amend grounds set out above in the light of any additional information and documents that may be furnished in terms of the Notice of Motion filed in this matter.

Application for Disclosure or Referral to Constitutional Court

[15] On the same day that the grounds of appeal were filed, the appellant also filed an application, under case number MA 249/2014 requesting an order compelling the respondent to complete the records filed in the Supreme Court by disclosing the confidential information relied upon by the Board in terms of ss 6(1)(d) and 6(1)(j) of the Act or alternatively requesting a referral to the Constitutional Court to determine "a constitutional issue relating to the appellant's constitutional rights to information under art 28, to equal protection of the law under art 27 and to a fair hearing under art 19(7) of the Constitution". At the next hearing, Mr Boullé for the appellant submitted that the records of proceedings served on him were incomplete since the confidential information relied on by the Board of the Central Bank in coming to its decision had not been made available to the appellant.

[16] He stated on behalf of the appellant that no law existed to curtail the right of access to information under art 28 of the Constitution and if any did, it would be unconstitutional. The right of access to information pre-empted confidential information being withheld from a citizen as one would be precluded from ascertaining whether the information was confidential or not.

[17] In its written reply to the appellant's application, the respondent prayed for a dismissal of the application. This was supported by the affidavit of Caroline Abel, the Governor of the Central Bank. She deponed inter alia as follows:

- 1 I aver that the Board of the Central Bank in coming to its decisions based on ss 6(1)(j) and 6(1)(d) on the Financial Services Act relied upon information disclosed to the Central Bank by the Financial Intelligence Unit, as set up under s 16 of the Anti-Money Laundering Act 2008, the latter being a public sector agency and a law enforcement agency.
- 2 I aver that the said information disclosed by the Financial Intelligence Unit to the Central Bank was disclosed on the grounds of confidentiality and secrecy between the Financial Services Act in that it may not be disclosed to third parties and as a result the Central Bank is under no duty to give reason for its decisions based on this information.
- 3 I aver that I am informed and verily believe that the Board of Central Bank received the information from the Financial Intelligence Unit on a confidential basis and its disclosure to third parties may affect the prevention and detection of crime and other law enforcement measures both current and in the future, in Seychelles and elsewhere.

[18] In his oral submissions, the Attorney-General for the respondent stated that the right of access to information was curtailed generally by laws that are reasonable in a democratic society. He submitted that s 6(3)(b)(i) and (ii) of the Act were provisions of such laws. In his view, a referral to the Constitutional Court was only merited if the appellant was of the view that the provisions of such laws were oppressive and breached his constitutional right. In any case, he submitted, no referral should be made if there was provision for the justifiable derogation of the constitutional right.

[19] The trial judge de Silva J opined that where decisions are based on confidential information, it could not be said that this information was only for the internal consumption of those who had made the decision as this might lead a party seeking "cover under a confidentiality clause and arriving at an unreasonable and arbitrary decision". In his view such matters were within the purview of the Constitutional Court and that he had expressed the stated view "to facilitate [his] line of thoughts". However, as can be seen from the latter comment de Silva J did not intend the statement to be influential and his reasoning is purely obiter dicta. He referred the following questions for the determination of the Constitutional Court pursuant to art 46(7) of the Constitution namely:

- 1 Does the failure of the Board of the Central Bank of Seychelles to set out the reasons for its non-approval of the banking licence requested by the applicant on the ground that such approval is denied on the confidential information disclosed to it under s 6(3)(b)(ii) of the Financial Institutions Act directly or indirectly violate the applicant's right to access to official information in terms of art 28(1) and 28(2) of the Constitution?
- 2 Does the above failure of the Central Bank to disclose confidential information to the appellant infringe any other article of the constitution?

[20] In a judgment given on 23 February 2016, the Constitutional Court provided the following reasoning:

It is our view that the trial judge having been made privy to the nature of the said information, could decide whether access to the information could be denied as it falls under the limitations contained in art 28(2) or whether limited or full disclosure could be permitted as it partially falls or does not fall within the ambit of s 6(3)(b)(ii) of the FIA and art 28(2) of the Constitution....[W]e direct the Attorney-General to provide the trial judge the information, in order that the trial judge could verify the nature of the information after being made privy to it and decide whether or not the information falls within the ambit of art 28(2) of the Constitution and make a suitable ruling in respect of same.

Therefore, the Constitutional Court answered the two questions put to it as follows:

- 1 The appellant's access to the confidential information should be decided by the trial judge after assessing whether the information supplied to it falls under the limitations contained in art 28(2) of the Constitution.
- 2 The failure to disclose the confidential information would only breach the appellant's right if it fell outside the limitations set out in art 28(2) of the Constitution, that is, those prescribed by law and are necessary for a democratic society.

[21] The matter having been remitted to the Supreme Court for hearing and the original trial judge having left, I became seized of the hearing of the merits of the case as directed by the Constitutional Court.

[22] In my view, by delegating the functions stated above to the Supreme Court, the Constitutional Court has divested itself of its functions. Article 129(1) provides that:

- (1) The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two Judges sitting together.
- (2) Where two or more Judges sit together for the purposes of clause (1), the most senior of the Judges shall preside.
- (3) Any reference to the Constitutional Court in this Constitution shall be a reference to the Court sitting under clause (1).

It is abundantly clear from those provisions that a Constitutional Court and not a single judge of the Supreme Court, should carry out the functions of interpreting the Constitution even when this merely amounts to assessing whether acts (in this case the non-disclosure of information of a person or a body) breaches the Constitution or falls within the parameters of the derogation to the charter right.

[23] Be that as it may, this matter has been dragging on in the courts for a number of years and its conclusion is of paramount importance for all concerned and in order to allow the appeal to progress, I called for the said confidential information and the same was duly delivered to my Chambers on 28 March 2016. I am of the view, however, that I need not examine it in detail for the purpose of this judgment for the reasons I explicate hereunder.

Submissions

[24] Following the Constitutional Court judgment and having perused the confidential information, I allowed the parties to be heard with regard to the question posed by the Constitutional Court. At the same time, the appellant made arguments about the confidential information insofar as it related to the subject-matter of the appeal. Mr Boullé submitted that although the appellant had pursued its appeal on six grounds, should the ground relating to the disclosure of confidential information not be successful, there would be no point in pursuing the rest of the grounds of appeal. The present appeal now, therefore, rests on only one ground: whether or not the appellant is entitled to the disclosure of the confidential information on which the Central Bank partly based its decision to refuse it a bank licence.

[25] Mr Boullé also submitted that despite abundant information being laid before it, the respondent chose to base its decision on information received by only one institution in Seychelles. In effect he added, the institution was allowed to discredit a holding company and a group of international companies licensed by the Financial Services Authority.

[26] He pointed to the “lack of seriousness” adopted by the respondent in considering the appellant’s application for a licence citing the Financial Services Act as opposed to the Financial Institutions Act. He submitted that the Governor’s affidavit was also frivolous in its reference to the appellant’s rights to access to information, a fair hearing and equal protection before the law being limited on the “grounds of prevention and detection of crime”.

[27] He submitted that information held about a citizen is not confidential to a citizen but only to a third party. In his view, all information about a person should be accessible by that person. In his words “... there is no confidential information to me about me”. Confidential information may be held by a public body about a person but the person to which it relates can give permission for it to be disclosed. He gave the example of the Commissioner of Taxes to whom one might write to disclose one’s tax affairs to a third party.

[28] In other words, he submitted, confidential information is confidential only in regard to the person to whom it relates.

[29] Further, he submitted, unless one has access to information held about oneself one cannot correct any mistakes, errors or lies contained in such information. He then referred to an excerpt from Wikipedia on “Access to Information in South Africa” emphasising that

access to state-held information provides government accountability in terms of protection of the rights of the citizen. He then referred to the South African Promotion of Access to Information Act No 2 of 2000 (PAIA) which was enacted to give effect to the constitutional right of access to information.

[30] The Attorney-General for the respondent submitted that whatever had been opined by de Silva J was obiter as he could not rule on the constitutionality of any legislation. He had necessarily to refer such matters to the Constitutional Court, which he had done in any event.

[31] He submitted that the typographical mistakes in the Governor's affidavit were regrettable but did not affect the substantive decision. He also submitted that the decision made by the Board was on several grounds and not purely on the basis of the confidential information submitted to it.

[32] He further submitted that the probity and competence of the appellant or its beneficial owner was a matter within the competence of the Board and a matter in which its discretion was properly exercised having perused all information, confidential or otherwise before it.

[33] He added that the FIU was properly mandated under the Anti-Money Laundering Act to give and share information about persons with agencies within and outside the Republic of Seychelles. In such situations, he submitted there was no need by the FIU or any other agency to request the permission for disclosure from the person to whom the information related to such disclosure was strictly within the bounds of art 28(2) of the Constitution.

Issues before the Court

[34] It is perhaps important at this juncture to recap the issues before the Court as the ground of appeal could easily be obfuscated by the submissions of counsel which may have little relevance to the core issue before this Court. In a nutshell, Mr Boullé for the appellant has applied for an order granting disclosure of the confidential information to complete the record of proceedings so that he could formulate further grounds of appeal or failing that, a referral to the Constitutional Court to rule whether failure to disclose such information violated the appellant's rights under arts 19, 27 and 28 of the Constitution.

[35] As the second option was chosen by de Silva J, I am now asked by the Constitutional Court to firstly consider granting the appellant access to the confidential information by assessing whether it falls within the limitations contained in art 28(2) of the Constitution. Secondly to consider whether failure to grant such access has breached the constitutional rights of the appellant. In this undertaking, I have expressed my reservations as a single judge of the Supreme Court with regard to my constitutional mandate. However, I do believe that the Constitution is a living, aspirational document, brought into our national democratic story in order to infuse all law with the principles on which our society is founded. Supreme Court judges have the honour of sitting on the Constitutional Court

panels when the duty arises to hear matters concerning the application, contravention, enforcement or interpretation of the Constitution. Similarly, when they are sitting alone on the Bench they are not to take off their constitutional hat and disregard these same principles. We are to perform our duties through the prism of the Constitution, in order to fulfil our individual mandate to “uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in this Constitution and on respect for the equality and dignity of human beings” (Preamble to the Constitution). Every day we are called upon to give meaning and interpretation to the laws of the land, many of which originated in our law prior to the modern constitution. It would be incongruous with our constitutional mandate to prefer interpretations and applications of the law which do not seek to promote the principles of the Constitution.

[36] Nevertheless, my decision hereunder is founded purely on rules relating to disclosure even when references are made to the Constitution.

[37] I must from the outset dispose of the point raised by Mr Boullé in respect of what constitutes confidential information. I am not persuaded by his argument that confidential information is never confidential as regards the person it concerns. In my view, confidential information necessarily relates to a communication in writing, visually, electronically or orally made in confidence between the discloser and the recipient(s). The submission of counsel in this regard is rejected.

[38] In respect of the submission relating to art 19 of the Constitution (right to a fair trial in criminal trials), I fail to see its application to the present case as the appellant has not been charged with any offence. However, I would be prepared to consider that natural justice as a jurisprudential concept applies equally to civil cases, to ensure equality of arms and fairness in any matter before a court. The general principle is that one should hear both sides of a case. I recognise that the appellant is hampered in prosecuting its appeal when it is unaware of the material disclosed to the decision-maker which informed the decision-making process in this case. This, it must be admitted, runs counter to principles of fairness. The dissatisfaction of the appellant with the decision and appeal process, although forcefully expressed, is perhaps understandable.

[39] There are however, certain considerations that the Court must take into account in relation to counsel’s submission on behalf of the appellant. Firstly, the equality of arms in this case is tempered by the fact that both the identity of the informant(s) in this case and the contents of the confidential information or at the very least part of the contents seem to have been in the knowledge of the appellant. This is evident from the record of proceedings before the Board and also before the Court as Mr Boullé named officers of the FIU and referred to them and their actions albeit in the most infelicitous choice of words. A possible inference is that there was access to the confidential information by the appellant. The disparity in equality of arms in this context would, therefore, be greatly diminished and in this respect the application for disclosure would be a sham.

[40] Secondly, even in the absence of the disclosure of the confidential information it must be acknowledged that the equality of arms principle is limited by public interest concerns.

The public interest is discussed below together with the considerations in respect of the submissions made in respect of arts 27 and 28 of the Constitution.

[41] Article 27 provides for the right to the equal protection of the law, that is, that all laws are applied equally to all people without discrimination. I am unsure what issues the appellant had in relation to these provisions as these were not developed at the hearing of the appeal. I assume that the appellant is inferring that the Central Bank has in some way discriminated against it in the consideration of its application for a banking licence. As I have stated, no submissions were made in respect of breaches under this provision of the Constitution and I do not propose, therefore, to consider this point especially given the impossibility of my position to do so as single judge of the Supreme Court.

[42] Mr Boullé on behalf of the appellant has, however, made several submissions in respect of art 28 which provides for the right of access to information as follows:

- (1) The State recognises the right of access of every person to information relating to that person and held by a public authority which is performing a governmental function and the right to have the information rectified or otherwise amended, if inaccurate.
- (2) The right of access to information contained in clause (1) shall be subject to such limitations and procedures as may be prescribed by law and are necessary in a democratic society including-
 - (a) for the protection of national security;
 - (b) for the prevention and detection of crime and the enforcement of law;
 - (c) for the compliance with an order of a court or in accordance with a legal privilege;
 - (d) for the protection of the privacy or rights or freedoms of others;
- (3) The State undertakes to take appropriate measures to ensure that information collected in respect of any person for a particular purpose is used only for that purpose except where a law necessary in a democratic society or an order of a court authorizes otherwise.
- (4) The State recognises the right of access by the public to information held by a public authority performing a government function subject to limitations contained in clause (2) and any law necessary in a democratic society.

[43] The right of access to information is a fundamental right contained in the Constitution. In addition, Seychelles has signed and ratified a number of international conventions in which these rights are enshrined, namely the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the African Charter on Human and People's Rights. However, regrettably, Seychelles has yet to enact access to information legislation to give further meaning to this right. Mr Boullé for the appellant referred to South Africa's Promotion of Access to Information Act as a shining example in

this field. It certainly is hoped that legislation of this kind will be introduced in Seychelles to inculcate a culture of transparency and accountability in all government departments. However, the failure to enact legislation does not undermine the content of the right contained in art 28 in its present form.

[44] What is equally noteworthy is the fact that freedom of information laws worldwide, including that of South Africa do not provide for an unconstrained right of access to information. Limitations to the right are contained in legislative frameworks so that access to information is qualified by exceptions such as public security and the protection of personal privacy.

[45] There is broad consensus however, that the right to information includes, at its core, the principle of maximum disclosure. Where the limitations operate as blanket bans on public access to information these provisions may be challenged. In such circumstances the Constitutional Court would be called not to balance the right of access to information by the requester against the right of the public authority to withhold the information but rather to consider whether the withholding of the information outweighs the public interest in disclosure.

[46] It is relevant that Mr Boullé did not challenge the provisions of the Act or the Act itself. In particular, there was no challenge to the constitutionality of s 6(3)(b)(i)-(iii) of the Act which provides that where one applies for a banking licence, the Central Bank shall:

- (a) grant a licence; or
- (b) inform the applicant that it has refused to grant a licence giving the reasons for the refusal:
 - Provided that the Central Bank shall be under no duty to give reasons where —
 - (i) it is precluded by law;
 - (ii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any public sector agency or law enforcement agency; or
 - (iii) information has been disclosed to the Central Bank under conditions of confidentiality between the Central Bank and any other foreign regulatory agency pursuant to a memorandum of understanding, an agreement or a treaty entered into by the Central Bank or the Republic of Seychelles.

[47] It would certainly have been an avenue available to the appellant to bring a constitutional case to argue that the restraint as contained in the proviso to s 6(3)(b) was an impermissible limitation on the right of access to information. It is in such cases that the limitations placed on constitutional rights are challenged and ultimately removed or endorsed.

[48] In the present case, since legislation appropriately grants discretion to the Central Bank to not disclose information provided under conditions of confidentiality and there is no constitutional challenge to s 6(3) of the Act, the Court cannot *ex mero motu* consider the constitutionality of the provisions. The role of the court, as granted to me by the Constitutional Court is to consider whether the contents of the confidential information upon which the Board of the Central Bank relied fall within the stated exceptions allowed under art 28(2). The derogation to the right certainly exists in law, and from my reviewing of the confidential information, I can see that it is capable of being the sort of information that may be deemed confidential for the purposes of s 6 of the Act. Therefore, if s 6 of the Act provides a lawful derogation of art 28, and I find that the information falls within that provision, then that is the end of the question at the core of the application for disclosure as remitted from the Constitutional Court. I can certainly see the reasons for which this information may be sought to be kept confidential, particularly to the extent that it involves an ongoing investigation by the disclosing agency, here the Financial Intelligence Unit.

[49] However, besides the application for disclosure, the appellant's submissions with regard to the disclosure of the information for the purposes of the appeal still stand, and require me to go further with my reasoning. The appellant did not come by way of judicial review to challenge to the exercise of the discretion of the Central Bank. I, therefore, have no reason in law to interfere with the decision of Bank in its exercise of its discretion. And as it is not directly in front of me by way of judicial review, it is certainly not the place of an appeal court to second-guess the decision of the Central Bank on this issue as it would be sitting in administrative review of such a decision.

[50] The consideration of whether the confidential information should be disclosed was the first limb of Mr Boullé's submission and is still a live issue under civil procedure rules which apply to civil appeals. Counsel has further submitted that without this information he cannot pursue his appeal. It must be noted that this is not a case where merely "standard disclosure" is required. All documents, namely letters and proceedings before the Bank and its Board were disclosed and were contained in the record or proceedings sent to the appellant for the preparation of his Memorandum of Appeal.

[51] In the present case disclosure of documents containing confidential information was sought at appeal stage when the record of proceedings was deemed incomplete by the appellant. In this respect ss 7 and 8 of the Courts Act provide that:

The clerk of the court shall prepare the record as soon as is practicable.
The record shall contain a list of the exhibits.

The provisions are silent as to what constitutes a "record".

[52] Disclosure is generally provided for under s 84 of the Seychelles Code of Civil Procedure. That provision is also silent on circumstances in which documents may be withheld from disclosure. In those circumstances s 17 of the Courts Act has application. It provides:

In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.

It is, therefore, to the Civil Procedure Rules of England (CPR) that I must now turn.

[53] Part 5 of the CPR outlines the rules concerning documents used in court proceedings and the obligations of the court officer in relation to those documents. Rule 5.4B *White Book Service* (vol 1, 2010) provides:

- (1) A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of any document listed in paragraph 4.2A of Practice Direction 5A.
- (2) A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party or another person.

[54] Paragraph 4.2A contained in subpara 1 above lists items of which copies may be furnished to parties. These include documents such as judgments, orders, lists of documents and is not relevant to the issue in this appeal.

[55] In respect of r 5(4) B, para 5.4B.3 notes:

An application for a document which was never in court records, or was and no longer is, would be misconceived. Where an applicant (whether a party or non-party) seeks a copy of a document used in proceedings but which formed no part of the record of the court, the jurisdiction of the court to grant such an application is not derived from r 5.4B or rule 5.4C (supply of documents to non-parties) but from the court's inherent jurisdiction.

In the present case, the document sought to be disclosed was never on the court record or the record of the Board (a quasi-court). The reference to confidential information was only made by the Central Bank in its letter of refusal dated 17 July 2013, in which it was stated that the appellant did not meet the requirements of s 6(1)(j) of the Financial Services Act. This was repeated in the letter of the Board rejecting the appeal on 18 October 2013.

[56] Hence, in terms of s 7 of the Courts Act (of Seychelles) the record of proceedings is complete. There is no merit in the appellant's submission that the information relied on should be part of the record submitted to him.

[57] I have finally to consider whether the Court can exercise its inherent equitable jurisdiction and order that a document relied on for the exercise of the discretion of the Central Bank should be disclosed. In my view, there are circumstances where the court can exercise its discretion equitably and in the interests of justice to order such disclosure but equity follows the law, it does not come to destroy the law but to fulfil it [FW Maitland

Equity: Also the *Forms of Actions at Common Law: Two Courses of Lectures* (Cambridge University Press, 1909) at 17]. Where provisions of the law exist they must be given effect and no exercise of discretion by the court or otherwise can obstruct their application.

[58] The Court is bound by the proviso to s 6(3)(b)(ii) of the Act. In the exercise of its discretion, the Central Bank need not give reasons for its decision if it is grounded on information disclosed to it under conditions of confidentiality. This Court would be ill-placed to substitute its discretion for that of the Central Bank where that discretion has been exercised within the parameters of the provisions of law.

[59] In the circumstances, this appeal is dismissed.

POOLE v GOVERNMENT OF SEYCHELLES

D Karunakaran (Presiding), B Renaud, G Dodin JJ
17 May 2016

[2016] SCCC 9

Constitution – Compulsory acquisition of land – Compensation upon acquisition

The petitioner's land was compulsorily acquired by the government. The petitioner wanted the land to be returned.

JUDGMENT Petition partly allowed.

HELD

- 1 The operative date to determine whether the land has been developed or is under a plan to be developed is the date of application for the return of the land.
- 2 If the development is necessary and in the public interest, the land cannot be returned.
- 3 Land that has been developed cannot be transferred to a third party.

Legislation

Constitution, Schedule 7, Part III
Land Acquisition Act 1977

Cases

Lise Morel Du Boil v Attorney-General and Josephine Maryse Berlouis CP10 of 2011
Charles Alfred Moulinie v Government of Seychelles and Attorney-General CP 11 of 2011

Counsel F Boulle for petitioner
C Jayaraj for respondent

JUDGMENT

[1] The Court of Appeal in its judgment dated 17 April 2015, made the following orders with respect to this case:

...we allow the appeal on the preliminary objections raised by the respondents in the court below which forestalled the further hearing of the petition. We order that the Constitutional Court proceeds to hear the matter on the merits.

[2] The merits of this case can be briefly summarised as follows: The petitioner was the owner of land parcel T 627 situated at Anse Gaulettes, Mahe, which was compulsorily acquired by the Government under the Land Acquisition Act 1977 on 1 October 1983. On 1 October 1993, the petitioner applied under the provisions of Part 111 of Schedule 7 of the Constitution for the return of the land and for compensation for any portions that cannot be returned. Since then negotiations and legal actions have been protracted

without any solution to the petitioner's claim until the above determination by the Court of Appeal.

[3] In this petition, the petitioner prays for an order ordering the 1st respondent to:

- i. Return and transfer to the petitioner the parcels of land registered as Titles Number: T-3161, T-3160, T-3159, T-2102, T-3095, T-3107, T-1855, T-1052, T-2839, T-767 and T-3094.
- ii. Order the 1st respondent to pay compensation to the petitioner for all land that cannot be returned to the petitioner at current market value as set out in para [27] of the petition.

[4] During the course of proceedings parcels T-3160, T-3159, T-1052 and T-2839 were returned to the petitioner which leaves the Court to make determinations on the remaining parcels: T3161, T2102, T3095, T3107, T1855, T767 and T3094.

[5] The 1st respondent objects to the return of the remaining parcels on the following grounds:

- 1 Parcel T3161 has been developed into a social housing estate, public infrastructure and sewerage plant. The remainder is to be returned to the petitioner after excising the area as stated.
- 2 Parcel T3095, has a plan approved in 2010 by the planning authority for developing this parcel as a Beach Park with toilets and kiosks. There is also an ongoing periodical activity known as Bazaar O Van which takes place there.
- 3 Parcel T-3107 has a public bus stand. This parcel is also covered by the planning approval given in 2010.
- 4 Parcel T-2102 has been developed into a mini stadium with a playground and other facilities for public use.
- 5 Parcel T-1855 has been leased out and in possession of a 3rd party. This land will be returned as soon as the 1st respondent retakes possession of the same for which steps are under way.
- 6 Parcel 3094 is not developed but is in the hands of a third party.

[6] Before we go to the issue of compensation, we shall determine which parcels should be returned to the petitioner so that we shall determine the quantum of compensation for only parcels that cannot be returned.

[7] Part III of the Schedule 7 to the Constitution states as follows:

PART III - COMPENSATION FOR PAST LAND ACQUISITIONS

Past Land Acquisition

14. (1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily

Poole v Government of Seychelles

acquired under the Lands Acquisition Act 1977 during the period starting June 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to -

- (a) where on the date of the receipt of the application the land has not been developed or there is no Government plan to develop it, transferring back the land to the person;
- (b) where there is a Government plan to develop the land and the person from whom the land was acquired satisfies the Government that the person will implement the plan or a similar plan, transferring the land back to the person;
- (c) where the land cannot be transferred back under sub-subparagraphs (a) or sub-subparagraph (b):
 - (i) as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;
 - (ii) paying the person full monetary compensation for the land acquired; or
 - (iii) as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.
- (2) For the purposes of subparagraph (1), the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.
- (3) No interest on compensation paid under this paragraph shall be due in respect of the land acquired but Government may, in special circumstances, pay such interest as it thinks just in the circumstances.
- (4) Where the person eligible to make an application or to receive compensation under this paragraph is dead, the application may be made or the compensation may be paid to the legal representative of that person.”

[8] As stated in the case of *Lise Morel Du Boil v Attorney-General and Josephine Maryse Berlouis* CP10 of 2011, the critical provisions in this Schedule which govern the issue under consideration by the Court are:

- (a) where on the date of the receipt of the application the land has not been developed or there is no Government plan to develop it, transferring back the land to the person;
- (b) where there is a Government plan to develop the land and the person from whom the land was acquired satisfies the Government that the person will implement the plan or a similar plan, transferring the land back to the person;

- (c) where the land cannot be transferred back under subsubparagraph (a) or subsubparagraph (b):
 - (i) as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;
 - (ii) paying the person full monetary compensation for the land acquired;
or
 - (iii) as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.

[9] Clearly the operative date to determine whether the land has been developed or has a plan for development is the date of application for the return of the land. However, the Court can determine that land developed after the application cannot be returned in exceptional circumstances, being that the development was necessary and in the public interest for which the return if ordered would be highly prejudicial to the public in addition to the balance of convenience and benefits favour the public interest. Transferring land that has not been developed to a 3rd party is not permitted under the provisions of the Schedule. Therefore it follows that the arguments of the 1st respondent to that effect must fail.

[10] This extract from the case of *Lise Morel Du Boil v Attorney-General and Josephine Maryse Berlouis* [supra] is also true for the position of parcels T767, T3094 and T1855.

In our considered opinion however, even if we were to accept that the intervener (in this case the current title holders of titles T767, T3094 and T1855) was a bona fide purchaser for value, her claim only amounts to a civil law claim which should be pursued in the Civil Court and in our considered opinion such claim cannot defeat the petitioner's constitutional right under art 26 of the Constitution. Furthermore, Schedule 7, Part 111 only makes exception to land that has been developed or where there is a plan to develop and such development must be in the public interest. Transferring the undeveloped land to a private individual after a claim has been made for its return is not in the public interest and is not an exception under Schedule 7, Part 111.

[11] Consequently, we make the following determination with respect to parcels which should be returned to the petitioner:

- 1 Parcel T767 has a house on it built by the petitioner prior to its acquisition. There is no evidence of any other development or plan to develop the land after acquisition. We determine therefore that the parcel should be returned to the petitioner. The Registrar of Lands shall register the petitioner as the owner of the land. We so order.
- 2 Parcel T3095. We find that the parcel is not developed and the plan for development was put together way after the petitioner had claimed the return of the parcel. Just holding of leisure activities occasionally is not sufficient to amount to development. We determine therefore that the parcel

- should be returned to the petitioner. We so order.
- 3 Parcel T1855 has been leased to a 3rd party. We find that it is not necessary to wait for the lease to be transferred to the 1st respondent before it can be returned to the petitioner. We find that the Registrar of Lands can cancel the registration of the lease and the land shall then be transferred to the petitioner. We order accordingly.
 - 4 Parcel T3094 has also been transferred undeveloped to a third party. We determine that the land should be returned to the petitioner. We order the Registrar of Lands to register the petitioner as the owner of the land.
 - 5 Parcel T-3107 has a public bus shelter and a development plan approved in the year 2010. We determine that the bus shelter is a necessary development and in the public interest. The remainder of the parcel should be returned to the petitioner for the same reasons as parcel T3095 after extraction of the bus shelter.
 - 6 Parcel T2102 has been developed into a mini stadium and playground with public facilities. We determine that the development was in the public interest and very beneficial to the community. We therefore find that the parcel should not be returned and that compensation be paid instead.
 - 7 Parcel T3161 has been developed into a social housing estate with public infrastructure and sewerage plant. We determine that the developments of parts of the parcel were in the public interest. We order that the developed portions of the parcel be retained by the 1st respondent in return for compensation. The remainder is to be returned to the petitioner after excising the areas as stated. The extraction shall cover the 68 plots already developed and transferred as well as the sewerage and water facilities and access roads and the portions not yet allocated parcel numbers upon which construction has been completed.
[T1356, T1074, T1079, T1078, T1415, T1414, T1357, T767, T795, T1456, T1455, T1453, T1452, T1940, T1939, T1924, T1849, T1639, T2035, T2032, T1955, T1953, T1952, T1951, T1450, T1949, T1948, T1947, T1946, T1945, T1944, T1943, T1942, T2840, T2476, T2474, T2472, T2477, T2478, T2465, T2464, T2297, T2296, T2295, T2294, T2293, T2292, T2291, T2290, T2289, T2287, T2286, T2285, T2283, T2160, T2163, T2114, T2036, T1954, T1950, T2475, T2288, T3494, T3589, T3588, T3054, T3055, T2891]

[12] We now turn to the issue of compensation for the land that will not be returned. Counsel for the petitioner submitted that compensation for the land that is not being returned should be calculated on the basis of current market value whilst counsel for the 1st and 2nd respondents submitted that such calculation should be based on the 1993 value. Both submitted valuation reports in support of their respective submissions and in line with their respective contentions. It was hoped that the decision on the same issue by the Court of Appeal in the case of *Charles Alfred Moulinie v Government of Seychelles and Attorney-General* CP No 11 of 2011 would settle that issue once and for all. Whilst the Court of Appeal comprehensively rejected the basis for calculating compensation at 1993 value, it also did not entirely adopt the current commercial valuations placed before it. The Court of Appeal determined as follows:

What remains now is the issue of settling the quantum. This may only be effected on the evidence available. Unfortunately for us, while the evidence ushered in by the appellant is for the current market value: i.e. R 52,316,451, that ushered in by the respondent is as at 1993: ie R 4,584,600. To refer the case back to the Supreme Court would unduly protract the disposal of this case.

We should think there have been complications regarding the choice of the system for the previously proposed determination of quantum: i.e. Ad Hoc Administrative Tribunal, exchange of expert reports, mediation etc. Accordingly, we shall take it upon ourselves.

We use our powers under the Rules of the Court of Appeal and invite a report from a panel of three experts on the matter. This panel to comprise Ms Sabrina Zoe, for the respondent, Mr Hubert Alton for the Appellant and another expert appointed by the Court: namely, Mr Daniel Blackburn.

This panel should strive to produce a joint report for the benefit of the court on the fair market value of the property as at the time of the claim. This report should reach us by mid-July for disposal of this case in the August session. Any procedural issue arising in the process shall be resolved before the President of the Court of Appeal.

[13] We shall adopt the same approach to determine the compensation to be paid for the land that is not being returned. We invite a joint report from a panel of three experts on the matter. This panel shall comprise Mrs Sabrina Zoe, for the 1st respondent, Mr Hubert Alton for the petitioner and another expert appointed by the Court: namely, Mr Daniel Blackburn.

[14] This panel should strive to produce a joint report for the benefit of this court on the fair market value of the property as at the time of the claim. This joint report should reach us before the last week of July 2016 for disposal of this case by the last session of this term. Any procedural issue arising in the process shall be resolved by this Constitutional Court panel.

[15] In summary, we enter judgment by making the following orders:

- 1 Parcel T767 is returned to the petitioner;
- 2 Parcel T3095 is returned to the petitioner;
- 3 Parcel T1855 is returned to the petitioner
- 4 Parcel T3094 is returned to the petitioner
- 5 Parcel T-3107 is returned to the petitioner after extraction of the bus shelter which shall not be returned and compensation shall be paid instead for the extracted part.
- 6 Parcel T2102 shall not be returned to the petitioner and compensation shall be paid instead.
- 7 Parcel T3161 shall be returned to the petitioner after extraction of the developed portions of the parcel retained by the 1st respondent or developed and transferred to individuals on the housing estates.

Poole v Government of Seychelles

- 8 The panel of expert named above shall produce to this Court a report on the fair compensation to be paid for the portions which are not being returned before the last week of July.
- 9 The 1st respondent shall have 30 days to complete the transfer of the portions of land under its ownership which have been ordered to be returned to the petitioner.
- 10 The Registrar of Lands shall have 30 days to register parcels which have been ordered to be returned but which have been transferred to 3rd parties and shall cancel the lease on T1855 within 21 days of today.

[16] We award costs to the petitioner.

JACQUES v MANOO

D Karunakaran J
25 May 2016

[2016] SCSC 354

Delict – Medical negligence – Standard of care

The plaintiff was suffering from septic arthritis following an accident. His condition deteriorated and the doctor advised him to get admitted to a hospital in which the defendant was an orthopaedic surgeon. Surgical intervention by the defendant further aggravated the condition of the plaintiff. Medical negligence was alleged and damages for the consequential losses were claimed.

JUDGMENT Suit dismissed.

HELD

- 1 In an action for medical negligence, the court is to see whether the defendant's negligence has, on a balance of probabilities, a material effect on the claimant's injury or disease.
- 2 A 'reasonable person' test is to be applied to determine a case for medical negligence.
- 3 A reasonable person needs to exercise a fair, reasonable and competent degree of care in a medical situation.

Legislation

Seychelles Civil Code, art 1382(2)

Cases

Charles Ventigadoo v The Government of Seychelles (Civil Side No 407 of 1998)

Gabriel v Government of Seychelles (2006) SLR 169

Nathaline Vidot v Dr Joel Nwosu (Civil Side No 12 of 2000)

Foreign Cases

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118

Cassidy v Ministry of Health [1951] 2 KB 348

Hotson v East Berkshire Health Authority [1987] 2 All ER 909

Lanphier v Phipos (1838) 8 C & P 475

White House v Jordan [1980] All E R 650

Counsel J Camille for the plaintiff
B Hoareau for the 1st defendant
H Kumar for the 2nd defendant

KARUNAKARAN J

[1] The plaintiff has brought this action against both defendants namely, (1) Medical Doctor Jewalal Manoo, an employee of the Government of Seychelles employed at the Victoria Central Hospital and (2) the Government of Seychelles, the employer of the said

doctor—based on vicarious liability—claiming compensation in the sum of R 8,000, 950 for loss and damage, which the plaintiff suffered as a result of a fault allegedly committed by the employees of the defendant through its Ministry of Health. The fault alleged emanated from medical negligence of the doctors/surgeons employed by the defendant at the Victoria Central Hospital. Particularly, the 1st defendant committed acts of medical negligence, while he diagnosed, operated on and treated the plaintiff for a chronic injury that was a discharging sinus over the left lateral thigh of the plaintiff. In fact, the plaintiff was left quadriplegic, completely paralysed below his neck, due to spinal injuries sustained in a road traffic accident which had happened about five years ago.

The Facts

[2] The facts as transpired from the evidence on record, are the following.

[3] The plaintiff is a young man, now aged 30. At all material times, he was and is living with his mother in a flat at Harrison Street, Victoria. In 2005, he was employed as a Survey Technician by PMC, a statutory corporation, engaged inter alia, in property management and housing development in Seychelles. On 13 July 2005, during the course of his employment he sustained a road accident in which the driver of the vehicle was killed, whereas the plaintiff, who was then a passenger in that vehicle, sustained serious bodily injuries including a major injury to his spinal cord. The spinal injury resulted for him in a lifelong tetraplegic condition, which had paralysed all his limbs permanently. The plaintiff was only 20 years old at the time of the said accident. He lost all sensation below his neck. Since then he has become bed-ridden. He cannot attend to his personal needs and care as he is physically and totally disabled. Now, he has to completely rely on someone to manage his day to day life activities and help physical movements. Consequently, he developed bedsores and other secondary infections. According to Dr Reginald (PW5), Consultant Surgeon, since the plaintiff's injury has occurred to the nervous system, it cannot be reversed. The plaintiff can never be able to get cured or restored to normal life. Since the plaintiff has a spinal injury to C4-C5, it has left him a quadriplegic with a neurogenic bladder. He was put on intermittent catheterisation which was being done by his mother on a daily basis and being followed by urological check-ups by Dr Reginald vide Exhibit P1. Dr Reginald, as an urologist, was constantly making home visits and observing and monitoring the condition of the plaintiff ever since he became quadriplegic and bedridden.

[4] According to Dr Reginald, the plaintiff had stayed in the same position for a long time and so he had developed ischemia to the skin with necrosis in his left thigh. As a result of infection, it had opened up a small hole, medically called sinus on his left thigh and there was discharge oozing out from the hole. The bedsores which the plaintiff had developed over years on his back and the hole in his left thigh had connections. This communication between the two holes is medically termed as sinus. Hence, Dr Reginald during one of his visits, well before the 4 February 2010, noticed and diagnosed that the plaintiff had septic arthritis, which had given rise to fever and discharge. He, therefore,

immediately advised the plaintiff to get admitted to the hospital for necessary treatment by an orthopaedic surgeon. On 4 February 2010, the plaintiff was shifted from home and was admitted to Victoria Hospital. The orthopaedic surgeon Dr Ribail Babie (PW6) attended the plaintiff, made a diagnosis and started the treatments.

[5] His medical report dated 5 May 2010, in Exhibit P2, reads thus:

RE: Mr Greg Jacques-Bel Ombre

The above-named patient was involved in a road traffic accident on July 2005 and it resulted in him being tetraplegic (C5 ASIA) for which he underwent anterior repair and fixation in Reunion.

He was admitted to Doffay Ward on 4 February 2010 by the Urologist service with a diagnosis of Neurogenic Bladder and anaemia (HGB 4.99g/dL). He was referred to an orthopaedic specialist because of a chronic fistula with smelly discharge in the Left Hip Trochanteric region. X-ray was done and showed the head of femur and acetabulum irregularity, Architecture, sclerotic reaction and head sub dislocation. On 5 February 2010, Debridement and drainage were done. Micro-culture and sensitivity report staphylococcus, sensitive to Rocephin and the blood test show HGB 7.1g/dL, one unit of blood transfusion was given. He continued to have purulent drainage from the drain over next few days.

On 4 March 2010, examination showed left inferior limb shorter than the right and hip joint unstable, X-ray was done and showed Hip dislocation, head of the femur irregular architecture with lytic changes and periosteal sclerotic reaction generalise with a diagnosis of left septic arthritis with head osteomyelitis. He was brought back to the theatre for debridement and possible head of femur excision. The family was informed. Arthrotomy, Debridement and bone curettage was done and preserve part of the femur head. He needed to go back to the Operating Theatre several times for dressing and change of irrigation tissue with satisfactory evolution.

Surgical days for dressing and drain changes: 11 March 2010, 13 March 2010, 15 March 2010 and 24 March 2010.

On date 23 March 2010, the pus discharge was increased with bad smell, the dressing was done and the next day smelling was increasing with discharge. He went back to the Operating Theatre on 27 March 2010 for dressing and change of drain. During the operation, joint pus and a dark colour of the femur head was detected and bone architecture destruction. We decided to excise the head and the specimen were sent for histological study and micro-culture and sensitivity was done. The result shows Bacterial Osteomyelitis and swab report staphylococcus aureus ++ and coliform ++.

CT Scan done on 30 March 2010 shows left hip septic arthritis with Osteomyelitis, left the head of the femur was not visualised, left Ischium sclerosis with the irregularity of surface, septic wounds at ischium and

sacrococcygeal region. The following days it improved gradually with less discharge without the smell. He went to the Operating Theatre every week for a change of dressing and drain (05/04/2010, 13/04/2010, 20/04/2010, and 27/04/2010).

On 5 April 2010 Micro-culture and sensitivity was repeated and inform Actinotobacter, Bauman II ++ resistant to Ceftriaxone, Augmentin, Ceftaxidine, Gentamicin, Amikacin and ciprofloxacin. His case was discussed in a meeting with the ICU doctors and suggest to start with lecofloxacin and vancomycin continuation for two weeks, the last micro-culture done on 23 April 2010 shows coliform + sensitive to Augmentin, Ceftaxidine, Gentamicin, Amikacin and ciprofloxacin. The antibiotic treatment with Rocephin and gentamicin combination started on 27 April 2010 after Operating Theatre dressing and closed the surgical wound.

The following days he improved and on 3 May 2010, the drain collection was empty. We are planning to remove the drain and do the dressing on 4 May 2010. His last HGB 9.9g/dL, WBC 5.6×10^3 Creatine 63, sodium 139mmol/l, potassium 4.1 mmol/l.

[6] Mrs Herachandra, (PW2) a theatre nurse testified in essence, that the 1st defendant Dr Manoo attended the plaintiff when he was first brought to the hospital in February 2010. The plaintiff was first taken to the theatre simply for incision in order to drain the discharge from the plaintiff's left thigh affected by septic arthritis. She was present in the theatre at that time presumably on 5 February 2010, when Dr Manoo was draining the discharge from the hole in the wound. According to her, it was the normal practice for any doctor, even a general physician to take the patients into the theatre for draining the discharge from the wounds or injuries of this nature. Dr Manoo also did the same procedure with the plaintiff that day, which any other doctors in his position would do in similar cases. PW3, Ms Muriel William, a senior staff nurse testified that the plaintiff's mother did sign a consent form on behalf of the plaintiff to drain the discharge and dress the wound. Another senior staff nurse one Lucille Mathiot also testified that the plaintiff had been admitted to the male medical ward in the beginning of 2010 as he had some problem with his wound and that he signed a consent form to undergo an operation on 18 April 2010, which was performed by Dr Ribail Babie, the orthopaedic surgeon. Consultant Surgeon and Urologist Dr Reginald, who had been fully conversant with the medical history and condition of the plaintiff as well as the orthopaedic surgeon Dr Ribail Babie, who performed arthrotomy, debridement and bone curettage and all surgeries in relation to septic arthritis including the hip surgery on the plaintiff testified that there were no acts of medical negligence on the part of any medical officer in diagnosing, treating and performing surgical operations on the plaintiff for septic arthritis and in draining of the discharge from the wound on his left thigh. All medical officers did their best to give a good medical treatment to the plaintiff for the injury. According to both surgeons, the plaintiff developed bedsores and consequently septic arthritis, which are secondary infections developed due to the prolonged period of confinement to bed and other conditions at home. These infections can in no way be attributed to any medical negligence on the part of any doctor or surgeon or medical officer or staff employed by the 2nd defendant.

[7] In the circumstances, the plaintiff, being dissatisfied with the said surgical interventions and treatments, felt that those treatments did not bring the desired result because of the fault of the doctor, especially Dr Manoo who treated him for the wound on his left thigh. According to the plaintiff, the said surgical operations were wrongly and negligently performed and diagnosed and treated by the 1st defendant or the 2nd defendant's préposé. Hence, by a plaint dated 9 February 2011, the plaintiff filed the instant suit against the defendants for the consequential loss and damages. In the plaint, he claimed compensation for loss and damage, which he suffered due to a fault allegedly committed by the 1st defendant, the employee of the 2nd defendant. The alleged fault that gave rise to the cause of action in the instant suit emanated from medical negligence on the part of the employees of the 2nd defendant, who—

- 1 failed to insert a drain after the surgery to allow the flow of the discharge
- 2 dressing was attended by the urologist Dr Manoo instead of by the orthopaedic surgeon
- 3 discharge occurred without proper medication.

[8] The plaintiff was not given the required standard of care and medical attention. The doctors/surgeons committed a fault in their medical diagnosis, operation and treatment given to the plaintiff for the injury. In that para [6] and [7] of the plaint read thus:

After the said operation and as a result of the poor medical attention administered onto the plaintiff, the plaintiff's injuries were further aggravated and the said plaintiff had to be attended on several occasions in the operation theatre for further dressing irrigation and change of drain.

... the said injuries were caused by the fault of and/or negligence of the 1st defendant and were compounded by the fault and/or negligence of the 2nd defendant whether by itself, its servants or agents.

[9] Moreover, the particulars of the injury, loss and damage, which the plaintiff claimed in the plaint, under para [7] read thus:

Particulars of injury, Loss and damage

| | | |
|---|---|------------------------------------|
| 1 | Gross negligence | R 3,000000 |
| 2 | Loss of head of femur | R 500,000 |
| 3 | Limitation for rehabilitation | R 3,000000 |
| 4 | Moral damage | R 500,000 |
| 5 | Loss of articulate joint/posture | R 1,000000 |
| 6 | Medical Report, Radiology CT Scan and MRI Examination Reports | R 950 |
| | | Total = <u>R 8,000, 950</u> |

[10] It is the case of the plaintiff that the first operation was carried out by Dr Manoo negligently. As a result, the plaintiff had to undergo subsequently a number of operations for the same wound. However, there was no improvement. Since then, the condition of

the injury has deteriorated. The plaintiff claims that subsequent operations had to be carried out because of the first faulty operation of Dr Manoo, who failed to insert a drain after the surgery to allow the flow of the discharge, in that he failed to make a proper diagnosis and give proper treatment to the plaintiff as well as failed to provide the required standard of medical care. According to the pleadings, the cause of action arose as and when Dr Manoo committed the negligent act on 4 February 2010, but the plaintiff came to know about it after seeing recommendations for a radiographer report commissioned by a private doctor.

[11] Therefore, the plaintiff now claims that the defendant is liable to compensate him for the consequential loss and damage hereinbefore particularised.

The Defence Case

[12] On the other side, the defendant has averred in the statement of defence that although the plaintiff was medically treated by the employees of the defendant at the Victoria Hospital, neither the 1st defendant nor any other employee for that matter committed any act of medical negligence in treating the plaintiff for the injury. They did not commit or omit anything that amounts to a fault in law. Therefore, the defendants totally deny medical negligence, liability and so dispute the claim of the plaintiff for consequential loss and damages.

Medical Negligence

[13] Before one proceeds to analyse the evidence, it is important to identify and ascertain the law applicable to cases of medical negligence as it stands in our jurisdiction and jurisprudence. Obviously, this action is based on art 1382(2) of the Civil Code, which defines a fault as "an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or omission". In this respect, Amos and Walton in *Introduction to French Law* state:

It also indicates the standard of care required of persons exercising a profession. A prudent man knows he must possess the *knowledge* and skill requisite for the exercise of his profession, and that he must conform at least to the normal standards of care expected of *persons* in that profession. [Emphasis added]

Standard of Care

[14] On the question of the standard of care and the principles governing medical negligence, I would like to restate what I have enunciated in *Charles Ventigadoo v The Government of Seychelles* (Civil Side No 407 of 1998, judgment delivered on 28 October 2002) and followed in *Gabriel v Government of Seychelles* (2006) SLR 169 endorsing the formula, which Perera J originally applied in *Nathaline Vidot v Dr Joel Nwosu* (Civil Side No 12 of 2000).

[15] Tindal CJ while summing up to a jury in *Lanphier v Phipos* (1838) 8 C & P 475 – a medical negligence action, formulated the following principle:

Every person who enters into a Learned Profession undertakes to bring to the exercise of it, a reasonable degree of care and skill. He does not undertake if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the *highest* possible degree of skill. There may be persons who have higher education and greater advantages than he has, *but he undertakes to bring a fair, reasonable and competent degree of skill* and you will say whether, in this case, the injury was occasioned by the *want of such skill* in the defendant.

[16] In *Cassidy v Ministry of Health* [1951] 2 KB 348 at 359, Denning LJ stated thus:

If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment on him and that is so whether the doctor is paid for his services or not.

[17] The accepted test currently applied in English law to determine the standard of care of a skilled professional, commonly referred to as the *Bolam* test, is based on the dicta of McNair J in his address to the jury in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121. He stated:

... but where you get a situation which involves the use of special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham omnibus, because he has not got this special skill. *The test is the standard of the ordinary skilled man exercising and professing to have that special skill.* A man need not possess the highest expert skill at the risk of being found negligent. It is a well-established law that it is sufficient if he exercises *the ordinary skill of an ordinary competent man exercising that particular art.* [Emphasis added]

[18] This test is a departure from the previous test of the hypothetical reasonable skilled professional, which placed emphasis on the standards adopted by the profession. The *Bolam* test concerns itself with what ought to have been done in the circumstances.

[19] The principles thus enunciated in these authorities have one thing in common with the French law of delict. That is, the relevant test is that of the reasonable or prudent man in his own class or profession, as distinct from the ordinary man in the street or the Clapham bus. This is the test, which in my view, ought to be applied to the case on hand. It is on this basis that the defendant's liability has to be determined in this action.

[20] Now, I will proceed to examine the merits of the case applying the above principles to the facts of the case on hand. Firstly, the case of the plaintiff herein, is that the following two material facts constitute medical negligence on the part of the defendant which amounts to a fault in law. They are:

- 1 Dr Manoo, when first operated the plaintiff failed to insert a drain after the surgery to allow the discharge;
- 2 The employees of the defendant failed to make a proper diagnosis and give proper treatment to the plaintiff, and
- 3 they also failed to take proper medical care and attention to the required standard.

[21] First of all, there is no evidence at all on record to show that the 1st defendant conducted any surgery on the plaintiff on the alleged date. The evidence of the other two surgeons reveals that the plaintiff had already developed septic arthritis and necrosis even before he was admitted to hospital and treated by Dr Manoo for the said wounds. On 4 February 2010, Dr Manoo had simply incised the wound drained out the discharge and did dressing in the theatre. Obviously, there was not any act of medical negligence on the part of the 1st defendant. In any event, the medical experts Surgeons Dr Reginald and Dr Ribail Babie, who treated the plaintiff for the septic arthritis stated that there was no medical negligence on the part of any doctor or surgeon or any employee of the 2nd defendant in treating the plaintiff for septic arthritis which is the secondary infection he had developed due to prolonged the bedridden condition, bedsores and home environment.

[22] I find that the allegation of medical negligence levelled against Dr Manoo is baseless; there is no evidence on record or testimony by any competent witness to substantiate this allegation. The plaintiff has wrongly believed and acted on his own medical opinion when he had no specialised knowledge, qualification or competence in that field. Unfortunately, the suit is based on his guesswork on medical negligence and some hearsay recommendation by a radiographer, who is simply a technician, having no medical qualification or competency in the medical field. Hence, I find that the plaintiff has miserably failed to establish any act of medical negligence on the part of the 1st defendant Dr Manoo or any other medical officer or employees of the Government of Seychelles, who in one way or the other had been involved in the operation or medical treatment given to the plaintiff at the Victoria hospital for septic arthritis.

[23] As regards the allegation of improper or wrong diagnosis, obviously, there is not one iota of evidence on record to show that the surgeons Dr Ribail Babie or Dr Reginald or Dr Manoo, who performed the operations or incision for draining or dressing the wound or treating the plaintiff for septic arthritis made any wrong diagnosis at any point in time in their surgical procedure or operation or medical treatment given to the plaintiff. I totally accept the evidence of the expert witness, the Orthopaedic Surgeon, Dr Ribail Babie (PW6) in that there has been no professional negligence on the part of the surgeons in treating the plaintiff for the injury. Their diagnostic procedure and decisions were correct even though they had repeatedly to operate and drain the wound because of its chronic nature and occurrence of continuous discharge from the wound. In the absence of any other evidence to the contrary, I accept the expert opinion of Dr Ribail Babie and Dr Reginald and so find that there had been no medical negligence in respect of the surgical treatment the plaintiff received from the defendant for the injury. It is also pertinent to note

that the development or condition of necrosis and septic arthritis are inherent and due to the nature of the injury, prolonged bedridden condition and therefore frequent draining of discharge was inevitable. Nothing could have prevented its development. The surgical intervention of the surgeon has nothing to do with it nor can this be attributed to any medical negligence on the part of the surgeon. In *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909, the claimant suffered an injury and was referred to hospital where a doctor negligently failed to diagnose his condition. The House of Lords rejected the claimant's claim because the vascular necrosis which developed was found to have been inevitable and there was nothing that could have been done even had the defendant made a correct diagnosis.

[24] Having said that I note that an allegation of negligence against medical personnel should be regarded as serious and that the standard of proof should, therefore, be of a high degree of probability per *White House v Jordan* [1980] All E R 650. I find the evidence of Dr Ribail Babie or Dr Reginald is uncontroverted, strong and credible in every aspect of the case for the defence. In my judgment, the surgeons, doctors and other medical personnel who operated and medically treated the plaintiff for the injury did exercise reasonable care and the necessary skills required of them in their treatment of the plaintiff. As I see it, the development of septic arthritis, necrosis and sinus that necessitated the revision of surgeries, draining of discharge and the resultant clinical symptoms such as fever pain were occasioned not through medical negligence of the employees of the defendant at the Victoria Hospital or by the want of any skill in the surgeon who treated the plaintiff for the injury. In fact, as a consequence of *Hotson* supra, in many medical negligence actions, the dispute between the parties is whether the defendant's negligence has, on a balance of probabilities, had a material effect on the outcome of the claimant's injury/disease or not. In the present case, even if one assumes, for the sake of argument that the defendant had been negligent in providing surgical treatment and medical care, still there is no causal link between the development of necrosis/septic arthritis and the medical negligence. Indeed, necrosis and discharge is the outcome of the plaintiff's injury and his physiological constitution due to chronic wound, and not that of any medical negligence on the part of the surgeons or any other employee of the defendant, who treated the plaintiff for the injury in question and so I conclude.

[25] In the final analysis, I find that the plaintiff has failed to show on a preponderance of probabilities that either the 1st defendant or any of the employees of the 2nd defendant namely, surgeons, doctors, and staff of the Victoria Central Hospital, who treated the plaintiff for the injury, committed any negligent act or omission in the course of medical or surgical treatment given to the plaintiff during the relevant period. Therefore, the suit is dismissed. I make no order as to costs.

(2016) SLR

UNION VALE CAR HIRE (PTY) LTD v BEAU VALLON PROPERTIES LTD

F Robinson J
25 May 2016

[2016] SCSC 375

Tenacy – “Premises”

The plaintiff was a car hire operator. He entered an agreement with the defendant, a hotel owner and operator, to use a desk at the hotel for the car hire business. He was subsequently prevented from using that part of the hotel. The plaintiff brought a claim against the defendant seeking a declaration that it is a statutory tenant, that the termination of the tenancy agreement by the defendant is unlawful, an order restraining the defendant from evicting the plaintiff, damages and costs.

JUDGMENT Case dismissed.

HELD

For an applicant to be a statutory tenant under s 12(1) of the Control of Rent and Tenancy Agreements Act they need to occupy a “premises” in accordance with s 13(1) of the Act. In relation to the ambit of the word “premises”, it is plain that the Legislature was considering primarily physical premises such as buildings.

Legislation

Control of Rent and Tenancy Agreements Act, ss 10(2), 12(1), 13(1)

Cases

West & East Sisters Island A.G v Bernard Sanders Civil Appeal No. 31 of 1999
Kim Koon v The Roman Catholic Church (1996) SLR 135

Counsel A Amesbury for plaintiff
 M Vidot for defendant

ROBINSON J

[1] The plaintiff is Union Vale Car Hire Proprietary Limited. The plaintiff is and was at all material times a car hire operator.

[2] The defendant is Beau Vallon Properties Limited. The defendant is and was at all material times the owner and operator of the Coral Strand Hotel.

[3] The plaintiff brought this suit in the Supreme Court on 26 March 2008, against the defendant for (i) a declaration that it is a statutory tenant; (ii) a declaration that the termination of the tenancy agreement by the defendant is unlawful; (iii) an order restraining the defendant from evicting the plaintiff from the “business premises”; (iv) loss and damages in the sum of Euro (€)7800.001- and continuing against the defendant; and (v) costs.

[4] The defence and counter-claim is dated 9 October 2012. The defence and counter-claim have not been filed in the registry of the Supreme Court. The defence to counter-claim dated 15 November 2012, has also not been filed in the registry of the Supreme Court. The defence and counterclaim and defence to counter-claim do not form part of the record. This suit proceeds on the plaint.

[5] For the plaintiff I heard oral evidence from its Managing Director, Mr Michel Gilbert Camille.

[6] The facts giving rise to the plaintiff's claim are as follows. On 28 April 1983, the plaintiff was permitted by the Coral Strand Hotel to use the facilities of the hotel in connection with its car hire rental operations in terms of the "Contract between Union Vale Car Hire Ply Ltd and Coral Strand Hotel Re Desk" (exhibit P1). The plaintiff occupied the desk nearest the reception of the Coral Strand Hotel in conjunction with one other car hire company.

[7] The Coral Strand Hotel came under the ownership and management of the defendant. By a written "Rental Agreement" by and between the defendant and the plaintiff dated 10 July 1995, for a term of two (2) years commencing 1 July 1995, and expiring on 30 June 1997, the "Desk adjacent to the Reception Counter in the Hotel Lobby" continued to be vested in the plaintiff for and in consideration of a monthly rent of Seychelles rupees (SCR) 4000 (exhibit P2). The "Desk adjacent to the Reception Counter in the Hotel Lobby" is hereinafter referred to as the "Desk". In terms of exhibit P2 the plaintiff "shall maintain the desk only 10 conduct its car hire business ... ". The "Rental Agreement" expired on 30 June 1997. The evidence shows that on and since 30 June 1997, the plaintiff was allowed to remain in possession of the Desk for the use of its car hire business. The plaintiff continued to pay defendant a monthly rent of SCR4000.001, which rent was accepted by the defendant.

[8] The evidence for the plaintiff as to the ejectment is to the following effect: On 28 March 2008, just after 10 am, three men in the employ of Coral Strand Hotel approached the Desk and told Mr John Toule, the representative of the plaintiff, to get off the chair. Those men told Mr John Toule that the plaintiff had no right to use the premises of the Coral Strand Hotel for its car hire business, and the defendant will be removing the Desk. The Desk was removed. Exhibit P10 is a video of the incident. Mr Camille related that two and a half weeks or three weeks before the "counter" was removed, persons in the employ of the Coral Strand Hotel had removed the plaintiff's front "counter" sign and all other marketing paraphernalia of plaintiff.

[9] On 29 March 2008 the representatives of the plaintiff were prevented by two security guards of the defendant, from entering the Coral Strand Hotel premises. The representatives of the plaintiff were told that the plaintiff should not solicit clients of the Coral Strand Hotel; and that the plaintiff should not use the car park of the Coral Strand Hotel to park any of its vehicles for hire. The evidence of Mr Camille was that front desk receptionists of the defendant were told not to collect any keys from the defendant's clients when returning the plaintiff's hired vehicles late in the evening.

[10] Following the removal of the Desk, the plaintiff could not engage in its car hire business on the premises of the Coral Strand Hotel as from 29 March 2008, until mid-May 2008. The plaintiff could also not engage in its car hire business during the time that the Coral Strand Hotel was closed down for minor work between mid-May 2008, and mid-July 2008. Mr Camille stated that representatives of the defendant tried to physically remove the representatives of the plaintiff, including himself, from the premises of the Coral Strand Hotel. One such incident took place on 2 July 2008, (police statement exhibit P4). The plaintiff refused to vacate the premises of the Coral Strand Hotel on account of a letter written by Attorney-at-Law Mr Francis Chang-Sam to the defendant to the effect that the plaintiff was a protected tenant, and proceedings brought by the plaintiff against the defendant before the Supreme Court of Seychelles (exhibit P11). The defendant brought proceedings against the plaintiff before the Rent Board.

[11] The Rent Board case was still pending, when the plaintiff was served with a letter emanating from counsel for the defendant dated 12 May 2010, informing the plaintiff that defendant will withdraw the case against plaintiff on condition that plaintiff will pay the defendant, "all unpaid rent for the period the case was before the Rent Board ... and Union Vale Car Hire is invited to enter into a new lease agreement with my client. My client proposes a monthly rent of Euro Three Hundred (£300) plus a rent free car for the use of a demarcated area in the hotel's reception area. 11 exhibit P5. The plaintiff prepared a new agreement in or about 2010. The defendant did not sign the said agreement. Draft of the agreement tendered as exhibit P6.

[12] On account of the cases pending before the courts, upon the re-opening of the Coral Strand Hotel in mid-July 2008, the plaintiff was allocated a new "counter". From mid-July 2008 to January 2011, the plaintiff conducted its car hire business on the premises of the Coral Strand Hotel until it closed down for major renovation work. The Coral Strand Hotel re-opened about September or October, 2012.

[13] The plaintiff paid the defendant rent for the month of March 2008, which rent the defendant accepted. The plaintiff paid the defendant by cheque dated 30 July 2008, rent for the months of July and August, 2008 (exhibit P8). The plaintiff received a Coral Strand Hotel receipt for payment of the said rent (exhibit P8). The plaintiff received a letter from defendant dated 31 July 2008, enclosing the cheque exhibit P8, stating that the defendant had "cancelled" the said exhibit P8.

[14] The plaintiff claimed that its removal from the "business premises" is unlawful. The evidence of Mr Camille sheds light on the plaintiff's claim and the prayer for relief –

Q. Mr Camille as a result of this unlawful termination of the contract that you have, what are you claiming from this court? How many years of loss and damage have you suffered? In your plaint you claimed 7800 Euros being loss of earnings and continuing at 600 Euros per day and the time we brought the action it had been only for 3 days and right now it is 4 years later from the date of the

breach and continuing so we are claiming from defendant 600 Euros per day from the date of the breach till today?

A. My ladyship just to rectify the claim we are not claiming more than we have lost, what we are claiming is since our counter was taken away in end of March 2008 there was March 2008, April 2008, half of May 2008 which is 2 and a half months then the hotel closed for minor renovations between mid-May and mid-July. When we came back in mid-July a counter was reinstated only because the injunction in front of Justice Karunakaran had ordered that Beau Vallon Properties maintains the status quo until there is a ruling either from the Rent Board or the Supreme Court. So from July 2008 onwards to January 2011 when the hotel again closed for major renovations we were able to work, so we are not claiming any loss of income for that period. However, from I believe it was either September or October, 2012 when the hotel re-opens till today and continuing, we have not been able to operate at that hotel even though we have written a letter to them to request our entrance or permit our entrance so we can continue on our business, basically we are claiming those 2 and half months back in 2008 plus the September, October 2012 till now and continuing.

Proceedings of 2 July 2013, at 1:45 pm.

[15] I have considered the oral evidence of the plaintiff in light of the written submissions of counsel.

[16] The plaintiff claims that it is a protected tenant under s 12(1) of the Control of Rent and Tenancy Agreements Act as amended [CAP 47]. The Control of Rent and Tenancy Agreements Act as amended [CAP 47] is hereinafter referred to as the "Act". Section 12(1) of the Act provides –

A lessee who under the provisions of this Act retains possession of any dwelling house shall so long as he retains possession observe and be entitled to the benefit of all the terms expressed or implied in the original contract of letting so far as the same are consistent with the provisions of this Act.

According to the plaintiff it occupied the Desk for the purpose of a business carried on by it, but is the Desk "premises" within the meaning of the Act. Counsel for the plaintiff has suggested that the tenancy which the plaintiff has of the Desk is within the Act. I have to consider this question which turns on the construction of s 13(1) and other sections of the Act. Section 13(1) of the Act, so far as relevant, provides –

- (1) This Act shall apply to any premises used for business, trade or professional purposes or for the public service as it applied to a dwelling house and as though references to a "dwelling house", "house" and "dwelling" includes references to any such premises, but this Act in its application to such premises shall have effect subject to the following modifications:

Union Vale Car Hire v Beau Vallon Properties

The following paragraphs shall be added after paragraph U) of subsection (2) of section 10:

- (k) the premises are reasonably required by the lessor for business, trade or professional purposes or for the public service;
 - (l) the premises are in whole or in part licensed for the sale of intoxicating liquor and the lessee has committed an offence as holder of the licence or has not conducted the business to the satisfaction of the licensing authority, or has carried it on in a manner detrimental to the public interest, or the renewal of the licence has for any reason been refused.
- (2) The application of this Act to such premises as aforesaid shall not extend to a letting in any market

The word "premises" is not defined in the Act. I am of the opinion that it is fair to say that it is plain that the Legislature is considering primarily physical premises such as buildings. I find for instance, in s 3 of the Act that the Act "shall apply to a house or part of a house let as a separate dwelling" or, by extension under s 13 of the Act, a building. That argument is fortified by reference to other sections of the Act, particularly s 10(2)(i), where it is said, that "the dwelling-house is bona fide required for the purpose of being demolished, reconstructed, moved or improved". Moreover, the common thread running through the jurisprudence of the courts of Seychelles is that the Legislature, when it used the word "premises," meant physical premises such as buildings. In the Seychelles Court of Appeal case of *West & East Sisters Island A.G v Bernard Sanders* Civil Appeal No. 31 of 1999, delivered on 13 April 2000, the Justices of Appeal opined as follows –

Secondly, the lease agreement specified in no uncertain terms that the subject matter of the lease was the two islands. Nowhere in the lease agreement or in the affidavits of either party was reference made to the lease of buildings used for business purposes. True it is that the Control of Rent and Tenancy Agreements Act mentions dwelling house and that section 13 extends the provisions of the Act to "premises used for business, trade or professional purposes.

It is clear, however, from the general language and purport of the legislation that it is meant to apply to rented buildings, be they dwelling houses or buildings used for business purposes. Moreover, a close look at section 13 itself shows that the section was not designed to, and cannot, apply to bare land .

See also the case of *Kim Koon v The Roman Catholic Church* (1996) SLR 135 on point.

[17] For these reasons in my opinion, I find that the tenancy which the plaintiff has of the Desk is not within the Act. I, therefore, hold that the plaintiff is not a statutory tenant under s 12(1) of the Act. The result of that is that prayer (ii), (iii), (iv) and (v) fail.

[18] Before I leave this matter, I state out of interest that the decisive question when looking at the issue of "ultra petita" is whether or not the prayer for relief - (iv) loss and damages in the sum of Euro (£) 7800 and continuing against defendant - is covered by the evidence. It is noted that the plaint was filed on 26 March 2008. According to the

evidence of the plaintiff the cause of action arose on 28 March 2008, when the "counter" was removed. The plaintiff claimed loss and damages as from 28 March 2008. It is plain that the evidence does not cover the said prayer for relief.

Decision

[19] I dismiss the plaint. There is 110 counter-claim on record.

[20] Each party shall bear its own costs.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, C Mckee, D Akiiki-Kiiza JJ
31 May 2016

[2016] SCCC 10

Constitution – Elections – “Votes cast” – Constitutional interpretation

The petitioner, a presidential candidate in the 2015 election, got 49.85 per cent of the votes. On the other hand, the 2nd respondent received 50.15 percent of the votes. The law required that a candidate must win more than 50 percent votes, and therefore, the Election Commission, the 1st respondent, issued the certificate of election in favour of the 2nd respondent. The petitioner challenged the validity of the certificate. It was claimed that the words “votes” and “votes cast” should get a different meaning and if all the “votes cast” were taken into account, the petitioner did not fulfil the minimum requirement of law to get elected as President.

JUDGMENT Petition dismissed.

HELD

- 1 The expression “votes” and “votes cast” used in the Constitution means valid votes cast. In counting the result, only the valid votes should be taken into account.
- 2 A valid vote does not have the same value as a rejected vote or a spoilt vote.
- 3 The reading of all “votes” as equivalent to the phrase “votes cast” may well lead to a constitutional impasse where rejected votes may out number valid votes. One should not interpret an expression appearing in different parts of the Constitution or an electoral law in different ways.

Legislation

Constitution, arts 1, 21, 22, 24, 27, 40, 51, 82, 91, 110, 113, 119, 129, 130, Schedule 2, 3, 4

Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, r 3

Presidential Election and National Assembly Election (Election Petition) Rules 1998, rr 7, 8

Elections Act, ss 21(1)(c), 25(1)(c), 34(2), 36, 37, 44, 45, 46, 47, 98

Official Oaths Act

Cases

Michel and Ors v Dhanjee (2012) SLR 258

Popular Democratic Movement v Electoral Commission (2011) SLR 384

Gill & Ors v Film Ansalt (2013) SLR 137

Foreign Cases

Bappoo v Bughaloo and Ors (1978) MR 105

Duport Steels Ltd v Sirs [1980] 1 WLR 142

Morgan & Ors v Simpson & Ors [1974] 3 WLR 517

People's Union for Civil Liberties & Anor v Union of India & Anor Writ Petition (Civil) No 161/2004, 27 September 2013 (India)

Raila Odinga v The Independent Electoral and Boundaries Commission and Ors [2013] eKLR

Foreign Legislation

Canada Elections Act 2000, (Canada) s 283(3)

Conduct of Elections Rules (India), rr 24, 54A

Constitution (Brazil), art 77(2)

Election of Representatives Act (Croatia)

Elections (General) Regulations 2012 (Kenya), s 77(1)

Elections Act 1989 (Netherlands), s J 26(1)

Electoral Act 1992 (Ireland), s 119(1)

Electoral Act 1993 (NZ), ss 178-179

Electoral Act of 1993 (South Africa) s 47(3)

Electoral Act (Queensland), s 123

Kenyan Constitution, art 138(4)

Representation of People's Act 1951 (India), s 64

Representation of the People Act 1983 (UK), ss 47-50

Counsel B Georges and A Georges for the petitioner
 S Aglae for the 1st respondent
 B Hoareau and L Valabhji for the 2nd respondent
 Attorney-General and A Subramanian for the 3rd respondent

JUDGMENT

[1] Some matters have troubled the Court in regard to this constitutional petition. There has been a tendency in the public fora, from the newspapers to the market place, to construe provisions of the Constitution by the uninitiated together with inventive appraisals by those who should know better. All without a studied and legal interpretative reading with the result of heightened tension around the case. This is regrettable and is not conducive to a mature and responsible democracy.

[2] We point out that although constitutional meaning emerges through the interaction of competing actors it cannot be the case that citizens assert the right to read the Constitution in any way they wish so as to serve a particular interest and to whip up a frenzy among those who are easily led. As Joseph Story, Justice of the Supreme Court of America in a letter to his wife in 1845 stated: "How easily men satisfy themselves that the Constitution is exactly what they wish it to be. They can contract or expand it at pleasure". — William Wetmore Story (ed) *Life and Letters of Joseph Story* (vol 1, London, John Chapman, 1851) at 514.

[3] It is the duty of the Constitutional Court of Seychelles to remain ever more resolved to serve the Constitution of Seychelles by interpreting its provisions according to their original public meaning while taking into account binding or persuasive precedent. The

courts in Seychelles are independent and subject only to the Constitution (art 119(2)) and they apply the Constitution and the law "without fear, or favour, affection or ill will" (First Schedule, Official Oaths Act). And art 40 of the Constitution makes special mention of every citizen's duty to further the national interest and foster national unity and generally to strive toward the fulfilment of the aspirations contained in the Constitution.

[4] We are, therefore, concerned with the politicisation of this petition and the one with which it is joined. The Court of Appeal bemoaned the politicisation of such cases previously (see *Popular Democratic Movement (PDM) v Electoral Commission* (2011) 387 SLR at 396). Five years on, Seychelles does not seem to have learnt from the experience of such practices. The bitter and polarised approach to the elections and the personal attacks on election candidates and the use of intemperate and unbridled language on social media were the backdrop to a closely fought Presidential election.

[5] However, as Fernando JA stated in *PDM*, "None of these factors can change the Constitution or the electoral process set out there in". The judiciary remains a mere spectator of the political forces at play. The Court only engages with the law and the evidence presented before it. We approach this case with only this sentiment and will not permit any arrogation of our duties. As was pointed out by Lord Scarman in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 169, "Justice ... is not left to the unguided, even if experienced, sage sitting under the spreading oak tree" or in the case of Seychelles under the coconut tree.

[6] This matter arose as one of two petitions brought to the Constitutional Court by the petitioner in relation to elections held in Seychelles in December 2015. This is the first case, brought as a constitutional petition in terms of art 130 of the Constitution and given case number CP 07 of 2015. The second was brought as an election petition under art 51 of the Constitution and s 44 of the Elections Act ("the Act"). That case was assigned the case number CP 010f 2016. Since both cases involve the same parties the two cases, CP 01 of 2016 and CP 07 of 2015 were consolidated for the purposes of hearing the matters and the hearings commenced on 14 January 2016. Today we are handing down judgments in both matters separately under their assigned case numbers.

The Agreed Facts

[7] The petitioner was a presidential candidate of the Seychelles National Party in two ballots of an election for the office of President held in Seychelles on 3, 4, 5 December 2015 and 16, 17 and 18 December 2015.

[8] The 1st respondent is a constitutional body vested with, inter alia, powers and duties to organise and hold elections in Seychelles. The 2nd respondent was at all material times the incumbent President and the 3rd respondent was joined as a necessary party to the proceedings in accordance with r 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.

[9] Five other candidates stood for the said election, namely the petitioner, the 2nd respondent, Patrick Pillay, Philippe Boullé, Alexia Amesbury and David Pierre.

[10] In the first ballot none of the candidates received more than fifty percent of the votes. In accordance with Schedule 3 of the Constitution and s 37 of the Elections Act 1995 as amended, the 1st respondent did not declare any President elected.

[11] The 2nd respondent and the petitioner having respectively received the highest and second highest number of votes proceeded in accordance with para [8](1)(c) of Schedule 3 of the Constitution to take part in a second ballot.

[12] After the holding of the second ballot, on 19 December 2016, the 1st respondent declared the results of the second ballot as follows:

| | |
|--------------------------------------|--------|
| Total Votes Cast | 63,983 |
| Total Votes in Favour | 62,831 |
| Total Votes Not in Favour | 1,062 |
| Votes for petitioner | 31,319 |
| Votes for 2 nd respondent | 31,512 |

[13] The chairperson of the 1st respondent, Hendricks Gappy further declared that the petitioner had won 49.85 per cent of the total votes cast and the 2nd respondent 50.15 per cent of the total votes cast.

The Issues

[14] In his petition, the petitioner avers that the declaration was incorrect and that the certificate of election issued by the 1st respondent was erroneous, improper and illegal in that the 2nd respondent had not received “more than fifty percent of the votes in the election” as required under para [5] of Schedule 3 of the Constitution or “more than fifty percent of the votes cast in the election” as required by para [8](1) of Schedule 3 of the Constitution. He prays inter alia for a declaration that the provisions of the Constitution had been contravened, that the certificate of election was null and void and for the Court to order the holding of further ballots until such time as a single candidate receives more than fifty percent of the votes in the election.

[15] All three respondents raise the same objection questioning the jurisdiction of this Court to hear this petition, stating that the Constitutional Court has no jurisdiction to entertain the petition in view of the provision of art 130(9) of the Constitution. They state that the matter ought to have been brought in terms of art 51(3) of the Constitution read with s 44 of the Elections Act.

[16] The 1st respondent also argues that the petition is frivolous and vexatious and an abuse of the process of Court as the words “votes in the election” (para [6], Schedule 3) and “votes cast in the election” (para [8], Schedule 3) in the Constitution have already been judicially settled in previous Seychelles cases.

Powers and Jurisdiction of the Constitutional Court

[17] Article 130 grants the Constitutional Court powers to hear and decide matters concerning violations of the provisions of the Constitution which are not violations of the rights contained in Chapter III of the Constitution. It provides in relevant part as follows:

- (1) A person who alleges that any provisions of this Constitution, other than a provision of Chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention may, subject to this article, apply to the Constitutional Court for redress.
....
- (4) Upon hearing an application under clause (1), the Constitutional Court may –
 - a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;
 - (b) declare any law or the provisions of any law which contravenes this Constitution to be void;
 - (c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate
....
- (9) Nothing in this article confers jurisdiction on the Constitutional Court to hear or determine a matter referred to under article 51(3) or article 82(1) otherwise than upon an application made in accordance with article 51 or article 82.

[18] The constituting and subject-matter jurisdiction of the Constitutional Court originates in art 129 of the Constitution. The subject-matter jurisdiction of the Court is with regard to all matters relating to the application, contravention, enforcement or interpretation of the Constitution [art 129(1) to (3)] and it is properly constituted when there are at least two judges sitting in these matters. Article 130 provides the standing for litigants to bring cases related to the contravention of the provisions of the Constitution other than those provisions contained in Chapter III, namely where that individual alleges that “any provisions of this Constitution, other than a provision of chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention” [art 130(1)]. The Court has taken a broad and encompassing approach to the matter of standing where a matter of significant public interest is the subject-matter of the petition (See in this regard *Michel and Ors v Dhanjee* (2012) SLR 258).

[19] Article 130(9) creates a procedural proviso to the expansive standing granted to litigants under art 130(1) by stating that where a litigant is asking the Constitutional Court to hear matters relating to a matter referred to under art 51(3) or art 82(1), the Court will only be properly seized when the application is made in accordance with art 51 or art 82 respectively. Subsection (9) does not limit or preclude the powers of the Constitutional

Court to hear such matters; it does not restrict the jurisdiction of the Court nor does it restrict the standing of a potential litigant. It merely requires that the cases which concern the jurisdiction under art 51(3) or art 82(1) must be brought in the procedural manner which is set by the processes under those articles.

[20] Article 51(3) refers to the power of the Constitutional Court “to hear and determine whether a person has been validly elected to the office of President”. Clause (6) of art 51 makes provision for a law to “provide for – (a) the circumstances and manner in which and the imposition of conditions upon which an application may be made to the Constitutional Court for the determination of a question under clause (3)....”

[21] The provisions which purport to prescribe this process, are contained in s 44 of the Elections Act and provide in relevant part as follows:

- (1) Article 51(3) and (5) of the Constitution shall apply for the determination of the question as to whether a person has been validly elected to the office of President.
....
- (3) An election petition to determine the question referred to in subsection (1) may be presented within 14 days of the publication of the results under section 38(2).
....
- (5) A petitioner in an election petition may claim –
 - (a) a declaration that the election is void; or
 - (b) a declaration that the nomination of a proportionately elected member of the National Assembly is void;
 - (c) a recount of the ballot papers.
....
- (7) The Constitutional Court may declare that an election or as the case may be, a nomination is void if the Court is satisfied –
 - (a) that there was a non-compliance with this Act relating to the election or relating to the nomination of a proportionately elected member of the National Assembly and the non-compliance affected the result of the election or nomination;
 - (b) that an illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the candidate;
 - (c) the candidate or the person nominated at the time of the election or nomination was not a person qualified to be elected as President or a directly elected member of the National Assembly or to be nominated as a proportionately elected member of the National Assembly, as the case may be.
- (7) [sic] The Constitutional Court may order a recount of the ballot papers where it is satisfied that there was an irregularity in the counting of ballot papers that affected the results of the election or the nomination.

[22] Section 45 provides for the procedure that may be followed for the trial of the matter brought in terms of s 44. Section 46 provides for the Constitutional Court to certify the determination of the Court in a specific manner to the Electoral Commission. Section 47 requires the Constitutional Court to report as to any illegal practices which it believes have been proved to have been committed. Moreover, s 98 [Note: s 95 as published in the *Gazette*] provides that the Chief Justice may make rules for the election petition, which rules were published as the Presidential Election and National Assembly Election (Election Petition) Rules 1998 (SI 10 of 1998). These rules set out in further detail the procedure to be followed in bringing an election petition and specifically provide a procedure where a petition fails to comply with the Elections Act or rules.

Our Decision on the Jurisdiction of the Constitutional Court

[23] Now, this case concerns the interpretation of the phrase “fifty percent of the votes in the election” and “fifty percent of the votes cast” as contained in Schedule 3 to the Constitution, paras [5] and [8] respectively. The petitioner is specifically averring that these provisions have been contravened. Paragraph [5] of Schedule 3 provides that:

Subject to paragraphs 6 and 7, a person shall not be elected to the office of President unless he has received more than fifty percent of the votes in the election and the necessary number of ballots may, subject to the election being discontinued and recommenced in accordance with an Act, be held in accordance with the direction of the Electoral Commissioner to achieve that result.

[24] Paragraph [8] provides: “Where in an election to the office of President three or more candidates take part in any ballot and no candidate receives more than fifty percent of the votes cast....” Clearly, there is no way that the Court can interpret the subject matter of this case as not regarding the valid election of the President. To say so would be to turn a blind eye to the very essence of the question before us. This matter falls squarely within art 51(3).

[25] We do not agree with Mr Georges that this is necessarily a matter arising out of art 130 due to the nature of the remedy that he has requested. Mr Georges’ argument goes, as we understand it, that the election rules prescribe the averments which may be made by the petitioner and that these are limited by the provisions of the Elections Act and Rules. Section 44(5) states what a petitioner may claim in the election petition. The Act here uses permissive language, indicating that these specific claims are amongst the remedies which may be claimed in the petition. If we were to interpret s 44(5) narrowly, such that an Election petition may only be brought when one of the three claims is brought, we would be restricting the jurisdiction of the Court. Such a move may result in the creation of certain lacunae, rendering some subject-matters unable to be brought under the Constitution or the Elections Act, as in this case where an interpretation with regard to the valid election of the President is sought which would be precluded by a narrow reading of s 44.

[26] It is our view that this Court retains its constitutionally granted jurisdiction and powers of remedy when hearing an election petition. However, the Elections Act governs the procedure for when the Court hears a matter falling within art 51 of the Constitution and it has additional remedies which it may grant which originate in the Election Act, specifically the powers contained in s 44(7) of the Act.

[27] We, therefore, find that the petition ought to have been brought procedurally as an election petition in terms of the Elections Rules.

[28] However, we do not believe that this should defeat the petition before us. We have several reasons to maintain the petition, the first and strongest of these is the discretion which is found in r 8 of the Election Petition Rules which grants the Court the power to make an order where an election petition fails to comply with the Rules of the Election Act. This discretion is not circumscribed, and the rationale appears to be to allow the Court to entertain a petition which may otherwise be dismissed for being improperly brought. Moreover, we note that this discretion does not require an application in order to be invoked, but can be raised *mero motu*.

[29] Furthermore, the very nature of this case is of such public importance that we would be hesitant to dismiss the matter on the basis of a procedural technicality, especially as “procedure is only the handmaid to justice” [*Gill & Ors v Film Ansalt* (2013) 1 SLR 137].

[30] We note further that the petition was correctly brought as a petition to Court and within the 14 days which is required by s 44 of the Elections Act. The petition contains a concise statement of the material facts on which the petitioner relies and the relief which the petitioner claims [r 7(1)]. The Attorney-General was correctly joined as a party [r 7(4)]. Therefore, there has been substantial compliance with the election petition rules, even if this was not intentional. It, therefore, does not prejudice either party for us to consider this as an election petition, notwithstanding the fact that Mr Georges was at pains to request that we consider it a constitutional challenge under art 130.

The Substantive Issue: The Interpretation of “Votes Cast”

Submissions of the petitioner

[31] Mr Georges on behalf of the petitioner has submitted that in order to achieve the requisite fifty percent threshold in the second ballot, the number of votes in favour of each candidate should be calculated by taking into account all of the votes contained in the ballot boxes at every polling station except perhaps for those votes that are mutilated or torn. He further submits that this approach is based on a clear interpretation of the phrase “votes in the election” in para [5] and “votes cast” at para [8] of Schedule 3 of the Constitution.

[32] Mr Georges has invited the Court to adopt, in his view, this irresistible interpretation taking into account the rules of constitutional interpretation as contained in the Constitution. He refers specifically to those rules of interpretation contained in Schedule 2 to the Constitution, the preamble of the Constitution and arts 21, 22, 24, 27 and 40 of the Constitution.

[33] It is important to set out in extenso those provisions on which he relies. Paragraph 8(a) of Schedule 2 of the Constitution provides in relevant part as follows: "For the purposes of interpretation – (a) the provisions of this Constitution shall be given their fair and liberal meaning; (b) this Constitution shall be read as a whole". The preamble provides in relevant part that:

CONSIDERING that these rights are most effectively maintained and protected in a democratic society where all powers of Government spring from the will of the people

...

SOLEMNLY DECLARING our unswaying commitment, during this our Third Republic, to... exercise our individual rights and freedoms with due regard to the rights and freedoms of others and the common interest;

Article 21 of the Constitution in relevant part provides that: "Every person has a right to freedom of conscience and for the purpose of this article this right includes freedom of thought". Article 22 goes: "Every person has a right to freedom of expression". Article 24 says: "Every citizen of Seychelles who has attained the age of eighteen years has a right... to vote by secret ballot at public elections which shall be by universal and equal suffrage. Article 27 reads: "Every person has a right to equal protection of the law... without discrimination on any ground except as is necessary in a democratic society". Article 40 says: "It shall be the duty of every citizen of Seychelles ... to strive towards the fulfilment of the aspirations contained in the preamble of this Constitution".

[34] The petitioner relies on all the provisions above to found and emphasise his submission that the overall philosophy in the Constitution of Seychelles is one providing counterweights and balance to a democratic society. He distinguishes between National Assembly elections which are one-round elections with a dual result: the election of a member for each constitutional area on a first-past-the post system irrespective of the percentage of the votes obtained and the election of a proportional elected member of the National Assembly for a political party that has polled more than 10 per cent of the votes and a Presidential election where a candidate must clear "more than fifty percent of the votes" [Schedule 2 para [8] (2) supra].

[35] In his view the right to vote as enshrined in art 24 means that every vote should have an equal value. In this regard, he submits, a vote in which there is a clear indication for a candidate must be equal to a vote which is rejected. In his submission, the exercise of the right to vote may be limited but not the right to vote or the manner in which one votes. As there is neither an obligation to vote, nor provision for a protest vote or for a "none of

the above" option, once a voter has his ballot paper in the ballot box the voting cannot be deleted. In his submission votes being equal in the voting process, one can either choose a candidate or refrain from voting or even cast a protest vote. In his view, the freedom of expression of a voter cannot be ignored.

[36] The only distinction that can be made according to Mr Georges is that between those who stay away from voting and those who take part in the process of voting. In his submission, all the votes in the ballot box must be counted as Seychellois law is silent on the meaning of the valid vote. He makes comparison with other constitutions, for example that of Brazil in which art 77(2) of its Constitution expressly states that the candidate obtaining a majority of valid votes excluding blank and invalid votes will be elected and Kenya which defines a spoilt ballot paper in s 77(1) its Elections (General) Regulations 2012 and which adds that such ballots will not be counted. He submits that s 34(2) of the Elections Act of Seychelles only defines a rejected vote but does not state that it is void.

[37] He relies on the Kenyan case of *Raila Odinga v The Independent Electoral and Boundaries Commission and ors* [2013] eKLR, para [281] which interpreted s 77(1) of Kenya's Election (General) Regulations. He cites page 102 from the judgment where the Supreme Court states that "a ballot paper marked and inserted into the ballot box has consistently been perceived as a vote...".

[38] He submitted that in many cases rejected votes may not be invalid. He relied on the English authority of *Morgan & Ors v Simpson & ors* [1974] 3 WLR 517 which is a proposition for the view that if a ballot is unstamped through the error of the Election Commission and not the voter, the vote may still be valid. Similarly, he submits that a voter who identifies himself on his ballot paper has only surrendered his right to secrecy but has validly exercised his right to vote and that that vote ought, therefore, to be counted. He submits that where however a ballot is torn or mutilated there can be no valid vote. However, he disagrees with the Court of Appeal decision in *PDM v Electoral Commission* (2011) SLR 384, namely with the pronouncement that a vote cast should be rejected in circumstances where it is unclear for whom a voter has voted. In his view, the status of such a vote is that it is still cast and should be counted.

[39] The status of the rejected votes in his submission must be viewed against the backdrop of the Constitution read as a whole and as emanating from the will of the people. It was the people's will that the President must be elected with a threshold of fifty percent. In his submission, the words *votes* and *votes cast* must be given a fair and liberal meaning to enlarge the meaning of the words rather than to restrict them. The calculation in a presidential vote must necessarily be made by the counting of all the votes in the ballot box. The petitioner argues that the fact that the phrase *votes cast* is used in Schedule 3 and the words *valid votes cast* was used in the original para [3](1) of Schedule 3 (since amended) in relation to proportionately elected members indicate that a distinction must be made between them. In his view, the drafters of the Constitution purposely omitted the word *valid* in Schedule 3 to indicate that all votes cast including those rejected should be counted to calculate the threshold percentage for a Presidential election.

[40] In his view, the *PDM* judgment construed as wide and liberal a meaning as possible to the provisions of the Constitution to achieve the intent of the drafters for the election of a proportionately elected member of the Assembly. Similarly, in the present case, it is the duty of the court to interpret the threshold to be as high as possible and not as low as is required.

Submissions of the First Respondent

[41] Mrs Aglae on behalf of the 1st respondent invited the Court to undertake a simple but contextual reading of the provisions of Schedule 3 to the Constitution. She referred specifically to para [5] of Schedule 3 which provides:

Subject to paragraphs 6 (sole candidate) and 7(death of candidate), a person shall not be elected to the office of President *unless he has received more than fifty percent of the votes in the election* and the necessary number of ballots may, subject to the election being discontinued and recommenced in accordance with an Act, be held in accordance with the direction of the Electoral Commission to achieve that result. [Emphasis added]

[42] In her submission, an indication by the voter of his choice of the candidate must be read into the word *vote*. Unless the voter has indicated his/her preference, then there is no vote for the candidate. In her view, this interpretation is reinforced by s 34 of the Elections Act which defines what constitutes a rejected vote and provides for the procedure in relation to all votes and their endorsement as such before counting proper takes place. In any case, she submits, the matter was already laid to rest in the *PDM* case and in the present case, the petitioner has brought nothing new for the Court to interpret or for it to enlarge the definition as stated in the *PDM* case.

[43] She also submits that no provision is made in the Constitution for a subsequent ballot post the second round. This necessitates the logical interpretation of s 34 that one of the candidates in the second round has to receive more than 50 per cent of the valid votes cast.

[44] She also submits that there is no distinction between the words *votes cast* or *valid votes* as employed either in relation to a Presidential election or a National Assembly election, both for direct and proportionately elected members.

Submissions of the Second Respondent

[45] Mr Hoareau, on behalf of the 2nd respondent, also submits that the *PDM* case substantially settled the law on the issue of *votes cast*. The Court of Appeal had laid an emphasis on the preamble of the Constitution and the entrenched principle of democracy and the democratic process.

[46] He further submits that the reliance placed on arts 1, 24 and 113 of the Constitution by the petitioner does not aid the interpretation of *votes cast*. He submits that the right to vote as provided in art 24 is not absolute and is restricted as art 24 provides in relevant part: “(2) The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society”. That law, he submits, is the Elections Act which provides for the exercise of the right to vote; hence if one does not act in the manner provided for in the Elections Act, one’s vote may not be taken into account.

[47] Mr Hoareau relied on the case of *Bappoo v Bughalloo and ors* (1978) MR 105 as cited by Fernando JA in *PDM*. Mr Hoareau cites the following excerpt from *Bappoo* which in his submission is relevant:

While it is true to say that effect should be given to the intention of the voter if it can be ascertained from the marking on the ballot paper, the voter must comply with a certain discipline, at least such as is necessary to regulate the holding of an election according to the expressed requirement of the law. The moment the voter adopts a method of voting which conflicts with the orderly arrangement of the election, his licence to express his vote as he chooses ends (at 107).

[48] Mr Hoareau further submits that Fernando JA in *PDM* was correct to distinguish between the right to vote and the right to vote in a valid manner. In Mr Hoareau's submission, although one may have a right not to express a vote, such a vote is not a right that should be given effect as it is not permitted by the provisions of the law.

[49] Further, he submits, in terms of the constitutional interpretation of the words “votes cast”, a liberal meaning of the law, contrary to what is submitted by Mr Georges, would entail a meaning that fosters and advances the principle of democracy as set out in the Constitution. In his view, a liberal meaning entails a contextual interpretation with an inference of consistency when similar terms are used in the provisions of the Constitution.

[50] In any case he submits, the issue was settled in *PDM* by the pronouncement of Fernando JA at 404:

...the term 'valid' in relation to a vote cast at a presidential or National Assembly election or referendum has always been mere surplusage in view of our Constitutional framework and does not become surplusage only in view of the provisions of the Elections Act.

[51] Mr Hoareau also submits that Mr Georges cites the Kenyan case of *Raila Odinga (supra)* out of context since that decision relied on the authority of the Seychellois Court of Appeal case of *PDM* to state that using a purposive approach to the definition of *votes cast* in art 138(4) of the Kenyan Constitution necessarily meant: “Valid votes cast and [did] not include ballot papers, or votes cast but are later rejected for non-compliance with the governing law and Regulations (para [286])”.

[52] Mr Hoareau further submits that since the Constitution must be read as a whole, in construing the provisions of para 5 of Schedule 2 of the Constitution one must read them together with the provisions of para [8](1) which makes specific provision for the words *votes cast* but also refers to situations where there are three or more candidates and the election proceeds to the second ballot. In his view, this logically presupposes that where there are only two candidates there is no subsequent ballot. In such a situation the term *votes cast* can only mean *valid votes cast*.

[53] In terms of the comparative study carried out by Mr Georges with respect to other Constitutions such as Brazil where the word *valid vote cast* is expressly stated, Mr Hoareau submits that laws can speak both expressly and impliedly. In the case of Seychelles and other countries in the region such as Uganda or Sri Lanka, the same wording *votes cast* is used and yet rejected votes are not included in the counting process similarly to Seychelles.

[54] Mr Hoareau further submits that s 21(1)(c) of the Elections Act expressly provides that in exercising one's vote, one does so in accordance with the notice set out in s21(1)(c). Such notice, he added, is the one placed outside the polling station which instructs a voter on the manner in which his vote should be recorded.

[55] Mr Hoareau also submits that if the petitioner concedes that a class of rejected vote, specifically those ballot papers which are torn or mutilated should not be counted, then all other rejected votes should also not be counted as the law in s 34(2) makes no distinction between rejected votes.

[56] Further, he adds, the counting process described in the provisions of s 34(2) indicate that before the count, the ballot papers are placed in groups to indicate the candidate for whom the voter has voted except for rejected papers. This together with s 36 of the Elections Act which provides for a ballot paper count classifying ballots as those, counted, rejected and unused leads to the inference that rejected ballots are not treated similarly to counted ballots. In his submission, a ballot paper not used in accordance with the procedure indicated does not amount to a vote.

Submissions of the Third respondent

[57] The Attorney-General adopts the arguments of the respondents. In his submission, the petition before the Court concerns a provision of law which was in *pari materia* to the one considered in *PDM*. The expression *votes cast* was interpreted by the Court and the expression now being challenged is contained in another part of the Constitution and should make no difference, regardless of whether it concerns executive or legislative elections. In terms of consistency, the term retains the same definition throughout the Constitution. One would have to distinguish the decision of the Court of Appeal in *PDM* on substantial facts to merit a departure from that authority.

[58] He further explores the consequences of reading into the definition of *votes cast*, total ballot papers in the ballot box in circumstances where there is a second ballot in a Presidential election. In his submission, if one was to compute the count on the basis of all ballot papers in the box regardless of whether they were valid or not, there was a possibility that the invalid votes might amount to more than 50% leading to a constitutional impasse as no candidate would ever achieve the threshold required.

Discussion

[59] The petitioner has submitted that the certificate of election was incorrect in that it was wrong to either declare that the 2nd respondent had received *more than fifty percent of the votes* in the election pursuant to para [5] of Schedule 3 of the Constitution or that the 2nd respondent had received *more than fifty percent of the votes cast* in the election pursuant to para [8](1) of Schedule 3 to the Constitution of Seychelles. The basis for his submission, if we understand him correctly, is that the 2nd respondent did not receive more than fifty percent of the votes as the words *votes* or *votes cast* refer to the total number of ballots in the ballot boxes and not valid votes.

[60] In this regard, we have looked for guidance to the International Institute for Democracy and Electoral Assistance (IDEA), an impartial organisation, working worldwide to support democracy. It is a permanent observer to the United Nations. It produces comparative knowledge in its key areas of expertise, which include electoral processes and political participation and representation. Its publications include *International Electoral Standards* and the *Venice Commission's Code of Good Practice in Electoral Matters* and *Report on Electoral Law and Electoral Administration in Europe: Synthesis Study on Recurrent Challenges and Problematic Issues*. We have consulted these publications.

[61] The latter publication sets out internationally recognised standards applicable across a range of areas of electoral legislation and provides basic and general electoral principles. It emphasises that the purpose of electoral laws is to achieve clarity and simplicity so as not to confuse the electorate. The overall goal of electoral laws is to provide both consistency and harmonisation between the Constitution and laws made in accordance with it. In this regard, the Report at 13-14 states:

It is important to note that each successively inferior authority cannot make provisions that contradict or are inconsistent with those of a superior authority. For example, an act of the legislature cannot contravene the Constitution....
As Constitutions are generally more complicated and time-consuming to amend, Constitutional provisions should not go beyond describing the very basics of electoral rights and the electoral system. In order to allow for necessary flexibility, provisions related to the management of elections should be incorporated into parliamentary legislation, and administrative and procedural matters should be left to administrative rules and regulations.

[62] This simple and logical approach is overwhelmingly convincing. While constitutions provide the broad brushstrokes of the citizen's right to vote and to take part in government, laws provide for the effective management of elections. Overall it is preferable that electoral laws avoid conflicting provisions in Presidential elections, national elections and referenda. Moreover, the stability of the law is crucial to the credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently confuse voters. It is therefore inconceivable that one should interpret an expression appearing in different parts of the Constitution or an electoral law in different ways. In our deliberations, these are the considerations that guide us.

[63] We note that throughout the Constitution there are several references to the words *vote* or *votes cast* in relation to elections and referenda. These are contained in the following provisions:

Article 91

- (1) The National Assembly shall not proceed on a Bill to alter Chapter I, Chapter III, this article, article 110 or article 111 unless -(a) the proposed alteration contained in the Bill has been approved in a referendum by not less than sixty percent of *the votes cast* in the referendum...

Article 110

- (4)(a) Where [...] the National Assembly votes against any measure or proposal of the Government and on a referendum a majority of *the votes cast* in the referendum supports the measure or proposal ... the President may..., dissolve the National Assembly.

Paragraph 2 of Schedule 3

Where a person *receives less than 5% of the votes cast* at the election for the office of President in respect of which the person is standing as a candidate, the person shall forfeit to the Republic the sum deposited or in respect of which security was given.

Paragraph 5 of Schedule 3

... a person shall not be elected to the office of President unless he has received *more than fifty percent of the votes* in the election....

Paragraph 8(1) of Schedule 3

Where in an election to the office of President three or more candidates take part in any ballot and no candidate receives more than *fifty percent of the votes cast* ... then, if the result of the ballot is that

- b) two or more candidates receive, equally, the highest number of votes...only those]candidates, shall take part in the subsequent ballot....

Paragraph 2 of Schedule 4

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate *10% or more of the votes cast* at the election may nominate proportionally elected members for each 10% of the votes polled.

Since the words *votes* or *vote cast* are used for all elections and referenda, it is our view that in terms of clarity and consistency the definition adopted by the Court for the present matter will necessitate a consistent application of such a definition to all the provisions of the Constitution and laws made pursuant to it where the words are used.

[64] It is true that the Constitution is silent as to the meaning of *votes cast*. However, we note that art 51(6)(c) of the Constitution provides in relevant part that: "A law may provide for ... any matter, not otherwise provided for in Schedule 3, which is necessary or required to ensure a true, fair and effective election of the President".

[65] It is, therefore, to the Elections Act that we must turn for the meaning of *votes cast*. The interpretation section of the Elections Act does not contain a definition of *votes cast*. In this respect, the Elections Act is similar to electoral laws of other jurisdictions. Before we examine the specific provisions of the Elections Act of Seychelles, however, we find it helpful to examine the concept of *vote* generally.

[66] The ordinary dictionary meaning of the word *vote* is "an indication of choice, opinion or will on a question such as the choosing of a candidate" (see *The Collins Dictionary and Thesaurus*, vol I) or "a formal expression of choice" (*Oxford Dictionary and Thesaurus*) and the phrase *to cast a vote* is to vote in an election or on an issue or to place one's ballot in the ballot box. Yet interestingly when someone has the casting vote he resolves a deadlock by casting the vote in favour of one side or the other (*Cambridge Dictionaries Online*). The simple issue in the present case is whether in Seychelles *casting a vote* is the act of inserting a ballot paper in a ballot box or indicating one's preference for a candidate on a ballot paper.

[67] Comparative studies in terms of electoral laws have been made by all parties to this petition and these submissions have been helpful. It must be noted, however, that terminology in electoral laws is not consistent across jurisdictions. For example, the term *spoilt* vote has different meanings. In Seychelles, a *spoilt* vote is a ballot paper that never enters a ballot box. In Canada for example, a *spoiled* vote is the equivalent of what in Seychelles is termed a rejected vote, that is, a ballot paper in the ballot box that is rejected for different reasons. However, although different terminology is used in different countries, generally those ballots considered spoilt, spoiled, void, null, informal, or stray are invalid and thus not included in the vote count. Spoiled ballots, rejected, and unused ballots are counted only to create a complete audit trail.

[68] It is noted that in some countries such as those pointed out by Mr Georges, namely Brazil, laws expressly state that the election of a candidate is dependent on it obtaining a majority of *valid votes excluding blank and invalid votes* and Kenya where s 77(1) of its Elections (General) Regulations 2012 defines a spoilt ballot paper and adds that such ballots will not be counted. Mr Hoareau has pointed to Croatia, the only country where he submits elections are determined on the percentage of people who have voted. We have looked at the Croatian Act on Election of Representatives to the Croatian Parliament and note that even so, in such elections only valid votes are taken into consideration for the count.

[69] We have rigorously considered what constitutes a *vote* and the distinction between *ballot papers* inserted into a ballot box and *votes* in different electoral systems worldwide. We summarise our findings below.

[70] In Australia, the terminology *formal vote* is used to indicate those votes that are counted to elect a candidate and *informal votes* those that are not. Section 123 of the Electoral Act of Queensland for example, in relevant part, provides as follows:

If a ballot paper has the effect to indicate a vote, it is a formal ballot paper.
If a ballot paper does not have the effect to indicate a vote, it is an informal ballot paper.

A vote in Australia is a formal expression of an individual's choice in voting, for or against some ballot question.

[71] Similarly, in New Zealand, ss 178-179 of the Electoral Act 1993 make a distinction between a *vote* and an *informal vote*. Informal votes are rejected and not included in the count of the votes for the party or constituency candidate.

[72] In the United Kingdom, a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated. A distinction is also made between ballot paper and vote (see ss 47-50 of the Representation of the People Act 1983).

[73] Section 283(3)(f) of the Canada Elections Act 2000 stipulates that at the count, the Deputy Returning Officer shall:

Examine each ballot, show the ballot to each person who is present, and ask the poll clerk to make a note on the tally sheet beside the name of the candidate for whom the vote was cast for the purpose of arriving at the total number of votes cast for each candidate.

Clearly, this implies that only votes which indicate a preference for a candidate are counted on the tally sheet.

[74] In Ireland, s 119(1) of the Electoral Act 1992 provides that the returning officer rejects invalid votes for the count of preferences for the election of a candidate.

[75] In the Netherlands, s J 26(1) of the Elections Act 1989 provides: "After receiving the ballot paper, the voter shall proceed to a polling booth and cast his vote thereby colouring red a white spot opposite the name of the candidate of his choice". Those ballot papers that are not marked as provided by the law are not counted as votes.

[76] In South Africa, s 47(3) of the Electoral Act of 1993 provides for the procedure for the rejection of votes and reg 25 of the Election Regulations of 2004 clarifies the procedure for counting the votes, clearly indicating that rejected ballots are not counted as part of the vote.

[77] In India, which partly uses electronic voting machines and also offers a None Of The Above (NOTA) option, the Conduct of Elections Rules made pursuant to s 64 of the Representation of People's Act 1951 makes a distinction between a ballot paper and a vote (see r 24). It provides that postal ballot votes should be rejected for the count where no preference or clear preference is shown for a candidate (r 54A). In terms of the Electronic Voting Machines, the "Result" of the election is captured by not taking into account the rejected vote or the NOTA votes. The NOTA vote only allows the electorate "the right to register a negative opinion." They are counted but do not affect the result as they are treated as invalid votes. Their purpose is only to put pressure on parties to nominate good candidates. (See *People's Union for Civil Liberties & Anor v Union of India & Anor* Writ Petition (Civil) No 161/2004, 27 September 2013).

[78] We have not been able to find a single jurisdiction where all votes cast are counted for the purpose of electing a candidate in an election. It would also appear that even in those jurisdictions where the phrase *votes cast* is used, only valid votes are counted for the election of a candidate. The word *valid* in this context is indeed mere surplusage. With this backdrop in mind, our task is to examine the definition of votes cast in the context of the electoral laws of Seychelles. Should the expression *votes cast* be entrusted with different meanings across the Constitution?

[79] Sections 34 and 36 of the Elections Act makes it clear that rejected votes are not taken into account for the count of votes for a candidate. They provide in relevant part as follows:

- 34 (2) Where a ballot paper—
- (i) does not bear the official mark referred to in section 25;
 - (ii) has anything written or marked by which a voter can be identified;
 - (iii) is mutilated or torn; or
 - (iv) does not contain a clear indication of the candidate for whom the voter has voted,
- the ballot paper, shall be rejected and shall be endorsed with the word "rejected" by the Electoral Officer ...
- (3) The ballot papers, *other than those rejected* under subsection (2), shall, in respect of an election or, where the Presidential Election and the National Assembly Election are held simultaneously, in respect of each such election separately, be thereafter sorted into different groups according to the indication of the candidate for whom the voter has voted, the ballot papers in each group *shall be counted* and the Electoral Officer or the Designated Electoral Officer, as the case may be, shall record the number of ballot papers in each group.

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- 36 (1) Upon the conclusion of the counting of votes, the Electoral Officer or the Designated Electoral Officer, as the case may be, shall in respect of an election or, where the Presidential Election and a National Assembly Election are held simultaneously, in respect of each such election separately, with the assistance of the enumerators—
- (a) in the presence of the candidates, if present, or the counting agents of candidates, as may be present, proceed to verify the ballot paper account referred to in section 29(1)(d) by comparing the number of ballot papers recorded in the account with the number of *ballot papers counted, rejected and unused*;
 - (b) shall seal in separate packets the counted, rejected and unused ballot papers;...
- (2) The Electoral Officer or the Designated Electoral Officer, as the case may be, shall, as soon as is practicable after the result of the election has been ascertained, transmit—
- (a) a statement of the result to the Electoral Commission....
[Emphasis added]

[80] However, while the Elections Act provides for the counting procedure in Seychelles and clearly shows that only valid votes are included in the vote count, the petitioner's submission goes further in underlining the differences between Schedule 3 and the original Schedule 4 of the Constitution to demonstrate a difference between them.

[81] According to his submission, *PDM* was rightly decided. In *PDM* the Court of Appeal held that it should adopt a democratic and purposeful interpretation which narrowed the meaning of *votes cast* to mean *valid votes cast* to ensure a maximum amount or proportionately elected representatives to the Seychellois National Assembly. Interestingly enough, it must be noted the petitioner's approach in the present case would result in an enlargement of the meaning of votes cast. In the petitioner's view a holistic, democratic and purposeful interpretation of the Schedules of the Constitution is that a distinction with the meaning of votes in para [5] or [8] of Schedule 3 was intended. Here, *votes cast* must mean valid and invalid votes.

[82] With respect, we fail to see how a democratic, purposeful and holistic interpretation of *votes cast* in Schedule 2 should deliver a different result. While the original provision of para [3](1) Schedule 4 of the Constitution may assist in explaining the amendment to the provision (the present para [2]) it cannot supersede it. The Court of Appeal explained the reason for the amendment in *PDM*. While we do not see a need to repeat what was said in that decision, we do point out that Mr Georges' submission cannot be sustained. It is the inconsistency in the interpretation of constitutional provisions that *PDM* corrected; the *ratio decidendi* in *PDM* is an articulation of the consistency approach urged by the IDEA in constitutional and attendant electoral legislation.

[83] We do agree with the 1st respondent's submission that the only distinction that ought to be made is between the insertion of a ballot paper in the ballot box and a vote so that, an indication by the voter of his choice of candidate must be read into the word *vote*. Unless the voter has indicated his/her preference, then there is no vote for any candidate.

[84] Mr Georges has also urged the court to consider the principle of equality of the vote to ensure that all votes are given the same value. We are not persuaded by this argument. The principle of equality of vote operates to provide for direct universal suffrage and a vote of equal value so that equal numbers of voters can vote for proportionally equal numbers of officials or that each person's vote is equal to the other person's. It certainly does not mean that a rejected vote of one voter has the same value as a valid vote of another voter.

[85] As Fernando JA stated in *PDM*:

Therefore in determining the membership of the National Assembly whether 'directly elected' or 'proportionately elected' it is only the wishes of those who decided to cast their votes correctly in favour of a candidate as expected of all Seychellois citizens, that needs to be considered and not those who sought to deliberately spoil the vote or vote incorrectly.

[86] The petitioner has also striven to differentiate between *the right to vote* and *the exercise of the right to vote* with the former, in his view, being incapable of limitation. We cannot accept the distinctions that he is making. It is certainly not an interpretation that can be derived from the constitutional provision of the right to vote since art 24(2) clearly states that: "The exercise of the right [to vote]...may be regulated by a law necessary in a democratic society". If a right or its exercise is regulated it is ultimately limited in some way.

[87] In any case, should we adopt Mr Georges' reasoning we would be equating the word *vote* with *ballot papers in the ballot box*. There are other reasons why we cannot venture down that path. Common sense is the most important of these. There must be a clear distinction between a ballot paper inserted into a ballot box and a vote counted in the election of a candidate. The Achilles heel of Mr Georges' argument is his concession that where a ballot is torn or mutilated it may not be counted. In making such a distinction he therefore also acknowledges that the value of votes are different. A valid vote does not have the same value as a rejected vote or a spoilt vote. The difficulty as pointed out by the Court of Appeal in *PDM* (supra), whose view was endorsed by the Kenyan Court in *Raila Odinga* (supra) is that:

If one includes spoilt votes in such computations, one is interpreting the intention behind the spoilt votes. However, a number of people also spoilt their votes as they do not know how to validly cast their votes or inadvertently spoilt their votes. It is impossible to separate those "real" spoilt votes from the "intentional" spoilt votes; to count the number

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of spoilt votes into total votes and ascribe to it the meaning of valid votes is to deliberately interpret the latent vote of a voter into a patent one. This then makes meaningless the distinction between spoilt votes and valid votes...

[NOTE - *Spoilt* votes here means *rejected* votes].

[88] Similarly, their Lordships Goburdhun and Moollan in *Bappoo* (supra) expressed the view that if one was to give the returning officer the power to vet a ballot paper outside the expressed requirements of the law one would leave him/her the power to ascertain each and every vote to decide whether different intentions might be inferred from votes cast, which in their Lordships' view was a recipe for chaos.

[89] As we have also pointed out, the comparative study above also indicates that in the process of counting votes for the election of a candidate, other electoral systems do not take into account rejected or spoilt votes. All the legislative instruments cited above provide for a consistent treatment of rejected, spoilt or informal votes. Those votes are disregarded for the election of a candidate whether or not there is an express provision stating that they are void. The support Mr Georges claims from the case of *Morgan & Ors* is ill-founded. That case is only authority that a voter who correctly expresses his vote through a defective ballot, the latter not being attributed to him, will have his vote counted for the election. Similarly, every ballot paper that is challenged may be ruled valid on various grounds but a rejected vote that remains rejected is never included as a valid vote in the count.

[90] We are also supported in our decision by the submission of the Attorney-General in respect of the provisions of a second or subsequent ballot in a Presidential election. Our reading of para [8] of Schedule 3 leads us to the conclusion that the reading of all votes into the phrase *votes cast* may well lead to a constitutional impasse where rejected votes outnumber valid votes. This cannot be said to have been the intention of the drafters of the Constitution.

Our Decision

[91] There is no merit in this petition. We are satisfied that the expression *votes* or *votes cast* in paras [5] and [8] of the Schedule 3 of the Constitution mean *valid votes cast*. The certificate issued by the Electoral Commission was, therefore, in order. For these reasons, we dismiss the petition.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, C McKee, D Akiiki-Kiiza JJ
31 May 2016

[2016] SCCC 11

Election petition – Illegal practices – Burden of proof – Standard of proof – Evidence – Judicial notice

The petitioner challenged the election of the 2nd respondent as President of Seychelles. The petitioner alleged that the 2nd respondent along with others breached the election law and resorted to illegal practices.

JUDGMENT Petition rejected.

HELD

- 1 Each and every element of a claim is to be proved by the petitioner alone. In case of necessity, the evidentiary burden may be shifted to the respondent.
- 2 In considering an allegation of illegal practices under an election petition, the civil standard of proof is adopted.
- 3 Practices that undermine the basic principles of the election process regardless of the election outcome amount to breaches of the election law.
- 4 If the election is conducted substantially in accordance with the law but some non-compliance affects the election result, the election is liable to be set aside.
- 5 The elements for an illegal practice include some *mens rea* in that the candidate or the agent must have knowledge of the illegal practice.
- 6 The advancement of technology such as internet may be taken as a matter of judicial notice as it permeates all aspects of society, including the legal system.

Legislation

Constitution, arts 19, 20(1)(b), 51, 115(3), 116(1), 130, Schedule 3

Elections Act, ss 3(b), 7(1), 8, 9, 15(1)(a), 15(1)(b), 18, 21(c), 25(1)(a)(b)(i) (ii), 29(1)(b)(d), 44, 45, 47, 50, 51(1)(r), 51(3)(a)(j), 53(3)

Presidential Election and National Assembly Election (Election Petition) Rules 1998, rr 7(4), 15

Evidence Act, ss 12, 15(1), 45

Civil Code of Seychelles, arts 1984, 1989

Cases

Berlouis v Pierre (1974) SLR 221

Foreign Cases

B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340

Barrow-In-Furness (1886) 4 O'M &H 76

Besigye v Museveni [2007] UGSC 24 (Uganda)

Bush v Al Gore 531 US (2000)

Chapman v Oakleigh Animal Products Ltd (1970) 8 KIR 1063

Commonwealth Shipping Representative v P and O Branch Services [1923] AC 191
Erlam & Ors v Rahman & Anor [2015] EWHC 1215 (QB) (Tower Hamlets Case)
Gough v Chief Constable of the Derbyshire Constabulary [2002] QB 1213
Home Department v Rehman [2003] 1 AC 153
Hornal v Neuberger Products Ltd [1957] 1 QB 247
Jugnauth v Ringadoo and Others [2008] UKPC 50
Lewanika and Others v Chiluba [1998] ZMSC (1999) 1 LRC 138 (Zambia)
McVicar v United Kingdom Eur CtHR, App No 46311/99
Medhurst v Lough Casquet (1901) 17 TLR 210
Morgan v Simpson [1975] QB 151
Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others (Writ J1/6/2013) (Ghana)
Odinga v Independent Electoral and Boundaries Commission and Others [2013] eKLR (Kenya)
Opitz v Wrzensnewskyj (2012) SCC 55, (2012) 3 SCR 76
Pilling and Others v Reynolds [2008] EWHC 316 (QB)
R (McCann) v Crown Court at Manchester [2003] 1 AC 787
R v Rowe ex parte Mainwaring and Others [1992] 1 WLR 1059
Re B (Children) (FC) [2008] UKHL 35
Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563
Simmons v Khan [2008] EWHC B4 (QB)

Foreign Legislation

Crime and Disorder Act 1998 (UK)
Football Spectator Act 1998 (UK)
Representation of the People Act, s 45(1) (Mauritius)

Counsel B Georges and A Georges for the petitioner
 S Aglae for the 1st respondent
 B Hoareau and L Ballabhji for the 2nd respondent
 Attorney-General and A Subarnainan for the 3rd
 respondent

JUDGMENT

[1] In early December 2015, the citizens of Seychelles went to the polling stations to choose their President for the next five years. This important democratic exercise was run by the 1st respondent, the Electoral Commission, which is a politically independent body constitutionally mandated to conduct and supervise elections in Seychelles (see art 115(3) and art 116(1)(a) of the Constitution. The petitioner, Mr Wavel John Charles Ramkalawan, and the 2nd respondent, Mr James Alix Michel, were both candidates for the presidency for their respective political parties, the Seychelles National Party (SNP) and Parti Lepep (PL).

[2] Elections in Seychelles are always heated and passionate and this one was no different. The elections took place over three days (3-5 December 2015) to allow Seychellois living on remote islands to vote first, followed by the inhabitants of the three main populated islands of Mahé, Praslin and La Digue on the final day. Six political parties fielded candidates in the election and a staggering 87.4 per cent of the eligible voters turned out on the day to cast their ballot, with 62,004 people braving the heat of the day and the long queues to exercise their right to vote.

[3] Since the return of multiparty democracy in 1993, Parti Lepep (PL) [or its predecessor the Seychelles Peoples Progressive Front (SPPF)] has won each Presidential election in the first round with more than 54 per cent of the vote. In this election, the 2nd respondent, who was running for his third term of office, secured the highest percentage of votes (47.76 per cent). However, he failed to secure the required fifty per cent of the votes in the election in order to be appointed as the president (see in this regard Schedule 3, para [5] of the Constitution). The petitioner secured 35.33 per cent of the vote with the other four opposition parties making up the remaining percentages. Rallying together, supporters of the five opposition parties took to the streets in celebration of their combined 52 per cent. Simultaneously the supporters of PL took to the streets in celebration of their majority. However, the elections were far from over.

[4] With no candidate securing more than fifty percent of the vote, the 1st respondent was required by law to run a second round of elections. According to Schedule 3 para [8] of the Constitution, in a second round of Presidential elections only the two candidates with the highest number of votes take part. Therefore, the petitioner and the 2nd respondents were to run against each other.

[5] The second round of the election was held on 16, 17 and 18 December 2015. A record number of 63,983 persons voted over the three days and as the results from the 25 electoral districts came in, it became clear that both candidates were neck and neck in the running. Eventually, late in the evening on 18 December 2015, the following results were declared by the 1st respondent: -

31,319 (49.85 per cent of the votes) votes in favour of the petitioner.

31,512 (50.15 per cent of the votes) in favour of the 2nd respondent.

Hence, the 2nd respondent won the election by 193 votes.

[6] After this historic process, the petitioner brought two cases to the Constitutional Court as he felt aggrieved by the declaration by the 1st respondent, that the 2nd respondent was validly elected President of Seychelles. The first case was brought as a constitutional petition in terms of art 130 of the Constitution and given case number CP 07 of 2015. The second, this petition was brought under art 51 of the Constitution and s 44 of the Elections Act ("the Act"). This case is assigned the case number CP 01 of 2016.

[7] The 3rd respondent, the Attorney-General, was joined to the petition under r 7(4) of the Presidential Election and National Assembly Election (Election Petition) Rules 1998.

[8] The petition was lodged in the Registry of the Supreme Court on 5 January 2016 and the respondents filed their replies thereto. Since both cases involve the same parties the two cases, CP 01 of 2016 and CP 07 of 2015 were consolidated for the purposes of hearing the matters and the hearings commenced on 14 January 2016. Today we are handing down judgments in both matters separately under their assigned case numbers.

[9] The petitioner and the respondents all raised preliminary matters and objections which the Court dealt with during the course of hearing of the petition. The Court made temporary rulings in certain matters, including with regard to the admissibility of certain evidence and reserved its reasoning, which reasoning is dealt with in the course of this judgment.

Case for the Petitioner against the First Respondent

[10] The petitioner avers that in a number of respects the 1st respondent, directly or through persons appointed to conduct the election in polling stations, failed to comply with the provisions of the Act and that this non-compliance directly affected the results of the election.

Particulars of Non-Compliance

[11] The petitioner alleges the following acts of non-compliance with the Act:

- a. That the 1st respondent failed to ensure that the indelible ink and proper quality invisible spray were procured and used in the election which left open the possibility of double voting.
- b. That in allowing a special polling station to be open on Mahé during the morning of 18 December 2015 for voters registered in Grand Anse and Baie Ste Anne on Praslin and on La Digue, at the same time as the polling stations in those three electoral areas opened a possibility of voting twice or impersonation contrary to the Act.
- c. That on 18 December 2015, two unknown persons voted in the special polling station at the National Library on Mahé in the names of Damian Charles Hoareau and Stan Nerick Fanchette, both voters registered in the Inner Islands electoral area. This illustrated a possibility of others voting twice in other polling stations or there was a greater impersonation which casts doubt on the genuineness of the record of votes cast in the three electoral areas.
- d. That the 1st respondent failed to ensure that the dignity of the aged voters was protected while exercising their right to vote.
- e. That there was a withholding of identity cards and coaching conducted by the 2nd respondent's agents.

Particulars of Non-Compliance by the Electoral Officers or Their Assistants

[12] In terms of non-compliance with the Act by the Electoral Officers or their assistants the particulars are as follows:

- a. That one voter who was registered in Bel Ombre Electoral Area was given a ballot paper to vote in Grand Anse, Mahé contrary to the Act.
- b. That a voter, Mrs Barbara Cooposamy, registered in the Plaisance electoral area was informed that someone else had already voted in her place, which was contrary to s 25(1)(a)(ii) of the Act.

Particulars of Irregularities in the Counting of Ballot Papers

[13] The petitioner averred the following non-compliance with the Act in relation to the counting procedure:

- a. That there were irregularities in the counting of ballot papers that affected the result of the election
- b. That the use of more than one electoral register in polling stations led to a failure to reconcile them, making it impossible to determine whether or not there was double voting in the same station.
- c. That having authorised voters to vote in the special polling station, the 1st respondent failed to ensure that votes cast in the special polling station and envelopes containing these votes were actually received in the polling station in the respective electoral area tallied. These stations were Anse Boileau, Au Cap, Anse Etoile, Bel Air, English River, Glacis and Pointe La Rue.
- d. That this cast doubt on the correctness of the procedure for voting in the special polling station, of the votes cast and the transmission thereof to the polling station in electoral areas.
- e. That in three polling station, the number of votes counted did not tally with the number of ballots issued. In Anse Aux Pins, there were two extra ballots which were marked with ball point pen. In Cascade, one extra ballot was found and counted. In Glacis, one ballot was found missing. That these irregularities cast a doubt on the genuineness of the poll in the three polling station

The Case against the Second Respondent

[14] The petitioner avers that there were illegal practices committed by the 2nd respondent in connection with the election by or with the knowledge and consent or approval of his agents contrary to s 51(3)(a) of the Act.

Particulars of Illegal Practices

[15] The particulars of the illegal practices complained of are the following:

- a. That between the two ballots the Agency for Social Protection in the Ministry of Social Affairs invited a large number of people to receive supplementary incomes. That this was to influence the recipients thereof to vote for the 2nd respondent contrary to ss 50 and 51(1)(r) of the Act.
- b. That on 16 December 2015, the District Administration Office at Perseverance distributed money to Mrs Jeanne [sic] Moustache with a view to influence her to vote for the 2nd respondent.
- c. That the announcement by the Principal Secretary of the Ministry of Finance, Trade and the Blue Economy on 16 December 2015 that all Seychellois employees of Indian Ocean Tuna Company earning less than R 15,000 per month would get a thirteenth month salary as an incentive, was aimed at influencing the 700 workers of the Company to vote for the 2nd respondent contrary to ss 50 and 51(1)(r) of the Act.
- d. That the offer by Mr France Albert Rene, former President and an agent of the 2nd respondent, to Mr Patrick Pillay of a high post in PL and the Government, if Mr Pillay returned to PL, was designed to induce Mr Pillay and others to vote for the 2nd respondent. That this was contrary to s 51(3)(c) of the Act.
- e. That between the ballots, the offer by Mrs Sylvette Pool, an agent of the 2nd respondent, to have Mr Peter Rodney Jules' loans written off with the Small Business Finance Agency if he procured the votes of former supporters of PL who had switched to the opposition, was contrary to s 51(3)(a) and (c) of the Act.
- f. That between the ballots and at the instigation of the 2nd respondent, Mrs Dania Valentin of Roche Caiman spoke in favour of PL despite her support for Mr Patrick Pillay, so as to secure a release from prison for her companion, Mr Francois contrary to s 51(3)(c) of the Act.
- g. That with a view of threatening temporal loss to the people of Seychelles and to induce voters in the second ballot to refrain from voting for the petitioner and to vote for the 2nd respondent, the latter stated in the *Seychelles Nation*, a government newspaper that Etihad Airways would probably pull out of Seychelles if the opposition won the election. The same sentiment was voiced by the Chairman of the Civil Aviation Authority in Social Media posts on 14 and 15 December 2015. That both instances were intended to induce the employees of the Airline to vote for the 2nd respondent instead of the petitioner.
- h. That the Speaker of the National Assembly and a supporter of the 2nd respondent made statements during an interview on Seychelles Broadcasting Corporation (SBC) TV to the effect that if the petitioner was elected, there might be difficulties in passing the budget and the approval of

the new Ministers which would lead to a shutdown. That this was intended to induce the employees of the public service and other Seychellois to vote for the 2nd respondent instead of the petitioner.

- i. That Mrs Beryl Botsoie, a Headmistress of La Rosiere School, and a supporter of the 2nd respondent induced her teachers not to vote for the petitioner as they would otherwise risk their livelihoods and not be paid, as the new government would not be able to pass the budget.
- j. That with a view to threatening temporal loss, three high ranking Seychelles People's Defence Forces (SPDF) Officers made disparaging remarks about the petitioner and invited the SPDF members to vote for the 2nd respondent instead of the petitioner, otherwise they would risk their livelihoods and lose their salary as the new government would not be able to pass the budget.
- k. That there was widespread giving of money and gifts by agents of the 2nd respondent contrary to s 51(3)(a) of the Act.

The Petitioner's Prayer to the Court

[16] The petitioner prayed, in view of the sum total of the above irregularities and non-compliance with the electoral laws, that the Court:

- a. Declare that for the reasons set out in paras [23] and [24] of the petition, there was non-compliance with the provisions of the law by the 1st respondent relating to the election and the non-compliance affected the result of the election.
- b. Declare that there were irregularities in the manner of counting of the ballot papers used in the election and that these affected the results of the election.
- c. Order a recount of all ballot papers used on 16, 17 and 18 December 2015, in all electoral areas nationally, such recount to include a prior reconciliation of all copies of the Electoral Registers used in all polling station.
- d. Declare that, for reasons set out in paras [25] to [31] of the petition, illegal practices were committed in connection with the election by or with the knowledge and consent or approval of the 2nd respondent or of his agents.
- e. Declare that the election is void.
- f. Make such further order or give further direction as may be just and appropriate in the circumstances.

Case for the First Respondent

[17] The 1st respondent opposes the petition and contends that the election was held in accordance with the electoral laws and the Constitution. That in case there was any non-compliance, which was denied, this was due to human error and never affected the results of the election.

[18] The 1st respondent averred that:

- a. There were no irregularities in the counting of ballot papers that affected the result of the election.
- b. The 1st respondent ensured that indelible ink and proper quality spray were procured and used during the elections.
- c. The special polling station which opened on Mahé during the morning of 18 December 2015 for voters registered in the two Praslin Electoral Areas and the Inner Islands Electoral areas was in accordance with the Act, and suitable arrangements were in place to ensure that every voter could only cast one vote or have only one vote against the voter's name.
- d. During the second ballot, no person voted twice or had impersonated genuine voters who did not vote at all.
- e. The 1st respondent at all times ensured that safeguards to protect the dignity of the aged voters and exercise their right to vote were in place.
- f. There was not any withholding of identity cards at North East Point Home for the elderly.
- g. There were no other persons who voted in place of Damien Charles Hoareau and Stan Nerick Fachette at the special polling station at the National Library and the same for Barbara Mirenda Copoosamy at Plaisance polling station.
- h. The use of more than one copy of the same Electoral Register in the polling station was to facilitate the voting process. The same copy was availed of by the polling agents of the candidates. No objection from them was raised.
- i. The provision of a special polling station is a creature of the law. The agents of both candidates were present during the sorting out of the envelopes received and they signed the documents accepting the records of envelopes declared as correct and any errors on the envelopes were explained to these agents and no objection was raised.
- j. As regards the use of ballpoint pens instead of the black marker, no objection was raised during the counting of votes regarding the two voters by either side's agent.
- k. All ballot papers tallied and were accounted for at the end of the exercise, including those from Cascade and Glacis polling stations and that the agents for both candidates signed.
- l. The existence of 99 or 101 ballot papers instead of 100 in every batch of ballot papers might have happened. However, all ballot papers given to all electoral areas were accounted for.

[19] The 1st respondent prayed for the dismissal of the petition with costs. It also prayed for such other order and relief as the Court may deem fit to grant.

The Second Respondent's Case

[20] The 2nd respondent's case was to deny all allegations made against him by the petitioner and put him to strict proof thereof.

[21] In terms of the alleged non-compliance by the 1st respondent with the Constitution and other electoral laws and the alleged illegal practices raised by the petitioner, the 2nd respondent more or less repeated the averments made by the 1st respondent regarding the alleged non-compliance. We do not see the necessity to repeat them. Consideration is, therefore, made in regards to his defence in connection with the alleged illegal practices raised against him, which he denies and puts the petitioner to strict proof thereof. His averments are as follows:

- a. That the Agency for Social Protection is governed by the Agency for Social Protection Act, and any payments of Social Assistance were carried out within the ambit of that Act.
- b. That there was no money distributed at the District Administrative Office at Perseverance.
- c. That the decision of the Ministry of Finance, Trade and Blue Economy to award a thirteenth salary to the employees of the Indian Ocean Tuna Limited was not an illegal practice under s 51(3)(a) of the Act.
- d. That Mr Albert Rene was not his agent nor did he call Mr Patrick Pillay between the two ballots, if he did so, he did not offer him any post in PL.
- e. That Mrs Sylvette Pool merely enquired from Mr Peter Rodney Jules as to why he had left PL but never offered to write off any loan.
- f. That Mr Flossel Francois was released from prison in accordance with the law and advice from the Pardon Advisory Committee which was made purely on medical grounds.
- g. That the 2nd respondent did not state to the Seychelles Nation Newspaper that Etihad Airways would probably pull out of Seychelles if the opposition won and therefore there was no threat of temporal loss.
- h. That any statements made by Captain David Savy in a blog were made in his personal capacity but not as the 2nd respondent's agent nor in his capacity as the Chairman of Seychelles Civil Aviation Authority.
- i. That whatever Dr Patrick Herminie stated during the SBC TV interview was done in his capacity as the Speaker and Head of the National Assembly, but not as the 2nd respondent's agent, and therefore did not threaten any temporal loss in terms of s 51(3)(j) of the Elections Act.
- j. That what Mrs Beryl Botsoie is alleged to have said was in her personal capacity and not as the 2nd respondent's agent.
- k. That what the three Senior Military Officers of SPDF are said to have told to soldiers was not done in any capacity as the 2nd respondent's agents and never amounted to a threat of temporal loss within the meaning of s 51(3)(j) of the Act.

- I. That Mrs Marie-Therese Dine had wanted to vote which is why Mr Dolor Ernesta had offered her transport to the polling station, but this was interfered with by Mr Simon Phillip Camille.

[22] On the other hand, the 2nd respondent averred that the petitioner had committed an illegal practice by publishing and distributing leaflets in the Tamil Language to voters from the Tamil community in Seychelles promising them senior posts in his government, thereby inducing them to vote for him or to refrain from voting for the 2nd respondent. This was contrary to s 51(3)(b) of the Electoral Act.

[23] The 2nd respondent prayed for the dismissal of the petition with costs.

The Third Respondent's Case

[24] The 3rd respondent is the Attorney-General. There was no specific grievance against him in the petition. In a ruling on a preliminary matter in the case, the Court ruled that the Attorney-General's role was solely as *amicus curiae*, with no live interest in the suit. The Attorney-General more or less supported the 1st and 2nd respondents' cases. He also prayed for the dismissal of the petition with costs.

Agreed Facts

[25] The parties also filed a memorandum of agreed facts on the following matters:

- a. Damien Charles Hoareau of La Passe, La Digue, NIN No. 962 – 0402 0 1-1-31 and Stan Nerick Fanchette of Anse Reunion, La Digue, NIN No. 995 – 1489-1-1-12, both voters registered in the Inner Islands electoral area, voted on 18 December 2015 at the polling station on La Digue. Neither voted at the special polling station at the National Library on Mahé on that day.
- b. In all polling stations, during the second Ballot on 18 December 2015;
 - i. More than one copy of the electoral register for each electoral area was used to mark names of voters who had attended at the polling station;
 - ii. No reconciliation of the copies of the electoral registers used in the polling station was made.
- c. On 18 December 2015, the following counting agents of the petitioner, in their respective polling station, were given a photocopy of the electoral station ballot paper account:

| | | |
|-------|----------------------|---------------|
| (i) | John Michel Hoareau | Beau Vallon |
| (ii) | Regina Alcindor | Glacis |
| (iii) | Alain Niole | Inner Islands |
| (iv) | Bernard Georges | Les Mamelles |
| (v) | Clive Roucou | Plaisance |
| (vi) | Alain Andre Ernesta | Port Glaud |
| (vii) | Bernard Freddy Denis | Takamaka |

- d. There were 531 Seychellois employees of the Indian Ocean Tuna Limited who qualified for the 13th-month salary and who were paid their 13th month in January 2016.

[26] During the hearing of the petition, paras [30](i) and [31](c) of the petition were struck out by the Court for failing to comply with the provisions of the Act in that they did not set out sufficient particulars.

[27] Further, no evidence was led to prove the allegations in paras [31](h) and [27] of the petition.

Evidence and Witnesses

[28] The petitioner testified on his own behalf before calling witnesses to support his petition.

[29] The petitioner stated that he had received various reports from his polling agents which led him to believe that there were irregularities in the way the election had gone on and that it was possible that the ultimate result of the national vote was incorrect. He made specific references to a number of these irregularities as set out below.

[30] On 18 December 2015, the petitioner presented a letter to the Electoral Commission demanding a recount on the basis that the difference of the estimated votes was too narrow and that he was not able to accept the figures declared in respect of the constituencies.

[31] He was notified of any irregularities or problems with the voting during the day, and whenever he considered them significant he would call Mr Gappy (the Chairman of the Electoral Commission) or Mr Morin (the Chief Electoral Officer).

[32] In order to make the amount of evidence brought in the case more manageable, we have provided a summary of the evidence below grouped according to the averments of the petitioner. Where possible we have placed all evidence pertaining to that averment under that head, and not just that of the petitioner.

Allegations of Non-Compliance

That the 1st respondent failed to ensure that the indelible ink and proper quality invisible spray were procured and used in the election which left open the possibility of double voting.

[33] The petitioner testified that he was not satisfied with the quality of indelible ink and UV spray used for the election.

[34] Mr David Vidot, a polling agent for the Cascade polling station gave testimony that having voted he went home, went to the kitchen and washed his hands with washing liquid and a sponge. He testified that he did not put much effort into removing the ink but the ink came off his index finger. He testified that there was not even a trace of ink left on

his finger. He returned to the voting station around 2 or 2.30 pm to resume work as a polling agent, for an hour or so and then he returned at the time of the counting in the evening at 7 pm. In the evening, he asked the presiding officer if they could check to see whether the ink and spray had, in fact, come off. He testified that this was observed by Mr Charles de Commarmond, the representative for Parti Lepep. When examining his hands under the UV light, there was no ink except for two small dots on one side of his hand, but on the main surface of his hands where the spray was applied, it was no longer visible.

[35] In response, Mr Morin, the Chief Electoral Officer testified for the 1st respondent that the ink was ordered from a reputed company in India which is ISO certified. This ink has been used before in previous elections and was also used in the first round of this election. [36] Mr Gappy also testified in this regard stating that the ink and spray were bought from a company in India. The Commission had been buying ink from the Company for 15 years. It was ISO certified and of good repute. Mr Gappy also stated that there were no complaints of the ink for the second round not being the same quality as the first round.

That in allowing a special polling station to be open on Mahé during the morning of 18 December 2015 for voters registered in Grand Anse and Baie Ste Anne on Praslin, and on La Digue, at the same time as the polling stations in those three electoral areas opened a possibility of voting twice or impersonation contrary to the Act.

[37] The petitioner raised an objection to the concurrent running of the special polling station at the National Library on Mahé and the polling station on La Digue and Praslin. The petitioner described the use of special polling stations, as those stations where polling takes place before the main polling day, and on the main polling day, the special polling station at the National Library, Victoria for residents of Praslin and La Digue who are on Mahé that day.

[38] On 18 December, the main polling day, the polling stations on Praslin and La Digue were open for persons from Praslin and the Inner Islands to vote. These stations were open concurrently to the Mahé special polling station held at the National Library at which persons from La Digue, Baie St Anne and Grande Anse Praslin were permitted to vote. The special polling station on Mahé was open until midday, thereafter the votes were sent to their respective election areas to be counted.

[39] Ballots cast at a special polling stations are placed in an envelope that is marked with the electoral area of that voter. These ballots are transferred to the Electoral Commission and then to the Electoral Area where the voter was registered, and are counted as part of that area.

[40] For ballots cast at special polling station prior to the main voting day on 18 December, there was a sorting out of all envelopes from the special polling stations on the night of 17 December. These were sorted according to their district, electronic registers were

generated of who had voted at the station, and a sheet detailing the number of envelopes distributed to each district was generated and signed by those present who were representatives of the petitioner, 1st respondent and 2nd respondent.

[41] The list of names of persons who had voted at a special polling station was then sent to the various constituencies. Then before voting began, at the polling station in the Electoral Area, the list was called out so that those working as officers of the Electoral Commission could cross out the names of those people on the registers, and the polling agents representing the presidential candidates also crossed those names out on their registers. The page and line of the register is called and the officer then uses a ruler to cross out the whole name on the register.

[42] Mr Morin testified that lists were made by district which identified who would be permitted to vote at a special polling station. Persons who were not on the list were also allowed to vote, such as where a fisherman on Assumption identified himself and stated which district he was from, he would be permitted to vote. This did in fact happen at Silhouette, and on another island where the names were added to the list. The Electoral Officer would then go through the procedures to ensure that the person has not voted previously, and the officer would check that the individual was on the master register (certified as a registered voter).

[43] After the voting on the special polling station, the ballot boxes were sealed and transported to Mahé; from the airport they were escorted to the Electoral Office where they were handed to Mr Morin.

[44] The petitioner described that in order to speed up voting in the second round of the elections it was decided between the two candidates that the ID numbers of the voters would not be called out. Moreover, the Electoral Commission increased the number of registers for the second round of elections.

[45] The petitioner testified that he had been provided with three electoral registers containing the names of persons entitled to vote in the electoral area of the Inner Islands. The 1st respondent had informed the petitioner that these were the registers used to mark off all voters who voted on La Digue.

[46] He stated that he had been told by Mr Gappy (Chairperson of the Electoral Commission) that the third (more comprehensive) register was drawn from the 2nd register number (which was not the one at the door when people came in, but a different register). He stated that he discovered that several names had not been transferred from the 1st register (ie the one used on Mahé) to the 2nd register (the main register on La Digue). This meant that a number of persons who voted on Mahé were not crossed off the list on La Digue.

[47] Later in the proceedings (in March 2016) another two registers were produced and Mr Gappy denied stating that the third register was the comprehensive list of all voters. Having looked at these in greater detail we can see that all persons who voted on Mahé

are marked off in two of the registers, and the third register contains the names of all of the persons who voted on La Digue at the La Digue polling station, along with the names of most of the persons who had voted at the special polling station on Mahé (53 names had not been crossed off this register). The Court was also provided with a handwritten list of names of persons who had voted on Mahé which had been compiled during the day and facsimiled to La Digue periodically throughout the day.

[48] The petitioner testified that when he compared the number of votes cast in the Inner Islands (according to the national tally sheet) with the number of names marked off on the register, there was a discrepancy of 53 names. There were 53 extra votes, and 53 fewer names marked off. They were not able to carry out the same exercise in the other constituencies because they did not have access to the registers.

[49] Mrs Aglaé put it to the petitioner that the person calling out the names might not have had an opportunity to mark off the name at the same time, which would not have been necessary since the 2nd register was being used to mark off the names.

[50] She also put it to him that there may have been errors between the calling out of the names and the names that were written down on the list, that the incorrect page and line numbers may have been recorded but that the correct names had been recorded. Similarly that there were inconsistencies in the page and line numbers as well as the ID numbers that were recorded but that these did not affect the fact that the persons with the correct names had been called out.

[51] In response the petitioner stated that he was not satisfied with the number of human errors which existed and that what was particularly problematic was that the discrepancy between the number of votes declared by the Electoral Commission for the Inner Islands and the number actually cast (the discrepancy of 53 votes), showed that the Electoral Commission had not gone back to check the registers and their process until the petition had been brought.

[52] The petitioner stated that as he was not initially looking for this error, he was unable to carry out the same exercise with other voting stations, and so this may have occurred in other places too.

[53] Mrs Aglaé put it to him that that if he had compared all three registers, he would have found the 53 names. However, the petitioner pointed out that the fact that 53 names were not crossed off the register, opened the door for double voting, which it would be difficult to detect given that no correct reconciliation ever took place. The Attorney-General also reminded the petitioner that there were other procedures in place to prevent double voting, such as the use of the indelible ink and the ultraviolet spray.

[54] Mrs Aglaé was able to show that the 53 names he claimed were missing from the registers were in fact on the handwritten list but had not been transmitted by fax to La Digue and therefore not called out or entered in the register on La Digue, however they had been entered in the register in use at the special polling station on Mahé.

[55] Mr Morin, in his testimony, confirmed the way that the National Library special polling station operated on the same day as the La Digue station. There was a form that was filled in marking down all of the names of the persons who were voting and this was periodically transmitted to La Digue by fax during the day, 4 or 5 pages at a time.

[56] When asked to explain discrepancies between the registers used on La Digue, Mr Morin could not provide an answer and stated “it could have been an omission, it could have been human error, it could have been anything”. Mr Morin was not aware of the fact that not all names from the special polling station on the 18th were transmitted to La Digue.

[57] Mr Steve Thelermont who was a name caller and the person who crossed out names on the register at the special polling station at the National Library stated that there were three name callers; one for Grand Anse Praslin, Baie Sainte Anne and the Inner Islands, one for each table. He was the name caller for the Inner Islands.

[58] Mr Thelermont stated that when he called out a person's name, the Document Officer would record this on a statement. When the statement was full, it would be given to the Presiding Officer who would fix it. At the end of voting, there was a reconciliation of how many people voted and the total amount was 185 voters. This information was handed to the Presiding Officer who then gave the result. Mr Thelermont then explained the ballot papers were sealed in a khaki envelope and the necessary was done to secure those votes.

[59] Mr Thelermont identified his register as the true reflection of people who voted for the Inner Islands as he saw each and every person who came to vote for the inner island.

[60] He confirmed that the number of names on the list corresponded to the names called out and in addition he stated that he did a verification from his register and the unused ballots. The only discrepancy was the names and not the numbers.

[61] Every time one of the sheet of names was faxed, this was entered in the occurrence book.

[62] A possible explanation was given by Ms Aglaé for the fact that some names were not recorded on the register and Mr Thelermont agreed with the reasoning that when the page and line numbers were called out the incorrect numbers were heard, and this resulted in the inconsistencies. Mrs Aglaé invited the Court to infer that all 53 names which were missing from the register had been updated incorrectly resulting in the inconsistency.

[63] Mr Justin Mathiot is a senior auditor at the office of Auditor-General. During the second round of voting, he was the Presiding Officer for Inner Islands. He was at La Digue Island on the main polling day.

[64] He had not observed any person come to the polling station and vote more than once. The polling station had received a list from the headquarters, Mahé, on those who had already voted on 16 and 17 December. They also periodically received a list of names of voters who had cast their ballots at National Library station on 18 December 2016.

Whenever the list of those who had voted was faxed to him, he would distribute it to each polling agent. He would also have his staff read the names one by one so as to update the voters register and cross out the names so called.

[65] There were three registers used at the time of voting. Two were the registers used by the polling clerks to cross-check on each voter coming to the polling station at La Digue, and the third was the master register, used to consolidate the information in the first two registers. Whenever a voter visited the station and voted, his name would be crossed off either of the two registers. The officer manning the master register would also cross the name on the master register. Whenever a list of voters who had voted was sent from the special polling station at Mahé, the names would immediately be entered into the registers.

[66] Mr Mathiot was questioned about the discrepancies on the lists sent from the headquarters, when compared to the two registers and the master register. His explanation for the discrepancy was that it could have been caused by human error. There was also a possibility that officers had omitted to cross out names called out or that some pages of the list might not have been faxed from the headquarters. However, he was not concerned that this opened the door for double voting, as to prevent double voting there had been control measures employed.

[67] Before the polling station was closed, the votes cast at the special polling station at the National Library had to be delivered to La Digue, with an accompanying list and police security. The votes would be counted to tally with the list presented, and earlier faxed to La Digue. Those votes were added to the votes cast at La Digue, and a last count would be conducted. Party agents witnessed the activities and signed the ballot account.

[68] Mr Mathiot testified there had been 185 votes cast in Mahé at the National Library, for La Digue on 18 November 2015. A list of the voters who had cast their votes had been sent, accompanying the ballot box. However, it was pointed out by the petitioner that of those 185 names, 53 names had not been crossed off on the register on La Digue as having voted in special polling station on Mahé.

[69] Mr Mathiot testified that he had of his own initiative attempted to consolidate the registers in what he referred to as the master register. He had used it to cross-check the information that was in the two other registers. It attempted to incorporate all persons who had voted on La Digue and at the National Library.

[70] In Cross-examination by Mr Georges he stated that he had used the original handwritten list of names sent alongside the votes cast in Mahé to tally the votes and the list.

[71] He described the two registers that had two callers at the voting station at La Digue, and the third register, which was his own innovation. He drew a diagram to explain how voters would go through the voting process. He explained the two registers, each manned by a caller, and the third register, the master register. When a name was called, it would be crossed off on one of the two callers from the register. The same name would also be crossed on the master register simultaneously. The master register was not manned by one person all the time during the day. There would be interchanges of the person marking it as one would take short breaks. It however had to tally with the two other registers. He however admitted that he had not reconciled the two registers used by the callers with his master register, as he did not consider that necessary.

[72] Headquarters would periodically fax a list to him at La Digue, he would have his secretary photocopy it and have it distributed to the polling agents, and one copy would be given to his officer to read. At the reading, they would update his master register. The two callers were purposely there to facilitate the process. This was not however the procedure everywhere else. For instance he did not use the same procedure in Silhouette because the volume of voters was lower. He did not also make an entry into the occurrence book of his innovative procedure.

[73] He considered that the reason there were names missing from his master register was because the list of those names had not been transmitted/faxed to him in La Digue.

[74] He was also unable to explain the extra two registers referred to him by counsel. He explained that the list of voters who had voted two days earlier had only been crossed off the master register. But when referred to a different register on which the names had been crossed he did not know if that register have been market at La Digue or at Mahé. Some names were also wrongly crossed. He could not explain the discrepancy.

That on 18 December 2015, two unknown persons voted in the special polling station at the National Library on Mahé in the names of Damien Charles Hoareau and Stan Nerick Fanchette, both voters registered in the Inner Islands electoral area. This illustrated a possibility of others voting twice in other polling stations or there was a greater impersonation which casts doubt on the genuineness of the record of voter cast in the three electoral areas.

[75] The petitioner testified that the list of persons from La Digue who voted at the special polling station on Mahé on 18 December 2015 contained two errors relating to Damien Charles Hoareau and Stan Nerick Fanchette – an entry was made in the occurrence book, to say that the two names appeared on the register from Mahé, but that those two persons had also voted on La Digue.

[76] In this regard, the petitioner stated, having two polling stations open simultaneously is not fool-proof and opens the door for double voting. In cross-examination, however, Mrs Aglaé showed that in the special polling station those two names were crossed out

inadvertently when two other persons had presented themselves for voting. Although this incorrect information was passed on to La Digue, these other individuals had voted in their own names with their own IDs.

[77] Mr Hoareau for the 2nd respondent put it to Mr Ramkalawan that the person who voted on Mahé was *Nelson Hoareau* and it was wrongly recorded as *Damien Hoareau*. The petitioner commented in response that even if this was so, this was an irregularity as it clearly showed that the official records stamped by the Electoral Commission were incorrect. In addition, he stated that the procedures put in place should not have allowed such a mistake (name, line number, page number and NIN number were all meant to be checked).

[78] Mr Hoareau also put it to the petitioner that it was Berney Farabeau who voted on Mahé but was wrongly recorded as Stan Nerick Fanchette. Again, the petitioner stated that he could only go according to the official records, which showed that this man had voted on Mahé and on La Digue. He was of the opinion that this was too much of a human error.

[79] Mr Morin described the procedures that had been adopted in order to speed up the voting process in the second round. In the first round, they called out the page, line, NIN number, name of the voter and the date of birth. In the second round, there were meetings with the party representatives, and they agreed to have two or three callers and to only call the page and line number. This was agreed by both parties. It was as a result of this process that the two names had been able to be erroneously checked off the register.

[80] However, Mr Morin stated that there were mechanisms to prevent double voting: such as that the names of persons who voted at special polling station were called out prior to the start of voting in the morning in their electoral areas. Then there was also the UV lamp and the ink on the thumb.

[81] Mr Mathiot, the Electoral Officer for the polling station on La Digue testified in this regard that he was aware of the two persons who were noted to have voted earlier on La Digue and who were reported as having also voted at the National Library. He had reported this to the headquarters, and an entry was made in the Occurrence Book. After an investigation, headquarters had confirmed that this was a mistake and forwarded the list of names of voters who had voted.

That the 1st respondent failed to ensure that the dignity of aged voters was protected while exercising their right to vote.

[82] The petitioner brought evidence relating to the North East Point Elderly home in support of this allegation which is dealt with in more detail below.

[83] On the issue of aged voters the petitioner testified that party activists were allowed to take persons to vote and that this influenced who the voters would vote for.

[84] The petitioner brought evidence of a video in which Mr Dolor Ernesta, a former Minister and a member of Parti Lepep was involved in a confrontation with a member of the family of an elderly lady. He identified the gentleman in the video as Mr Camille who was seen to be accusing Mr Ernesta of forcing the elderly lady into his car and taking her to vote against her wishes. The gentleman in the video is heard shouting “you will bring this lady back to her home. She did not want to vote, you have come to force her to vote.”

[85] Mr Hoareau in cross-examination questioned the petitioner about whether he could verify the authenticity of this video, the petitioner stated that it is exactly as appeared on Facebook, he simply downloaded it.

[86] Mr Simon Philip Camille, the gentleman in the video, testified that his aunt is Marie Therese Dine, an 85-year-old pensioner who is blind and lives with her partner in Anse Aux Pins. On the morning of 18 December 2015, when he was sleeping he heard the neighbours calling out for him and he went around to her house, it was about 7 am. She was not there. He went to the polling station and found her in a vehicle outside the polling station. The vehicle was being driven by Mr Dolor Ernesta. His aunt was in the car, he said that her hair had not been combed, her clothes were inside out and there was sleep in her eyes. He asked Mr Ernesta to take her back home. He stated that his aunt did not know where she was.

[87] In cross-examination by Mr Hoareau it was put to him that Mrs Dine was only 74 years old, not 85.

[88] Mr Camille revealed that he did not realise that blind people were able to vote but in his view, he stated that they should not be allowed to vote. He testified that he was angry because "you cannot take somebody to vote without consulting their family". He did not answer when it was put to him by Mr Hoareau that he did not actually ask his aunt if she wanted to vote. It was also shown to him that his aunt was wearing a hat in the video and that he could not have seen what he stated was her uncombed hair.

That there was the withholding of identity cards and coaching conducted by the 2nd respondent's agents.

[89] On the morning of 16 December 2015, Mrs Regina Esparon, a polling agent for the petitioner, had requested that Mr Patrick Savy, another polling agent, investigate allegations of coaching occurring at the North East Point Old Persons' home. Mr Patrick Savy, who was a representative of Linyon Sanzman at the North East Point special polling station, went to the Old People's home, and entered the building, going into the women's ward.

[90] In the ward, he saw Mrs Anne Desir in the ward with the residents who live there. There were approximately 25 people in the room. Mr Savy stated that Ms Vicky Vanderwesthuizen who is a member of the Assembly and a representative of the Parti

Lepep came into the room. She raised her voice at Mr Savy and had him removed by security. Ms Vanderwesthuizen made a note in the occurrence book confirming that she had requested that he leave the Old Person's home at 7.45 am on 16 December.

[91] In relation to the North East Point Home, the petitioner testified that Mrs Anne Desir was in charge of the home. She was known to him to be Parti Lepep activist in the past. She was an activist for Parti Lepep during the December Elections.

[92] Mrs Vanderwesthuizen testified on behalf of the 2nd respondent and stated that she was a polling agent at North East Point for Parti Lepep, on behalf of Mr James Michel on 16 December 2015. She described the incident that occurred where she saw Mr Savy at the female ward and requested that he leave with the aid of the police present. He left the ward but was still on the premises of the polling station.

[93] On cross-examination by Mr Georges she stated that the incident occurred around 7.30 am in the morning and she then lodged a complaint in the occurrence book. She saw Mr Savy enter the polling station when it was his turn to take over, but the incident occurred before Mr Savy carried his duty as polling agent so she had not seen him. The access to the female ward was described as well as ways to get to the room which was set up for voting. Both were on the ground floor but one need not go through the polling room to get to the female ward. The witness stated that there were nurses when she saw Mr Savy at the female ward but she could not recall how many. Mrs Anne Desir was present as well and she is the head of the place.

[94] She stated that she decided to get involved, as she was conscious it was election time and was being alert and thought it was her duty to tell Mr Savy to leave. The witness stated that she made an entry in the occurrence book. Mr Georges suggested that she wanted Mr Savy to leave because she did not want him to see what was happening in the ward hence why she interceded. Mrs Vanderwesthuizen stated that he was not correct.

[95] With regard to the allegation of withholding of ID cards, Mr Matombe a member of the Citizen Democracy Watch Seychelles (CDWS) association testified on behalf of the petitioner. The CDWS was an accredited observer of the elections. Mr Matombe observed the North East Point Old People's hospital for the second round of voting. He arrived at 7.30 am and the presiding officer was putting everything in order. He witnessed a man shouting that he could not vote because he did not have his ID document. After 5-10 minutes somebody came and gave him his ID card.

[96] When asked about these matters, Mr Morin confirmed that there was a report in the North East Old Person's home special polling station occurrence book of workers telling residents whom to vote for. A report was sent to headquarters. Mr Morin received the report and reported the incident to the police for investigation. However, he did not follow up.

Non-Compliance by the Electoral Officers or Their Assistants

That one voter who was registered in Bel Ombre Electoral Area was given a ballot paper to vote in Grand Anse, Mahé contrary to the Act.

[97] Mrs Lizelle Tirant testified that on 18 December 2015 she had voted in Bel Ombre and then gone to Grand Anse to assist her mother who is in a wheelchair. Mrs Tirant accompanied her mother throughout the process of voting and was issued a ballot at the same time that her mother was issued a ballot paper. Mrs Tirant took the ballot paper and then realised that she had just been given a ballot although she was not registered in the area and had already voted. She took it back to the woman who had issued it. She testified that there was no supervision at the ballot box like there was in the Bel Ombre polling station. She stated that she could have used the ballot and voted. She said that she did not see any electoral officers or police officers in the station.

[98] In response, the 1st respondent called Mrs Cecile Boniface who was the person who gave ballot papers at the Grand Anse Mahé polling station in the second round in the Presidential election. Mrs Boniface testified that although Mrs Tirant had been presented with the ballot paper, she had refrained from taking it, immediately stating that she had already voted.

[99] Mrs Francoise Mein, the Deputy Presiding Officer at the Grand Anse Mahé polling station agreed with Mrs Boniface that Mrs Tirant was never given a paper but merely presented with a paper.

That a voter, Mrs Barbara Coopoosamy, registered in the Plaisance electoral area was informed that someone else had already voted in her place, which was contrary to s 25(1)(a)(ii) of the Act.

[100] Mrs Coopoosamy testified on behalf of the petitioner that on 18 December Mrs Coopoosamy went to her voting district (Plaisance) at about 10.30 am and was informed that she had already voted. She was asked to step aside while Mr Trevor Servina took up the issue with the person in charge of the polling station, and then a few minutes later she was allowed to vote. However, she was informed that someone had written an 'x' next to her name which is why she was initially declined.

[101] Mrs Coopoosamy showed the court 4 registers from the Plaisance station. In register 2 at page 14 line 34, her name had been crossed out, and there was an 'x' marked next to the name on the same line. In the registers numbered 1, 3 and 4 at the same place her name had not been crossed out.

[102] She testified that at the time that she voted there were about 50 people waiting to vote, several of whom were elderly persons using the fast track queue. She described the process – her hands were checked for marks, then she proceeded to the table to where the register was. Her name was not called out at any point.

[103] Mrs Aglaé put it to Mrs Coopposamy that in her affidavit she did not mention the 'x' next to her name and she asked her why she had omitted to mention this. Mrs Coopposamy held to her testimony that she had initially not been permitted to vote, then after 1-2 minutes, she was permitted to vote. She did not have to sign any declarations or statements. Mrs Aglaé pointed out the irregularity of the fact that there was no entry in the occurrence book, and no report.

[104] Mr Thomas Dauban who was the presiding officer at Plaisance for the second round of the Presidential elections came to testify with regard to the running of the Plaisance polling station. Mr Dauban stated that prior to the start of voting on 18 December 2015, he did not count each and every ballot paper received as he had done so before the election had started.

[105] With regard to Barbara Coopposamy, he confirmed that her name was marked off on the register with an asterisk or cross. Mr Dauban was not aware what the asterisk meant next to the name which had been crossed off. Mr Dauban admitted that he had seen a few names which had been crossed off with a cross or other remark next to it. Mr Dauban admitted that inadvertently a name could have been crossed out. Mr Dauban had not been made aware of Ms Coopposamy's situation, even though he was the presiding officer.

Irregularities in the Counting of Ballot Papers

That there were irregularities in the counting of ballot papers that affected the result of the election

[106] The petitioner produced a handbook that had been prepared and published by the Electoral Commission in November 2015. It was accepted by all parties as the document laying out the procedure for the elections and the procedures at the polling stations specifically.

[107] This handbook stated that the ballot papers would be printed in books of 100, 50 and 25 and that the content of each book was to be verified to ensure that they contained the correct number of pages. At the start of the voting, the electoral officer was to re-verify the content, and record it in the occurrence book. However, it became apparent that this did not occur at all of the polling stations. The petitioner and Mrs Georges had gone through five occurrence books and none of them noted the number of ballots or that the number had been verified.

[108] Mr Nicholas Prea was a polling agent at the Bel Ombre polling station and described the process. He stated that one pack of 100 ballots was counted in front of everyone, and then "they presumed that all batches also contained 100 ballot papers". They had a list of who had voted at special polling station; they had received 176 names.

[109] They had 5 registers in place during the day and 5 "callers". In the second round only the page number and line number were called, not the details of the voters. The names were only marked off on one of the 5 registers.

[110] At the end of the day, the registers were collected by the Presiding Officer, put in a box and sealed. In Bel Ombre everything tallied. They had 2608 votes plus 176 from special polling stations, coming to 2784. They had received 2800 papers in the morning, and 192 votes left over (although this was not counted in front of the agents, but was done by the Presiding Officer). At the end of the day a Ballot Account Sheet was completed by the Presiding Officer detailing the number of votes, special votes, spoilt votes, and votes for each party.

[111] Mr Prea had requested a copy of the Ballot Account Sheet from the Presiding Officer which was not allowed. In request to Mr Morin he was told that he should have asked the Presiding Officer at the time of the vote, and if this was rejected to have put an entry in the occurrence book. It came out that some four or five counting agents from the opposition party received copies of the Ballot Account Sheets when requested. However, this was inconsistent.

[112] Mr Accouche, the presiding officer from Anse Etoile polling station indicated that there was a concern with the ballot papers which they had received, the papers were sticky and there were certain batches of 101 and 99 instead of 100. There were two batches of ballot papers which had 99. He stated that those two batches of 99 ballot papers were left for last. These were still taken to the station, even though they did not have the correct number of ballots.

[113] Mr Accouche stated that there was a random count on the morning of the polling, and he had verified the ballot books before when he had seen that two of the ballot books had fewer ballots. He described the method of tallying that was done at the polling station, each tally that was received was sent to the Electoral Commission Headquarters. The checks and balance of the ballots were done at the end of counting, everything tallied up.

[114] Mr Gervais Henrie from English River polling station testified that that only one pack of 100 ballots was counted and it was assumed that the other packs were correct.

[115] Mr Guy Morel was the Presiding Officer at Pointe Larue. During the pre-check stage, he stated that there was one batch that had 101 ballots instead of 100 which made a total stock of ballot papers to 2101 instead of 2100. This booklet was marked and Mr Morel called the polling agents to explain what happened and they all agreed to readjust the number to 2101 instead of 2100.

[116] Mr Justin Mathiot, the Electoral Officer from La Digue, testified that a total of 250 ballot papers were received in respect of Silhouette (one of the electoral areas covered by the Inner Islands). However, when counting the final tally at Silhouette, they had noticed an extra one unused ballot paper, and he entered the issue in the Occurrence Book. He stated that ballot booklets had been in two bunches of 100 and one bunch of 50. 209 votes had been cast in Silhouette. However, when counting the votes, cast and unused, they had noticed one extra vote.

[117] Mr Mathiot described that he had taken 250 ballots from the headquarters to Silhouette. His deputy had physically counted them. A document to that effect had been signed at the headquarters. However he had entered the extra ballot paper in the Occurrence Book. He had put the total number of the ballot papers he had received at 251, to reflect the reality of the extra ballot paper. He had assumed that they had actually received 251, and not 250, as he had earlier thought. Each ballot paper had an accompanying envelope. There were 250 envelopes.

[118] At Silhouette, they had brought a laptop, and every person who voted was marked. At the end of the day, they had produced the list of voters and it agreed with the tally sheet.

[119] The witness admitted that there could have been a mistake in counting of the ballot papers by his deputy, when he had indicated they were 250. He had informed him of the discovery of an extra ballot paper, but had not entered the entry of that conversation into the occurrence book. He considered it was a mistake at the outset.

[120] Mr Morin also testified with regard to the ballots, he stated that he had only received complaints regarding two polling stations: the first was Silhouette where there were 101 ballot papers in a batch and in Cascade they were “in batches of 100 some batches of 99 and some batches had 101 and some batched had perfect 100”. These were the only electoral areas where he was made aware of any problems. There were some packets of 50 which were produced but in very limited numbers. When a batch was found to contain an incorrect number, it was replaced with a batch containing the correct number. He admitted that the batched may have the incorrect number of ballots and stated that this was the reason why they were counted before being given to the polling station.

[121] He testified that the ballot papers were counted on the evening before the voting. They were individually counted. These were counted by the electoral officer and his deputy for each polling station. He stated that it was at the discretion of the individual electoral officers to count the books again. However, when shown the Elections Handbook, Mr Morin agreed that the wording of the Handbook is imperative and not discretionary.

[122] Mr Mathiot had placed a remark in the Silhouette Occurrence Book which stated that “250 ballot papers were issued for Silhouette, however at the end of the day, it was noted that the amount of ballot papers received was two hundred and fifty-one instead of two hundred and fifty. Thereby resulting in the excess of one ballot paper”.

[123] Similarly, an entry was made in the Cascade Occurrence Book – “After recounting more than four different approaches, the difference of one ballot paper remains. Following telephone contact between electoral officer and headquarters, the majority of counting staff agrees that there has been irregular difference of one ballot paper in the batches used”.

[124] Mr Morin agreed that if there was an error by the person who was making the handwritten tally that would also result in there being one less ballot at the end of the day. Mr Georges questioned Mr Morin about how they would resolve a discrepancy between the register and the tally sheet, but Mr Morin stated that it was not a requirement to tally it against the register. He did however, agree that the notion of a tally is not found in the wording of the law.

[125] Mr Gappy testified about the ballot books stating that previously the Electoral Commission had used a company from Singapore to print its ballot papers. Direct flights to Singapore had ceased and they had been forced to look for an alternative printing company. They chose the South African company to print the ballots because the company had a good reputation. It had printed ballot papers for Zambia and Tanzania also. They had travelled to South Africa with representatives of the political parties and had designed the ballot paper together. All parties had been in agreement throughout the process.

[126] Mr Gappy stated there were no irregular books in previous elections as they were printed by a different supplier. In addition, he stated that he did not anticipate that there would be irregular books and knew of the irregularities only from his Chief Electoral Officer who mentioned it when counting prior to the start of the second round of elections.

[127] Mr Gappy acknowledged that there were batches of ballot papers which had 101 or 99, and those which were reported were corrected, however even those which were corrected, there is a possibility those had mistakes as well. An explanation of issuing ballot papers one at a time was explained, and how the tally was made when a paper was issued. Numbering is not used on ballot papers to ensure that there is secrecy of one's vote.

[128] Mr Gappy stated that the responsibility of telling the presiding officers to recount the ballot books before issuing the book was Mr Morin's, but he did not know if Mr Morin had done this.

That the use of more than one electoral register in polling stations led to a failure to reconcile them, making it impossible to determine whether or not there was double voting in the same station.

[129] The petitioner relied on the confusion created by having multiple registers in each polling station and the high number of human errors in the processes to argue that there is a need to reconcile the electoral register into one register in order to prevent the possibility of double voting. The petitioner stated that reconciling the registers was the only way to know with certainty that no one had double voted.

[130] In response, Mr Morin stated that he was confident that there was no need to reconcile the registers in the individual electoral areas. He was confident that the tally sheet would provide a sufficient safeguard.

[131] Mr Gappy testified that a tally sheet was used at all polling stations, as has been the case since the introduction of multi-party democracy. It was a popular method in Commonwealth countries.

[132] Mr Gappy explained that he did not give instructions for the marking of registers as that would be done by the Chief Electoral Officer.

[133] When questioned about the multiple registers used on La Digue, Mr Gappy acknowledged that he had handed over a bag with several registers to Mr Ramkalawan and his lawyers. The registers were from La Digue. They had not been in the sealed boxes, probably because they were brought from La Digue in the presence of the presiding officer.

[134] Mr Mathiot had previously described that these registers had been unsealed at the instruction of Mr Morin. He described that at the end of voting, he had put the ballot papers in one box and sealed it with a green seal and a silver seal. He had put the register, the Occurrence Book and other accountable documents like the results sheets in a box and padlocked it. When he brought the boxes to headquarters the same night, Mr Morin had required him to present him with the registers, the Occurrence Book and other accountable and the result sheet. He opened the padlock and removed the documents and presented them to him. He considered the requirement by Mr Morin to be unprocedural, but the demand was from his superior and so he had followed it. Mr Morin had indicated that he needed to sort out the issue of two voters who had been alleged to have voted twice (Mr Fanchette and Mr Hoareau).

That having authorised voters to vote in the special polling station, the 1st respondent failed to ensure that votes cast in the special polling station and envelopes containing these votes were actually received in polling stations in the respective electoral area tallied. These stations were Anse Boileau, Au Cap, Anse Etoile, Bel Air, English River, Glacis and Pointe La Rue.

[135] Mr Ramkalawan brought testimony about several electoral areas which received a different number of envelopes from special polling stations from the number of names on the register of voters which they had received. Evidence was brought about specific electoral areas.

[136] Mr Steve Pillay testified that he was a counting agent at Au Cap. When they received the list of persons who had voted at special polling station whose votes were accredited to the Au Cap region, the list contained 209 names. However, it transpired that 210 votes in envelopes were transmitted to Au Cap and therefore counted. The Summary of votes for Au Cap as released by the Electoral Commission showed that there were 210 votes received from special polling stations. There were no steps taken to remedy the discrepancy between the number of names on the list and the number of envelopes actually received. Mr Pillay informed the Electoral Officer for Au Cap, Mr Accouche, and was informed that the extra vote came from the headquarters and had been cleared. No occurrences were written up in the occurrence book.

[137] Ms Brioché is an Administrative Secretary from Ma Constance. She was a polling agent for the SNP party in Anse Etoile. They received a list of 283 voters from Anse Etoile who had voted at special polling stations. 284 envelopes were received from the special polling stations.

[138] Mr Douglas Accouche was the Presiding Officer of Anse Etoile at the second Round of Presidential elections 2015. He confirmed that 284 envelopes were received, however only 283 names were called out in the morning prior to the commencement of voting. Mr Accouche brought this discrepancy to the attention of the polling agents and other officers present. He made a note of this in the occurrence book that they had received 284 envelopes, and he stated that no objections were raised.

[139] Mr Hoareau questioned Mr Accouche on his years of experience which he stated that he has been part of the election process since the 1990s so he is familiar with the process.

[140] Mr Georges asked Mr Accouche to explain the discrepancy; 284 envelopes were received at the station but only 283 names were on the list which had been sent to the Anse Etoile polling station. Mr Georges pointed out that one name had not been crossed out on the register and that there should have been 284 names which should have been crossed out and not 283. Mr Accouche in response explained the procedure of what they did when the station received the envelopes from the other polling station. It was brought to Mr Accouche's attention, that if the officers counted the ballots in the boxes and the names crossed out in register, it would show the discrepancy. Mr Georges suggested a possibility that the list provided was correct and that there was an extra ballot to the number which the witness agreed that it could be a possibility.

[141] Mr Accouche was asked to explain whether the 284 envelopes received at the station were counted separately or jointly with the other ballot boxes where votes were cast at the station, as well as how the counting procedure took place. Mr Accouche stated that he did bring the discrepancy to the attention of the polling agents for each political party as well as notified this to Electoral Commission Headquarters. He explained that at the end of voting, a ballot account was completed, however on the account he did not make mention of the additional vote as there was no place that made provision for this but he did make an entry in his occurrence book.

[142] The Court asked Mr Accouche whether in his years of experience as a presiding officer, whether this was the first time that such a discrepancy occurred in relation to the list received and the envelopes received.

[143] Mr Philip Louise testified that he was a polling and counting agent for the second round of the elections in the Anse Boileau region. The list of persons who were from the district but had voted at special polling station totalled 214 names. However when the votes were received during the day, there were 215 envelopes. These were mixed in with

the other ballots and counted in the usual manner. The official announcement of votes shows that there were 215 votes for Anse Boileau from special polling stations. No steps were taken to remedy the discrepancy.

[144] Mr Gervais Henrie was polling and counting agent in the second round for the polling station held at English River. Mr Henrie confirmed that prior to the opening for voting, the names were read out of all persons who had cast their votes at a special polling station. They were crossed off the registers. Mr Henrie confirmed that on the list of persons who had voted at a special polling station, there were 259 names recorded and called out. During the course of the day the envelopes from the special polling station were received from Headquarters. Two hundred and sixty-two envelopes were received, three more than ought to have been received. Mr Henrie also suggested that no tally sheet was used at the polling station. He stated that there was no reconciliation of the registers.

[145] Mr Vincent Jeannevol testified that he is a taxi driver and was a polling agent and counting agent for the Bel Air district for Linyon Sanzman. Before voting started there was a list of people who had voted on the previous days at the special polling station, these names were called out and marked on the list.

[146] There were 146 persons who were registered as having voted for Bel Air in the special polling station. At about 11am the ballot papers arrived along with the police officers and were handed over. There were only 145 envelopes. Mr Rath, the presiding officer, undertook to look for the missing vote.

[147] The number of votes reflected on the official list of the votes from the special polling station showed that Bel Air had 145 voters. Mr Jeannevol alleged, in cross-examination, that there was little incentive to spend time trying to explain the discrepancy as there was a competition that persons who got their results first to the Electoral Commission would get a bonus. He stated that his desire to win the bonus motivated his signing of the paper even though he would not personally benefit but it would be given to the Electoral Commission workers.

[148] In his testimony Mr Morin denied that there were any bonuses on offer to Electoral Commission officers who were working at the polling stations and who submitted their results first.

[149] Mr Zialor is an executive Chef from Point Larue. He was working at Point Larue polling station as a polling and counting agent. Before the station opened at 7 am, they counted the ballot batches and papers. They counted the votes of the voters that had already voted outside the district. There were 145 names on the list of persons who had voted at the special polling station. Later 144 votes in envelopes were received by the station. The official list states that 144 votes were cast at the special polling station from Point Larue.

[150] Mr Morin described that there had been a situation at Glacis which he was aware of where the envelopes to be handed over had totalled 243 envelopes, however, they certified 244 envelopes as received. This was marked in the occurrence book.

[151] On the Glacis occurrence book being shown to him, Mr Gappy stated that when there was a discrepancy between names and envelopes, this would be recorded in the occurrence book.

[152] Mr Morel from Point Larue stated that the envelopes from the special polling station were received in the morning at the Pointe Larue polling station. On the list there were 145 names whilst the envelopes received were 144. The polling agents and Mr Morel realised that there might be a possibility that a person who had not voted might come to the station and try and vote but would not be able to do this as their name had been struck off and that they would be prepared should that happen and neither political party objected to this.

[153] Mr Morel indicated that he ensured that the ballot papers from the special polling station had been counted again in front of the polling agents.

[154] Mr Morin for the 1st respondent stated that there were two envelopes which were found to not contain the electoral area names. Mr Morin could not remember which special polling station these envelopes came from. He requested the party agents to decide which district they would like those two envelopes to go to.

[155] He testified that there was a tally between the number of envelopes received and the number of persons alleged to have voted. There was a list which was admitted into evidence which itemised the number of votes received and the stations to which they were distributed. Mr Morin stated that they agreed that the number of persons who voted on those special polling stations tallied with the number of envelopes that had been sorted out per districts and put in the envelope for distribution.

[156] Mr Morin was certain that the number of persons who voted reflects the number of ballot envelopes received. He testified that he had accounted for 4100 envelopes and 4100 named voters. Mr Georges questioned Mr Morin about the fact that the night that the envelopes were counted. Mr Morin was satisfied that everything was in order and tallied, however by morning when the envelopes reached the polling stations, there were discrepancies in some of them. Mr Morin believed that there could have been human error in this regard. He said that this error could have been in the counting of the envelopes, the sorting, but he maintained that at the end of the date 4100 votes were cast and 4100 votes were counted.

[157] In testimony he mentioned the following statistics:

| District | Summary of ballot papers | Number of names of voters |
|---------------|------------------------------|---------------------------|
| Bel Air | 145 | 146 |
| Anse Etoile | 284 | 283 |
| English River | 262 | 259 |
| Au Cap | 210 | 209 |
| Anse Boileau | 215 | 214 |
| Glacis | 243 / 244 envelopes received | 243 |
| | 1359 | 1354 |

[158] Mr Georges pointed out that if all the votes are added together, they do not cancel each other out. It is not simply one more balancing the situations where there was one less. According to the numbers given by Mr Morin, there were five envelopes more than votes. This did not tally. Mr Morin conceded this point and stated that it must have been an error. Mr Georges challenged Mr Morin's calculation of the 4100 votes and envelopes, because he was showing that there were five extra envelopes which were not accounted for.

[159] Mr Morin reiterated that the agents were exhausted, having not slept for close to 72 hours. "I mean we are bound to make errors". Mr Morin accepted that there could have been a mistake and some names might not have been put down.

[160] The lists for the individual electoral areas were prepared by clerical staff, but Mr Morin's role was to oversee and supervise the making of these lists.

[161] Mr Morin stated that to ensure that no one voted twice, despite discrepancies in the list sent and the envelopes, the Commission used two special inks, one invisible to the naked eye and the other indelible ink. There were no complaints of persons coming to vote twice.

[162] Mr Gappy was able to provide more light on the matter and testified that the sorting of votes from the special polling station started at 7.30 pm and went on until 3 am the day before the main polling day. Party representatives were present at the sorting of the votes. Before sorting started, a list was generated by the Chief Registration Officer, of all the people who have voted. It helped in the tallying.

[163] Mr Gappy provided the full list of envelopes received and a number of names itemised. He stated that there were several envelopes which did not contain the name of their electoral areas. It was decided by those present to allocate those envelopes at random to the various Electoral Areas as it would not change the result of the election (because it was a national election). When looking at all of the allocations nationally, it transpired that there were only two envelopes which did not have corresponding names itemised on the lists provided to the electoral stations. Mr Gappy explained that a supplementary list of voters had been agreed by all political parties, which was not in the electronic system used to generate the lists of voters' names which were circulated to the

electoral districts. Both of the additional votes could be explained as being persons who were on this supplementary list. He identified two women, Ms Veronica Pillay and Louisiane Belle who had voted at the special polling station at English River and whose names had appeared on the supplementary list. Ms Pillay was permitted to vote at the special polling station because she was travelling abroad, and Ms Belle is a police officer who was required to work on the polling day and therefore entitled to vote ahead of time.

[164] Mr Gappy confirmed that 4100 votes had been cast on the islands in the first two days of voting. The list of voters who had voted was prepared and sent to the different presiding officers in each electoral area. On the morning of voting, they were supposed to call out those names and the names should then be ticked/crossed off the voters register to ensure no one voted twice.

[165] In cross-examination by Mr Hoareau, Mr Gappy confirmed that the envelopes sent to the different polling stations had been confirmed sealed by representatives of the SNP, and their representatives were in the convoy delivering the envelopes.

[166] In terms of whether there was an additional ballot at Glacis, Mr Gappy disagreed and stated six persons had testified, verified and counted 243 ballots going to Glacis on the eve of sorting; it was sealed and verified the next day and the seals were not broken.

[167] Mr Georges questioned whether all were aware of the Supplementary List on 17 December. Mr Gappy stated that the Supplementary List was used in the first round so everyone was aware of it. Mr Georges stated that the two voters, namely Ms Pillay and Ms Belle were not included in the list of names being sent to Au Cap and Anse Etoile respectively, despite the fact that all were aware of this Supplementary List; Mr Gappy agreed that it was not. Mr Georges asked whether the fact that two names were missing could not have been communicated to the Chief Electoral Officer or presiding officers of those stations on the morning, to which Mr Gappy replied that it could not. Mr Georges inquired why Mr Gappy and his Chief Electoral Officer did not seek that explanation of those two names on the night of counting. Mr Gappy stated that it is for Mr Morin to answer, and an error was made but he can say for certain that those people did not vote twice

[168] The 2nd respondent called Louisiane Belle to confirm the version of events put forward by Mr Gappy. Ms Belle confirmed that she is a voter from Anse Etoile District. She stated that she voted at the special polling station at English River on 16 December 2015 as she is a police officer and she was working on 18 December 2015.

[169] The 2nd respondent also called Mr Francoise, an employee at the Department of Immigration who gave details regarding Ms Veronica Pillay. He brought with him documents which included a copy of her travel documents which showed that she has been travelling in and out of the country. For the month of December, she entered Seychelles on 3 December 2015 and left on 17 December 2015.

That this cast doubt on the correctness of the procedure for voting in the special polling station, of the votes cast and the transmission thereof to the polling station in electoral areas.

[170] The petitioner relied on the totality of the circumstances surrounding the special polling station to support this averment.

That in three polling stations, the number of votes counted did not tally with the number of ballots issued. In Anse Aux Pins, there were two extra ballots which were marked with ball point pen. In Cascade, one extra ballot was found and counted. In Glacis, one ballot was found missing. That these irregularities cast a doubt on the genuineness of the poll in the three polling stations

[171] At the close of voting, the petitioner was contacted by Mr Danny Sopha about problems in Anse Aux Pins. He stated that there were two votes marked in a ballpoint pen at the polling station. He was also aware of other problems at Cascade and Glacis.

[172] The petitioner produced the occurrence book from Anse Aux Pins which contained a note from 7.30pm detailing the number of ballot papers from the Headquarters, the number of unused ballots, the number from other stations, and the total ballot papers. By tallying the numbers it is clear that there were two extra ballots from those recorded.

[173] Mr Danny Sopha testified. He was a polling agent at Anse Aux Pins. He was at the polling station in the morning before polling started observed that one or two ballot packs were counted, and then assumed that all of the rest of them had 100 ballots. In the morning they had double-checked the number of votes received in envelopes in respect of people who had already voted at special polling station against the number of names that they were given on the list.

[174] Mr Sopha testified that he had wanted to go back to the polling station after going to get a take away, but was informed that he was being arrested. He was driven to Anse Aux Pins station, he was told that he had been giving out money to the people in the line. He was eventually released on warning.

[175] He testified that at the end of the day they had two extra votes and two votes marked with ballpoint pens. Due to the fact that they were unable to pinpoint where the two extra votes came from he was unwilling to sign off on the results. He wrote an entry in the occurrence book.

[176] Nella Gentile was the presiding officer at the Anse Aux Pins polling station. She testified that envelopes containing votes from special polling stations were received in the morning – a total of 199 envelopes – which were placed in ballot box number 3, no objections were raised during the count of the envelopes. At the end of the voting day Ms Gentile informed her team that since there were 30 books of ballot papers they were expecting 3000 papers, as there are 100 papers per book. After finishing the first count it became clear that there were two extra votes unaccounted for, a recount was made and gave the same result. As the recount gave the same result the two extra votes were validated and there were no objections.

[177] Ms Gentile also confirmed that there were two ballot papers marked with a ball pen instead of a felt marker.

[178] Ms Gentile stated that she did not count all the books of the ballots at the beginning but only counted one book which came to 100 papers in one book. She mentioned that it was not common practice to count all the ballot books, however she did count them prior to the main polling day. She stated that there was one book while counting that had 101 papers and not 100. This book was sent back to the headquarters and replaced by another with 100.

[179] She could not confirm that of the 30 books some actually had 101 papers (which the witness believes to be the most probable explanation for the two votes in excess). When asked if some books could have had 99 papers (which would increase the number of unaccounted votes to more than two) she did not give conclusive answers. Mr Georges suggested that both scenarios are equally possible and, for lack of evidence to the contrary, equally probable.

[180] She stated that it is important to note that the number of ballots in the box (valid votes and spoilt votes) tallied with the tally sheet which excluded the 199 envelopes. She also confirmed that during the counting process, at no point were there two ballot papers which had been folded together.

[181] The petitioner also explained to the Court that in Cascade they also had a difference of one ballot paper. An entry had been made in the Occurrence Book stating "it is worth noting that when ballot paper batches were counted at HQ the difference of one was noted (plus minus one error in two batches of one hundred)."

[182] The petitioner made the point that the handbook specified that the extra ballots in the packs ought to be discovered before voting takes place, and not afterwards. This is the purpose of the handbook.

[183] Mr David Michel Vidot testified with regard to the polling at Cascade. He was a polling agent for Mr Boullé in the first round, and he testified that in the first round the NIN numbers were read out along with the page number, line number and name of the voter as the voter entered the polling station. In the second round, he was the polling agent for the petitioner's party. In this round they did not call out the NIN numbers, only the names and page and line numbers. There was a third table in the station, and the pace of voting was very quick, putting pressure on the polling agents. He testified that they were not always able to hear the names being called out.

[184] He was satisfied that there were no extra votes in the boxes at the beginning of the day. Mrs Choppy had told him that the count of the number of ballots distributed to them had already been counted at the Headquarters and there was no need to recount them.

Mrs Choppy's explanation was that there was one extra ballot in the packs of ballots issued by headquarters. Mr Vidot was not convinced that this was the case, as the possibility of this was first mentioned only after the extra vote was discovered.

[185] At the time of counting the votes, Mr Vidot testified that they were informed first of how many ballots they had been given at the start of the day, then they counted the unused ballot papers, they counted the votes that came from the list at the start of voting from other stations. And this was reconciled with the tally sheet (of ballot papers issued).

[186] Tally sheets are the sheets of paper which the electoral officers record the voters as they come through and are given ballots. There were 4 ballot boxes used at Cascade. Each box was opened and counted separately.

[187] Mr Vidot testified that they were given 2600 ballots at the beginning of the day. 191 ballot papers were not used. 194 envelopes were received from the special polling station. Two thousand four hundred and nine votes were cast at the polling station. This meant that there ought to have been 2603 votes to be counted (the votes cast plus the votes from special polling stations). The first ballot box contained 747 votes. The 2nd ballot box contained 652 votes. The third ballot box contained 757 votes. And the fourth contained 448. These added up to 2604.

[188] Mr Vidot did concede that in the 4 hours that he was on duty as a polling agent at the station he did not see nor did it come to his knowledge that anyone was issued a second ballot, nor did he see anyone voting twice.

[189] There was a note in the occurrence book which stated that "when ballot papers were counted at the headquarters and the difference of 1 was noted (plus minus 1 error) in two batches of 100 HQ generally agrees such error exists and that it is important for each batch to be checked prior to issuing to voters".

[190] Mr Vidot stated that he refused to sign off on the results from the voting station on the basis of the extra vote; he wrote a note in the occurrence book for Cascade. He confirmed that they had not verified the number of ballots in the packs prior to the start of voting.

[191] Mrs Shirley Choppy was the Presiding Electoral Officer at the Cascade polling station. She testified that there were no issues reported to her about any person voting twice or any person being given an extra ballot. At the end of the counting, it was seen that there was one extra ballot which was not unaccounted for. However Mrs Choppy stated that when the officers and she counted all the votes; the ballot papers which had been issued and using the tally sheet and votes in the box, they all tallied. Further, the counted spoilt votes and the counted envelopes that came from other stations all tallied. Therefore, Mrs Choppy could not explain why there was a vote which could not be accounted for at that point in time and a further recount was done.

[192] Mrs Choppy stated that probably it was due to human error that two papers may have gotten stuck to each other when counting. When they realised that this could be the reason, they plugged it in and it tallied. After the error was found, only the polling agent for Seychelles National Party (SNP) (Mr Vidot) did not sign the ballot sheet account at the end of counting.

[193] Mrs Choppy stated that there had been one ballot paper which had been marked with a ball point and not with the felt marker. However she felt that this was purely a coincidence and not related to the extra ballot.

[194] Mrs Choppy stated that she counted the ballots in the book, three days prior to the election as it was the customary practice. She did not count the ballots on the main polling day, 18 December 2015 as the electoral officers had done so before at the Electoral Office and did not feel it was necessary to count again.

[195] Mrs Choppy testified that when they had started they had 2600 ballot papers but at the end, there were 2601 ballots. She explained how the total 2601 was calculated however she was not an accountant by profession so she could not confirm; the ballots that were used were counted from the tally sheet and were added to the number of unused ballots. Mrs Choppy's explanation for the extra ballot was that when they received the ballot books, there must have been one book with 101 papers and she was certain that there were 2601 ballots which they had received at the Cascade polling station.

[196] Mrs Linda Monthy was the person who issued the ballot papers as well as the polling and counting agent at Cascade. Mrs Monthy explained the procedure of issuing ballot papers, as well as what happened after a tally sheet had been completed. In addition she stated that after each ballot paper was issued, she would make a mark on a tally sheet.

[197] Towards the end of the voting process, she stated that on her last ballot book she was using did not have 100 papers but had 101; there were 79 left from the book and 22 had been used. She had not expected to have 79 and she recounted to ensure that was the correct number. She brought this to the attention of Mrs Choppy. The polling agents for each political party signed that there were indeed 79 ballot papers remaining in her ballot book.

[198] Mrs Monthy indicated that her tally sheet did not match the number that Mrs Choppy had which was 2600, however she was certain that her tally sheet was correct and that her ballot book had 101 which increased the ballot count to 2601.

[199] Mrs Monthy explained that there were 194 ballot papers from the special polling station, and 2410 ballots from persons who had voted at Cascade. Therefore, 2604 votes should have been counted. The officers believed that they might have received 2601 ballots instead of 2600, and that this discrepancy of 1 ballot was significant.

[200] Mrs Monthy stated that she did report the extra ballot paper in her book to Mrs Choppy but Mrs Choppy was not paying attention as she was busy. She also stated that the Mrs Choppy's secretary also told her that there was a book at Victoria when she had checked had 101, this was mentioned at 7pm. She stated that it was not normal to find 101 ballots in one book, perhaps there was a factory defect that printed an extra ballot. Mr Georges pointed out to Mrs Monthy that she knew of the discrepancy and if she was concerned as she stated she was, she would have brought it to the attention of Mrs Choppy.

[201] She stated that at the beginning of polling, no one at the station counted the books as the secretary had verified this before. From 7pm there was a ballot 'adrift', the officers at the station recounted 4 times to ensure that there were 2601 ballots. Mrs Monthy stated that the secretary at the station, Ms Madeleine had mentioned to her that when she was counting the ballot books; there was a book with 101 and another with 99 ballot papers and Ms Madeleine concluded that the two books compensated each other. This information was only relayed to her late in the evening and this information was made known to Mrs Choppy as presiding officer as well as others at the station and that it had been recorded in the occurrence book.

[202] Mrs Monthy stated that Ms Madeleine must have made a mistake on counting; that there was a book with 99 as well as a book with 101 and that she did not make any mistake.

[203] Mrs Regina Alcindor Esparon was brought to testify regarding the Glacis polling station. Mrs Esparon was the polling agent for SNP on the day of the second vote 18 December. She opened the station and was also the counting agent on that day. Prior to the commencement of voting, all of the names of persons who voted at a special polling station were called out and marked off on all 4 registers in use at the station. There were 243 names on the list. The number of ballot packs was counted (but not the individual ballots in each pack) by the presiding officer.

[204] The votes from the special polling station were counted separately from the votes cast in the station itself. 244 votes were received from the special polling station (not 243 as enumerated on the list). The station had received 2900 votes from HQ, 2872 had been cast. They received 244 votes from the special polling station. On the ballot paper account there was a note stating that of the "stamped ballot papers 2869 short by one ballot paper". It transpired that there was one missing ballot paper which could not be located when the ballots were counted. Therefore, there was one additional special polling station vote handed to the station, and one missing ballot from HQ.

[205] The Presidential election 2015 second round summary of ballot papers from special polling stations listed that there were 243 votes to be allocated to Glacis. At the end of the day, the electoral registers from the station were placed in an unsealed box, and were not reconciled.

The Case against the Second Respondent

That between the two ballots the Agency for Social Protection in the Ministry of Social Affairs invited a large number of people to receive supplementary incomes. That this was to influence the recipients thereof to vote for the 2nd respondent contrary to ss 50 and 51(1)(r) of the Act.

[206] The petitioner described becoming aware that there were abnormally long queues outside Ocean Gate House, where welfare assistance is distributed by the Ministry of Social Affairs. He became aware of these long queues as a result of photographs that were appearing on Facebook. He investigated and discovered that one queue was for ID cards, and another for social assistance. He stated that the queue for social assistance was abnormally long, even for that time of the month. The petitioner estimated that there were about 1000 people involved. The petitioner brought evidence from the budget expenses of government showing that in December 2015 the government had spent 82 million rupees, as opposed to 49 million, 30 million and 25 million in the previous months, on welfare assistance.

[207] He made a complaint to Mr Gappy that he believed that money was being given out as a form of bribe to people. Mr Gappy gave orders to a member of the Indian Ocean Commission Observer Mission, Mr Romaine, to go and investigate.

[208] In cross-examination the petitioner maintained his stance despite the Attorney-General challenging his estimation of 1000 people who had received social pay-outs. The Attorney-General stated that people could be receiving all types of payments – disability, funeral, social welfare, children, elderly payments and the petitioner had not presented any evidence to show that they were receiving social benefits for the purposes of voting in favour of the ruling party. However, the petitioner rebutted this sentiment by stating that usually payments are made through the respective consistencies and banks and that only emergency payments are made in this way through payments at the Department itself.

[209] The Attorney-General also put it to the petitioner that the agency is an independent statutory organization with a board and it is the board that independently assesses the criteria for the payment of benefits. The petitioner responded that the Agency has a governing Ministry, their funding is from the Consolidated Fund and that they are not entirely independent.

[210] The petitioner stated that the 2nd respondent, as President and head of the Executive, had given his recurring focus on welfare from time to time and is in a position to know what is happening in the Agency. He has also been known to state the amount that the Agency gives out.

[211] Mr Marlon Zialor came to the Court to give evidence in this regard. Mr Zialor testified about the Agency for Social Affairs, however, he could not identify which building it was housed in in Victoria, but stated that it was close to Pirates Arms. He testified that on 16 December 2015 he went to the Agency with three others. There he was informed that he had to go into his district in order to get assistance, but a friend of his told him to go to the

Chief Executive Officer to get the money, and so he went to the CEO and took his ID card. A lady took his ID, got him to sign a paper and then told him to go downstairs to receive the money. He took the paper down to the accounts office for him to get the money. He testified that there were about 40 other people in the office. All three of his companions were similarly paid out. Mr Zialor produced a letter which he stated that he had signed in the office on the top floor at Ocean Gate House which he then took downstairs in order to be paid.

[212] In cross-examination it transpired that Mr Zialor had received benefits in 2014 from Social Welfare. He testified that he made an application in his district and was assisted. He was given assistance for three months. Mr Hoareau on behalf of the 2nd respondent pointed out to him that the Agency had two applications for assistance from Mr Zialor, one in 2014 and one in 2015. Mr Zialor stated that he had not made any application in 2015, he simply attended at the office and received the assistance.

[213] Mr Hoareau put it to Mr Zialor that he had made an application for social assistance on that day, and that he signed the application form on that day. Mr Zialor denied it and stated that he did not make any application but simply signed a page.

[214] Mr Marcus Simeon, the Chief Executive Officer of the Agency for Social Protection testified about the types of social assistance which are given out by the Agency. Some forms of assistance are statutory, such as benefits for elderly persons, and others are discretionary. Applications must be submitted for the latter. They are means tested according to a system. Usually, it can take between a few hours or up to a few days to approve an application, which is signed off by Mr Simeon himself or another officer. Mr Simeon identified Mr Zialor's letter as a standard form letter informing him of his successful application and qualification to receive Rs1608 per month for 3 months.

[215] He gave a detailed breakdown of social security payments which were made during each week in December 2014 and December 2015. The relevant figures for the same week in each year were R 167,455 and R 250,970 respectively. Mr Simeon testified that there had been an increase in the amount of money paid in 2015 because of a standard adjustment to the weights. Mr Simeon stated further that welfare payments peaked in November when a subsidy was paid out to fishermen.

[216] With regard to Mr Zialor's application specifically, Mr Simeon testified that Mr Zialor applied for assistance on 16 December 2015. This application was decided by a person other than Mr Simeon. In the application, Mr Zialor had stated that he was unemployed, had a child and was responsible for the support of his child and his pensioner mother. According to Mr Simeon due to the fact that he had a previous record on the system (Mr Zialor had also applied in September 2014), it was easy to see that he was qualified for short term assistance even though his situation had changed a bit. Mr Zialor's file was produced to the court.

[217] Mr Brian Commettant, the head of research and statistics from the Central Bank also testified about the amount of money allocated for social grants. He produced the fiscal report showing the total expenditure by the government on social programmes.

- a. In December 2015 the total expenditure was R 82.1 million.
- b. During November 2015 it was 30 million and October 2015 was R 47 million.
- c. During 2015 as a whole the expenditure was R 405 million, a 14 per cent increase on the year before, 2014 which saw an expenditure on social programmes of R 356 million.
- d. In 2014 the expenditure for December was Rs.54 million, for November was R 26 million and October was R 41 million.

[218] In cross-examination Mr Commettant admitted that these figures only represent the fiscal report for social programmes from the budget, and not specific programmes or projects.

[219] Mr Morin confirmed that between the two elections, he received reports of long queues outside the Social Agency and that he sent Mr Romain, an international observer from the Indian Ocean Observer group but did not take any other steps.

That on 16 December 2015, the District Administration Office at Perseverance distributed money to Mrs Jeanne [sic] Moustache with a view to influence her to vote for the 2nd respondent.

[220] The petitioner referred to 'The Electoral Commission of Seychelles Shared Code of Ethical Conduct for Political Parties, Candidates and Other Stakeholders' which was a document agreed upon by all stakeholders in the election. It was signed by all stakeholders and political parties. This document stated that all District Administration (DA) offices should be closed on the day of the election. The petitioner stated that it was agreed that this only applied to DA offices where the elections were being held. It was put to him by Mr Hoareau that this was only meant to apply on the main voting day.

[221] Mrs Stella Afif testified that the special polling station on Perseverance was open on 16 December 2016 as was the District Administration Office and that this was against the agreed Code of Conduct.

[222] She, along with two other women, went to the polling station on Perseverance on the morning of 16 December because she was a polling agent and went to see if everything was running smoothly on the day. She stayed outside the station. When going past the District Administration Office she noticed that there were people walking in and out. They each had a white envelope in their hands. She stopped across the road from the DA Office to monitor what was going on. She sat there for 5-10 minutes before Mrs Joanne Moustache, a Parti Lepep activist, came across the road and had a confrontation with her for taking photographs. Under cross-examination, Mrs Afif contradicted herself

and said that Mrs Moustache came over immediately when they parked. Under further cross-examination by the Attorney-General, Mrs Afif stated that Mrs Moustache was the only one still coming out of the office after she parked and that no one else came out of the office in the 15 minutes that she was parked there.

[223] Mrs Afif admitted that Mrs Moustache lived behind the DA Office, and used the lane between the buildings to access her house. She stated that Mrs Moustache had stated that she was collecting her welfare money. She could not confirm what was in the envelope.

[224] Mrs Afif stated that there was a Parti Lepep branch office near the DA Office. Mrs Afif had taken some pictures which were admitted in evidence. They showed Mrs Moustache with her bag and an envelope. Mrs Afif also testified that she saw the driver of Idith Alexander, the Minister, on that day with the Minister's car. He went into the DA office before returning to the Jeep.

[225] When asked about this incident, Mr Morin stated that the requirement to close DA offices is for instances where the voting station actually occurs in the DA office itself. In the districts where the DA office was far away from the voting station, they could still operate.

[226] For the Perseverance DA office, the polling station was in Perseverance Primary School. The DA office for Perseverance was not adjacent to the polling station and "quite far". Therefore, Mr Morin did not believe that the DA office ought to be closed on that day. He stated that he had "an agreement" that if the DA was adjacent to one of the polling stations or in the same building, then they would be requested to close.

[227] Mrs Joanne Moustache also testified. She stated that she lived on Perseverance I and that her house was behind the (DA) office on Perseverance. She is a mobiliser for Parti Lepep for Perseverance. She described what a mobiliser does and that she had done this for 11 years. She acknowledged that she knew Mrs Stella Afif as she used to work for her. Mrs Moustache stated that she was involved with the special polling station on Perseverance on 16 December 2015. She was helping incapacitated people by providing transport to them and their family. She coordinated this arrangement and there were other people helping her.

[228] The photograph that Mrs Afif had taken was shown to the witness and she identified the two people in the picture as herself and Mr Francois Michel and stated she was holding a sandwich and in her bag was a writing pad with the names and telephone numbers of persons with vehicles to transport the elderly. She stated that to access her house, she has to pass through a pathway between the DA office and the Youth Service Bureau. Prior to the picture being taken, Mrs Moustache had come from the voting station and she was dropped off where the picture was taken. After the picture was taken, she

went home but before she did she approached Mrs Afif. She confronted her and told her to come closer so she could get a better picture. She stated she did not see anyone entering DA office nor was she on a welfare benefit. She stated that she did not go the DA office on 16 December 2015.

[229] On cross-examination by Mr Georges she said that the DA office was open on 16 and she saw one or two people going in and that she did not go in. The DA office was open throughout the day until 4 pm. She denied that she told Mrs Afif that she went to collect her welfare money when she approached her.

[230] Mr Gappy stated that in past DA offices were used as polling stations but this had stopped to prevent abuse. Mr Gappy stated that if a DA office was in the vicinity of a polling station it should be closed on the day of polling.'

That the announcement by the Principal Secretary of the Ministry of Finance, Trade and the Blue Economy on 16 December 2015 that all Seychellois employees of Indian Ocean Tuna Company earning less than R 15,000 per month would get a thirteenth month salary as an incentive, was aimed at influencing the 700 workers of the Company to vote for the 2nd respondent contrary to s 50 and 51(1)(r) of the Act.

[231] The Government is a minority shareholder in the IOT which employs about 700 employees. The petitioner testified that he received a document from his nephew regarding the IOT. It was a letter dated 16 December 2015, from the Principal Secretary for Finance and Trade. It informed Seychellois employees that they would be getting a thirteenth-month cheque. The petitioner led evidence that this was a government originating transaction coming from the Consolidated Fund.

[232] Mr Hoareau mentioned that the Seychellois employees at IOT enjoy gratuities which are paid by the government and put it to the petitioner that the letter was the result of negotiations that had been ongoing between the IOT and the government of Seychelles for some time. The petitioner pointed out the incredibly fortuitous timing of the letter (16 December) and rejected that this was just a sheer coincidence.

[233] Mr Patrick Payet is the Principal Secretary of the Ministry of Finance and Trade and the Blue Economy. The letter that Mr Payet had written to employees of Seychelles Indian Ocean Tuna (IOT) concerning the 13th month salary was shown to him. The incentive was then explained by Mr Payet who stated that negotiations had taken place between the Ministry of Finance and IOT. He stated that this gratuity system was going to be presented in the budget speech on 15 December and had been previously gazetted on 27 November 2015. The letter was written in his capacity as Principal Secretary and that he sent it before the Christmas shutdown of the IOT plant on 24 December 2015. President Michel was not aware of this letter.

[234] Mr Payet stated that the Government has 40 per cent shares in the company and that it is a profitable company. The company was not budget dependent except for Seychellois employees where there was an incentive scheme in place and that IOT does

not get the monies directly but it is given to employees. The Government does not provide budget assistance directly to IOT but the Seychellois employees get direct payment from the Government. IOT was not covered in a circular, despite the term public enterprise mentioned. IOT did not want to pay their employees a 13th month salary and this had to be provided by the Government. Mr Georges suggested that as a Senior Civil Servant, by sending that letter, he was giving a boost to the Incumbent President as a candidate for elections. Mr Payet stated that he was not and that he was simply doing his job.

[235] Upon re-examination, Mr Payet stated that the circular was dated 14 September 2015 in relation to the 13th month salary and negotiation had taken place in June 2015, before the circular. Further, he stated that the letter was sent to the Managing Director of IOT and that he did not specify when the 13th month salary would be paid. The reason why the 13th month salary was announced during the Christmas period despite only being paid in January 2016 was that it would assist the Seychellois employees to plan for Christmas and enjoy themselves.

That the offer by Mr France Albert Rene, former President and an agent of the 2nd respondent, to Mr Patrick Pillay of a high post in Parti Lepep and the Government, if Mr Pillay returned to Parti Lepep, was designed to induce Mr Pillay and others to vote for the 2nd respondent. That this was contrary to s 51(3)(c) of the Act.

[236] Mr Pillay, the leader of an opposition political party, Lalyans Seselwa, was a Minister in Government for 16 years. Mr Pillay resigned from the Party in April 2015. Between the two rounds of the elections, on 9 December 2015, after Mr Pillay had already publicly aligned his party with that of the petitioner, the former President, Mr René called Mr Pillay to encourage him to return to Parti Lepep and offering him “a good post in government”. Mr Pillay refused. Mr René was supporting Mr Michel as a candidate for the elections and appeared on a PPB in favour of Parti Lepep. Mr Pillay accepted that this was ‘politicking’, and when questioned by the Attorney-General he accepted that Mr Rene did not actually tell him whom to vote for.

That between the ballots, the offer by Mrs Sylvette Pool, an agent of the 2nd respondent, to have Mr Peter Rodney Jules’ loans written off with the Small Business Finance Agency if he procured the votes of former supporters of Parti Lepep who had switched to the opposition, was contrary to s 51(3)(a) and (c) of the Act.

[237] Mr Jules, a known musician and supporter of Lalyans Seselwa, was approached during the period between the two elections by Mrs Sylvette Pool, a former Minister, with whom he had previously met when he was a Parti Lepep supporter. Mrs Pool also appeared on a Parti Lepep Public Political Broadcast. He was asked to see her at Maison du Peuple on 9 December. They met at about 4.30 pm. She wanted to discuss why he had moved away from Parti Lepep. He explained to her that when the Lalyans Seselwa did their first convention Mrs Marie Antoinette Rose had threatened to “squeeze” him everywhere. Mrs Rose is a Parti Lepep representative in the Assembly. Shortly later when he was due to play at 5 June Parti Lepep rally Mr Bouchereau, who was in charge of the group, was told by Mrs Rose that Mr Jules was not to be seen on her stage.

[238] Upon hearing this, Mrs Pool said that the President was not happy about what had happened to Mr Jules. She told him that if he returned to Parti Lepep, “anything that (he) wanted they w(ould) give it to (him), even if I wanted her to write off (his) loan”. She asked him to bring back the people who had followed him to the opposition party.

[239] Mr Hoareau put it to Mr Jules that his affidavit only mentioned a telephone conversation and not a visit to Maison du Peuple.

[240] The Attorney-General put it to Mr Jules that he had a personal friendship with Mrs Pool and that she was acting in her personal capacity to bring him back into the Parti Lepep fold. Mr Jules reiterated that she had said that the President was personally not happy when he heard the bad news.

That between the ballots and at the instigation of the 2nd respondent, Mrs Dania Valentin of Roche Caiman spoke in favour of Parti Lepep despite her support for Mr Patrick Pillay, so as to secure a release from prison for her companion, Mr Francois contrary to s 51(3)(c) of the Act.

[241] The petitioner stated that Mr Flossel Francois from Takamaka was a staunch supporter of the SNP party. He was imprisoned with a life sentence after having stabbed a person. He was released from prison on 16 December 2015.

[242] Mr Francois’s concubine, Mrs Valentin was a known supporter of Lalyans Seselwa and had appeared on the Party Political Broadcast for Mr Pat Pillay in the first round of the election. After the first round, Mr Pillay’s party took the decision to give its support to the petitioner. The petitioner stated that he was surprised when Mrs Valentin appeared on the Party Political Broadcast for Mr Michel in the second round of the election. The petitioner believed that Mr Flossel’s release was linked to Mrs Valentin’s change of heart. He discussed how he had attempted to encourage the President to grant a presidential pardon for a terminally ill prisoner with cancer who was serving an 8-year sentence but had not been successful.

[243] The petitioner admitted that Mr Francios had a heart condition. He stated that he was only familiar with two other presidential pardons in the previous year, one in June 2015 and another after the election in December.

[244] Mr Hoareau put it to the petitioner that the President is advised by an advisory committee prior to pardoning anyone. The Attorney-General also mentioned that the presidential pardon is only at the recommendations of the Board and that the petitioner was engaging in mere speculation as to why Mrs Valentin had a change of heart.

[245] Mr Tony Dubignon, a former prison inmate, came to court to describe that he had a serious heart condition and had applied for 4 presidential pardons, none of which had been successful. He was ultimately released from prison on a licence to receive treatment in Chennai because his condition reached a critical state.

That with a view of threatening temporal loss to the people of Seychelles and to induce voters in the second ballot to refrain from voting for the petitioner and to vote for the 2nd respondent, the latter stated in the Seychelles Nation, a government newspaper, that Etihad Airways would probably pull out of Seychelles if the opposition won the election. The same sentiment was voiced by the Chairman of the Civil Aviation Authority in social media posts on 14 and 15 December 2015. That both instances were intended to induce the employees of the Airline to vote for the 2nd respondent instead of the petitioner.

[246] The petitioner led evidence about an article which appeared on the front page of the Nation newspaper on 16 December 2015 which was about Etihad Airway. In the article, the paper quoted Mr Michel, the 2nd respondent, as saying that Etihad would likely pull out of the country should there be a change of government. The petitioner admitted that Mr Michel had later dissociated himself from the article.

[247] The petitioner also pointed out that Mr David Savy, the Chairman of the Seychelles Aviation Authority, had posted on Facebook about the potential that Etihad would pull out of the country, and Minister Morgan also discussed the same topic. The petitioner deduced that the matter of Etihad's ongoing presence in the country was a very politically relevant topic.

[248] He testified that Mr David Savy, the Chairman of the Seychelles Aviation Authority, had posted comments on the Facebook group page "Dan Lari Bazar" stating that Etihad is the only one to decide whether they will remain or not and that this decision would be taken by Sheik Khalifa. He stated further that "Without Etihad Air Seychelles is over" and further Mr Savy implied that Air Seychelles was at risk of closure, and would close without Etihad Airways. He stated that this would "destroy the future of our youth that is aspiring to join the industry of aviation."

[249] The petitioner testified that this was in line with other statements made by the ruling party, threatening the workers that if they voted for the opposition, Etihad would pull out of Seychelles and Air Seychelles would close down. These statements were made between the two ballots.

[250] He added that further on Mr Savy stated that although a "diplomatic relationship w(ould) remain... Sheik Khalifa w(ould) no longer patronise Seychelles as he does currently. Far too many insults have been hurled at him and his family in the public domain just to get cheap political mileage".

That the Speaker of the National Assembly and a supporter of the 2nd respondent made statements during an interview on Seychelles Broadcasting Corporation (SBC) TV to the effect that if the petitioner was elected, there might be difficulties in passing the budget and the approval of the new Ministers which would lead to a shutdown. That this was intended to induce the employees of the public service and other Seychellois to vote for the 2nd respondent instead of the petitioner.

[251] Mr Patrick Herminie is the current speaker of the National Assembly. He is a proportionally elected member of Parti Lepep. On 15 December 2015, Mr Herminie gave an interview on SBC in English and in Creole. The interview was aired on the 12.30 news and the petitioner spoke to Mr Gappy in order to prevent it from being aired on the 8 pm news.

[252] Mr Herminie is a member of the ruling party and was giving a political address in the 24 hours prior to the first day of voting, during which time the SBC and other media are supposed to be under the authority of the Electoral Commission. The petitioner stated that he had an issue with the interview as it was aired during the cooling-off period.

[253] After involving Mr Gappy, the interview was not aired on the 8 pm news, however, a shorter English language interview was aired on the 7 pm news. Thereafter both interviews appeared in the Facebook group, Dan Lari Bazar. The petitioner downloaded these recordings from Facebook and they were aired in the courtroom.

[254] The Attorney-General raised the point that the Speaker of the National Assembly is the leader of an independent arm of the government – the legislature and there is nothing to suggest that he was talking on behalf of the 2nd respondent or the government. The petitioner reminded the Attorney-General that the Speaker also happens to be a proportionally elected member of Parti Lepep.

That Mrs Beryl Botsoie, a Headmistress of La Rosiere School, and a supporter of the 2nd respondent induced her teachers not to vote for the petitioner as they would otherwise risk their livelihoods and not be paid, as the new government would not be able to pass the budget.

[255] Mr Ramkalawan mentioned Mrs Beryl Botsoie who is a Parti Lepep activist from Beau Vallon and the head teacher of La Rosiere school. The petitioner produced a video, also extracted from Facebook, of Mrs Botsoie giving a lecture to the teachers of La Rosiere School during working hours.

That with a view to threatening temporal loss, three high ranking Seychelles People's Defence Forces (SPDF) Officers made disparaging remarks about the petitioner and invited the SPDF members to vote for the 2nd respondent instead of the petitioner, otherwise they would risk their livelihoods and lose their salary as the new government would not be able to pass the budget.

[256] The petitioner also raised concerns over a meeting that had occurred at the Seychelles People's Defence Forces. He led evidence that Lieutenant Colonel Clifford Roseline, the Chief Military Advisor to Mr Michel, Reverend Louis Agathine, the Chaplain to the armed forces and Mr Simon Dine, the Commander of the Coast Guard had held a meeting with the soldiers at the Coast Guard a recording of which was posted in the group Seychelles Daily on Facebook. The petitioner believed that in the meeting Mr Roseline was effectively advising the soldiers on how they should vote, how they should view the elections and how they should take their responsibility.

[257] Reverend Agathine, did not deny that he was present at the meeting, or that the information on a recording was true. However, he stated that he did not tell the soldiers how to vote. The petitioner had extracted that recording from Facebook and produced it in court.

[258] Reverend Agathine is the chaplain of the Defence Forces. Every month he goes to each unit of the Defence Forces. During December 2015 he carried out these duties as usual. On 11 December he attended a meeting at the Coast Guard headquarters at Ile du Port. At this meeting there was also the representative from the CEO, Lieutenant Colonel Simon Dine and the CMA, Colonel Roseline was also present. And both of these also had the opportunity to address the meeting. There were between 50 and 70 persons at that meeting. He stated that he took his mandate from the Chief of the Army, Colonel Rosette, however, he has a ministry by presence so when he can see certain needs and realities, he will address them. The Chief of Staff would have arranged the meeting and invited Col Roseline to accompany the reverend.

[259] Reverend Agathine identified himself on the tape by implication. He did not deny that this was a recording of the meeting he had attended with Lieutenant Colonel Clifford Roseline, and Mr Simon Dine, the Commander of the Coast Guard. He stated that he was not acting on behalf of Mr Michel.

That there was widespread giving of money and gifts by agents of the 2nd respondent contrary to s 51(3)(a) of the Act.

[260] The petitioner led evidence about Mr James Lesperance, who had been seated in the front row at the inauguration of the President following the 18 December ballot. The petitioner admitted that there were others who were also at the swearing in, and also seated in prominent positions.

[261] He stated however that Mr Lesperance had been seen in a group of prominent businessmen coming down from State House prior to the elections. The petitioner led evidence that some men had made a complaint to him about their ID cards. The petitioner had called Mr Lesperance in this regard and following that conversation had called Mr Quatre, the Commissioner of Police. The Police took up the matter and the ID cards were returned to the men.

[262] Mr Adolph Jason Dubel, a casual labourer who is hired for casual labour on a day-to-day, or job-to-job basis, gave testimony that on 9 December he was waiting for work in Providence as is his usual custom, and was approached by Mr James Lesperance. Mr Lesperance gave the men R 500 for lemonade and refreshments, and invited them to come to his office in Lesperance Complex for a meeting later that morning. Mr Dubel went along with several others. They had a discussion and Mr Lesperance paid each of the persons and in exchange, they were to leave their ID's there with Mr Lesperance. He signed a document confirming that he had received the money. He stated that he had been promised a further R 3000 after the initial R 2000. 24 hours later he was again contacted and his identity card returned.

[263] Mr Ron Philip Laporte similarly testified that he was also a casual worker. On 9 December he was in Providence with about 14 others. He had never done any work for Mr Lesperance, but he knew who he was. Mr Lesperance offered him money in return for his identity card. This occurred at Lesperance Complex. He confirmed that Mr Lesperance had also given them R 500 for drinks and snacks before they went to Mr Lesperance's office. He was invited along with the group. He was paid R 2000 specifically from Mrs Elizabeth Lafortune, Mr Lesperance's secretary. Each of them were paid R 2000 and were promised to be paid R 3000 which would be paid one day before the 2nd round of elections. He was told to sign a document which stated that the money was being given as a loan for casual work. He recorded a video to reveal the truth about what had happened to his ID card and those of his friends. He reported what had happened to the SNP and to the petitioner. He was advised by the petitioner to go to the police to report the payment for the ID cards. The next day his ID card was returned to him by Adolph Dubel. On 16 December he was again contacted by Mr Lesperance. He was offered R 3000 and invited to the office to discuss another arrangement, however, Mr Laporte was unwilling to attend the meeting.

[264] The petitioner conceded that he could not confirm that Mr Lesperance was acting as an agent of Mr Michel. He further testified that on the day of the election, at the polling station of Mont Buxton at La Rosiere he had to approach the Electoral Officer for the constituency in order to have Mr Lesperance removed from the 100 metre perimeter of the station which he did.

[265] Ms Lydia Jumeau testified that she had been present in a shop in Providence on 9 December 2015 and saw Mr Lesperance with a person seeking casual labour. She confronted Mr Lesperance thereafter and discovered that he had several ID cards in his pocket.

[266] Mr Morin confirmed that James Lesperance was not a representative or polling or counting agent for any party.

Further Evidence Produced in the Case

Letter to the Tamil Community in Seychelles

[267] Mr Hoareau, on behalf of the 2nd respondent, introduced a letter which the petitioner had written to the Tamil Community on 9 December 2015. In the letter, the petitioner committed himself to protecting the interests of the Tamil community, undertook to make Deepavali a national holiday and to appoint "those who are eligible from Tamil and Indian origins (in) suitably placed positions in (his) cabinet." These were amongst other benefits to the Tamil community if they were to vote for him. In response, the petitioner stated that it was simply politicking and that all elections are about promises.

[268] The 2nd respondent called Mr Rajasundaram who is a registered voter at Bel Ombre since 1999. His former mother language is Tamil which he can read and write. He explained what the Tamil community is and where people who speak the Tamil language originate from. He was shown the letter sent to those from the Tamil community where he was asked to identify and compare the translated Tamil with the English version. Mr Ramkalawan had made promises to the Tamil community and inquired of his impression when reading the letter. The witness stated that in his opinion, this was a manifesto of a political party and that the Tamil community was being considered and that the document was requesting that the Tamil community vote for Mr Ramkalawan and that there were a lot of promises that were made in the letter. The witness stated that he knew many Tamil voters and gave a few names.

[269] The Attorney-General read s 51(3)(b) of the Act in relation to illegal practices, he asked the witness whether the letter was an offer which was illegal according to the law which Mr Rajasundaram agreed. Further Mr Rajasundaram agreed that Mr Ramkalawan was inducing the Tamil Community to vote for him and in return for a favour.

[270] Mr Georges questioned the witness on the Tamil community; the witness stated that the community is not a person but a community. Further, he stated that there was not a specific person who was promised a post as a Minister or Principal Secretary and the letter was not personalised. It was agreed that there was no signature on the letter. Mr Rajasundaram stated that he received the letter between the first and second round of elections despite the letter being dated 9 December 2015.

Additional Evidence of Mr Charles Morin

[271] In addition to his testimony on each of the topics above, Mr Morin stated the following in this testimony. His role was to make sure that the election proceeded well according to the laws of the elections. Mr Morin has a lot of experience with elections, in 1993 he started the elections in different districts. In 2000 he was in charge of the station at Anse Aux Pins and twice at St Louis for the Presidential and National Assembly elections. He was also the Chief Electoral Officer for the last election that was in 2006 for the National Assembly and for the by-election at Anse Aux Pins.

[272] He stated that they only had 7 days to prepare for the second election.

[273] The representatives of each political party signed off on their satisfaction with the way that the printing process had gone and with the ballots. Also confirming that the ballots were safely secured in the Central Bank.

[274] Mr Morin testified that the Elections Handbook was a resume and “it is only a guide that the officers should follow when they arrived at their station and how they should carry out their duties”.

[275] His attitude to the reports of the official observers was “some of them I started reading, and it is no interest to me, so I stopped.” Mr Morin stated that it was not his role to investigate allegations from observers about election practices. This was the job of the Electoral Commission in his opinion.

[276] Mr Morin agreed that if a representative asked for a final copy of the ballot count, they should have been permitted to take a copy or be given a copy of the official document. However, it was clear from the evidence of the representatives from the various voting stations that not all of them had received the final ballot count forms when they requested these.

[277] Mr Morin stated that a successful election is a free and fair election, where all procedures run smoothly, according to the Act and to the best capacity, ability and knowledge of all persons involved in running an election. However, he stated that there is always a percentage of tolerable factors, of mistakes that can happen, human errors.

[278] In his experience as a polling agent, Mr Morin agreed that ID cards were the most commonly used methods of identification.

[279] Mr Morin denied being involved in the creation of any reports and recommendations relating to electoral reform, particularly in 2013.

[280] Mr Morin stated that after the voting, the registers and occurrence books were brought to the headquarters to Mr Morin. Some were sealed and others not. There was no standard procedure. Mr Morin was not bothered to establish such a procedure, despite the existence of s 29 of the Act which provided that a register of voters was to be included in any record made in a bag and sealed. Mr Morin acknowledged that in this regard there had been non-compliance with the law by some of the electoral officers.

[281] Similarly with regard to the occurrence books, some were sealed, others were not.

Additional Evidence of Mr Hendricks Gappy

[282] In addition to his testimony on the specific topics above, Mr Gappy led the following evidence. He is the chairman of the Electoral Commission and has been so since July 2011. He was previously the Electoral Commissioner since 1999.

[283] His duties during the election were to assist the Chief Electoral Officer. He explained the preparations they had to make for the second round of elections within seven days. They had done all preparations with consultation with the political parties.

[284] Once polling is over, an Electoral Officer seals the box in front of the polling agents and invites them to seal the box as well. The box and the polling agents would then be escorted under police guard to the office to hand over and sign off.

[285] There were no complaints from the islands. There was a master register at each station, with all the 69,000 voters, arranged in alphabetical order. Should a person not registered at that polling station turn up to vote, the Electoral Officer would go to that list and search for his name. If the name was on the master register, then the voter would be allowed to vote. Special arrangements were made for voters on the islands who should have otherwise voted at Mahé but were at the island on duty, including the police, pilots, cabin crew, temporary workers, and people travelling out of the country as well as voters at Perseverance.

[286] He explained a ballot account as an instrument used by the electoral management to record every ballot that goes through the system. To be effective, the counting of the ballots should be done and the lists of the issued ballots also added up. The counted ballots, valid and invalid should match the list of votes. Once the results are accepted, it should be communicated to the headquarters.

[287] In cross-examination by Mr Georges, he explained what he considered a successful election, as an election guided by the law and other guidelines for the proper conduct of elections. Practical experience had been gained from working with the Electoral Commission and gaining shared experiences with other people within the ambit of Electoral Commission Forum, and electoral management bodies.

[288] He agreed he was aware of the ACE as well as the Institute for Democracy and Electoral Assistance-IDEA and had previously met one Mette Bakken, who had written a paper on Seychelles and the process of electoral reform. He was also familiar with the paper. But he insisted recommendations of various bodies and persons were not binding and the Electoral Commission had to consider what was important before adopting any recommendations.

[289] He explained that he had not yet read any reports from observer missions of the elections, and probably they had delayed the reports not to influence the outcome of the petitions in Court.

[290] After polling, all boxes were stored at the Electoral Commission Offices. Two officers keep keys of the store, himself and the Chief Electoral Officer. They could only open the store in the presence of each other. A few days before, the Cascade box was sought by the court. They had opened it in the presence of the lawyer. The seal on the box was that of the officer in charge, not that of the candidates.

[291] He further explained that he did not give instructions for the marking of registers as that would be done by the Chief Electoral Officer.

[292] Mr Gappy admitted that early on in the election petition process (17 February 2016), he had handed over a bag with several registers to Mr Ramkalawan and his lawyers. The registers were from La Digue. They had not been in the sealed boxes, probably because they were brought from La Digue in the presence of the presiding officer. He further stated

that after Mr Ramkalawan examined the registers, he had called Mr Gappy to explain the registers. Mr Gappy admitted that they spoke of what was available but that he did not remember the conversation that Mr Georges stated had happened.

[293] Mr Georges inquired whether any consideration was given to complaints received by the Commission. Mr Gappy stated that there was a complaints mechanism in place and he described what happened when a complaint was placed and necessary steps were taken. He then went on to explain what the Commission did in relation to the complaints of social assistance. He reiterated that there were mechanisms in place.

[294] Mr Gappy explained the purpose of the Handbook, which was issued by the Electoral Commission Office. Mr Gappy stated that it is imperative that one reads the law and relies on that rather than the handbook. He went on to explain the Code of Conduct which was prepared for the 2015 Elections and its purpose. Mr Gappy stated that the tally sheet is efficient and simple and that there has never been any report that when a ballot paper was handed over, a mark was not made on the tally sheet.

[295] The Handbook stated that a felt marker was to be used to mark one's vote and the procedure was to be followed. Mr Gappy stated that in past elections from observation, people used to come with a ballpoint pen so they wanted to discourage such practice and hence the reason to provide a marker but the law does not state that a pen cannot be used.

[296] Upon re-examination by Mrs Aglaé, Mr Gappy stated that it was not practicable to check names on the register for counting. He was not present when occurrence books or registers were delivered at the Electoral Commission and would not know if all the registers were sealed or not.

Submissions of the Parties

[297] Final submissions were made by all parties.

The Attorney-General

[298] Firstly, the Attorney-General suggested that an election petition was dissimilar to any other civil court actions and it is principally to the provisions of the Act, its subsidiary legislation and local and foreign authorities that the Court should look in coming to its decision. He also submitted that the burden of proof rests on the petitioner and remains with him throughout the case whether a complaint relates to non-compliance with the Act or on the ground of illegal practices. In furtherance of this, he submitted that the standard of proof was the criminal standard, namely, beyond a reasonable doubt. While holding that this was the proper standard in the present case he also referred us to some cases where the lesser civil standard was preferred.

[299] In his opinion the Court should look to arts 51(3) to 51(5) of the Constitution read with s 44 of the Act and in particular s 44(7) of the Act in conjunction with r 15 of the Election Petition Rules. The Attorney-General was of the view that the evidence was insufficient for the Court to make a finding of an irregularity in the counting of votes that affected the result of the election.

[300] The Attorney-General then considered the possible position under s 15(1)(a) of the Act. He held the view that the petitioner had to adduce sufficient evidence to satisfy the Court that there had been non-compliance with this provision of the law to the extent that it had affected the result of the election. The Attorney-General asked the court to consider the evidence from the petitioner and twelve allegedly supporting witnesses as they sought to persuade the court that the extent of non-compliance would lead to the conclusion that the result of the election had been affected. The Attorney-General reviewed in his submission and in some detail the evidence which had been led before the court. He suggested that the Court consider the findings in the case of *Berlouis v Pierre* (1974) SLR 39 and that the findings, in this case, were entirely relevant in the present matter. He submitted that irregularities, if any, found by the court were not of such materiality to affect the results of the election.

[301] The Attorney-General also referred to s 15(1)(b) of the Act which is brought into consideration where there are allegations of an illegal practice or practices. He emphasised that it is to be proved by evidence that such illegal practice has been committed by or with the knowledge and consent or approval of a candidate or any agent of the candidate. Again the Attorney-General asked the court to analyse the evidence given by the petitioner and fourteen other named witnesses in this respect.

[302] The Attorney-General also drew the attention of the Court to the powers available to it in the event of it making a finding that an illegal practice or practices had occurred. In essence, this was effected by the Court making a report to the Electoral Commission for possible onward transmission to the Attorney-General.

[303] In conclusion the Attorney-General, on a reasoned analysis of the evidence and authorities before the court, was of the opinion that the petitioner had failed to prove his case to the required standard, which he submitted was beyond reasonable doubt. Accordingly, the Attorney-General sought dismissal of the petition with costs.

First Respondent

[304] Counsel for the Electoral Commission, Mrs Samantha Aglaé's main thrust in her submissions related to the alleged irregularities in the voting procedures although she also referred to the allegations of illegal practices aimed at the 2nd respondent by the petitioner. She submitted that consideration of the issues was in terms of art 51 of the Constitution read with the provisions of s 44 of the Act. She looked to the averments of the petitioner relating to his allegations that the Electoral Commission and its servants and agents had failed to comply with the Act when conducting the election and that this non-compliance had affected the result of the election.

[305] She set out the main points of contention in respect of non-compliance which can be summarised as follows:

- a. The use of poor quality indelible ink and spray, possible easy removal by a voter and hence the danger of double voting,
- b. A failure to ensure that each voter could only cast one vote, especially in relation to the districts of Grand Anse, Praslin, Baie St Anne, Praslin and La Digue,
- c. A failure to safeguard the dignity of aged voters,
- d. A failure to ensure that the elderly voters at the North East Point Home did not have their identity cards withheld. Furthermore, to guard against the 'coaching' of these elderly voters prior to their voting,
- e. Non-compliance with s 25 of the Act in respect of the procedure for voting, and,
- f. The difficulties encountered by a voter, one Barbara Cooposamy, at the Plaisance polling station.

[306] In each of the six sub-paragraphs Mrs Aglaé set out in some detail the related evidence which came before the Court and gave her opinion on its reliability, quality and sufficiency.

[307] In the final analysis she came to the view and submitted in each instance that there had been compliance with the electoral process and the will of the voters had been effected in a transparent, free and fair manner.

[308] Mrs Aglaé considered the averments of the petitioner that there had been an irregularity in the counting of votes that affected the result of the election. These three complaints can be summarised as follows:

- a. The use of more than one copy of the register at a polling station and a failure to reconcile each marked copy resulting in a possible danger that one person may have voted twice.
- b. The failure by the Electoral Commissioner to ensure that votes cast in special voting stations and envelopes containing these votes received in the polling station of the *parent* electoral area tallied. The failure to provide a satisfactory explanation on this topic, and,
- c. That the votes counted in the electoral areas of Anse aux Pins, Cascade and Glacis did not tally with the number of ballots issued.

[309] Mrs Aglaé reviewed the evidence before the court in respect of the normal practice, an amended practice agreed by both political parties to speed up this particular voting process and the prescribed requirements of s 25 of the Act.

[310] Mrs Aglaé set out in considerable detail the voting procedures for the special polling station. She also referred to, in particular, the evidence of Mr Gappy the Electoral Commissioner, as supported by the Counting Agent at Glacis, Regina Esparon, and their explanations regarding small inconsistencies in eight electoral areas in respect of numbers of votes cast and a number of envelopes received under the special voting system.

[311] Mrs Aglaé drew the attention of the court to the evidence of witnesses, Danny Sopha and Neila Gentile in respect of the electoral area of Anse aux Pins, David Vidot and Mrs Choppy in respect of Cascade, the Mrs Regina Esparon for Glacis and Mr Gappy and Mr Morin, both of the Electoral Commission.

[312] Mrs Aglaé submitted, that despite attempts by the petitioner to create doubt on procedures it was to be noted that Counting Agents for the petitioner were present at all polling station and able to record the counting process. At twenty-three of the twenty-five polling station such Counting Agents for the petitioner did sign the final ballot paper account. Of the remaining two polling station, namely, Anse aux Pins and Cascade, such confirmatory signatures did not occur, but Mrs Aglaé submitted that this was not as a result of extra votes but because the number of ballots received from headquarters did not tally with the tally sheet.

[313] In conclusion, she submitted on behalf of the 1st respondent, that there was no irregularity in the counting of ballot papers that affected the result of the election.

[314] Mrs Aglaé finally turned her attention to the allegation of illegal practices by the 2nd respondent and hence a breach of s 51(3)(a) of the Act. She recorded these allegations under the following heads:

- a. Illegal practices by the Social Welfare Agency. Mrs Aglaé reviewed the available evidence and submitted that the petitioner had failed to prove this allegation.
- b. Distribution of money at Perseverance District Administration Office to Joanne Moustache. Again, Mrs Aglaé reviewed what the available evidence was, in her view, and was of the opinion that the petitioner had failed to bring sufficient evidence before the court to succeed under this heading.
- c. Breach of s 50 and 51(1)(r) of the Act. This related to the issue of a letter from the Ministry of Finance to the company known as Indian Ocean Tuna Limited on or around the time of the election. Counsel again submitted on this point. She briefly reviewed what she saw as the available evidence on which the court could make an inference. It was her view that the petitioner had again failed to prove any illegal practice on the part of the 2nd respondent.
- d. Breach of s 51(3)(b) and (c) of the Act. This submission is couched in general terms and to certain initial complaints in the petition. The allegations relating to former President, France Albert Rene, Simon Gill, Sylvette Pool,

- Dania Valentin (paras [26], [27], [28], and [29] of the petition). In each case, Mrs Aglaé briefly referred to the evidence available to the court and was of the view, in each case, that the evidence fell short of the required standard.
- e. Breach of s 51(3)(j) of the Act. Under this paragraph Mrs Aglaé made reference to the allegation of illegal practices imputed to one Captain Savy in relation to Etihad Airways, Dr Patrick Herminie, Speaker of the House of Assembly in respect of a speech made, the recording of a speech at the barracks of the Coastguards, a Beryl Botsoie of La Rosiere School and certain NDEA Officers. In each case, Mrs Aglaé submitted that there was no or insufficient evidence before the court to make a finding that in each case an illegal practice in terms of the Act had occurred.
 - f. Finally, breach of s 51(3)(a) of the Act. This related to the evidence before the court relating to one James Lesperance and the purchasing of Seychelles identity cards. Mrs Aglaé was of the view that there was no evidence to show that an offence of an illegal practice had been committed. She further submitted that there was no evidence that Lesperance was an agent of James Alix Michel.

[315] She made further submissions of a general nature, which could be summarised as follows:

- a. Where required by the provisions of the Act, the petitioner had failed to prove the essential element of agency.
- b. On an analysis of the evidence of Mr Rajasundaram, counsel was of the view that a letter written by the petitioner to the Tamil community could be construed as an illegal practice within the terms of the Act.
- c. The standard of proof in respect of the commission of an illegal practice to be considered by the Constitutional Court is the criminal standard, that is, beyond a reasonable doubt.
- d. While not expressly stated as a final conclusion we take the position of the 1st respondent to be no allegation of the commission of an illegal practice has been proved.
- e. Finally, Mrs Aglaé submitted that the election was free, fair and impartial and in full compliance with the Act. She referred to the Canadian case of *Opitz v Wrzensnewskyj* (2012) SCC 55, (2012) 3 SCR 76 where, *inter alia*, it was held that there is a need to take into consideration the practical realities of election administration where workers perform unfamiliar and detailed tasks under difficult conditions, and, that, at the end of the day, courts should concern themselves with the integrity of the electoral system. The element of “human error” was also considered in this case and it was held that despite all efforts human error can occur but do not *per se* necessarily amount to non-compliance with the Act. It was the submission of counsel that this Court should take this approach in the present matter.

[316] Again her submission would be that the petition be dismissed.

Second Respondent

[317] Mr Basil Hoareau presented his written submissions for the 2nd respondent. He reminded the Court of the limbs on which the petition was based, namely:

- a. Non-compliance with the Act which non-compliance affected the result of the election,
- b. Illegal practices in connection with the election by or with the knowledge and consent or approval of the 2nd respondent or by or with the knowledge and consent of his agent,
- c. Irregularities in the counting of the ballot papers that affected the results of the election.

[318] He also referred to the averment that the petitioner may have committed one act of illegal practice and reminded the Court that the 1st respondent had denied all the allegations.

[319] Firstly, he drew the attention of the Court to the status of the affidavits attached to the originating petition. He submitted that affidavits should be disregarded except where they have been used to cross-examine the makers thereof as to inconsistencies with their viva voce evidence. In respect of the pleadings, bearing in mind especially that this is an election petition, he submitted that the petitioner is bound by the terms of his written pleadings, and evidence given but out with the pleadings should be disregarded.

[320] It was also submitted that the Handbook (exhibit 10) and Shared Code of Conduct (exhibit 5) lacked legal status and in any conflict with the Act, the Act prevailed.

[321] Mr Hoareau then considered the element of burden of proof. On consideration of the law and authorities quoted he was of the opinion, and asked the Court, to accept that the burden of proving the allegations rested with the petitioner. He also gave consideration to the concept of what is referred to as “the shifting of the evidential burden” and incorporated references in his submission. Ultimately he concluded that the Court has to consider all the facts before it, the legal burden and the standard of proof. He, however, reiterated that, in his view, in accordance with English law, the legal burden remains solely on the petitioner.

[322] Mr Hoareau then fully explored the standard of proof required for the petitioner to prove his case. He considered that there could be three possibilities, the civil standard of proof, the higher standard, namely, the criminal standard and finally a standard of proof that goes beyond the balance of probability but falls slightly short of proof beyond reasonable doubt. He submitted that if the Court considered the criminal burden of proof too high, he invited the Court to apply the third alternative and take the burden of proof as higher than the balance of probability but not as high as beyond reasonable doubt.

[323] To conclude preliminary issues Mr Hoareau submitted his opinion on the element and evidence to prove agency and temporal loss.

[324] He then moved on to the crux of his defence which referred to the allegations of illegal practices. He submitted that each allegation stands on its own two feet and the Court cannot consider the cumulative effects of all alleged allegations. He then proceeded to look at each particular allegation.

[325] He considered the allegations against the Social Protection Agency as set out in the petition, and concluded that there was no evidence or an insufficiency of evidence to support this allegation.

[326] Mr Hoareau considered the allegations of payment to Ms Joanne Moustache and reviewed the strengths and weaknesses of the evidence in this regard and concluded that the credibility of the main witnesses was a major factor. He submitted that the evidence of the main witness for the petitioner, Mrs Stella Afif should be disregarded as unreliable.

[327] He considered the issue of the letter by the Principal Secretary of Finance to the General Manager of Indian Ocean Tuna Limited dated 16 December 2015 advising that Government would pay a thirteenth month incentive salary to Seychellois employees. The allegation was that the decision and its timing was solely to influence employees to vote for the 2nd respondent. Mr Hoareau stated that it was not pleaded that the said Principal Secretary was acting as an agent of the 2nd respondent nor that the letter was sent with the knowledge and consent or approval of the 2nd respondent or any of his agents. He was further of the view that the complaint as drafted did not satisfy the requirements of s 51(3)(a) of the Act. He also drew the attention of the Court to the prior governmental initiatives and considerations relating to the eventual decision to make this payment which were set out in the submission. The Court was invited to dismiss these averments.

[328] In respect of allegations of electioneering against the Agency for Social Protection and Ministry of Finance it was Mr Hoareau's position that the allegations were unfounded since the government had to continue to function normally despite the election process.

[329] He similarly asked the Court to disregard the allegation against the former President France Albert Rene in respect of Mr Patrick Pillay. He considered the evidence and drew the attention of the Court to the quotation from *Halsbury's Laws of England* at para [619] that "a voluntary canvasser who canvasses without authority is not an agent". He considered that Mr Rene did not speak to Mr Pillay as a voter.

[330] Mr Hoareau submitted that there was no evidence before the Court in respect of Mr Simon Gill. While it is taken slightly out of order he also submitted that there was no evidence before the court in respect of allegations against Mr France Bonte.

[331] Mr Hoareau summarised the evidence relating to the allegations against Mrs Sylvette Pool, pointing out a major inconsistency in the evidence of the petitioner's witness, Peter Jules, rendering his evidence unreliable.

[332] Mr Hoareau reviewed, as he saw it, the legal position of the alleged promise made to Dania Valentin as read with the wording of s 53(3)(c) of the Act. He was of the opinion that there was no averment that the said promise was made to induce Mrs Valentin to procure, or endeavour to procure, the vote of a voter at the election. He submitted that it was also essential for the averment to identify the voter that Mrs Valentin was to procure.

[333] As regard the report in the *Seychelles Nation* of 16 December 2016 he submitted that para [30](b) of the petition was incorrect. Rather para [19](b)(i) of the defences of the 2nd respondent was the true position. He also submitted that the petitioner had also stated that the 2nd respondent had distanced himself from the said article and a reading of the said art did not make any statement to the *Seychelles Nation* as averred.

[334] In respect of the allegations against Captain Savy/Etihad Airways, Mr Hoareau submitted that there are no averments and no evidence on record that, in expressing certain sentiments on the social media blog, he was an agent of the 2nd respondent even although he holds the position of Chairman of the Seychelles Civil Aviation Authority. Even if it was to be held that he was a confidential employee there is authority in *Halsbury's Laws* that "a confidential employee, though active in an election, is not necessarily an agent". It was further submitted that at no time did Mr Savy threaten to inflict temporal loss upon any voter and stressed that any decision concerning viability of the airline would be made outwith Seychelles. Mr Hoareau also stressed that in a final blog Mr Savy's position would be that the present position would continue.

[335] Mr Hoareau submitted that there are no averments nor evidence before the Court indicating that Dr Herminie acted as an agent of the 2nd respondent when giving an interview on the Seychelles Broadcasting Corporation. He had spoken generally and at no stage did he make any threat of temporal loss against any voter.

[336] In respect of Mrs Beryl Botsoie, he submitted that the relevant averment does not comply with s 51(3)(j) of the Act in that there was a failure to stipulate that any threat of temporal loss was made "for or against a voter". There was no averment or evidence that Mrs Botsoie was an agent of the 2nd respondent, although it was acknowledged that she was a polling agent with duties inside a polling station on polling day. Mr Hoareau suggested that Mrs Botsoie was merely expressing an opinion of what she thought could occur if the petitioner was elected as President.

[337] In terms of the allegation of threats of temporal loss against members of the SPDF was not specifically averred that there were voters amongst members of the SPDF. The particular meeting referred to was a routine monthly meeting. There was no averment nor evidence that the Officers addressing the members of the SPDF present at the meeting were acting as agents of the 2nd respondent.

[338] It was submitted that the allegations against Mr James Lesperance had not been proven to the required standard, or, as Mr Hoareau simply put it "not proven". He submits that there is no evidence to support an allegation that Mr Lesperance did anything to

induce any voter to vote or refrain from voting. Furthermore, he submits that there is no provision in the Act which makes the taking or buying of identity card of a third party an illegal act. In addition there was evidence that that a voter was entitled to vote using other means of identification.

[339] Mr Hoareau then looked at a number of topics which he has listed under the heading "Non-compliance with legal provisions relating to elections which non-compliance affected the result of the elections on the second ballot.

[340] He listed the allegations as follows:

Poor Quality of Indelible Ink and Invisible Spray

[341] Mr Hoareau also reviewed the evidence, making special reference to that of Mr David Vidot, which was available to the Court. He submitted that there had been no complaints received about either the ink or the spray in either the first or second ballots. There was no report of anyone voting or attempting to vote twice and there was no evidence to this effect.

Inadequate arrangements to prevent double voting or impersonation in respect of Praslin and inner island voters.

[342] Mr Hoareau submitted, even allowing for the agreed evidence relating to Damien Charles Hoareau and Stan Nerick Fanchette, the petitioner had failed to bring evidence to substantiate this allegation.

Failure to ensure sufficient safeguards to protect the dignity of aged voters and prevent interference of their free right to vote which in turn affected the result of the election.

[343] Mr Hoareau again reviewed the evidence relating to the purported incident in Anse aux Pins and at the North East Point Hospital. He referred to the evidence of Mr Gappy and Mr Morin. He took into account the evidence surrounding the intrusion of Mr Savy in a female ward of the said hospital. He considered whether any individual at the hospital could be considered an agent of the 2nd respondent. He submitted that there was no evidence of the withholding of identity cards at the said hospital nor of elderly voters being coached. He was of the view and submitted that there was no evidence of substance that affected the result of the election.

Non-compliance by Electoral Officers and Deputy Electoral Officers

[344] Mr Hoareau referred to two particular incidents on which the Court heard evidence. One referred to an incident at the polling station at Grand Anse, Mahé, Cascade and La Digue.

[345] On consideration of the evidence relating to Grand Anse, Mahé, Mr Hoareau submitted that there was a conflict in the evidence between parties involved in the incident. Even on the acceptance of one version of the incident, the Court should hold that a one-off error occurred but this was not of such substance that there had been a material non-compliance with the Act.

[346] The incident at Cascade referred to the confusing situation which arose when Barbara Cooposamy went to vote. Mr Hoareau does not appear to offer an explanation. In any event, he submitted that there was no evidence of impersonation, double voting or difficulty with the tallying of the ballot account. Finally, Mr Hoareau submitted that there was no evidence of non-compliance with the Act in Cascade.

[347] Mr Hoareau finally turned to events at the La Digue polling station. He observed that the witness Thelermont was of the view that some mistakes could have occurred in the registering of names of potential voters due to poor acoustics at the polling station. Mr Hoareau acknowledged that the system of periodic faxing of the names of voters at a special polling station in Mahé back to La Digue was not without error. However, he submitted there was no evidence of double voting or attempted double voting in the La Digue constituency. He submitted that, at the end of the day, the overall calculation of votes was correct. He stated that an allegation of missing votes was not pleaded and Court was not entitled to take these errors in procedure into account, but, in any event, they did not affect the result of the election.

[348] Mr Hoareau finally turned his attention to the topic which has headed up as “Irregularities in the counting of ballot papers that affected the result of the election”. He placed these under the following five heads:

- a. Non-reconciliation of Registers, non-distribution of Ballot Paper Accounts and non-adherence to certain parts of the Handbook and the Code. Mr Hoareau reviewed the evidence available to the Court. He submitted that related practices were by agreement of all parties or had been established and accepted over a number of years.
- b. Misallocation of votes and missing voters names from the special polling station. Mr Hoareau set out fully the position as he saw it relating to incidents at a number of polling stations and summarised the relevant evidence. He was of the view that, at the end of the day, there were no ambiguities in these incidents and no errors had occurred that affected the result of the election.
- c. The marking of ballot papers by ballpoint pen. Mr Hoareau submitted that the consensus of evidence was that while felt pens were provided by polling station staff the marking of a vote on a ballot paper by ballpoint pen would be considered a valid vote.
- d. Wrong count of envelopes at Glacis. Mr Hoareau set out the available evidence in his submission. He submitted that adequate explanations had been given and there was no doubt as to the genuineness of the polls at Glacis polling station.

- e. Inaccurate recording of ballot count from HQ/Ballot booklet having a plus or minus 1 error. Booklets of ballot papers came in numbers of 100 and 50. Mr Hoareau summarised the evidence of checking procedures both before the voting opened and after the closure of the polls. He referred inter alia to the evidence of Mr Gappy and Mr Morin who were of the view that any error in counting and checking of the number of ballot papers in a booklet would be due to human error. Mr Hoareau contended that no evidence was before the Court to indicate that any error which might have occurred in this respect affected the result of the election.

[349] As a result of his submissions the 2nd respondent prayed that the petition be dismissed with costs.

Petitioner

[350] Mr Bernard Georges presented his final written submission to the Court and invited it to consider it in conjunction with his opening remarks.

[351] Firstly, he expressed the sentiment that a successful election should be one where all the electoral processes be followed to the best extent possible and be seen to be free and fair, credible and transparent. In this election, this was especially important where the majority was slim and Mr Georges submitted that scrutiny of the procedures adopted was required.

[352] With regard to the topics (1) burden of proof and (2) standard of proof, Mr Georges made the following submissions.

Burden of Proof

[353] The thrust of his submission is that the initial burden rested on the petitioner to prove each of his allegations and thereafter the burden shifted to the respondents to satisfactorily explain the allegations and negate the evidence brought by the petitioner; this could be referred to as the doctrine of the shifting burden of proof. Mr Georges, in this aspect, and later in the submission sought support for his views in *Erlam & Ors v Rahman & Anor* [2015] EWHC 1215 (QB) (23 April 2015) (The *Tower Hamlets case*). In the present matter which is an election case, he submitted that in the absence of the respondents discharging the burden which has shifted to them the petitioner is entitled to succeed.

Standard of Proof

[354] Mr Georges relied on his opening remarks on this topic. He acknowledged that different standards applied across the world since allegations can be civil, criminal or quasi-criminal in nature. He submitted that a "substantially in compliance" provision did not exist in the Act of Seychelles and hence the civil standard of proof should be applied in the present case.

[355] Mr Georges then looked at the principles of the agency as they should apply. He again asked the Court to adopt his statement in his opening remarks. He asked the Court to consider his final detailed submissions, the authorities quoted and apply the principles therein stated to the present petition.

The Case against the First Respondent

[356] Mr Georges enumerated fourteen irregularities and the results resulting therefrom. In addition to the said irregularities, he also identified five separate issues which caused him concern. He chose to take, as a case in point the Inner Islands, to emphasise irregularities which he suggested had occurred in this electoral area and set these points out in full. He suggested that the discrepancies in this case alone left room for doubt as to the quality of the processes and the certainty of results *in other electoral areas*. [Emphasis added]

[357] He then applied the doctrine of the shifting burden of proof and submitted that in numerous instances the 1st respondent had failed to explain the position satisfactorily or rebut the allegations. He also set out the instances where, he submitted, there had been a failure either to give an adequate explanation or selective evidence had been led. He felt constrained to itemise instances where, it was suggested, relevant evidence was not made available or some matters were left unexpected and hence, it was suggested, remained suspect.

[358] Mr Georges then considered the import of the phrase “affect the result”. He accepted that proof of non-compliance with electoral law was insufficient on its own for the petitioner to succeed. It had also to be shown that any non-compliance affected the result of the election. He expanded his arguments on this topic submitting that the excuse of human error was insufficient to explain away any failure in procedure or behaviour.

[359] Finally in this aspect, Mr Georges submitted that the phrase “affects the result” should be looked at in respect to the cumulative effect of, as he sees it, the numerous irregularities, the failure to provide acceptable explanations in respect of discrepancies which have come to light and, generally, the doubts which have arisen concerning the regularity of the final result of this election.

[360] It was the opinion of the petitioner that the cumulative effect of all the improprieties shown amounts to such a degree of non-compliance that the result of the election has been affected.

[361] Finally, in respect of the 1st respondent, counsel for the petitioner brought further matters collectively to the attention of the Court under the heading “Reconciliation of Registers”.

[362] Mr Georges commented on the fact that the evidence admitted through an agreed statement of facts showed that more than one electoral register was used in each polling station on polling day. He pointed out that this seemed to be at odds with s 25(1)(b)(ii) of the Act which speaks of one register. He also referred to the use of tally sheets in each polling station and the assurance by the 1st respondent that this was a simpler and quicker procedure to mark the number of ballot papers issued. The thrust of this submission is that, while the use of the register in the voting procedure is supported by statute, the law, it is silent on the use of tally sheets, despite the reliance which is placed on this method of accounting. He adds to this general comment that initial counts did not tally in the polling stations of Cascade and Anse aux Pins until later adjustments were made.

[363] Mr Georges also submitted that errors had occurred in the transmission of names from special polling station to the parent polling station which led to errors in the markings of registers at the parent polling station. From this he invited the Court to come to the conclusion, even on the basis of a probability, that failings in the proper recording of votes occurred *in other polling stations*. [Emphasis added]

[364] He suggested that this problem could be exacerbated by the use of poor quality indelible ink and invisible spray. A further example of the unreliability of the existing process could be seen from the evidence relating to the confusion which occurred involving one Barbara Cooposamy. Mr Georges again invited the Court to make the inference that occurrences of a similar nature could have occurred *at other polling station*, [Emphasis added]

[365] As a result of the above points, Mr Georges submitted, that the use of a single register, properly marked, rather than tally sheets, was the single way to ensure the accurate tallying of votes and this, in fact, would comply with the provisions of the Act.

[366] In conclusion, Mr Georges submitted that the counting procedures adopted in this election were irregular and did not conform to the Act. He further submitted that to conform to the Act the entries in each of the registers used in each polling station should each have been collated into one main register which would be used when the final tally of votes was undertaken.

[367] It followed, according to Mr Georges' concluding submission, that the Court should order a Recount of Votes in accordance with the provisions of the Act.

The Case against the Second Respondent

[368] Mr Georges then submitted regarding the petitioner's case against the 2nd respondent. He dealt with the main allegations of illegal practices committed by the 2nd respondent or, as Mr Georges puts it, those for whom he is responsible. He submits that, if proven, each illegal practice can lead, in itself, to the annulment of this election. He referred to *Barrow-In-Furness* (1886) 4 O'M &H 76 which was referred to in the *Jugnauth v Ringadoo and Others* [2008] UKPC 50 (5 November 2008) Privy Council Appeal No 58

of 2007 and submitted that a court could make a finding that an illegal practice had occurred when corrupt intention or corrupt motive stands out from the facts. It may be preferable to use the phrase “is shown or can be inferred from the evidence adduced in the case”.

[369] Following on from this Mr Georges identified seven particular instances where he submitted that the evidence was sufficient to show that illegal practices had occurred. In doing so he referred inter alia to the principles of the shifting burden of proof, the doctrine of agency, the inferences which can be drawn from the evidence adduced, the subject of offering of incentives to potential voters and the legal authorities produced in support of these submissions. We do not intend to relate these detailed arguments here, they are set out in detail in the written submission. It is sufficient to record, generally speaking, that the matters to which Mr Georges referred to were as follows:

- a. the attempt to take an aged voter in Anse-aux-Pins to the polling station and the alleged behaviour of a Mr Ernesta in relation thereto;
- b. the purchase of identity cards by a Mr James Lesperance;
- c. the allegation of money being offered by the Social Protection Agency;
- d. the allegation of money being offered by the Ministry of Finance to the company, Indian Ocean Tuna Limited, in respect of its Seychellois employees;
- e. the suggestion of temporal loss arising from statements made by Dr Patrick Herminie, the Speaker of the House of Assembly, Beryl Botsoie, a teacher at La Rosiere school, and by the Chief Military Adviser to the President, Colonel Rosaline. He found the statement made by Colonel Roseline to his troops to be of particular concern;
- f. an offer and inducement involving Ms Dania Valentin and Mr Flossel Francois; and
- g. offers and inducements held out to Mr Patrick Pillay and Mr Peter Jules.

[370] In conclusion, Mr Georges brought out the following basic issues which he submitted the Court had to bear in mind. He emphasised the need that the election must be seen to be free, fair, true and transparent for it to be considered valid.

[371] He again referred to the narrow margin of victory, namely, by one hundred and ninety-three (193) votes. He suggested that a swing of one hundred votes could produce a different result.

[372] He suggested that the irregularities or illegal practices referred to above, if found to be proven, and bearing in mind the number of voters who could have been unduly influenced by such improprieties, left open the possibility or even the certainty that the result of the election could be, or was, adversely affected. He suggested that this Court should look to the whole tenor of the evidence before it and draw the necessary inferences from it. He suggested that the *Tower Hamlets* case was particularly in point in this regard. He would suggest that on a proper examination of all relevant factors that many processes and practices were to be found wanting.

[373] He suggested that, in addition to the above instances of illegal practices, the Court had also to consider the cumulative effect of all irregularities and instances of non-compliance by the 1st respondent and should find in his favour, namely, that the sum total of the above improprieties had adversely affected the result of the election.

[374] As a result, based on the evidence before the Court, the petitioner sought from this Court a declaration that (firstly) the election was void on two grounds and (secondly) there be a national recount of votes cast, such recount to include a reconciliation of all registers used in all polling stations.

Discussion: The Law

[375] We first have to consider the applicable burden and standard of proof in election petitions. It is eminently better for parties to come into Court forewarned and forearmed with the knowledge of the burden and standard of proof in relation to one's case. Unfortunately, neither the Constitution nor its attendant legislation provides for these evidential processes in election petitions.

[376] Needless to say, the two questions that form the bedrock of due process in both criminal and civil courts relate to where the burden lies in establishing liability (in civil trials) or guilt (in criminal trials) and what the requisite standard of proof in adjudicating the evidence to establish liability is. It is trite law that in criminal cases the burden lies with the prosecution and the standard of proof is that beyond a reasonable doubt and that in civil cases the burden of proof lies with the claimant and the standard of proof is on a balance of probabilities. However, there has been much jurisprudential and statutory development with regard to quasi-criminal cases (which are cases where the Court is required to make a finding, in the course of a civil trial, on an act which also constitutes a criminal act under the same or another law).

Burden of Proof

[377] While it is constitutionally mandated that the burden of proof in criminal cases rests with the prosecution (as the presumption of innocence is a constitutional guarantee under art 19 of the Constitution), the burden of proof in civil cases is not so expressly set out.

[378] The issue, although less problematic than that of the standard of proof, is nevertheless not straightforward either. Section 12 of the Evidence Act of Seychelles provides: "Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail".

[379] Section 45 of the Act provides: "The trial of an election petition, shall, subject to this Act, *be held in the same manner as a trial before the Supreme Court in its original civil jurisdiction*". [Emphasis added]

[380] Since the Act states that it is the civil rules of evidence that apply in cases involving election petitions and since there are no specific legal provisions relating to evidential rules at trials in Seychellois law, it is to England that we turn for guidance. In English law, the general principle in civil cases is that he who asserts must prove (see *Chapman v Oakleigh Animal Products Ltd* (1970) 8 KIR 1063 at 1072, per Davies LJ). In all civil legal contexts, including at the European Court of Human Rights, the Court has found that:

It is fair to place the burden of proof on the person who positively assert[s] a particular state of affairs, rather than the person who denies[s] that a state of affairs existed given the difficulties which arise where proof of a negative was required.

(*McVicar v United Kingdom*, Eur CtHR, App No 46311/99, Judgment of 7 May 2002, 40).

The burden of proof, therefore, is on the claimant, that is, the petitioner in this case.

[381] However, the burden of proof has two components: the burden of producing evidence that is satisfactory enough to prove a particular matter (also known as the evidential burden) and the burden of persuading the court that the allegations made are true or untrue (also known as the legal burden). In civil cases it has not been satisfactorily established whether the defence bears any evidential burden “in relation to a defence which amounts to nothing more than a denial of the prosecution case and therefore raises no new issues”—Adrian Keane and Paul McKeown *The Modern Law of Evidence* (9th ed, Oxford University Press, 2014) at 103.

[382] Mr Georges in his submission has not distinguished between the two burdens and we cannot agree with him that only:

The initial burden rests on [the petitioner] to prove each of his allegations and thereafter the burden shifts on the respondents to satisfactorily explain the allegations and to negate the evidence brought by the petitioner.

[383] In an election petition, as in a civil case, it is the petitioner who has to convince the court to take action on the allegations in the petition. The legal burden remains with the petitioner throughout. The evidential burden initially rests upon the party bearing the legal burden (that is the petitioner), but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence (See *Halsbury's Laws*, vol 17, 4th ed, para [15]).

[384] Hence, we agree with Mr Hoareau quoting Adrian Keane (*The Modern Law of Evidence, supra*) that the evidential burden shifts constantly as “a ball-game with the evidential burden as the ball which is continuously bounced to and fro between contenders” (at 83).

[385] Nevertheless, the burden of proof remains ultimately with the petitioner. We cannot express it better than as formulated by Lord Hoffman in *In Re B (Children)(FC)* [2008] UKHL 35, namely that:

If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

[386] In our view, therefore, each and every element of the allegations made by the petitioner has to be proved by him and by him alone. It is only when he has discharged that legal burden that the evidentiary burden if the need arises shifts onto the respondents.

The Standard of Proof in Election Petitions

[387] What weight should the court put on the material facts placed before it? The issue is problematic arising from the nature of evidence in election cases and the vocabulary used in the Act. Sections 44(7)(b) and 47(1)(a) and (b) contain the words “illegal practice” and “guilty of an illegal practice”.

[388] The use of such phrases usually associated with criminal trials in the provisions above is at odds with s 45(1) of the Act which provides: “The trial of an election petition, shall, subject to this Act, be held in the same manner as *a trial before the Supreme Court in its original civil jurisdiction*. [Emphasis added]

[389] More problematic is the fact that the election petition brought by the petitioner alleges both non-compliance with the Act (s 44(7)(a)) and illegal practices (s 47(b)). While it is evident that the standard of proof in relation to the former should clearly be that of civil cases, in the case of the latter the standard may be that of criminal cases.

[390] Hence, while s 45(1) provides that election petitions are private legal processes, ss 44 and 47 import a criminal element in terms of a finding of illegal practice by a particular person. It is for this reason that the respondents’ counsel have argued that considering the public interest in identifying and remedying electoral malpractice, the civil standard of proof may not be appropriate. In the case of *Ogilvy Berlouis and anor v Holden Pierre and ors* (1974) SLR 221, although it was argued that the trial of an election petition was conducted in the same way as that of a civil trial, Souyave CJ was of the view that a higher standard of proof was required. Relying on *Hansard* he stated that in such cases the court had to “be satisfied beyond reasonable doubt or, in other words, be fully satisfied that the election is void before upsetting it”.

[391] The elevated standard in *Berlouis* stems from common law development where the courts in some civil matters have found that although a strict adversarial standard would require proof on a balance of probabilities, a quasi-inquisitorial approach is required by the wording of statutes. These are instances where circumstances dictate that the standard of proof be more onerous for some civil cases than others. The standard does not seem to equate to that of criminal cases but nevertheless is above the normal standard of proof on a balance of probabilities.

[392] For example, in the UK, the court has in some instances sought to establish special standards where cases fall outside normal civil actions. In *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 in relation to the Sex Offender Orders under the Crime and Disorder Act 1998 the Court found that the burden of proof would for “all practical purposes be indistinguishable from the criminal standard”. In *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 concerning a football banning case under the Football Spectators Act 1989, the Court found that “an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard” was required. In *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 in a case relating to Anti-Social Behaviour Orders the Court found that “a heightened civil standard [that is] virtually indistinguishable [from the] criminal standard” was required.

[393] Having reviewed the above authorities in the case of *In Re B (Children) (FC)* [2008] UKHL 35, Lord Hoffmann stated:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann*’s case (at 812) that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[394] Hence, in civil cases where there are some criminal elements involved a higher standard of proof is necessitated. In *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, a civil matter where fraud was alleged, Lord Denning expressed the standard of proof at page 258 that should apply in the following way:

The more serious the allegation the higher the degree of probability that is required: but it need not in a civil case, reach the very high standard required by the criminal law.

[395] Similarly, in election cases, the Court has exacted a similar standard of proof. In *Home Department v Rehman* [2003] 1 AC 153, Lord Hoffman explained that at para [55]:

The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard*

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of Proof) [1996] AC 563 at 586, some things are inherently more likely than others. Hence, the more serious an allegation or the more serious its consequences if proven, the stronger the evidence has to be produced before a court to find the allegation proved on the balance of probabilities.

[396] Different approaches have been adopted by different jurisdictions in election cases. Authorities from Africa and UK have been submitted by counsel and it is important that we consider them in coming to our decision. We add some authorities of our own.

[397] In the UK the issue was raised in *R v Rowe ex parte Mainwaring and Others* [1992] 1 WLR 1059 and the Court found that it must apply the criminal standard of proof, namely proof beyond reasonable doubt. This was reaffirmed in *Simmons v Khan* [2008] EWHC B4 (QB) in respect of the standard of proof against the respondent and his agents for the corrupt or illegal practices and for general corruptions but the civil standard of proof was applied to the question of whether the general corruption may reasonably be supposed to have affected the result of the election.

[398] Lately, in *Erlam & Ors v Rahman & Anor* (The *Tower Hamlets* case supra), the Court stated at para [47]:

There was no controversy at the hearing about the standard of proof the court must apply to the charges of corrupt and illegal practices. It is settled law that the court must apply the criminal standard of proof, namely proof beyond reasonable doubt. This was definitively decided by the Court of Appeal in *R v Rowe, ex parte Mainwaring*, a decision binding on this Court.

It must be noted that in the UK as in Seychelles at the end of an Election petition alleging corrupt or illegal practices, the court decides whether a person is guilty of such practices. It is only in terms of these practices that the criminal burden of proof applies.

[399] In the Mauritian case of *Jugnauth v Ringadoo* (supra), the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. Lord Rodger of Earlsferry, giving the judgment of the Board emphasised that “there is no question of the court applying any kind of intermediate standard”. He stated:

It follows that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition.

However, as Mr Hoareau for the 2nd respondent has pointed out in this case, the Judicial Committee of the Privy Council was giving effect to the provisions of s 45(1) of the Mauritian Representation of the People Act which does not use the phrase “guilty” but empowers the court to declare an election voided by reason of bribery.

[400] In the Ghanaian case of *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others* (Writ J1/6/2013) the majority of the judges of the Supreme Court found that election petitions are “a species of a civil case” and adopted the civil standard of proof, which is proof by a “preponderance of probabilities”.

[401] An intermediate standard of proof was adopted in *Lewanika and Others v Chiluba* [1998] ZMSC (1999) 1 LRC 138 where the petitioners had alleged that there was bribery, fraud and other electoral irregularities by the respondent in a Presidential election in Zambia and sought its nullification. Ngulube CJ, giving the judgment of the court, stated:

We wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.

[402] In the Ugandan case of *Besigye v Museveni* [2007] UGSC 24, the unsuccessful presidential candidate had alleged that the respondents were responsible for a series of offences and other illegal electoral practices. Odoki CJ, asserted that in election petitions although the standard of proof is of civil cases, it “is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance”.

[403] In the Kenyan case of *Odinga v Independent Electoral and Boundaries Commission and Others* [2013] eKLR, the Court was of the same view holding that:

The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt: save that this would not affect the normal standards where criminal charges linked to an election are in question.

[404] The overview above provides a useful lens through which the provisions of the Elections Act in Seychelles may be examined. Some jurisdictions exact a criminal standard of proof, others a civil standard of proof and yet others an intermediate standard in terms of proving the allegations in an election petition.

[405] However, elections in Seychelles are a civil matter, even if there are some findings of criminal activity involved. As we have pointed out the Act does contain criminal law phraseology but the provisions also envisage two distinct processes— one in terms of voiding elections and the other in terms of reporting persons to the Electoral Commission for committing illegal practices with the possibility of the Electoral Commission striking the person off the electoral register. In the case of the latter, such a report by the Court may not be made until those persons are given an opportunity to be heard and to have evidence called to show why they should not be reported. We are not at this stage engaged in the latter process although we are obliged by the provisions of the Act to undertake this exercise.

[406] The Act also, separately to the election petition process, provides for offences which may be prosecuted by the Attorney-General with penalties of up to three years imprisonment and fines of up to R 20,000.

[407] Hence, whilst persons found to have been involved in electoral malpractice may face serious consequences, including being disqualified from participation in future elections and/ or prosecution and imprisonment, it is not up to the Constitutional Court to convict persons or impose any criminal penalties at this stage. We may only report.

[408] Extraneous factors are also not worth our consideration, especially political sentiments, although these are constantly referred to in the African authorities above and also in election cases in jurisdictions around the world. In *Bush v Al Gore* 531 US (2000) (United States Supreme Court) for example, the Supreme Court of the United States of America talking of such judicial sentiments declared that :

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people ... and to the political sphere.

[409] Phrases such as the "national interest", the "democratic will of the people", "economic and social stability" are also employed to dissuade judges from interfering with the results of the elections. For example, Blake J in the case of *Pilling and others v Reynolds* [2008] EWHC 316 (QB) stated that "there is an important public interest in clarifying the legitimacy of the ballot".

[410] We are aware that in Presidential election petitions all the three branches of the Government are brought into play: the Judiciary is brought to adjudicate on laws passed by the Legislature to decide whether the head of the Executive was lawfully elected.

[411] However, we are also conscious of the real difficulties in bringing an election petition: the time constraints within which petitions should be brought, the cost of bringing petitions and the difficulty in assembling witnesses to challenge an election. Moreover, the thrust of the provisions of the Act in Seychelles is to impose an unusually difficult evidentiary duty on the petitioner, some of which will be discussed later in our decision. Yet, it is by such actions that the democratic process develops and matures.

[412] In our view this raises important questions about the threshold of proof that should be applied in Presidential election disputes and how it should be discharged. We have given anxious consideration to these issues and have come to the conclusion that given all the different considerations above it is the civil standard of proof, that is proof on a balance of probabilities, that should be applied when considering whether an election is void by reason of non-compliance with the provisions of the Act and, or the commission of illegal practices.

The Elements Necessary for the Proof of Breaches of the Act

[413] It is necessary to examine the different components required to be proven by the petitioner in an election case. As we have pointed out the present petition alleges breaches both under s 44(7)(a) and (b) of the Act which provides in relevant part as follows:

The Constitutional Court may declare that an election ... is void if the Court is satisfied—

- (a) that there was a non-compliance with this Act relating to the election ...and the non-compliance affected the result of the election or the nomination;
- (b) that an illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the candidate.

[414] Further, s 45 of the Act provides in relevant part:

- (4) Where it appears to the Constitutional Court on an election petition—
 - (a) that an act or omission of a candidate or the agent of a candidate or any other person, which, but for this s, would be an illegal practice under this Act, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; or
 - (b) that upon taking into account all the relevant circumstances it would be just that the candidate, agent of the candidate or the other person should not be subject to any of the consequences under this Act for such act or omission, the Court may make an order allowing the act or omission, which would otherwise be an illegal practice under this Act, to be an exception to this Act and the candidate, agent or another person shall not be subject to the consequences under this Act in respect of the act or omission and the result obtained by the candidate shall not, by reason only of that act or omission, be declared to be void.

Non-Compliance with the Act

[415] We wish to examine separately the elements of each of the breaches of complained of by the petitioner. As regards the non-compliance with the Act we can extrapolate from the provisions of s 44(7)(a) and 45(4)(b) that the ingredients for the proof of such a breach are evidence of—

- a. the acts of non-compliance; and
- b. that these acts affected the result of the election

[416] Hence mere non-compliance with the Act does not render an election void. It is only when such non-compliance affects the result of the elections that the Court may declare the election void. As to the extent of the effect of non-compliance necessary to avoid an election, no guidance is provided by the Act.

[417] *Halsbury's Laws of England* (vol 15, 4th ed, 15 at para [581]) states the general position as being that an election should not be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal, having cognisance of the question that the election was conducted substantially in accordance with the law as to the elections and that the act or omission did not affect the result.

[418] In *Medhurst v Lough Casquet* (1901) 17 TLR 210, 230 Kennedy J observed that –

An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions.

[419] Similarly, in the case of *Opitz v Wrzesnewskyj* (2012) SCC 55, [2012] 3 SCR 76, the Canadian Supreme Court stated (Rothstein and Moldaver JJ at 198):

The practical realities of election administration are such that imperfections in the conduct of elections are inevitable.... A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical on-the-job experience.... The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the idea of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system. This overarching concern informs our interpretation of the phrase 'irregularities ...that affected the result'.

[420] Mr Georges on behalf of the petitioner has conceded that the court will not negate a result simply because a candidate might receive a better score. In the case of *Morgan v Simpson* [1975] QB 151, election officials at some Electoral Commission polling stations issued ballot papers which did not bear the official mark. The election rules provided that such ballot papers must be rejected by the Returning Officer at the count and so a total of 44 ballot papers were rejected. Had they been valid, the second placed rather than the

returned candidate would have been elected. On petition, the Court took the view that the election was conducted substantially in accordance with electoral law, however, as the result had been affected, the court declared the election invalid. The Court of Appeal upheld this ruling and ruled that the election was invalid despite the fact that it had been held in substantial compliance with the electoral laws.

[421] Lord Denning MR outlined the circumstances under which the court would nullify elections as follows:

- a. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not....
- b. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election....
- c. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.

[422] In the absence of any statutory guidance, we are happy to accept this approach in examining the list of matters of non-compliance with the Act. We understand the first of the circumstances above to indicate that if there were breaches of the elections laws which were so dire as to undermine the basic principles of the election process, regardless of the effect that this may have had on the outcome of the election, the results would not stand. As to the second and third set of circumstances, if we find that, notwithstanding the breach of the election laws, the election was conducted substantially in accordance with the relevant provisions laid down in the relevant parts of the Act but the non-compliance did affect the result of the election we will have no alternative but to set aside the election.

Illegal Practices

[423] Insofar as illegal practices committed in connection with the elections are concerned, a definition of what constitutes an illegal practice is contained in s 53(3) of the Act. It provides in relevant part as follows:

- (3) For the purposes of this section and sections 44, 45 and 47, a person commits an illegal practice where the person—
 - (a) directly or indirectly, by that person or by any other person on that person's behalf, gives, lends or agrees to give or lend, offers or promises to procure or to endeavor to procure, any money or valuable consideration to or for any voter or to or for any other person on behalf of a voter or to or for any other person, in order to

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induce the voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at an election.

- (b) directly or indirectly, by that person or by any other person on that person's behalf, gives or procures or agrees to give or procure or to endeavor to procure, any office, place or employment to or for a voter, or to or for any person, in order to induce the voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of the voter having voted or refrained from voting at an election;
- (c) directly or indirectly, by that person or by any other person on that person's behalf, makes any gift, loan, offer, promise, procurement, or agreement referred to in paragraph (b) to or for any person in order to induce such person to procure or to endeavor to procure the vote of a voter at an election;
- (d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement referred to in paragraph (a), (b) or (c), procures or engages or promises or endeavors to procure the vote of a voter at an election;
-
- (h) corruptly, directly or indirectly, by that person or by any other person on that person's behalf, either before, during or after an election, gives, or provides, or pays, wholly or in part, the expense of giving or providing food, drink, entertainment or provision to or for any person for the purpose of influencing that person or any other person to vote or refrain from voting at the election;
- (i) corruptly accepts or takes any food, drink, entertainment or provision referred to in paragraph (h);
- (j) directly or indirectly, by that person or by any other person on that person's behalf, makes use of or threatens to make use of, any force, violence or restraint, or inflicts or threatens to inflict by that person or by any other person, any temporal or spiritual injury, damage, harm or loss, upon or against a voter, in order to induce or compel the voter to vote or refrain from voting, at an election or who, by abduction, duress or any fraudulent contrivance, impedes or prevents the free use of the vote by a voter either to give or refrain from giving the vote to an election.

[424] The totality of these provisions together with those of ss 44 and 45 of the Act indicate that the essential elements of the proof that an illegal practice voids an election are:

- a. That the illegal practice as outlined in provisions of s 51(3) was committed
- b. In connection with the election
- c. By the candidate or his agent
- d. With the knowledge, consent or approval of the candidate or his agent.

- e. The illegal practice was not done in good faith, inadvertence, or by accidental miscalculation or reasonable cause
- f. The illegal practice was intended to induce the voter to vote, refrain from voting or induce the voter to vote in a particular way in the election.

[425] The elements of the illegal practice seem to include some *mens rea* in that the candidate or his agent must have knowledge of the illegal practice.

[426] In view of the fact that the present matter concerns illegal practices attributed to persons acting on behalf of the 2nd respondent it is also necessary to consider the law on the agency. Both Mr Georges and Mr Hoareau have relied on the English law in relation to agency. These submissions are not helpful as Seychellois law provides for the law relating to agency. It is those provisions that inform our decision.

[427] Chapters 1-IV of Title XIII of the Civil Code of Seychelles provide for the rules relating to agency. Article 1984 defines agency as:

An act whereby a person called the principal gives to another called the agent or proxy the power to do something for him and in his name.
The contract is made by the acceptance of the agent.

The rest of the provisions in the Code relating to agency state that the principal will only be bound when he consents to the agent's acting on his behalf within the limits of the authority defined by the mandate. The Code expressly stipulates that the agent cannot act beyond the authority granted by the principal in the mandate (art 1989).

[428] In our view where the petitioner claims illegal practices have been carried out by agents of the 2nd respondent he must under the provisions of the law adduce evidence of the contract of agency either expressly or impliedly by the principal (in this case the 2nd respondent) and the acceptance by the agent (in this case all the persons alleged to have carried out illegal practices) of such an agreement.

[429] We now examine the averments and the evidence adduced by the petitioner in the light of the requisite ingredients as outlined above.

Illegal Practices by the Second Respondent

The Agency for Special Protection

[430] The petitioner has averred that between the two ballots for the Presidential election, the Agency for Social Protection in the Ministry of Social Affairs invited a large number of people to receive supplementary incomes. The evidence adduced by the petitioner in support of this averment was the affidavit and testimony of the petitioner, the affidavit and testimony of Marlon Zialor and the testimony of Mr Marcus Simeon.

[431] We have not been shown any evidence of letters emanating from the Agency of Social Protection to recipients of social welfare as alleged in the pleadings, nor any oral invitation to the recipients as pleaded. We cannot, therefore, find this allegation proved at all.

[432] It had also been pleaded that over 1000 people queued up outside the Agency office but no evidence to support this fact was adduced apart from photographs of half a dozen persons outside and inside Ocean Gate House and building. Mr Gappy testified that Mr Ramkalawan had reported the queues to him and that he had sent an independent observer, Mr Romaine from the Indian Ocean Commission Observer Mission to go and investigate. He did not report anything untoward.

[433] Mr Zialor did produce a letter informing him that he was eligible for assistance but this was on the basis of an application he had made albeit on the same day. He was, however, in our estimation an unreliable witness. He could not remember whether the Agency was at Pirates Arms or Ocean Gate House. It also transpired in cross-examination that he had misled the Agency as to his circumstances and means and had made a false claim for which he received monthly social assistance payments for three months. He had been a former recipient of social assistance, that fact only emerging in cross-examination and which he did not deny.

[434] The petitioner also called Mr Marcus Simeon, the Chief Executive officer of the Agency for Social Protection who produced documentary evidence to show the speed of the Agency in December 2015. He did explain that some of this extra spending was as a result of the fact that social assistance had to be paid to fishermen to compensate them for a loss of income due to a ban on fishing brought about by an algae bloom. He also explained that spending in social assistance has constantly risen over the years and especially in 2015 as the weighting used for means testing for receiving assistance were relaxed. He also explained that payments before the elections coincided with the fact that they are made earlier than other months every year, that is on 20 December in time for Christmas. Mr Commettant produced documentary evidence to show that the government had spent R 82 million, as opposed to 49 million, 30 million and 25 million in the previous months on social programmes, however, he could not determine for which specific programmes or projects the money was allocated.

[435] We are unable in the circumstances to state that the burden of proving the essential elements of the illegality has been discharged by the petitioner especially in respect of the fact that the Agency for Social Protection committed illegal acts or if they were indeed illegal payments, that these were not made in good faith, inadvertence or by reasonable cause.

Mr René and Mr Pillay

[436] The evidence produced that an illegal practice was committed by Mr Albert René, a former President and alleged agent for the 2nd respondent in relation to an offer for a high post in government should Mr Pillay return to PL was pause. We need only repeat

Mr Patrick Pillay's own statement in Court, that this was normal politicking and that Mr René did not actually tell him who to vote for. There was, in any case, no attempt to show either an express or implied agency between Mr René or the 2nd respondent. Given Mr Pillay's own view on this matter as outlined we do not find any illegal practice committed in this regard.

Sylvette Pool and Mr Peter Jules

[437] In regard to alleged illegal practices by Mrs Sylvette Pool, no evidence of her acting as an agent for the 2nd respondent was adduced by the petitioner apart from the averment in his pleadings and his affidavit that he was informed and believed that she was an agent of the 2nd respondent. Insofar as the allegation of her offering Mr Peter Jules anything he wanted if he switched back to PL, the latter's testimony differed from the depositions he made in his affidavit of a material fact putting in doubt his credibility. He stated in his affidavit that Mrs Pool made the offer to him over the phone but in court stated that she did so at a meeting in Maison du Peuple.

Dania Valentin and Flossel Francois

[438] The petitioner averred that a promise was made to Ms Valentin that her companion Mr Flossel Francois would be released from prison if she appeared on a party political broadcast for the 2nd respondent. Ms Valentin, however, was never called and never testified. Nor was Mr Francois. The petitioner did call a former prison inmate, Mr Tony Dubignon, who testified that because of a serious heart condition he had applied on four occasions for a presidential pardon, none of which had been successful. He admitted that he was ultimately released from prison on a licence to receive treatment.

[439] Although we do not doubt the petitioner's testimony that he had unsuccessfully attempted to obtain a presidential pardon for another terminally ill prisoner on a previous occasion, we cannot infer that from this fact alone that Mr Francois' pardon was granted solely because his concubine appeared on a PL party political broadcast and not because of his serious health condition as admitted by the petitioner himself. Mere allegations or beliefs do not suffice as or amount to evidence in a court of law.

Etihad Airways

[440] A serious allegation of illegality on the part of the 2nd respondent threatening temporal loss by the employees of Etihad Airways was alleged by the petitioner. This related to an article that appeared in the Nation newspaper on 16 December 2015. However although in the article the 2nd respondent is quoted as saying that the airline would pull out if the opposition won the election the respondent in his statement of defence dissociated himself from the article. No evidence was brought by the petitioner to show that the 2nd respondent had indeed given the interview or uttered the words as reported.

[441] Evidence of Facebook posts by Mr David Savy, the Chairman of the Seychelles Aviation Authority was adduced by the petitioner. Mr Savy initiated these posts, the contents of which may on the face of it be threatening temporal loss if the airline was to pull out. Unless he can show otherwise this is in our view an illegal practice on his part in terms of s 51(3)(j) of the Act.

[442] However, these acts cannot be attributed to the 2nd respondent as no evidence was adduced to show that Mr Savy was acting as an agent for the 2nd respondent. The court cannot of its own make such inferences unless evidence pointing to these suggestions are brought by the petitioner.

[443] We also have not been shown any evidence that the actions by Mr Savy were not done in good faith or under any other statutory excuse. In terms of a report to the Electoral Commission under s 47 of the Act on these alleged illegal practices on his part, he will be given an opportunity to defend himself.

Dr Patrick Herminie

[444] The petitioner submitted that the evidence adduced through recordings on Facebook indicate that Dr Herminie the Speaker of the National Assembly committed an illegal act by appearing on a political broadcast during the 24-hour cooling period prior to the election and stated that if the petitioner were to win the elections there might be a risk of his Ministers not being able to be appointed as the National Assembly seats were filled with members of the 2nd respondent's party and consequently a budget for the year 2016 would not be passed.

[445] We are of the view that the actions of Dr Herminie were certainly inappropriate and the national broadcaster which sought the interview should not have done so nor should it have broadcast it on the 7 pm news on 15 December 2015. Moreover, the interview, intellectual property of the national broadcaster, should also not have been posted on Facebook.

[446] We are however constrained by the provisions of the Act to find that the actions of Dr Herminie may have been done in good faith as indeed his remarks correctly stated the consequences of the law should the petitioner have been elected without the budget having been already passed.

Mrs Beryl Botsoie

[447] The petitioner submitted that the evidence adduced, namely a tape recording of Mrs Botsoie, a head teacher addressing teachers of La Rosiere School and accusing the petitioner of ignorance and inviting teachers not to vote for him amounted to an illegal practice capable of voiding the election.

[448] The admission of this evidence was objected to by the respondents on the grounds that it could not be satisfactorily shown to the Court that the audio recording had not been tampered with. Second, Mr Hoareau submitted that, by virtue of art 20(1)(b) of the Constitution, every person has the right not to be subjected without their consent or an order of the Supreme Court to the interception of their private conversations and that the petitioner was not in a position to tell the Court that this recording was not in violation of the constitutional rights of the individuals who allegedly feature on this recording. thirdly, that the recording was a copy (not an original) and the Court should always insist on the production of the best evidence except in exceptional circumstances which do not exist here. The Attorney-General adopted the submissions of Mr Hoareau and raised a further objection based on art 19 of the Constitution (right to a fair hearing) and the privilege against self-incrimination. The Attorney-General stated that admitting the audio recording and thereafter calling the individuals that allegedly feature on the recording to answer as to whether they feature on the recording could result in the individuals incriminating themselves and potentially being found guilty of an illegal practice by the Court.

[449] Mr Georges replied that the respondents had misread the right to privacy as contained in the Constitution; that it exists only in so far as the interception is of private correspondence and not, as here, where the correspondence was made publicly. Second, Mr Georges submitted that whilst there is a privilege against self-incrimination, contrary to the issue raised by the Attorney-General, the individuals that allegedly feature on the audio recording and may be called to give evidence in Court would not be on trial and hence would not have the right to invoke the fair trial protection. Mr Georges further submitted that the Court has a discretion under s 45(4) of the Act to excuse a witness who incriminates himself/herself or is found *prima facie* to have committed an illegal practice.

[450] We ruled that the audio recording was admissible and reserved our reasons for so finding. In a nutshell, we allowed the video recording for the reasons hereunder. Mrs Botsoie was called as a witness by the petitioner but not examined by him or any of the respondents. The audio recording submitted with the petitioner's pleadings was not put to her. The contents of the audio recording were not challenged by counsel for the 2nd respondent as utterances emanating from her. The objections were purely based on the fact that the recording might have been tampered with or that it was only a copy and not the original.

[451] Section 15(1) of the Evidence Act permits the admission of documentary evidence from computers where this would be admissible by direct oral evidence if the computer was used to store, process or retrieve information for the purposes of any activities carried on by anybody or person. The provisions do not state that these activities have been by a person in the normal course of his/her duties. We are of the view that the petitioner, a presidential candidate, concerned about election irregularities which might affect his chances of the election could in the proper course of his duties collect and collate

information relating to such activities. We are not persuaded that there has been any evidence of tampering of the recording. We are also of the view that the recording posted on the internet could be accessed and recorded by any person savvy enough to operate Facebook, of which one such person was the petitioner.

[452] Even had we failed to admit the evidence of the audio recording under the Evidence Act, we would have done so under the doctrine of judicial notice. The Court also has wide discretion in relation to matters of which it takes judicial notice. The doctrine of judicial notice enables the Court to accept a fact without the need for a party to prove it through evidence. In *Commonwealth Shipping Representative v P and O Branch Services* [1923] AC 191, Sumner LJ defined judicial notice as to refer to:

Facts which a judge can be called upon to receive and act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer (at 212).

It can be argued, therefore, that the doctrine of judicial notice obliges courts to accept certain facts before it without the need to have the same proved by the parties in evidence; these being frequently referred to as notorious facts. There is no statutory provision relating to matters of which judicial notice may be taken of in Seychelles. Law is not static either and the Court has to acknowledge technological developments and in this regard, we accept that the internet permeates all aspects of society, including the legal system. In our view, the internet has exploded the possibilities of matters of which judicial notice might be taken.

[453] We are of the opinion that given the fact that the audio recording was already in the public arena and seemed to have been within the notice of most Seychellois it would be improper of the Court not to take judicial notice of it.

[454] We, however, point out that the audio recording is not admitted for the purpose of establishing the truth of the statements contained therein but rather to acknowledge that the information from the audio recording was publicly available before the second round of the elections in 2015.

[455] The audio recording, however, has to be viewed through the lens of the necessary ingredients for the proof of illegal practices affecting the results of the election as detailed above. Whilst Mrs Botsoie's actions, as they appear on the tape, are reprehensible and merit sanction especially given her role as head teacher and the abuse of such a position, there is absolutely no evidence adduced by the petitioner that she acted as agent for the 2nd respondent.

[456] Mrs Botsoie may well have engaged in an illegal practice under the provisions of s 51 of the Act and in this regard will be given an opportunity to be heard why her name should not be sent to the Electoral Commission pursuant to s 47(3) of the Act.

SPDF officers

[457] The evidence adduced by the petitioner in relation to the three army officers is to be viewed similarly to that of Mrs Botsoie. The audio evidence of their statements to army cadets is admissible for the same reasons that the audio evidence relating to Mrs Botsoie was.

[458] If the contents of the video are true, it was certainly reprehensible that persons in such authority would take it on themselves to harangue young soldiers about the wisdom of not voting for the petitioner. But crucially, as in the case of other alleged illegal practices attributable to the 2nd respondent affecting the election result, no evidence was brought by the petitioner to demonstrate that these officers were acting as agents of the 2nd respondent. It is certainly possible that people engage in frolics of their own with the mistaken conviction that they are doing a presidential candidate a service by inducing voters to vote in his favour but it cannot be said that the 2nd respondent had any knowledge of such nefarious activities and he cannot be held responsible for them in the absence of evidence.

[459] However, the acts of all three officers may well amount to an illegal practice and in this regard, they will be given an opportunity to show why they should not be reported to the Electoral Commission.

James Lesperance

[460] By far one of the most serious potential infractions of the Act was the activities of Mr James Lesperance. Evidence was adduced by the petitioner and corroborated by Adolph Dubel and Ron Laporte that on 9 December fifteen casual labourers had been accosted by Mr Lesperance who had given them money for food and refreshments and asked them to meet him at his office. In the office they were paid R 2000 in exchange for their identity cards with a promise of a further R 3000, the assumption being that without those cards voters could not vote. Although complaints were made eventually to the police and the identity cards returned the petitioner alleges that the actions of Mr Lesperance were to induce the voters not to vote.

[461] Much as we take a very dim view of these disgraceful acts and are of the view that Mr Lesperance may well have committed an offence under the Act, for the purposes of these proceedings we cannot find that he acted as an agent for the 2nd respondent on the evidence adduced. The evidence suggests that he acted illegally. However, the fact that he was observed at the inauguration ceremony of the 2nd respondent does not amount to proof of agency. His acts must have been done with the knowledge, consent or approval of the 2nd respondent to amount to such agency. It would be far too risky for the court to deduce from the paucity of evidence tendered that a person who goes about fraudulently buying identity cards does so on behalf of another.

[462] Insofar as the illegal acts of Mr Lesperance are concerned he will be given the opportunity to show why his name should not be sent to the Electoral Commission for striking off as a voter.

France Bonté and Simon Gill

[463] Allegations were made against these two individuals by the petitioner in both his pleadings and affidavit but no evidence of these averments was brought. We, therefore, disregard them.

Dolor Ernesta

[464] The allegations made against Dolor Ernesta were very serious. The petitioner averred that he had "kidnapped Marie-Therese Dine, a blind octogenarian". Not only did the petitioner fail to adduce such evidence but in calling Mr Simon Philip Camille to prove and support this allegation the petitioner leads this court to seriously question why this type of language was used in the petition in the first place. In cross-examination, it transpired that Mr Camille, who was Mrs Dine's nephew did not know the age of his aunt, did not live with her, did not know her political beliefs but also did not believe that blind people should be allowed to vote. His aggressive behavior leading to Mr Ernesta returning Mrs Dine to her home instead of driving her to the polling booth resulted in her being disenfranchised. If anything it is he who performed an illegal act.

[465] We disregard the evidence of the petitioner and Mr Ernesta on this issue and need say no more about it.

Indian Ocean Tuna

[466] It was averred by the petitioner that the Principal Secretary of the Ministry of Finance, Trade and the Blue Economy wrote to the General Manager of Indian Ocean Tuna Limited, a company in which the government is a shareholder to announce that the government would pay all Seychellois employees of the company earning less than R 15, 000 monthly a thirteenth month incentive salary. This in his view was to induce workers of the company to vote for the 2nd respondent.

[467] The documentary evidence produced by the petitioner bears out his allegation about the thirteenth-month salary. However, it also transpired that this promise had first been made to Seychellois workers by the petitioner himself and then adopted by the 2nd respondent as far back as June 2015.

[468] The letter was sent just before the second round of elections on 15 December. We are not convinced by the assurances of Mr Payet that this was done to "assist the Seychellois employees to plan for Christmas" even though the thirteenth-month salary was to be paid in January. The timing in our view is far too fortuitous and on a balance of probabilities, we are inclined to believe the petitioner that it was done to influence workers.

[469] However, the effects of such influence is much tempered by the fact that the petitioner had himself promised the same kind of incentive to Seychellois workers. The thirteenth-month salary was a *fait accompli* and very much in the public arena as it had been gazetted in November. The workers were in a win-win situation regardless of who won the Presidential elections. Both candidates had assured them of a thirteenth-month salary incentive. The letter's influence if any on workers in this context cannot, therefore, be assessed. The acts of both candidates in this context in an election year amount to electioneering.

Joanne Moustache

[470] The petitioner averred that money was distributed to Joanne Moustache to induce her to vote for the 2nd respondent. He called Mrs Stella Afif, wife of Ahmed Afif the Vice-Presidential candidate of Mr Pat Pillay of Lalyans Seselwa. She testified that she observed Ms Moustache coming out of the District Administration Office with an envelope. She however admitted under cross-examination that Ms Moustache lived directly behind the office. She also admitted that Ms Moustache was a PL activist but had also previously worked for her.

[471] Ms Moustache also testified. She painted a picture of a strained relationship between herself and her previous employer, Ms Afif. She produced to the court what she had had in her hand on the day in question – a writing pad containing the names of drivers who she was contacting on that day to transport incapacitated voters to the polling station and not an envelope of money as alleged by Mrs Afif.

[472] Given the obvious acrimonious relationship between Mrs Afif and Ms Moustache we do not find the evidence of Mrs Afif credible insofar as the illegal practice on the part of Ms Moustache is concerned. We are unable to understand why PL would need to pay one of their known activists to vote for them. We do not, therefore, find the assertions of the petitioner proved in this instance.

Illegal Practice on the Part of the Petitioner

[473] The 2nd respondent did not file a counter petition but averred in his statement of defense that the petitioner had himself committed an illegal practice by publishing and distributing leaflets in the Tamil Language to voters from the Tamil Community in Seychelles promising them *inter alia* senior posts in his government so as induce them to vote for him or to refrain from voting for the 2nd respondent. This was contrary to s 51(3)(b) of the Act.

[474] While it is not averred that the acts of the petitioner affected the results of the elections in any way, it is clear that his acts satisfy the provisions of s 51(3)(b) to constitute illegal practices. Even if he was not intending to contravene the law, we view such acts especially by the leader of a political party to be reprehensible and irresponsible. We were

particularly dismayed by his nonchalance and levity when challenged with the evidence, which he admitted. We are obliged to make a report on this matter to the Electoral Commission in terms of striking his name off the register of voters.

[475] We take this opportunity to warn future candidates to be careful about their conduct and the potential, when making electioneering promises, in contravention to the provisions of the law.

Non-Compliance with the Act

[476] There were several allegations made in respect of the failure of the electoral officers and other electoral staff to comply with the provisions of the Act. The submission of the petitioner is that because of these irregularities the election is void. We have already outlined the elements necessary for proof that acts of non-compliance can be deemed by the court to affect the result of the elections. We now examine the acts complained in the light of the criteria that have to be satisfied.

Mrs Lizelle Tirant.

[477] Mrs Tirant's evidence in terms of accompanying her incapacitated mother to vote in an electoral area other than her own is not disputed and is accepted by this Court. We also accept that she was erroneously presented with a ballot paper which was handed back. While on the face of it the Act did not comply this did not result in double voting. Hence, the election result was not affected in any way. The provisions of s 44(7)(a) have therefore not been satisfied.

Indelible Ink

[478] The petitioner averred that the indelible ink and spray used to mark the fingers of voters on the day of elections were substandard. He submits that in the circumstances this leaves the possibility of double voting.

[479] We understand the allegation of non-compliance to be grounded in s 25 of the Act which provides in relevant part as follows:

- (1) Voting for an election at the polling station shall be conducted in substance and as nearly as possible in the following manner—
 - (a) a person wishing to vote at the polling station shall—
 - (i) attend personally the polling station;
 - (ii) produce the National Identity Card of the person or satisfy the Electoral Officer of the identity and that the person has not voted at the station or elsewhere at the election;

- (b) the Electoral Officer, on being satisfied as provided in paragraph (a), shall—
 - (i) call out the number and particulars of the person as stated in the copy of the register of voters at the polling station;
 - (ii) stamp a ballot paper with an official mark and deliver it to the person;
 - (iii) place a mark against the name of the person on the copy of the register of voters to denote that a ballot paper in respect of the election has been delivered to the person; and
 - (iv) explain to the person how to record the vote; and
- (c) subject to subsection (3), the person shall go immediately into one of the compartments at the polling station and, without delay, record the vote in the manner explained in the notices referred to in section 21(1)(c) and by the Electoral Officer, fold the ballot paper in such manner as not to reveal the identity of the candidate for whom the vote has been recorded and place the ballot paper in the ballot box provided for this purpose. [Emphasis added]

[480] It must be noted that s 44(7)(a) of the Act in relation to the issue of non-compliance specifies that non-compliance has to be in relation to the provisions of the Act. We have not been able to identify any provisions of the Act in relation to the use of indelible ink or UV spray. Both seem to have been introduced as precautionary measures against double voting together with other mechanisms such as marking-off the names of the voter on their presentation to vote to satisfy s 25(1)(i) – (iii) above.

[481] Mr David Vidot's evidence therefore that he was able to substantially remove the ink by washing it off with a sponge and washing up liquid is not sufficient to satisfy the Court that there was non-compliance with the Act in that regard. It is a concern that the ink used may come off more easily than expected but the fact that even only two spots remained when viewed under the UV light and the fact that he did not vote twice shows that there was compliance with the Act in terms of the provisions of s 25.

The use of pens or pencils instead of markers

[482] The implement used to mark ballot papers is not provided for in the Act. In the circumstances, we cannot find that the use of pens or pencils contravened the Act in any way. Hence any adverse inference relating to such ballots are rejected.

Special polling station

[483] The petitioner has also averred that the opening of a special polling station to allow voters from Praslin and La Digue who are on Mahé on the morning of the main polling day without making special arrangements to prevent them from voting twice or not being impersonated fails to comply with the Act.

[484] In this regard it was an agreed fact that two persons, namely Damian Hoareau and Stan Fanchette, had their names crossed off the Register at the special polling station on Mahé in error even though they did not vote on Mahé but on La Digue. The 1st respondent's witness, Mr Steve Thelermont gave evidence that the person compiling the list must have misheard him calling the page number and line number of Mr Nelson Hoareau (page 16, line 37) and Bernie Farabeau (page 15 line 15) and erroneously marked off Mr Damian Hoareau (page 16 line 27) and Mr Stan Fanchette (page 15 line 29). In evidence it was accepted by Mr Thelermont that the statement officer compiling the list to send to La Digue "may have missed out a few names or entered the wrong page and line number on the list".

[485] In the proceedings Mr Gappy and Mr Morin confirmed that a decision had been taken along with the relevant presidential candidates to speed up the voting by only calling out the page number and line number of individuals who were voting as opposed to calling their full names and NIN numbers. The errors above illustrate the pitfalls of this decision as they resulted in the erroneous marking of several individuals' names.

[486] Section 25(1)(b)(i) of the Act requires that the Electoral Officer *shall (i) call out the number and particulars of the person* as stated in the copy of the register of voters at the polling station. [Emphasis added]

[487] It was not for the Election Commissioner, the Chief Electoral Officer or the presidential candidates or their parties to decide to do away with the calling of the particulars of the individuals, regardless of how logical or practical it may have seemed at the time. This amounts to non-compliance with the Act, not only in the few identified cases but in each and every case where the particulars of the individuals were not called, which may even have been in all 63000 voters' situations. This is a significant and concerning act of non-compliance with the Act and an abuse of the powers of the Electoral Commission, regardless of how well meant the decision was. However, this non-compliance falls far short of the first circumstance as envisaged by Lord Denning above. This alone has not rendered the election so badly executed as to vitiate the results. Therefore, despite being a serious act of non-compliance, the election was still substantially in compliance with the Act.

[488] However, we have to go on to the second leg of the analysis, which is whether this non-compliance affected the outcome of the election. The effect of this non-compliance is that names have been identified as wrongly marked off the register, however, there are no instances that have been identified where persons were prevented from voting because their names had been erroneously marked off (including the situation of Barbara Coopoosamy) or any identified situations of individuals attempting to present themselves to double vote. Indeed in the situations of Mr Hoareau and Mr Fanchette it is clear that the errors had no material effect on the outcome of the vote due to the fact that it is clear that no one voted in their names or with their ID cards. The petitioner would welcome us

to extrapolate these discrepancies out across the other electoral areas, however, it is not the role of the Court to do that mathematical exercise with no proof to back it up. In the circumstances, we can accept that the processes in this regard were poor, however we do not see sufficient basis to suggest that the outcome of the election was affected.

[489] During the proceedings, when considering the evidence from the special polling station, the petitioner discovered that some 53 persons voted in the special polling station held in the National Library on Mahé, however their names were not transmitted to La Digue and therefore not crossed off the register in La Digue. Mr Georges alleged that this opened the door for double-voting as those individuals would have been able to double-vote.

[490] We have carefully gone through the lists compiled at the National Library and the registers used at the National Library and on La Digue. We can identify that three pages of the handwritten list of persons who voted on Mahé were not transmitted to La Digue. These total 45 names. The other eight names we cannot account for the reason why they were omitted from the list as they must have appeared on pages which were transmitted to La Digue. The only explanation that we can think of is that Mr Mathiot accidentally omitted to cross them off on his “master” list.

[491] However, it is not disputed that their names were checked off the copy of the register for the Inner Islands which was being used at the National Library on Mahé in compliance with s 25(1)(b)(iii) of the Act.

[492] Mr Mathiot confirmed that 185 persons voted at the National Library and 185 envelopes containing votes were transferred to La Digue for counting. Their names were read out and were marked off the register. There was no failure to comply with the Act in this regard. We will however address our concerns with regard to the keeping of the electoral register below.

[493] Section 18 of the Act requires that the Chief Electoral Officer provide voting facilities for persons who are unable to vote in their registered electoral area. These facilities are known as special polling stations purely by virtue of parlance and the Act provides for little more than an authorization for their creation. Section 18 provides that:

- (2) The Chief Electoral Officer shall provide voting facilities for voters:
 - (a) temporarily on Mahé who are registered in electoral areas other than those situate on Mahé on the date of the election in those electoral areas;
 - (b) temporarily residing on the Island of Praslin and Inner Islands for employment reasons, who are registered in electoral areas on Mahé;
 - (c) incapacitated and elderly residing in the institutions set out in schedule 1;
 - (d) who are registered in any electoral areas and employed in the essential services as set out in the schedule 2, and on the date of election are on duty away from their electoral area.

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- (2A) Voters under subsection (2) when so voting shall be deemed to have voted in the electoral area in which they are registered.
- (3) polling for an election in the Outer Islands shall be conducted in such manner as the Chief Electoral Officer determines and any voter so voting shall be deemed to have voted in the electoral area in which the voter is registered.
- (4) The Chief Electoral Officer shall provide voting facilities for Electoral Officers, Assistant Electoral Officers and police officers on duty at a polling station of an electoral area other than that in which they are registered as voters to vote on the day on which they are on duty or on the immediately preceding day and when they have so voted they shall be deemed to have voted in the electoral area in which they are registered.

[494] There are no further procedures or precautions that are required by law to be imposed in establishing these special polling stations. Whilst the lax attitude taken by Mr Morin is appalling, in order for us to uphold the submission of the petitioner here, we would need to see that there was a failure to comply with a legal requirement with regard to the conduct of special polling stations. Nowhere in the Act, or its subsidiary legislation are there specific conditions for the conduct of special polling stations. According to s 3(b), the Chief Electoral Officer is subject to the direction of the Electoral Commission and as such is to be guided by the regulations made by the 1st respondent pursuant to s 99 of the Act. Unfortunately these regulations do not exist.

[495] Greater detail for how these stations are to be operated, including the requirement that the ballots are placed in separate envelopes, sealed and marked with the name of the electoral area of that voter, are only found in the document entitled *Handbook for Electoral Officers* (November 2015) at 31 *et seq* which is published by the Electoral Commission. However, this Handbook does not have any legal weight and is merely a book of guidelines for the purposes of the persons involved in the elections process. The content of the Handbook really is such that should be contained in subsidiary legislation to the Act as it clarifies procedures and processes for the election. If it had been gazetted as regulations or given legal weight, failure to comply with its provisions would have amounted to non-compliance with the Act. We agree with Mr Georges that this is a very important document insofar as it contains much of the backbone of the elections process, however we cannot afford it more weight than it has. It is merely a handbook and not binding or authoritative and as such failure to comply with its requirements does not amount to non-compliance with the Act.

[496] It is undeniable that the requirement to make available voting facilities includes a requirement to ensure that the voting facilities provided are fair and transparent and will enable the exercise of each citizen's fundamental right to vote. This duty falls on Mr Morin, the Chief Electoral Officer. Mr Morin is given a wide scope to exercise his discretion in this regard and it is fair to say that processes and procedures have been put in place to facilitate the voting by having these special polling stations open.

[497] With regard to the only polling station which ran concurrently, the National Library on Mahé and the polling station on La Digue, Grand Anse Praslin and Baie St. Anne. To prevent double voting, there was a procedure where periodically throughout the day the names of the persons who had voted on Mahé were facsimiled to the various polling stations to ensure that the names of those voters were crossed off the voting register's in the electoral areas. The failure to transmit the 53 names from Mahé to La Digue resulted in those names not being read out during the polling day.

[498] The calling out of the names periodically on the day is only one step to prevent double voting and others include the application of the indelible ink and UV spray and the fact that the names of all persons who voted at a special polling station in advance of the main elections day were transmitted to the polling station before the polling station opened. Given the short period of time during which the two stations were open concurrently (5 hours), the fact that steps were being taken to transmit names throughout the day and the added precaution of having had the indelible ink on the thumb and the UV spray on the hand, it is sufficient for our purposes to say that there were safeguards in place to ensure that double voting did not occur. Moreover, it is common cause that no one attempted to vote twice, which would have become apparent by checking these 53 names against the register on La Digue. The failure to call out these 53 names has not amounted to non-compliance which has affected the outcome of the election. These 53 names ought to have been timeously transmitted to La Digue. However, the failure of these names to reach La Digue did not actually affect the outcome of the elections. We can cross reference the names and check that none of those persons on the list attempted to vote on La Digue. Even if these individuals had known that their names had not been properly transmitted and they had made the attempt to cross to La Digue and vote before their names were cross-referenced, they would have been identified by the UV spray and indelible ink on their fingers.

[499] Still addressing irregularities in the special polling station process, it came to light during the proceedings that some envelopes containing votes from the special polling station did not have their electoral area written on the front of the envelope. The Chief Electoral Officer, Electoral Commission and representatives of both candidates, made a decision that these unlabelled envelopes could be distributed at random to electoral areas notwithstanding the fact that this would mean that the number of envelopes received by a specific electoral area may not tally with the number of names on the list of persons from that electoral area who had voted in the special polling station. Mr Morin was adamant that this would not affect the outcome of the vote as he stated that the number of persons who had voted would exactly match the number of envelopes received and the names of the persons who voted would still be appropriately circulated to their electoral areas to prevent them from voting again on the main polling day. However, failure to tell the Polling Agents and Electoral Officers at the actual polling station was a significant oversight, causing much concern for the officers involved whose tallies therefore did not match what they were expecting.

[500] Mr Georges spent some time addressing the fact that when the information available to the Court was analysed, it appeared that there were five envelopes more than names marked off the register. Mr Morin conceded this point and stated that it must have been an error. Mr Morin reiterated that the agents were exhausted, having not slept for close to 72 hours, “I mean we are bound to make errors”. Mr Morin accepted that there could have been a mistake and some names might have not been put down on the list.

[501] We wish to note that it is regrettable that Mr Morin has taken such a lackadaisical attitude to his duties. Moreover it is regrettable that there is a blasé approach to the human errors which have been blamed for each and every incongruence in the marking and sorting process.

[502] Mr Gappy, on the other hand, was able to explain where the envelopes were distributed. He clearly went through the number of envelopes received by each electoral area, and compared it to the number of names itemised on the electronic list provided to the electoral areas (which was provided to the polling station and called out in the morning prior to the polling station opening. Below is a table of all of the electoral areas which received a number of envelopes which differed from the electronic list.

[503] Electoral Area No. of envelopes received No. of names on electronic list

| | | |
|--------------------|------|------|
| Anse Boileau | 215 | 214 |
| Anse Etoile | 284 | 283 |
| Au Cap | 210 | 209 |
| Bel Air | 145 | 146 |
| English River | 262 | 259 |
| Grand Anse Praslin | 83 | 84 |
| Plaisance | 209 | 210 |
| Point Larue | 144 | 145 |
| | 1552 | 1550 |

[504] At the end of that exercise we can see that there were only two envelopes which did not have corresponding names itemised on the lists provided to the electoral stations. These Mr Gappy identified as belonging to two women whose names appeared on a supplementary list of voters which had been agreed by all political parties. Both of these women voted at the special polling station at English River. The one was permitted to vote at the special polling station because she was travelling abroad, the other was a member of the essential services and therefore was required to work on the polling day and therefore entitled to vote ahead of time. The one vote was allocated to Au Cap and the other to Anse Etoile. However, their names could not appear on the electronically generated lists as they only appeared on the supplementary list.

[505] At the end of the exercise we see that all of the votes are appropriately accounted for. However, it would have been helpful for Mr Georges to have been provided with this information earlier in the process.

[506] We understand that Mr Georges only became aware of this discrepancy during the course of the proceedings and was precluded by the Election Petition Rules from pleading in this regard. We choose to take judicial notice of this matter even though it is *ultra petita* as we felt that we needed to say something about the 1st respondent's performance of its duties and note our concern.

Aged Voters

[507] The petitioner alleged that there was a failure to ensure sufficient safeguards to protect the dignity of aged voters and prevent interference of their free right to vote which affected the results. In addition to the evidence regarding Mr Dolor Ernesta (which has already been dealt with above), the petitioner brought evidence relating to the conduct of the special polling station in the Old Person's Home at North East Point, averring that there had been coaching of the elderly residents in the female ward in the morning of the elections. Mr Patrick Savy testified that he had gone to investigate ongoing allegations at the home, and had seen Mrs Desir, the nurse in charge, of the station, and Mrs Vicky Vanderwesthuizen who is a member of the Assembly and a representative of the PL were in the ward. Mr Savy was asked to leave the ward. This was verified by an entry in the occurrence book for the station. Whilst we accept that it may be suspicious that Mrs Vanderwesthuizen was present in the ward at that time in the morning, there is no concrete evidence of her applying influence to the elderly persons or coaching them.

[508] Moreover, Mr Savy testified that during the day one elderly gentleman complained that he did not have his ID card, which a staff member thereafter brought to him.

[509] Section 25(1)(b) requires that voting facilities are established to enable the elderly and infirm to be able to vote. The special polling station at North East Point was in compliance with this provision. Taken in its totality, this was insufficient evidence to suggest that the patients were being coached. There was insufficient proof of failure to safeguard the dignity of the elderly voters, and therefore we reject this pleading.

Ballot papers

[510] The ballot papers were printed by a company in South Africa and were bound into batches of 100 ballots or 50 ballots per batch. It was admitted that in some batches there were 101 ballots or 99. This becomes significant to the extent that in the final tally from each polling station, the electoral officers calculate the number of ballots they received from the headquarters plus the number of votes received from special polling station less the number of votes left over and rejected and this should equal the number of valid votes cast. However, in several polling stations these figures failed to balance, namely in the following stations: Silhouette (which had a surplus of 1 ballot), Cascade (surplus of 1 ballot), Anse Aux Pins (surplus of 2 ballots), Anse Etoile (2 ballots short), and Pointe Larue (surplus of 1 ballot).

[511] In his testimony, Mr Morin explained that the procedure as set out in the Elections Handbook was that the ballot papers would be counted at the headquarters before being distributed to the individual polling station. Any errors were to be corrected at that time (ballot batches with the incorrect number of ballots would be replaced with correct ones). Moreover, on the morning of the election, the polling station were to recount the ballots prior to starting voting. However, in testimony it transpired that almost no polling station counted the ballots on the morning of the vote. When questioned about this Mr Morin stated that it was at the discretion of the individual electoral officers to count the books again. However, when shown the Elections Handbook, Mr Morin agreed that the wording of the Handbook is imperative and not discretionary, but he reiterated his point of view that the Handbook is merely a guideline for the electoral officers.

[512] At the time of counting, several polling stations discovered that their numbers did not balance. The witnesses assumed that the reason for any surplus or deficit had to do with a ballot batch not containing the requisite number of ballots. The only place where this was clearly shown to have happened was at the Point Larue polling station which was exemplarily run by Mr Guy Morel.

[513] During the pre-check stage prior to polling, Mr Morel recounted the ballots and discovered one batch that had 101 ballots instead of 100, which made a total stock of ballot papers at 2101 instead of 2100. This booklet was marked and Mr Morel called the Polling Agents to explain what happened and they all agreed to readjust the number of assigned ballots to 2101 instead of 2100. As a result there were no surprises at the counting stage of the day. Mr Morel should be commended on his professionalism and attention to detail with how he managed his polling station. He ensured that all parties were engaged when he spotted potential problems and he dealt with them up front. He abided by the letter of the Handbook and the laws, even to the extent of ensuring that all registers, occurrence books and notes were locked and sealed. The same cannot be said of the other polling stations, however they took their lead from the two persons in charge of the election process, the Electoral Commissioner and the Chief Electoral Officer, both of whom appeared to treat the requirement to recount the ballots as optional. As a result we cannot be certain how many ballots were in fact issued to any of the polling stations which did not recount their ballots, and as such their tallying at the end of the day equally cannot be relied upon.

[514] Mr Gappy and Mr Morin were of the view that any error in counting and checking of the number of ballot papers in a booklet would be due to human error. The 1st and 2nd respondents contended that no evidence was before the Court to indicate that any error which might have occurred in this respect affected the result of the election.

[515] The number of ballots received at the beginning of the day is relevant for the purpose of the balancing exercise on the ballot paper account (as required by s 29(1)(d) of the Act). Moreover, it is important to ensure that ballots do not go missing at any point, which is protected by having the ballot paper account and by requiring that all unused

ballot papers are sealed and returned (s 29(1)(b)). Whilst there is no requirement in law that the ballot papers are counted twice before the polling begins, having an accurate number of ballots allocated to each polling station is an important requirement of the process.

[516] The Act firmly places the overarching duty to supervise the election on the Chief Electoral Officer, under the supervision of the Electoral Commission (s 3(b) of the Act). Therefore, it is his responsibility to ensure that the procedures are correct to ensure that the provisions of the Act are complied with. Mr Morin has failed to ensure that adequate controls are in place to ensure that there is an accurate count of the ballots allocated to each polling station at the start of the elections. Moreover, this placed pressure and stress on the elections officers who were unaware of the likelihood that there were the incorrect number of ballots in the batches (although many of them were disregarding the requirement in the Handbook to recount the ballots). We, therefore, find non-compliance with these provisions of the Act.

[517] However, it does not necessarily follow that these inconsistencies affected the outcome of the election, because the presence of an extra ballot is not necessarily the presence of an extra vote. It should be easy enough to calculate whether there are excess votes or excess ballots. The number of votes cast in the ballot box should equal the number of names marked off on the register, which should equal the number of tallies on the tally sheets. This is the point of completing the ballot paper account sheet (s 29(1)(d)) and of storing and sealing the unused ballots, the register of voters and other documents in terms of s 29(1)(e). A complete and thorough exercise was not performed to satisfy us of the reason for the extra ballots at Cascade, Silhouette, Anse Aux Pins, Anse Etoile and whether or not there were extra ballots or votes. However, equally there was no evidence placed before us to suggest that the approximately 5 extra ballots were in fact extra votes and affected the results of the election.

Registers

[518] The petitioner has placed emphasis on the fact that there has not been a reconciliation of the multiple registers used at each polling station. The register is used upon entry to ensure that the person has not already voted (and therefore had their name checked off the register). The Act envisages that the register of voters will play an important role in the election process. Section 7(1) requires the preparation of a register of voters for each electoral area, which is verified (s 8) and certified (s 9). Prior to voting “sufficient copies” of the register of voters are to be provided to the polling station (s 21(e)) and upon entry into the polling station the number and particulars of the voter are called out according to the details provided in the copy of the register of voters (s 25(1)(b)(i)). A

mark is then placed against the name of the voter in the copy of the register of voters to denote that a ballot paper in respect of the election has been delivered to the person (s 25(1)(b)(iii)). After the voting is completed, s 29(1) of the Act requires that

[t]he Electoral Officer shall, as soon as is practicable... after the close of the poll, in the presence of the respective polling agents who wish to attend –

....

(c) mark the copy of the register of voters;

....

(e) place the pack of unused ballot papers and register of voters ... in a bag and seal the bag with the seal of the Electoral Commission.

Clearly, the register of voters is envisaged to play an important role in the voting process. Furthermore, the wording of s 21 suggests that it is perfectly permissible under the Act for more than one register to be in use in a polling station at any one time. However, the use of the singular in s 25 suggests that the names are to be marked in only one register.

[519] During the proceedings, the Chief Electoral Officer and the Electoral Commissioner both seemed unaware of the requirement that the registers ought to be sealed and handed to the Electoral Commission despite it being explicitly laid out in the Act. Mr Morin stated that some registers were sealed, and some were simply placed in a box or envelope with the other stationery from the polling station. The registers were not marked for any form of easy identification. Mr Gappy stated that it was not SADC practice to reconcile the registers and that it would cause unreasonable delay in announcing results. He stated that he is satisfied with using the tally sheet system to mark off the allocation of ballot sheets as this has been used since the times of Justice Sauzier in the early 1990s.

[520] Whilst it is not a legal requirement that any reconciliation of the registers is done, it is important that they are kept, sealed, for the purposes of a challenge such as this one. Where the cause is shown in a petition, it is possible to order that they are reconciled to prove or disprove the tallying of the votes with the number of voters. The tally sheets are useful in allowing a quick calculation of the votes, however, they are not as reliable as the register and by no means a replacement for it. Situations such as those encountered at Cascade and Anse Aux Pins, where additional ballot papers are found to be present could be easily resolved with reference to the register (which should match the tally sheet).

[521] The registers from the Inner Islands certainly showed several incongruities which could not be explained away by the relevant officers as names were marked off some registers and not others with little consistency between the three registers produced. Mr Georges for the petitioner stated that "the marking only of the register where a voter presents him or herself leaves the possibility open for voters returning to another table and voting against" and states that "[t]here is only one way for these problems to be satisfactorily resolved. This is to use the electoral register, properly marked, as the base

for the tallying of voters who had voted." Indeed this is so. However, that does not mean that only one register needs to be used in the polling station. Section 21 clearly envisages that there may be more than one register in use, however, sufficient steps must be taken to ensure that the registers are consistently and diligently used. They should be relied on in preference to the tally sheets.

[522] The failure to reconcile the registers is not a form of non-compliance with the law as there is no law requiring that the registers be reconciled in the first place. However, they do need to be sealed and placed in the care of the Chief Electoral Officer as required by the Act.

Our Decision

[523] With regard to the allegation of illegal practices against the 2nd respondent affecting the results of the elections, after a meticulous examination of the evidence before us, we find that the petitioner has not discharged the burden of proof to the standard required by law in this matter. In terms of the allegations of illegal practices by a number of persons, we are of the view that some reprehensible acts did take place as outlined in our judgment above. We are not, however, persuaded that those acts or any of the others alleged, satisfy the tests of the agency to directly or indirectly link them to the 2nd respondent as is required by the provisions of the Act.

[524] Moreover, it is a further requirement of the law that the petitioner has to prove that the illegal practices if perpetrated by the 2nd respondent or through his agency affected the result of the elections. This again was not proved. It occurs to us that the provisions of the Act as framed make it very difficult to successfully bring allegations of illegal practices affecting the results of elections in an election petition. The Court is aware of that burden. However, in this case, the evidence brought before the Court relied too much on inference with insufficient evidence to back up those inferences.

[525] Nevertheless, the Court is under a duty to report incidences of illegal practices in terms of s 47(1) to the Electoral Commission. Our report will be based on the totality of the evidence in this case. Where persons have not had an opportunity to be heard in defence of these illegal practices they will be given an opportunity to be heard in terms of s 47(2) of the Act. The Court is however not obliged to make such report public. Moreover, it would be improper to discuss the contents of this report in this judgment.

[526] In terms of non-compliance by the 1st respondent with the Act, although many irregularities occurred and unsatisfactory procedures were followed these did not flout the law but rather the guidelines in the Handbook which is not enforceable. In each situation, the Electoral Commission had an adequate excuse in response to the allegations. In situations such as with regard to the sorting of the envelopes, the failure by the 1st respondent to come forward with full and frank disclosure earlier in the proceedings resulted in time wasting and prevented the Court from focusing its time on the more pertinent issues.

[527] We are satisfied that the counting procedures although not always orthodox did not reveal any stray votes or evidence of stuffed ballots or any interference in the count amounting to affecting the result of the election. We do find that the Director of Elections was far too lax in the execution of his duties and seemed to have not grasped the importance of his role both for the satisfactory conduct of elections and for the advancement of democracy and the nation as a whole. Similarly, the Electoral Commission did not satisfactorily execute its responsibilities as demanded by the provisions of the Act. We have articulated these deficiencies above.

[528] We wish to warn political activists and supporters that in no circumstances should they abuse their positions of power or employment for the purpose of advancing the interests of a party which they support. This is a violation of the Act and carries serious penalties. In this regard, we will discharge our duties in terms of a report to the Electoral Commission.

[529] For the avoidance of any doubt, a report by the Constitutional Court will be forwarded to the Electoral Commission in regards to the illegal practice by the petitioner pursuant to s 47(1)(a) of the Act.

[530] We are unanimous on the matters brought before us in these proceedings and make the following orders:

- a. Constitutional petition No 1 of 2016 in the consolidated petitions is hereby dismissed.
- b. Each party shall bear its own costs.
- c. We order the following persons to appear before us on Tuesday 28 June at 9.00 am to show cause why they should not be reported to the Electoral Commission in terms of s 47(1)(b) with regard to illegal practices averred in these proceedings: Mr James Lesperance, Mrs Beryl Botsoie, Lieutenant Colonel Clifford Roseline, Reverend Louis Agathine, Mr Simon Dine and Mr David Savy.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, D Akiiki-Kiiza J
14 June 2016

[2016] SCCC 12

Civil procedure – Stay of execution

The applicant lost a case and applied for a stay of execution of judgment. It was held that a stay cannot be granted unless an appeal is made and supported by grounds.

Counsel A Derjacques for the petitioner
 S Aglae for the 1st respondent
 B Hoareau for the 2nd respondent
 Attorney-General for the 3rd respondent

Order

[1] The applicant, a party to an election petition in which a decision was delivered on 31 May 2016, has applied for a stay of execution of the judgment.

[2] He has supported his application with an affidavit in which he swears, inter alia, that he filed an appeal against the said judgment on 3 June 2016.

[3] A copy of this appeal is not attached to the application.

[4] The Court has verified that no such appeal has been filed as alleged by the petitioner.

[5] In the circumstances not only is the fact alleged, which is sworn to be true and correct by the applicant, false and incorrect, it also cannot support such an application before this Court.

[6] Furthermore, there are no supporting grounds for the application.

[7] The application is, therefore, dismissed with costs.

RAMKALAWAN v ELECTORAL COMMISSION

M Twomey CJ, D Akiiki-Kiiza J
14 June 2016

[2016] SCCC 13

Election petition – Stay of execution

The applicant was a party to an election petition. The Court found that the petitioner was engaged in illegal practices in the election and so was about to report to the Electoral Commission, the 1st respondent, about the findings. The report would have the consequence of making the petitioner disqualified for the next election. The petitioner applied for a stay.

JUDGMENT Stay granted.

HELD

- 1 It is entirely in the discretion of the Court to grant a stay.
- 2 The Court considers the following things in granting a stay: chances of success of appeal, the balance of convenience, hardship and irreparable damage that may be suffered by the appellant and the concern that unless a stay was ordered the appeal would be rendered nugatory.

Legislation

Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, r 2
Elections Act, ss 45, 47(1)(a)
Presidential Election and National Assembly Election (Election Petition) Rules 1998, r 3(2)
Seychelles Code of Civil Procedure, s 230

Cases

Avalon v Berlouis (2003) SLR 59
Chang-Tave v Chang-Tave (2003) SLR 74
Choppy (Pty) Ltd v NJS Construction (Pty) Ltd (2011) SLR 215
Faye v Lefevre (2012) SLR 44
International Investment Trading v Piazzola (2005) SLR 57
Pool v William (1996) SLR 206

Foreign Cases

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685

Counsel

B Georges for the petitioner
S Aglae for the 1st respondent
B Hoareau for the 2nd respondent
Attorney-General for the 3rd respondent

Order

[1] The applicant was a party to an election petition in which a decision was delivered on 31 May 2016. The respondents were also parties to the said petition.

[2] In the said decision, the Court found that the applicant had engaged in an illegal practice and stated that pursuant to s 47(1)(a) of the Elections Act it had to make a report in writing to the 1st respondent of the said illegal practice.

[3] The applicant has applied to this Court for a stay of execution of the writing of this report.

[4] He has supported his application with an affidavit in which he swears, inter alia, that the making of the report will result in disqualifying him from being registered as a voter for five years and from voting at an election.

[5] He further avers that the disqualification will have the result of preventing him from standing as a candidate in the forthcoming National Assembly Elections to be held before the end of August 2016.

[6] He also avers that he has filed a notice and memorandum of appeal against the said decision, namely on the ground that the Court failed to consider the matters which would except the illegal practice under s 45 of the Elections Act.

[7] The 2nd and 3rd respondents have argued that the application is premature given that the Court has not yet made or sent a report in terms of s 47(1)(a) of the Elections Act. However, we are of the opinion that the finding of illegality was contained in the judgment of the Court dated 31 May 2016 (CC 01 of 2016). The report is yet to be made and therefore this application is timely.

[8] The Court notes that there are no provisions in the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules with regard to stays of execution. Rule 2 provides for the practice and procedure of the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution. An election petition is, therefore, not covered by these specific rules.

[9] The Court also notes that r 3(2) of the Presidential Election and National Assembly Election (Election Petition) Rules 1998 provides that in the circumstances where a matter is not provided for in the rules, the Seychelles Code of Civil Procedure shall apply to the “practice, and procedure to be observed in connection with the presentation and hearing of an election petition as they apply to civil proceedings before the Supreme Court”. An application for a stay of execution after the hearing of the petition also falls outside these provisions

[10] It would seem that a matter outside the presentation and hearing of an election petition before the Constitutional Court is not provided for statutorily.

[11] Notwithstanding, an election petition being a civil action, this Court finds that s 230 of the Seychelles Code of Civil Procedure applies in these circumstances. It provides, however, that an appeal shall not operate as a stay of execution unless the Court so orders and subject to such terms as it may impose.

[12] This is an unusual application for a stay of execution as the applicant is seeking to prevent the Court from proceeding in terms of its requirement under the provisions of the Elections Act. However, s 230 of the Seychelles Code of Civil Procedure does provide for both stays of execution and of proceedings under a decision.

[13] The provision, however, is not instructive as to when such an order should be granted. The authorities in this jurisdiction have confirmed that it is entirely in the discretion of the Court to grant a stay (*Pool v William* (1996) SLR 206, *Chang-Tave v Chang-Tave* (2003) SLR 74, *Avalon v Berlouis* (2003) SLR 59, *International Investment Trading v Piazzola* (2005) SLR 57 and *Faye v Lefevre* (2012) SLR 44).

[14] The considerations for granting a stay of execution include the weighing of the interests of the parties to establish whether the appeal has some chance of success, the balance of convenience, hardship and irreparable damage that may be suffered by the appellant and the concern that unless a stay was ordered the appeal would be rendered nugatory (See *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685, *Choppy (Pty) Ltd v NJS Construction (Pty) Ltd* (2011) SLR 215).

[15] The balance of convenience in the present case weighs in favour of the applicant since no prejudice will be visited on the respondents as the decision concerns the actions of the Court only.

[16] The Court accepts the applicant's pleadings in relation to the effect this will have on his political career and considers that refusing a stay of execution of its report to the 1st respondent will render the appeal nugatory and the applicant would suffer real prejudice that would not be otherwise compensated.

[17] Therefore, out of an abundance of caution this Court grants a stay of execution in respect of the making of a report to the Electoral Commission as regards the illegal practice by the applicant. It is so ordered.

REPUBLIC v Z

M Burhan J
17 June 2016

[2016] SCSC 422

Criminal procedure – Indecency – Evidence of Child

The accused had been charged on 2 counts of committing acts of indecency on a person below the age of 15 years contrary to s 135(1) of the Penal Code. Counsel for the accused raised the contention that the accused has no case to answer.

JUDGMENT No case to answer contention rejected.

HELD

- 1 A no case to answer can only succeed if it can be shown on the facts that the prosecution has no evidence to prove an essential element of the offence, or that the evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
- 2 The necessity to look for corroboration does not always arise. Acts of indecency could occur on a child without there being any medical evidence to corroborate the same.

Legislation

Penal Code, art 135(1)

Cases

R v Stiven 1971 SLR 137

Lucas v Republic (2011) SLR 313

Foreign Cases

R v Hayse [1977] 1 WLR 234

Counsel B Confait for the Republic
 C Lucas for the accused

BURHAN J

[1] I have considered the submissions made by counsel for the accused at the close of the prosecution case in regard to his contention that the accused has no case to answer. I have also considered counsel for the prosecution's submission in respect of same.

[2] The accused had been charged on 2 counts for committing acts of indecency on a person below the age of 15 years, contrary to and punishable under art 135(1) of the Penal Code Cap 158.

[3] In the case of *R v Stiven* 1971 SLR 137, it was held what court has to consider at the stage of no case to answer is whether:

- a) there is no evidence to prove the essential elements of the offence charged.
- b) whether the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

[4] *Archbold in Criminal Pleadings Evidence and Practice* (2012 Ed) 4-363 sets out the principle in a no case to answer application:

A submission of no case should be allowed where there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict.

[5] The main grounds relied on by counsel for the accused are that:

- a) The unsworn evidence of the child should be corroborated and the medical certificates do not corroborate the evidence of the child.
- b) The judge found her unfit to give evidence under oath even though she could give intelligible evidence and therefore her unsworn evidence needs to be corroborated.
- c) The evidence of the victim should not be believed as she was subject to undue influence by the Social Worker and as she had voluntarily confessed in court that she had spoken lies and therefore on her own admission she was a liar.

[6] When one considers the evidence of the victim, she speaks of several acts of indecency committed on her by the accused her father, when she went to stay with him and spend time in his house at as she attended school in the same district. It is apparent that on meeting her mother who was separated from the accused the next day 28 July 2015, she had informed her mother at the bus stand what had taken place and her mother had immediately taken her to the police station and thereafter, the statement of the victim was recorded and investigations begun, leading to the arrest of the accused who was subsequently charged in court.

[7] The victim in her evidence in chief, described in detail the acts of indecency committed on her by the accused who she was able to identify as he was her father and maintained her version despite being subject to cross-examination for several days. However on 11 December 2015, there was what court could clearly observe, a sudden change in her evidence and she began to deny the acts of indecency committed on her by the accused.

[8] It would be pertinent at this stage to set out the evidence at page 5 of the proceedings of 11 December 2015,

Q. “The other day you were saying that your father did something very nasty to you with his penis did this ever happen? ---(name withheld) this is a very important question because your father is in court because for that reason he risks spending 14 years in prison.”

Court: All that is not necessary, let her answer the 1st question first.

[9] It is the submission of counsel for the prosecution that this type of question made the child feel sympathetic and due to the natural love and affection an eight year old child would have for her father, the victim had begun to change her evidence and it is apparent therefore that the question would have had an effect on the child.

[10] I observe on a reading of the recorded evidence on that particular date that there definitely was a complete and sudden change in the evidence of the victim witness who is only 8 years old. I also observe that until that day, despite being subject to detailed cross-examination, her evidence had withstood all the rigours of cross-examination and her evidence disclosed acts of indecency being committed on her by the accused. I also note that the victim mother’s evidence of the acts of indecency as told to her by the victim, are not contradictory to the evidence of the victim in court, showing consistency in the case of the prosecution.

[11] Further, I note the promptness of the complaint made by the victim to her mother separated from the accused and the prompt action of the mother in going straight away to the police station with the victim and making the necessary complaint, does not leave room for any undue influence either by the Social Services or mother to have been brought upon the child, to fabricate a story.

[12] I therefore would not at this stage due to the aforementioned reasons contained in paras [6] to [11] herein, come to the conclusion that the 8 year old child witness was deliberately lying to implicate her father or that the evidence of the child witness has been totally discredited by the cross-examination. The possibility of the child witness only 8 years of age, suddenly changing her evidence as she felt sympathy for her father exists. Further, on consideration of the above facts, it could not be said that the prosecution has failed to prove an essential element of the said offence.

[13] It cannot be said that the court held that the victim was unfit to take the oath as the record indicates, the finding made by court after due inquiry was that the child was capable of giving intelligible evidence and considering the tender age of the child, the administration of an oath was not necessary, followed in the case of *R v Hayse* [1977] 1 WLR 234, referred to by counsel for the prosecution at pg 15 of her submissions dated 8 April 2016.

[14] In regard to counsel for the accused's submission that the evidence of the victim was not corroborated by the evidence of the doctor, in the case of *Lucas v Republic* (2011) SLR 313, the necessity to look for corroboration does not always arise and it is the view of this court that acts of indecency could occur on a child, without there being any medical evidence to corroborate same.

[15] Therefore for the aforementioned reasons, this court is satisfied that a prima facie case in respect of the offences set out in the charges exists against the accused and there is no merit in the contention of counsel for the defence that the accused has no case to answer.

[16] Further, considering the circumstances peculiar to this case as the evidence of the child in my view would have ignited the wrath of both parents, the court being the upper guardian of the minor child orders that the Social Services continue to monitor the welfare of the child and report to the relevant court or tribunal, if any form of relief is required in the best interest of the child.

[17] For the aforementioned reasons, this court proceeds to call for a defence from the accused in respect of the charges framed against him.

[18] A copy of this order to be served on the Social Services Department.

SOLO v PAYET

M Twomey CJ
8 July 2016

[2016] SCSC 479

Evidence – Penal judgments in civil action – Delict – Damages

The plaintiff sustained a fracture in her finger by the defendant's assault. The defendant pleaded guilty. Damages of R 500,000 was claimed for injuries along with moral suffering.

JUDGMENT R 30,000 awarded.

HELD

- 1 A conviction in a criminal case is admissible in a later civil action as proof of the act for which conviction was entered.
- 2 The amount of damages to be granted in a given case is subjective.

Legislation

Civil Code of Seychelles, arts 1149(2), 1351, 1382
Evidence Act, s 29

Cases

Bouchereau v Francois and ors (1980) SLR 77
Denis v Ryland [2016] SCSC 10
Dufrene v Bacco SCSC 109 of 2003
Kimkoon and Co v R (1965) SCAR 64
Saunders and Or v Loizeau (1992) SLR 214
Servina v Richmond SCSC 342 of 2004
Vel v Tirant and or (1978) SLR 9

Foreign Cases

Hollington v Hewthorn [1943] KB 587

Foreign Legislation

English Civil Evidence Act 1968 (ENG), s 11(1)

Counsel F Bonte for the plaintiff
E Chetty for the defendant

TWOMEY CJ

[1] The plaintiff and defendant were involved in an incident at Ile Perseverance in which the plaintiff alleged she was unlawfully assaulted by the defendant and suffered a fracture to her middle finger.

[2] The defendant pleaded guilty on 4 February 2014 to the charge of grievous harm before the Magistrate's Court.

[3] The plaintiff averred in her plaint filed in March 2014, that the acts of the defendant amounted to a fault in law and claimed the sum of R 500,000 comprising R 200,000 for injuries, R 100,000 for pain and suffering, R 100,000 for trespass to the person and R100,00 for moral damage.

[4] The defendant in her statement of defence denied assaulting the plaintiff but stated that she had pushed the plaintiff away to defend her husband, Nigel Payet, who was being attacked by the plaintiff and her husband's son Selby Payet. She denied causing injury resulting in loss and damage to the plaintiff.

[5] At the hearing of the plaint, the plaintiff testified that on 30 April at 6.30 at her residence in Perseverance, the defendant used abusive language which resulted in a fracas between her husband and the defendant's husband. She intervened to defend her husband and in the process she was hit by the defendant, kicked to get away and fell off balance onto the stairs.

[6] She suffered physical pain and had to take leave from work to recover. She could not use her hand or take care of her daughter and had to send her to her grandmother's house. This caused a lot of stress and emotional injury. She also felt that her integrity and reputation in the neighbourhood was affected and she was dragged into the courts which was not something she had wanted.

[7] She further testified that she still had pain in her finger especially when the weather was cold and that her hand was disfigured. She used to go to the spa to have manicures but she is not able to anymore as it attracts attention to her hand. Her sleeping pattern was also affected because of the incident.

[8] The Assistant Registrar of the Supreme Court, Sumita André produced the criminal file in relation to the proceedings in the Magistrate's Court in which the defendant had pleaded guilty to grievous harm to the plaintiff and had been convicted of grievous harm and sentenced to six months imprisonment suspended for two years and the payment of a fine of R 5,000 sum in respect of the offence.

[9] Dr Jawula Manoo of the Ministry of Health and the Department of Orthopaedics treated the plaintiff for her injuries which consisted of a fractured middle phalange of her right finger. The finger was splinted for two weeks and reviewed. As the finger then became stiff the plaintiff was referred to the occupational therapist for treatment. In cross-examination he stated that some deformity in the form of a slight curvature to the finger had occurred.

[10] The defendant also testified. She stated that she had gone with her husband to collect items of furniture left at the plaintiff's house. The plaintiff had verbally abused her and she had retreated down the stairs but then heard the plaintiff asking her husband to let go of Nigel Payet. She went back up to stop the fight but was hit by the plaintiff. In the process of defending herself, the plaintiff fell and injured herself.

[11] In closing submissions Mr Chetty for the defendant asked that the court take into account the fact that the defendant had acted in self-defence after being provoked and that the plaintiff had admitted losing her balance and falling. He submitted that there was, therefore, an element of contributory negligence on the part of the defendant. Further, he submitted that quantum claimed was excessive and that the maximum that should be granted was R 20,000.

[12] Mr Bonté for the plaintiff submitted that the claim had been supported by evidence and that the defendant's account of self-defence did not correspond with her guilty plea in the Magistrates Court. He also submitted that the quantum of damages as claimed was appropriate given the fact that the plaintiff had not recovered full use of the finger.

[13] The plaintiff relied for proof of her case largely on a decision of a court of criminal jurisdiction. Article 1351 of the Civil Code of Seychelles provides in relevant part:

3. The admissibility and effect of judgments given by a Court of criminal jurisdiction shall, in civil matters be governed by and decided in accordance with the principles of English law.

[14] The applicable English law on this issue was explored by Perera J (as he then was) in *Saunders and Or v Loizeau* (1992) SLR 214. The rule against the inadmissibility of such evidence to prove a civil case was contained in *Hollington v Hewthorn* [1943] KB 587. The rule, however, was abrogated by s 11(1) the English Civil Evidence Act of 1968 which made admissible a conviction for proving that a defendant in a civil action committed the act for which he was convicted. The Act was adopted in the jurisprudence of Seychelles by virtue of the fact that applicable English law in Seychelles in terms of evidence is that in force when Seychelles became independent on 1 January 1976 [See *Kimkoon and Co v R* (1965) SCAR 64, *Vel v Tirant and or* (1978) SLR 9, *Bouchereau v Francois and ors* (1980) SLR 77].

[15] The Seychellois Evidence Act by amendment in 1990 imported this statutory provision of the English Civil Evidence Act 1968 into our laws. Section 29 of our Evidence Act provides in relevant part:

- (1) In a trial the fact that a person, other than, in the case of a criminal trial, the accused, has been convicted of an offence by or before any court in the Republic shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in the trial, that that person committed the offence or otherwise, whether or not any other evidence of his having committed that offence is given.

- (2) In a trial, other than in a civil trial for defamation, in which by virtue of this section a person, other than, in the case of criminal trial, the accused, is proved to have been convicted of an offence by or before a court in the Republic, he shall be taken to have committed that offence unless the contrary is proved.

....

- 5) Where evidence that a person has been convicted of an offence is admissible under this section, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based
- (a) the contents of any document which is admissible as evidence of the conviction; and
 - (b) the contents of the information, complaint or charge sheet on which the person was convicted,
- shall be admissible in evidence for that purpose.

[16] The effect of this statutory provision is that the contents of the file of proceedings of the criminal trial before the Magistrate Court's proves that the defendant committed the offence of grievous harm on the plaintiff. Section 29(2) shifts the legal burden onto the defendant to show on a balance of probabilities she has not committed the offence.

[17] The evidence brought by the defendant in no way satisfies this burden. In this respect the submission of Mr Chetty for the defendant as regards contributory negligence on the part of the plaintiff is rejected. I therefore find pursuant to art 1382 of the Civil Code, that the defendant is liable for the delict on the defendant.

[18] In terms of the quantum for damages, I accept Mr Chetty's submission that the amount claimed is exorbitant. However, no comparative authority was brought to support this submission. This is unfortunate and not a practice the Court wishes to encourage as it cannot of its own pluck figures from the sky.

[19] I accept the plaintiff's evidence that there is permanent disfigurement and some reduced use of the middle finger of her right hand. I also accept the cosmetic and aesthetic damage to her hand. I also accept the evidence with regard to pain, suffering and emotional stress. In the absence of any supporting authorities any award will, therefore, be subjective and arbitrary.

[20] In *Denis v Ryland* [2016] SCSC 10, I alluded to this dilemma especially where there is no statutory yardstick and where there is jurisprudential divergence in awards for moral damages. I said then and I reiterate now that it appears that each case is judged on its own merits. In the absence of any statutory guidance or evidence from the parties awards will continue to be arbitrary.

[21] Article 1149(2) of the Civil Code provides for the recovery for injury to rights that cannot be measured such as pain, suffering and aesthetic loss. In *Servina v Richmond* SC CS 342 of 2004 a sum of R 10, 000 was awarded for pain, suffering and moral damage for injury awarded in respect of laceration to the right arm. Similarly in *Dufrene v Bacco* SC CS 109 of 2003 an award of R 20, 000 was made in respect of lacerations to the palm of the plaintiff's hand and another R 8,000 for the permanent scar. In the case of *Denis* (supra), I awarded R 30,000 for humiliation, distress and mental anguish.

[22] I bear in mind the time that has elapsed since the authorities cited above. I believe that the moral damages in this case must be on par with the award I gave in *Denis* although not as serious as *Denis* which was a case of assault by a police officer and injury, followed by the unlawful detention of the plaintiff. I, therefore, make the following award: for the physical injuries suffered by the plaintiff including the permanent disfigurement to her finger, I award the sum of R 20, 000; for pain suffering, and trespass to the person (which all constitute moral damage) I award R10,000, together with costs.

Re JOHANSSON

C McKee J
25 July 2016

[2016] SCSC 524

Family – Adoption – Best interests of the child – Private international law

The 1st and 2nd applicants from Seychelles and Sweden respectively got married in 2005 and reside in Sweden. They expressed their interest in adopting a child from Seychelles. For that, they took the necessary legal steps in both the countries. The Social Department of Seychelles found a baby suitable for adoption. The natural mother of the baby, however, refused to consent. The question arose whether she unreasonably withheld her consent to the adoption process.

JUDGMENT Consent dispensed with.

HELD

- 1 For the best interests of the child, the consent of a natural mother to the adoption of a child may be dispensed with.
- 2 In determining the best interests, the court may consider the child's future development and emotional wellbeing.

Legislation

Children Amendment Act, s 40(2), 80(3)

Children Act, s 40, Schedule 1

Children (Registration of Adoption Orders) Regulations

International Conventions

Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993, arts 16, 17(c)

Foreign Cases

In the matter of B (a Child) [2013] UKSC 33 [FC]

Foreign Legislation

Social Services Act (Sweden), s 12

Counsel A Amesbury

MCKEE J

[1] The 1st applicant, Natalie Lyze Amelie Payet Johansson, was born in Seychelles on 23 December 1980. The 2nd applicant, a Swedish citizen, was born in Revsund, Sweden on 26 July 1960. The 1st and 2nd applicants were married by civil ceremony in the Sundsvall District Court, Sweden on 6 December 2005. The prospective adopted child is Gino Lawrence Tahib Barra born in Victoria, Mahe, Seychelles (the child Gino) on 8

January 2016 and his birth was registered by his mother, Vanessa Joana Barra, now residing at Ma Constance, Mahe, Seychelles in the Civil Status Office, Victoria, Mahe Seychelles according to Certificate of Birth issued by the Chief Officer of Civil Status on 20 January 2016 (Civil Status Register No 86 of 2016).

[2] The 1st and 2nd applicants are unable to have children. The 1st applicant initially approached the Social Services Division of the Ministry of Social Affairs, Community and Sports, Seychelles (the Department) during 2012 expressing the desire of her husband and herself to adopt a child from Seychelles, the native land of the 1st applicant and requesting information and guidance as to the adoption procedure.

[3] This general application was considered by the Department in terms of art 16 of the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption dated 29 May 1993. The Department kept in view the provisions of the Children Act ("the Act") and its subsidiary legislation, the Children (Registration of Adoption Orders) Regulations (the Regulations).

[4] Following her initial contact with the Department and following guidance given to her, the 1st applicant approached the Central Authority in Sweden with special responsibility in respect of adoption. Procedures were followed culminating in the Individual and Family Care sub-committee of the Social Welfare Committee of the Municipality of Sundsvall meeting on 25 June 2014 to consider an application by the 1st and 2nd applicants to receive a child from abroad with a view to adoption. Following consideration of the application, the Individual and Family Care sub-committee granted general consent to the spouses Kent and Amelie Johansson under chapter 6, s 12 of the Social Services Act to receive a child from abroad with a view to adoption.

[5] The child Gino, as stated, was born in Seychelles on 8 January 2016. On 21 January 2016, the natural mother, Ms Vanessa Joanna Barra, approached the Department requesting that the child be placed in care as she had nowhere to stay. She was temporarily staying with her mother but due to a conflicting relationship, she would have to vacate the house. On 28 January 2016, Ms Vanessa Joana Barra gave her written consent to the Department for the transfer of the child to a place of safety. The Department then submitted an application to the Family Tribunal of Seychelles for a Compulsory Measure of Care Order under s 80(3) of the Children Amendment Act (Case No 66 of 16) which Order was granted on 19 February 2016.

[6] I am advised by the Department in its report dated 21 March 2016 that the natural mother, Ms Vanessa Joana Barra is known to the social services of Seychelles. I am advised, *inter alia*, that she has four other children none of whom is living with her. These other four children were also removed, with the mother's consent, to separate places of safety and placed in care. This report states that the four children are in separate homes since there was difficulty in persuading members of the immediate family to assist. The said report stated that the mother, Ms Vanessa Joana Barra, had failed to maintain contact with these children.

[7] It was against this background and shortly after the birth of her fifth child that the Department counselled Ms Vanessa Joana Barra about the future of the child Gino. The Department had serious concerns relating to the continuing indulgent practices of the natural mother, poor parenting capacity and neglectful tendencies in respect of her four other children, her unstable home situation, conflicting relationships with her immediate family and recurring instances of unemployment. It has also to be noted that the initiative for the application for care for the child Gino came from the natural mother.

[8] It was under this set of circumstances that the proposal was made by the Department to the natural mother that the child Gino could be offered for adoption. The position taken by the natural mother was that she did not consent to a possible adoption of the child, Gino. It was further explained to the natural mother, in the light of the position taken that the provisions of s 40(2) of the Act allowed the agreement of the natural parent to be dispensed with and an adoption order nevertheless granted. It was further explained that a decision on the matter of adoption, after taking into account all the facts and circumstances, was based on what was in the best interests of the child. The natural mother maintained her decision.

[9] The Department then reviewed the whole facts and circumstances of the case and gave full consideration as to what it felt was in “the best interests of the child”.

[10] The procedure followed to declare that a baby is eligible for adoption within the Seychelles context is to consider which babies were in need of alternative placement. The Department applies the following criteria when considering whether adoption is the best option for a child, namely, whether there is (i) a lack of positive family support; (ii) no or inappropriate informal support within the parent’s network; (3) evidence of strong potential risks to the baby’s well-being and development and (4) no motivation on the part of the parent to respond to guidance provided by a care plan drawn up for his or her benefit. The Department considered these criteria in respect of this matter. It also took into account the fact that the natural mother had registered her lack of consent to a formal adoption of the child Gino. The Department also took into account s 40(2) of the Act and particularly focussed at para (b). Section 40(2)(b) reads as follows: “The grounds on which the agreement of a parent or guardian to an adoption order may be dispensed with are that the parent or guardian is withholding his agreement unreasonably”.

[11] The Department considered the overall position. It considered the present and past circumstances of the natural mother, the fact that she had been unable to exercise custody and care for her remaining four children and the continuation of this profound difficulty with her fifth child, namely the child Gino who is now formally in care. The Department was of the opinion that in the case of the child Gino the natural mother was unreasonably withholding her agreement to an adoption within the terms of s 40(2)(b) of the Act. Based on the adoption guidelines of the Social Services, the Department classified the child Gino as free for adoption.

[12] The Department then again considered the interest expressed by the applicants to adopt a Seychellois child. It kept in view the matter of cultural identity and any possible problem with a Seychellois child residing abroad with integration into a new culture. In this respect, it took fully into account the personal circumstances of the applicants noting that the 1st applicant was a Seychelloise (although now married and resident in Sweden) whose parents still resided in Seychelles. The Department were of the opinion that the applicants would be suitable adoptive parents for the child Gino.

[13] From the date in the year 2012 when the 1st applicant had first declared her interest in adopting a Seychellois child, she had kept in regular contact with the Department in Seychelles. The applicants had also instituted an application to adopt in Sweden and on 25 June 2014 received from the Individual and Family Care sub-committee of the Social Welfare Committee of Sundsvall, Sweden the general consent to receive a child from abroad with a view to adoption. This decision was supported by a further agreement from the said Social Welfare Committee, acting under art 17(c) of the Hague Convention dated 1 April 2016 that the adoption of the child, Gino Laurence Jahib Barra could proceed. The 1st and 2nd applicants had thus completed the necessary requirements under Swedish law to proceed in Seychelles with a formal application for the adoption of the child Gino.

[14] The Department received from the Swedish authorities a Home Study Report, medical certificates, marriage certificate and confirmation that the applicants were of good character and the decisions by the Swedish Authorities. The Department considered all of the above information and accepted the recommendation from the Swedish authorities that the applicants were caring individuals, had a good socio-economic background and a genuine reason to adopt coupled with having a sound awareness of the needs of a child. Copies of these documents were annexed to the application. The Department was of the opinion that the adoption process should proceed in Seychelles since it was in the best interests of the child.

[15] There is also presented to the Court a satisfactory medical report in respect of the child Gino dated 21 March 2016 from the English River Medical Clinic, Mahe, Seychelles together with medical certificates in respect of each applicant dated 20 April 2016 from Dr H R Jivan, Mahe, Seychelles confirming that they were each physically, mentally and emotionally suitable to adopt a child.

[16] As a first step in the adoption procedure in Seychelles the child Gino, when only two months old, on 10 March 2016, was given into the care and custody of a third party, Mrs Rosie Payet, the mother of the 1st applicant, to await the arrival of the applicants from Sweden.

[17] The applicants arrived in Seychelles in April 2016 and I find that the child was received into the care and custody of the applicants on 9 April 2016, all parties being resident in the home of the mother of the 1st applicant. By Report dated 29 April 2016, the Department advised that during a home visit on 18 April 2016 the child was bonding well with the applicants and since 10 March 2016 when cared for by Mrs Rosie Payet had established a good routine for feeding, sleeping and playing.

[18] In my opinion there was a particular matter which required further consideration. This related to the lack of consent by the natural mother to a proposed adoption. The Department was of the opinion for the reasons stated that the natural mother was unreasonably withholding her agreement to the adoption. I set the date on 7 July 2016 to hear the views of the natural mother; Miss Vanessa Joana Barra, appeared in court in answer to a summons. She firstly indicated her consent from the public area but I decided to take any further evidence from the natural mother under oath. I asked to confirm that she understood the full nature and conditions of an adoption order as set out in Schedule 1 of the Act, namely, *inter alia*, that she would henceforth be deprived permanently of her rights as a parent and have no right to get in touch with the child or have him returned to her. Following this explanation the natural mother again withdrew her agreement to the proposed adoption.

[19] She further explained that she would wish to take her child back when she moved from her present residence which was too small. She anticipated that this would be around December 2016 or January 2017. She agreed that she had four other children and explained that, while all four children were in care, two of the children stayed with family. I took her through the terms of the report from the Director of Social Services dated 21 March 2016. She agreed that the name of the father was not disclosed in the birth certificate but, as I understood it, the father may be in prison. She stated that she had left the child in the care of the social services but not for adoption. She wished to know what would happen if she did not sign the consent forms. I advised her that it was her decision whether she gave her consent or not but at the end of the day, I would make a decision, based on all the available information from the Department and as presented by her to the Court, whether she was withholding her agreement to the proposed adoption unreasonably. She reiterated that she did not wish to give her agreement.

CONCLUSIONS

[20] This particular Ruling is concerned solely with the matter of consent or agreement generally, and with the absence of agreement expressed by the natural mother to the possible adoption of her child, Gino Lawrence Tahib Barra.

[21] I have given thought to all the evidence, written and oral, laid before the Court by the Department and the natural mother. I carefully considered the reports from the Department through its social welfare officers, who I accept are professionals in their field. I took the natural mother through the departmental report dated 21 March 2016 for her comments. I also took into account all that the natural mother said from the witness box. I find the position to be as stated by the Department in its reports subject to the exception that it would seem that two of the five children of the natural mother, while still under care, reside with members of her immediate family.

[22] I find the position to be that the natural mother, aged 27 years of age, now resides in accommodation of limited space either alone or in company of another or other persons whose identity she did not disclose to the court. This housing is unsuitable for the care of a young child or family. She did not advise the Court that she was in gainful employment and the Department had no information on this. There is no information that she receives financial support from a partner, only that the possible father of the child Gino may be in prison. The natural mother does not advise the Court in what way her personal circumstances may have improved since the birth of the child Gino. The natural mother has four other children before the birth of the child, Gino, none of whom reside with her but are in the care of the Department who placed them in separate homes, although now two of the children may reside with her family. Since the natural mother is 27 years of age it is reasonable to infer that the four other children are less than 12 years of age. I accept the evidence from the Department that the natural mother is in conflict with her own family and its support is unreliable.

[23] It is against this background that the natural mother gave birth to the child, Gino, on 8 January 2016. Within two weeks of the birth, namely on 21 January 2016, the natural mother approached the Department with the child Gino requesting that he be placed in care as she, the natural mother, had nowhere to reside. It would seem that she had been residing temporarily with her own mother but this arrangement was temporary due to family conflict. On 28 January 2016, she gave her written consent for the removal of the child, Gino, to a place of safety. Both of these actions were done voluntarily and shortly after the birth of the child. The Department fully considered these circumstances and prior family history when it made its determination that adoption was a viable option for the child Gino and similarly made its decision that the natural mother was unreasonably withholding her agreement to the adoption.

[24] The matter for determination by the Court, at this stage, is not whether the applicants are suitable adoptive parents but whether the agreement by the natural mother to the proposed adoption has been unreasonably withheld. I have had the opportunity of reading the judgement in the case, *In the matter of B (a Child)* [2013] UKSC 33 (FC), which was heard by the Supreme Court of the United Kingdom. In my view, all relevant factors were considered in this appeal and I take cognisance of them.

[25] On the evidence I find that the natural mother has failed to provide adequate parental care for her four elder children who are all still of a tender or young age. Rather, she took a different approach and abdicated her parental responsibilities to the extent that the four children are now out of her custody and placed in care for their own safety. The Department, through their professional social workers, are of the view, which I accept, that she leads a disorderly life.

[26] It was into this life that the child Gino was born. Within two weeks of the birth of her fifth child the natural mother sought the assistance again of the Department requesting that this young baby, Gino, be placed in care. Within a further week she had given her consent for the young baby Gino to be removed to a place of safety. I find that she is simply repeating her former course of behaviour and passing the care of her fifth child on

to some third party. She has made no effort to care for or bond with the child. As with her other four children she has quickly abdicated her parental responsibilities in respect of the child, Gino and handed over the responsibility of caring for the child to the social services. There is no evidence that since the baby's birth she has made serious enquiries of the Department as to the health and welfare of the child, Gino, who is now six months old. That is the position now.

[27] The natural mother offers the excuse that she handed the baby into care since in January 2016, she had inadequate accommodation. She does not advise the Court of attempts to discover more suitable accommodation and I find that she has no proposal to make in this line. She can give no proposal as to how she plans to provide for the child Gino, or the remaining four children. She seeks to persuade the Court that it is against this background that at some indeterminate date in the future she will resume the care and custody of the child Gino. Accordingly she refuses her consent to the proposed adoption.

[28] I consider the facts as found by me as above in the light of the finding in the above case, *B (a child)*.

[29] I accept the general premise that the best person to bring up a child is a parent. However, in a matter such as this, the best interests of the child are paramount. I consider whether the best interests of the child must render it necessary now to make an adoption order. The natural mother at present has caused no harm to the child but I have to consider whether there is a real possibility of significant harm in the future. Harm does not mean simply physical harm but includes emotional harm. I have to consider whether there could be in the future impairment of the child's emotional wellbeing and development bearing in mind that emotional harm is no less serious than physical harm. I have to take into account whether, if the child was returned to care of the natural mother, the child would receive a reasonable standard of care or whether there would be an absence of adequate parental control or expertise. I consider the child's health and social and behavioural development in the future and whether it is likely to be harmed due to parental inadequacies. I warn myself that the salient feature to consider is not a deficiency in the parental character but a real possibility of a deficiency in parental care. I have to make a value judgment bearing all the above factors in mind. I also find as relevant the views of the professionals, the social welfare officers, that it is in the best interests of the child that the child be adopted. I also consider it relevant to take into account the lack of personal and parental care shown to the remaining four children. I may say that I do not share the confidence expressed by the natural mother that she will be able to acquire satisfactory family accommodation on or around the end of 2016.

[30] I find that the natural mother, Ms Vanessa Joana Barra, has shown a level of negligence and neglect in respect of the other four children which shows a lack of insight into the needs of children and precludes the success of her resuming normal family ties with the child Gino. I find that the life of the natural mother is complex and chaotic and, on the evidence, that there would be a real danger of harm, in its extended meaning, to the child Gino if family ties were to be resumed. I find that there is a real likelihood that

the natural mother would be unable to exercise a reasonable standard of care to look after the child Gino. I find that there is a real possibility that his general wellbeing and health and social and behavioural development would suffer. In making these findings, I have always kept in mind the natural ties between a mother and her child but feel that adoption is the preferred viable option.

[31] In these circumstances, I have come to the conclusion that it is in the best interests of the child Gino that this adoption should proceed. I find that the natural mother has unreasonably withheld her agreement to the proposed adoption. Consequently, I dispense with the consent of the natural mother in terms of s 40 (2) of the Act.

[32] The adoption application will proceed.

RAMKALAWAN v GOVERNMENT OF SEYCHELLES

G Dodin, F Robinson, S Nunkoo JJ
28 July 2016

[2016] SCCC 15

Constitution – Election rights

The petitioner filed a Constitutional Petition seeking a number of declarations on the compatibility of ss 47(3) and (4) of the Elections Act with the rights set out in art 24(1)(b) of the Constitution interpreted with the relevant provisions of arts 113 and 114 of the Constitution. He claimed his right to vote at a public election and to stand as a candidate in the forthcoming National Assembly election had been contravened or was likely to be contravened.

JUDGMENT Petition dismissed.

HELD

- 1 The Elections Act provides for “criminality” to be a state in which a person who is reported by the Constitutional Court to the Electoral Commission to have been guilty at trial of an illegal practice is subject to disqualification, as a voter and from voting at an election or a referendum under the Elections Act, for a period of 5 years from the date of the report being registered.
- 2 Disqualification of a person party to an election by reason of a report of the Constitutional Court in terms of ss 47(3) and (4) of the Elections Act is necessary in a democratic society.

Legislation

Elections Act, ss 5, 6(b), 47, 51

Constitution, arts 19, 24, 26, 76, 113-115

Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitutional) Rules, r 3(3)

Foreign Cases

The Queen v Mr Commissioner Rowe QC Ex Parte Julia Mainwaring and others

The Queen v Mr Commissioner Rowe QC Ex Parte Belle Harris 1992 WL 89352524

Counsel A Derjacques for petitioner
Attorney- General for 1st respondent and 2nd respondent

JUDGMENT OF THE COURT

Background

[1] The petitioner filed a Constitutional Petition on 3 June 2016, accompanied by an affidavit of facts. The petitioner prays the Constitutional Court for a number of declarations on the compatibility of s 47(3) and s 47(4) of the Elections Act with the rights

set out in art 24(1)(b) of the Constitution of the Republic of Seychelles interpreted with the relevant provisions of arts 113 and 114 of the Constitution claiming that, because of the provisions impugned in the Constitutional Petition, his right to vote at a public election and to stand as a candidate in the forthcoming National Assembly election which is scheduled to be held before 30 September 2016, for the electoral area of English River, have been contravened or are likely to be contravened.

[2] The following averments contained in the Constitutional Petition are not disputed by First and Second respondents –

1. The petitioner is the Leader of Seychelles National Party (SNP) and is an Anglican Priest. He was a Presidential Candidate in the last election of 2015. He is a Seychellois and an inhabitant of St Louis, Mahe.
2. The 1st respondent is the Government of Seychelles, which drafted and proposed the said Election Act CAP 68A to the National Assembly of Seychelles.
3. The 2nd respondent is the Attorney-General of the Republic of Seychelles by virtue of the Constitution of Seychelles and is joined under rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitutional) Rules, 1994.
4. On 18 December 2015, the Presidential election results were announced. The petitioner, Wavel Ramkalawan achieved 49.85 % of valid votes and Mr James Michel with 50.15 % of valid votes.
5. The petitioner filed a petition namely Constitutional Court Case No. 1 of 2016 of the Constitutional Court referring to alleged illegal practices made during the course of the said Presidential election.
6. The Judgment of the Constitutional Court (Case No. 1 of 2016) was delivered on 31 May 2016. Important to this matter, paras [473] and [474] of the said judgment are as follows:

[473] The 2nd respondent did not file a counter petition but averred in his Statement of Defence that the petitioner had himself committed an illegal practice by publishing and distributing leaflets in the Tamil Language to voters from the Tamil Community in Seychelles promising them inter alia senior posts in his government so as to induce them to vote for him or to refrain from voting for the 2nd respondent. This was contrary to section 51(3)(b) of the Act (supra).

[474] While it is not averred that the acts of the petitioner affected the results of the elections in any way, it is clear that his acts satisfy the provisions of section 51(3)(b) to constitute illegal practices. Even if he was not intending to contravene the law, we view such acts especially by the leader of a political party to be reprehensible and irresponsible. We were particularly dismayed by his nonchalance and levity when challenged with the evidence, which he admitted. We are obliged to make a report on this matter to the Electoral Commission in terms of striking his name off the register of voters.

[3] Paragraphs [473] and [474], of the judgment of the Constitutional Court (Case No 1 of 2016), delivered on 31 May 2016, gave rise to the dispute at the heart of the Constitutional Petition (*the Constitutional Court Case No 1 of 2016 is hereinafter referred to as the "Wavel Ramkalawan case"*) and (*the judgment of the Constitutional Court in the Wavel Ramkalawan case, delivered on 31 May 2016, is hereinafter referred to as the "Wavel Ramkalawan Judgment"*).

Case for the Petitioner

[4] In addition to paras [473] and [474] of the Wavel Ramkalawan Judgment, the petitioner complains of the passage which appears at para [529], of the same judgment in support of his claim. Therein, at para [529] the Judges stated –

For the avoidance of any doubt, a report by the Constitutional Court will be forwarded to the Electoral Commission in regards to the illegal practice by the petitioner pursuant to section 47(1)(a) of the Act.

[5] In view of the matters contained in paras [473], [474] and [529] of the Wavel Ramkalawan Judgment, the petitioner states that his name will be struck off the register of voters. Consequently, it is likely that his right as a voter will be curtailed. Furthermore, the petitioner intends to stand as a candidate for the electoral area of English River for the forthcoming National Assembly Election which is scheduled to be held before 30 September 2016. The petitioner complains that he will be unable to stand as a candidate.

[6] The petitioner alleges that s 47(3) and s 47(4) of the Elections Act contravenes art 114(1) of the Constitution, which provides for disqualification on the ground of "(a) infirmity of mind; (b) criminality; or (c) residence outside Seychelles.". More specifically, it would be unconstitutional for the Electoral Commission to cause his name to be struck off the register of voters without first establishing one of the three grounds for striking off provided under art 114(1)(a), (b) or (c) of the Constitution read with s 5 of the Elections Act. The petitioner cites the case of *Boulle v The Government of Seychelles and The Attorney-General Constitutional Case No.2 of 2011*, in support of that point. The Judges of the Constitutional Court stated in the *Boulle* case (page 16) –

Section 5 of the Elections Act intends to set out in the constitutional provisions of art 114, in particular, that every citizen of Seychelles who is entitled to be registered as a voter under art 114 shall be registered as a voter in that electoral area unless that citizen is disqualified. It sets out that a citizen is disqualified from registering as a voter if he/she is so disqualified under the Elections Act or any other written law; or is under any written law, adjudged or otherwise declared to be of unsound mind; or detained as a criminal lunatic; or is detained at the pleasure of the President; and/or serving a sentence of imprisonment of or exceeding six months imposed by a court in Seychelles.

The petitioner avers that the Constitutional Court must adhere to the *Boulle* case, and insists that the Electoral Commission should not cause his name to be struck off the register of voters unless he is disqualified on the ground of "criminality".

[7] On the basis of the aforementioned matters, the petitioner states that the principal question involved in the present constitutional case is what does "criminality" entail? The petitioner relies on the decision of the Constitutional Court in the *Boulle* case as regards the interpretation of "criminality".

[8] On the basis of the aforementioned matters, the petitioner avers that his fundamental human rights as envisaged in the Constitution, as particularised in the aforementioned articles, have been contravened or are likely to be contravened. Furthermore, the petitioner avers that s 47(3) and s 47(4) of the Elections Act is not in conformity with the rights set out in art 24(1) of the Constitution read with arts 113 and 114(1)(b) of the Constitution, and is thereby unconstitutional.

[9] The petitioner prays the Constitutional Court for the following declarations –

- (a) The Elections Act, s 47(3) and s 47(4) is not in conformity with and contravenes the Constitution and is therefore declared void.
- (b) That the petitioner's name is not removed from the registered voters list by the Electoral Commission.

And Costs.

Case for the First and Second Respondents

[10] With the exception of the facts that are specifically admitted in the defence to the Constitutional Petition, the respondents deny all averments contained in the Constitutional Petition.

[11] The 1st and 2nd respondents state that s 47(3) and s 47(4) of the Elections Act is in conformity with the Constitution. The 1st and 2nd respondents state the following in support of that averment –

- (a) that section 47(3) and section 47(4) of the Elections Act will not curtail the right of the petitioner from standing as a candidate for the forthcoming National Assembly Election, as such curtailment, if any, would constitute a limitation of such a right permissible under a written law reasonably justifiable in a democratic society;
- (b) in addition, that the Electoral Commission may cause the name of the petitioner to be removed from the voters register under the Elections Act because the right of the petitioner to be registered as a voter for the purpose of and to vote at public elections would be curtailed under art 114(1)(b) read with section 47(1) and section 47(2) of the Elections Act;

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- (c) that there is a presumption of constitutionality of written laws and there is no requirement for *a priori* testing of written laws by a Constitutional Court before their application and enforcement in Seychelles;
- (d) in the main, with reference to the Boulle case -
 - (i) that the scope of section 5 of the Elections Act differs from that of section 47 of the Elections Act. Section 5 of the Elections Act applies to qualification for registration of voters in an electoral area. As regards section 47 of the Elections Act, it applies to a report of a Constitutional Court as to an illegal practice. In the Wavel Ramkalawan case, the activities of the petitioner, a party to the election, were found to be contrary to the Elections Act. So section 5 of the Elections Act does not apply to the present constitutional case;
 - (ii) that the Constitutional Court dealt with facts, circumstances and provisions of written laws relating to elections under the Elections Act, which are different from those being dealt with by the Constitutional Court in the present constitutional case, and that the Constitutional Court should, therefore, distinguished the Boulle case with the present constitutional case, in that in the Boulle case the issue before the Constitutional Court, among other things, was whether or not a person who was under lawful detention could be assimilated to a criminal, and his right to be registered as a voter was fettered in any way under art 114(1)(b) of the Constitution;
 - (iii) further, that the Constitutional Court was not called upon to provide an exhaustive interpretation of the word "criminality", and did not provide such an exhaustive interpretation of the said word;
 - (iv) that the Constitutional Court did not rule that "criminality" as a ground of disqualification permitted by art 114(1)(b) of the Constitution was to be interpreted only in its strictest sense as provided by the Constitution under art 19(2) of the Constitution. That is "criminality" would have to be based only on that constitutional principle and unless and until that person had gone through that process he could not be deemed to be a criminal;
 - (v) that the determination of the Constitutional Court that a citizen was disqualified from registering as a voter when serving a term of imprisonment of six months or more was not unconstitutional in the circumstances because "criminality" was recognised by art 114(I)(b) of the Constitution as a ground of such disqualification, that the right to be registered as a voter and to vote at an election by a category of prisoners that fell into that category might, as a matter of policy, be lawfully and constitutionally curtailed;
- (e) that a person reported to be guilty of an illegal practice by the Constitutional Court to the Electoral Commission is subject to the consequences of disqualification and having his name removed from the register of voters of the electoral area where the person is registered as a voter, is "criminality" as a ground of disqualification under art

114(1)(b) of the Constitution, being a permissible and justifiable limitation on the right to vote in a democratic society, after due legal process.

[12] The 1st and 2nd respondents aver that the rights of the petitioner as envisaged in the Constitution have neither been contravened nor are likely to be contravened.

[13] The 1st and 2nd respondents aver that s 47(1), s 47(2), s 47(3) and s 47(4) is constitutional.

[14] The 1st and 2nd respondents pray the Constitutional Court for the following orders –

- (a) to dismiss the Constitutional Petition;
- (b) for costs;
- (c) for such other orders that the Constitutional Court shall deem fit.

Submissions of Counsel

[15] Mr Derjacques outlines one main issue as forming the core of the Constitutional Petition: "criminality" under art 114(1)(b) of the Constitution.

[16] Mr Derjacques contends that the Judges in the *Wavel Ramkalawan* case had invoked art 114(1)(b) of the Constitution, which provides for disqualification on the ground of "criminality", when they made the finding that the acts of the petitioner satisfy s 51(3)(b) to constitute illegal practice and stated that they are obliged to report to the Electoral Commission that an illegal practice has been proved in terms of striking the petitioner's name off the register of voters.

[17] Counsel, relying on the *Boulle* case, insists that "criminality" will have to be based only on the constitutional principle that a person is considered to be innocent until the person is proved or has been found guilty by a court of law after due legal process under art 19(2) of the Constitution. The position of the petitioner is that a person will not be deemed a criminal unless and until the person has gone through that legal process. In support of that point Mr Derjacques made extensive submissions on the protection afforded by art 19 of the Constitution to the right of fair trial and whether or not s 47(3) and s 47(4) is compatible with the protections afforded by art 19 of the Constitution.

[18] Drawing a distinction between a trial of an election petition and a criminal trial, Mr Derjacques argues that in a criminal trial, prosecutorial powers under art 76 of the Constitution are vested in the Attorney-General, who in exercising his powers shall not be subject to the direction or control of any other person or authority. Under art 19(1)

of the Constitution, a charge must be laid, and every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law. Under art 19(2) of the Constitution,

a person who is charged with an offence (a) is innocent until the person is proved or has pleaded guilty; (b) shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail, of the nature of the offence; (c) shall be given adequate time and facilities to prepare a defence to the charge

....

Such protections, it is urged by Mr Derjacques, are missing in an election petition. Further, Mr Derjacques suggested that if a person is proved at trial to have been guilty of an illegal practice, then the same would be reported to the Attorney-General who would exercise his discretion, preferring any charge against the person by the process specified under the Criminal Procedure Code.

[19] Another distinguishing factor between the trial of an election petition, and that of a criminal offence with its safeguards under art 19 of the Constitution, is that the latter requires proof beyond reasonable doubt; whereas the former requires proof on a balance of probabilities. Mr Derjacques refers to the *Wavel Ramkalawan* Judgment about the threshold of proof, in particular to the passages which appear at paras [389] and [412] of the same judgment –

at para [389] the Judges stated –

More problematic is the fact that the Election Petition brought by the petitioner alleges both non-compliance with the Act (s 44(7)(a)) and illegal practices (s 47(b)). While it is evident that the standard of proof in relation to the former should clearly be that of civil cases, in the case of the latter the standard may be that of criminal cases.

and at para [412] the Judges stated –

In our view this raises important questions about the threshold of proof that should be applied in presidential election disputes and how it should be discharged. We have given anxious consideration to these issues and have come to the conclusion that given all the different considerations above it is the civil standard of proof, that is proof on a balance of probabilities, that should be applied when considering whether an election is void by reason of non-compliance with the provisions of the Act and, or the commission of illegal practices.

We note that no adverse comment was made on the standard of proof – proof on a balance of probabilities – applied by the Constitutional Court in the *Wavel Ramkalawan* case. Both counsel submitted that the same standard of proof should be applied in the present constitutional case.

[20] In the main, the Honourable Attorney-General, on behalf of 1st and 2nd respondents argues that s 47(3) and (4) of the Elections Act is constitutional. After making many references to the *Boulle* case, the Attorney-General was of the view that the *Boulle* case neither provides an exhaustive interpretation of the word "criminality" nor that should the basis of "criminality" only be on account of a criminal conviction. In his opinion, a disqualification by reason of a report of a Constitutional Court pursuant to s 47(3) and s 47(4) of the Elections Act is compatible with the relevant provisions of art 24 of the Constitution interpreted with the relevant provisions of arts 113 and 114 of the Constitution.

The Law

[21] The Constitutional Court sets out the relevant written laws for ease of reference.

[22] Article 24 of the Constitution falls under the Seychellois Charter of Fundamental Human Rights and Freedoms. Article 24 provides –

- (1) Subject to this Constitution, every citizen of Seychelles who has attained the age of eighteen years has a right
 - (a) to take part in the conduct of public affairs either directly or through freely chosen representatives;
 - (b) to be registered as a voter for the purpose of and to vote by secret ballot at public elections which shall be by universal and equal suffrage;
 - (c) to be elected to public office; and
 - (d) to participate, on general terms of equality, in public service.
- (2) The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society.

[23] Articles 113, 114 and 115 of the Constitution fall under Chapter VII of the Constitution, dealing with "Electoral Areas, Franchise and Electoral Commission".

[24] Article 113 of the Constitution deals with the right to vote and provides that –

- A citizen of Seychelles who is registered as a voter in an electoral area shall be entitled to vote, in accordance with law, in the electoral area -
- (a) at an election for the office of President,'
 - (b) at an election of the members of the National Assembly; or
 - (c) in a referendum held under this Constitution,

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unless any circumstances have arisen which, if the citizen were not so registered, would cause the citizen to be disqualified under an Act made under article 114(1) on ground (a) ground (b) of article 114(1).

[25] Article 114 of the Constitution deals with the qualification for registration as a voter and provides that -

- (1) A person who is a citizen of Seychelles and has attained the age of eighteen years is entitled to be registered as a voter unless the person is disqualified from registration under an Act on the ground of -
 - (a) infirmity of mind;
 - (b) criminality; or
 - (c) residence outside Seychelles.
- (2) An Act referred to in clause (1) may provide for different grounds of disqualification with regard to -
 - (a) an election for the office of President;
 - (b) an election of the members of the National Assembly, and
 - (c) a referendum held under this Constitution.
- (3) A person is not entitled to be registered as a voter in more than one electoral area.

[26] Article 115 of the Constitution establishes the Electoral Commission. The Electoral Commission is constitutionally mandated to perform the functions conferred upon it by the Constitution and any other written law.

[27] Section 5 of the Elections Act provides for the qualification for registration as a voter as follows –

- (1) Every citizen of Seychelles entitled to be registered as a voter for registration under article 114 of the Constitution shall, if the citizen resides in an electoral area, be registered as a voter in that electoral area unless the citizen –
 - (a) is disqualified from registering as a voter under this Act or any other written law;
 - (b) is under any written law, adjudged or otherwise declared to be of unsound mind or detained as a criminal lunatic or at the pleasure of the President;
 - (c) is serving a sentence of imprisonment of or exceeding six months imposed by a court in Seychelles.
- (2) No person shall be registered as a voter in more than one electoral area.

[28] Section 47 of the Elections Act provides for a report of a Constitutional Court as to an illegal practice as follows –

- (1) At the conclusion of the trial of an election petition, the Constitutional Court shall report in writing to the Electoral Commission –
 - (a) whether an illegal practice has been proved to have been committed by a candidate or an agent of the candidate and the nature of the practice;
 - (b) the names and descriptions of all persons who have been proved at the trial to have been guilty of an illegal practice.
- (2) Before making any report under subsection (1)(b) in respect of a person who is not a party to an election petition the Constitutional Court shall give the person an opportunity to be heard and to call evidence to show why the person should not be reported.
- (3) When the Constitutional Court reports that an illegal practice has been committed by a person, the person is disqualified for a period of five years from the date of the report from being registered as a voter and from voting at an election or a referendum under this Act.
- (4) The Electoral Commission shall cause the name of the person reported under subsection (1) to be removed from the register of voters of the electoral area where the person is registered as a voter.

Issue

[29] The principal issue for the determination of the Constitutional Court is whether or not s 47(3) and s 47(4) of the Elections Act is constitutional? More specifically, whether or not a disqualification by reason of a report of a Constitutional Court pursuant to s 47 of the Elections Act is compatible with art 24(1)(b) interpreted with arts 113 and 114(1)(b) of the Constitution.

Discussion

[30] The Constitutional Court has considered the principal issue for determination in the light of the Constitutional Petition, the defence to the Constitutional Petition and the submissions of counsel (consideration has been given to all submissions on record).

The Boulle case

[31] The Constitutional Court agrees with the Attorney-General that the Constitutional Court in the *Boulle* case dealt with facts, circumstances and provisions of written laws relating to elections under the Elections Act, which are different from those being dealt with by the Constitutional Court in the present constitutional case. Nevertheless, the Constitutional Court is of the opinion that the *Boulle* case offers valuable guidance on the issue for determination. The petitioner was a Seychellois over 18 years old. The petitioner had the right to be registered as a voter under arts 24(1)(b) and 114 of the Constitution. The petitioner was registered as a voter and intended, as entitled, to

stand as a candidate for the forthcoming Presidential election. The petitioner brought a Constitutional Petition for a number of declarations on the compatibility of provisions of the Elections Act with the rights set out in the Constitution, alleging that, because of the provisions impugned in the Constitutional Petition, his right to be elected to public office under art 24(1)(c) of the Constitution was likely to be contravened.

Whether or not section 5(1)(b) of the Elections Act was unconstitutional

[32] Among other things, the petitioner contended that s 5(1)(b) of the Elections Act was unconstitutional, to the extent that it disqualified a citizen from registering and voting if he was detained at the pleasure of the President in spite of the fact that such restriction was not permissible under art 114(1) of the Constitution, which provided for disqualification on the ground of "criminality".

[33] It is observed that no definition is provided for the word "criminality" in the written laws under consideration. The Judges were of the opinion that "criminality" as a ground of disqualification permitted by art 114(1) of the Constitution, was to be interpreted in its strictest sense, as provided by the Constitution; under art 19(2)(a) a person was considered to be innocent until he is proved or had been found guilty by a court of law after due legal process.

[34] The Judges emphasised that "criminality" would have to be based solely on that constitutional principle and unless a person had gone through that process he could not be deemed to be a criminal. In that context, a person who was under lawful detention could not be assimilated to a criminal and his right to be registered as a voter was not fettered in any way.

Whether or not s 5(1)(c) of the Elections Act was unconstitutional

[35] The petitioner contended that s 5(1)(c) of the Elections Act was unconstitutional as it deprived citizens of age of their right to register or vote if serving a period of imprisonment.

[36] The Judges were of the opinion that s 5(1)(c) of the Elections Act, providing that a citizen was disqualified from registering as a voter when serving a term of imprisonment of six months or more, was not unconstitutional in the circumstances. "Criminality" was recognised by art 114(1) of the Constitution as a ground for such disqualification.

[37] The Elections Act had defined "criminality" to be a state in which a person was serving a sentence of imprisonment of or exceeding six months imposed by a court in Seychelles. The right to be registered as a voter and to vote at an election by a category of prisoners that fell into that category might, as a matter of policy, be lawfully and constitutionally curtailed. That was a matter of policy to be determined by the State. The curtailing of the right of prisoners to vote was neither necessarily unreasonable nor unjustifiable, particularly in a country like Seychelles where there was

a strong public feeling against the high level of crime. That measure might be considered a minimum impairment test and satisfy the requirement of proportionality between the right of society to curb criminal action and the right of the prisoners to vote at the time of the preparation of the Electoral Register of the district in which he resided pursuant to the provisions of the Elections Act.

Whether or not s 6(b) of the Elections Act was unconstitutional

[38] Additionally, the petitioner contended that, in the light of art 113 of the Constitution, s 6(b) of the Elections Act was unconstitutional as it introduced a restriction on voting that was different from the restriction on registration, which was not permissible under art 113, and, furthermore, as it introduced a frivolous restriction in violation of voter would not be entitled to vote if he was being detained under any written law, as it contravened art 113 of the Constitution.

The present case

[39] In the present constitutional case it is not disputed that petitioner is a registered voter in an electoral area and is entitled to vote at an election in the electoral area. It is also not disputed that petitioner voted at the election for the office of President and stood as a candidate for the office of President in the election for the office of President in 2015. The Wavel Ramkalawan case arose from the election for the office of President. The petitioner (petitioner in the present constitutional case) felt aggrieved by the declaration of the Electoral Commission that James Alix Michel was validly elected President of Seychelles, and filed a petition (Wavel Ramkalawan case), praying, among other things, that the Constitutional Court declare that the election is void.

[40] The Judges in the Wavel Ramkalawan case found that the petitioner had himself committed an illegal practice by publishing and distributing leaflets in the Tamil Language to voters from the Tamil Community in Seychelles, promising them, among other things, senior posts in the Government so as to induce them to vote for him or to refrain from voting for James Alix Michel. The Judges found that it was contrary to s 51(3) of the Elections Act and satisfied the provisions of s 51(3)(b) in constituting illegal practice. The Judges stated that they, "*are obliged to make a report on this matter to the Electoral Commission in terms of striking his name [the petitioner] off the register of voters*".

[41] With reference to the *Boulle* case, the petitioner insists that disqualification does not arise until he has been charged and convicted by a court in Seychelles. The 1st and 2nd respondents are not in agreement with the stance of petitioner. Counsel on behalf of the 1st and 2nd respondents argues that the exercise of the rights under art 26 of the Constitution may be regulated by a law necessary in a democratic society. To determine the issue, the Constitutional Court embarked on an interpretation of s 47(3) and s 47(4) of the Elections Act to ascertain whether or not it is compatible with the relevant provisions of art 24 of the Constitution interpreted with arts 113 and 114 of the Constitution.

[42] The right of a citizen of Seychelles who has attained the age of eighteen years to be registered as a voter for the purpose of and to vote at an election under art 24(1)(b) of the Constitution is not absolute. The right under art 24(1)(b) of the Constitution is subject to this Constitution. The exercise of the right under art 24(1) of the Constitution may be regulated by a law necessary in a democratic society under art 24(2) of the Constitution.

[43] Article 113 of the Constitution provides for the entitlement to vote of a citizen of Seychelles who is registered as a voter in an electoral area. In terms of art 113 of the Constitution any circumstances could have arisen that would cause the citizen to be disqualified under an Act made under art 114(1) of the Constitution on ground of infirmity of mind or "criminality".

[44] Article 114 is to the effect that a person who is a citizen of Seychelles and has attained the age of eighteen years is entitled to be registered as a voter unless the citizen is disqualified from registration under an Act on the ground of (a) infirmity of mind; (b) "criminality", or (c) residence outside Seychelles.

[45] Section 47 of the Elections Act –

Elections in Seychelles are civil in nature, even if there are some findings of criminal activity involved: see the *Wavel Ramkalawan* case (paragraph [405]).

- (1) at the conclusion of the trial of an election petition the Constitutional Court shall report in writing to the Electoral Commission
 - (a) whether an illegal practice has been proved to have been committed by a candidate [...] and the nature of the practice;
 - (b) the names and descriptions of all persons who have been proved at the trial to have been guilty of an illegal practice.

Those reported by the Constitutional Court to be guilty of an illegal practice are subject to severe electoral disqualification in terms of s 47(4) of the Elections Act. In our considered opinion a determination by the Constitutional Court that a person is guilty of an illegal practice is necessarily a crime. Section 47 of the Elections Act makes it clear that the Constitutional Court does not convict persons or impose any criminal penalties at this stage. The Constitutional Court "shall report in writing to the Electoral Commission" under s 47(1) of the Elections Act. The passages which appear at paras [406] and [407] of the *Wavel Ramkalawan* Judgment are pertinent. At para [406] the Judges stated –

The Act also, separately to the Election Petition process, provides for offences which may be prosecuted by the Attorney-General with penalties of up to three years imprisonment and fines of up to SR20,000.

And at para [407] -

Hence, whilst persons found to have been involved in electoral malpractice may face serious consequences, including being disqualified from participation in future elections and/or prosecution and imprisonment, it is not up to the Constitutional Court to convict persons or impose any criminal penalties at this stage. We may only report.

[46] Consideration was given during submissions to the standard of proof to be applied by a Constitutional Court to find a person guilty of having committed an illegal practice. We are satisfied that, if there is a prosecution under s 51(1) of the Elections Act, the case must be proved to the criminal standard of proof - proof beyond reasonable doubt. It is our considered opinion that it would not be desirable to have a different standard of proof in different courts on the same issue: see *The Queen v Mr Commissioner Rowe QC Ex parte Julia Mainwaring and others* *The Queen v Mr Commissioner Rowe QC Ex parte Belle Harris* 1992 WL 89352524 March 1992.

[47] In light of the above, in the context of the present Constitutional Petition, it is our considered opinion that the Elections Act provides for "criminality" to be a state in which a person party to an election reported, by the Constitutional Court to the Electoral Commission, to have been guilty at trial of an illegal practice is subject to the severe consequence of disqualification for a period of five years from the date of the report from being registered as a voter and from voting at an election or a referendum under the Elections Act.

[48] On a consideration of the above, we are satisfied that the arguments of counsel for the petitioner grounded on art 19(2) of the Constitution bear no merit.

[49] We are also satisfied that the disqualification, of a person party to an election, by reason of a report, of a Constitutional Court, in terms of s 47(3) and s 47(4) of the Elections Act, is necessary in a democratic society. The disqualification of a person party to an election involved in an illegal practice is on the ground that he is not a responsible citizen, and has demonstrated beyond reasonable doubt his lack of commitment to the well-being of the community. In the context of the present constitutional case, s 47(3) and s 47(4) does not fail the proportionality test because it limits the disqualification to persons party to an election who have been proved at the trial to have been guilty of an illegal practice. The National Assembly has carefully considered the extent to which persons party to an election should be disenfranchised. The disqualification is for a period of five years from the date of the report.

Determination

[50] We are satisfied that s 47 subs (3) and (4) are in conformity with and do not contravene the Constitution.

[51] The Constitutional Petition is dismissed.

[52] We make no order as to costs.

