



IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Application No GYCV2020/002
GY Civil Appeal No 41 of 2020

BETWEEN

MOHAMED IRFAAN ALI
BHARRAT JAGDEO

APPLICANTS/
INTENDED APPELLANTS

AND

ESLYN DAVID
CHIEF ELECTIONS OFFICER
CHAIRMAN OF THE GUYANA ELECTIONS
COMMISSION
THE GUYANA ELECTIONS COMMISSION
THE ATTORNEY GENERAL OF GUYANA
MARK FRANCE
DANIEL JOSH KANHAI
LENNOX SHUMAN
SHAZAAM ALLY
ABEDIN KINDY ALI

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHT RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT

AND

UNITED REPUBLICAN PARTY
JOSEPH HARMON

INTERVENERS

Jurisdiction of the CCJ – Sections 4(3) and 6(c) of the Caribbean Court of Justice Act – Articles 163 and 177 of the Guyana Constitution – elections process in Guyana – jurisdiction of Court of Appeal under Art 177(4) - validity of election of a President – valid votes – exclusive jurisdictions of the High Court and Court of Appeal of Guyana

JUDGMENT SUMMARY

[1] It is a matter of considerable concern to the people of Guyana that, although General and Regional Elections (“the Elections”) were held as long ago as 2 March 2020, to date, the results of the Elections have not been declared and the President and members of the National Assembly have not been appointed. The Constitution, which expressly

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declares that it is the supreme law, professes the Co-operative Republic of Guyana to be a democratic sovereign State. Elections that are free and fair are the lifeblood of any true democracy. All arms of state, whether legislative, judicial, or executive, are subject to the normative, enabling, and limiting jurisdictions, powers, and responsibilities that are constitutionally legitimate.

- [2] This Court is acutely conscious of the great importance of these proceedings and our own ultimate responsibility to safeguard and uphold the provisions of the Constitution and the high constitutional values contained in the Preamble to that instrument. The central questions that have been placed before us are: whether a) this Court has jurisdiction to hear and determine this matter, and if so, whether b) the Court of Appeal rightly assumed and/or acted within the jurisdiction conferred by Article 177 (4) of the Constitution. We determine these issues based on the rule of law, the full extent of the jurisdiction vested by the Parliament of Guyana in all the courts serving that country and our appreciation of the applicable constitutional, legislative, and legal provisions.
- [3] After the elections were held in Guyana 2 March 2020, the Guyana Elections Commission (GECOM) decided to recount the votes cast in all ten administrative regions. To facilitate the recount, GECOM issued Order No. 60 of 2020 which was Gazetted and dated 4 May 2020 and later amended by Order No. 69 of 2020 dated 29 May 2020 (Order 60).
- [4] Order 60 was aimed at a transparent recount process. To this end it embraced a variety of measures. For example, at each “workstation” where recounting was to be carried out, there was to be installed a picture of the ballot box depicting the state in which it was delivered to the workstation and an audio feed of the recount process. An audio-visual facility was established in the Tabulation Center, broadcasting live the entire tabulation process. Order 60 carefully set out how the process should unfold. Paragraph 12 of the Order required the Chief Elections Officer (CEO) to tabulate the matrices containing the Statements of recount of the ten electoral districts and submit to the Commission a report together with a summary of observation reports for each District.
- [5] During the recount process, Mr Joseph Harmon, an Election Agent of the APNU/AFC alliance wrote several letters to GECOM alleging anomalies, irregularities, voter impersonation and fraud. On 13th June the CEO submitted his report. He indicated the

votes that were cast and counted for each List of Candidates, but he also drew attention to what he considered to be widespread irregularities. He took it upon himself to indicate that votes contained in any ballot box in which he found an irregularity should be subtracted from the total votes cast and previously counted. It was his assessment that it could not be ascertained that the results for the Districts met the standard of fair and credible Elections.

[6] On receiving this report, the GECOM Chairperson conferred with the GECOM Commissioners and announced publicly that some of the allegations set out in the CEO's report were serious, but the Commission did not have the machinery to adjudicate them. The Commission, she noted, lacked the powers of a Court of Law to examine and re-examine witnesses or to procure official documents to determine the truth of the allegations. The Chairperson pointed out that the Constitution had vested in the High Court an exclusive jurisdiction to determine the legality of an election and the Commission could not arrogate onto itself the power to annul elections. By letter of 16 June, the Chairperson accordingly directed the CEO to prepare and submit his report by 1:00PM on 18th June, 2020 using the results of the recount. Before the CEO could comply with this request Ms Elysn David launched these proceedings by an Application to the Court of Appeal.

[7] Ms. David's Application sought to invoke the Court of Appeal's jurisdiction under Article 177(4) of the Constitution. Decisions of the Court of Appeal under that Article are final and cannot be appealed to the CCJ. The Application challenged the credibility of the count by GECOM under Order 60. Ms David requested an interpretation of the phrase "more votes are cast" in Article 177(2)(b) of the Constitution and she asked the court to restrain the CEO from complying with the GECOM Chair's Direction without GECOM first determining the credibility of the Elections under Order No. 60 and s 96 of the Representation of the People Act. Her Application was premised on the notion that Order 60 created a new and completely different legal regime, that GECOM had abdicated its responsibility to determine the election's credibility and that the Chairperson's direction to the CEO required that official to commit an illegality.

[8] The Court of Appeal heard Ms David's Application on 20 June 2020 and, commendably, on 22 June 2002 delivered its judgment ("the Decision"). A critical issue was whether the Court of Appeal possessed the jurisdiction to hear Ms David's

Application, that is whether the Application properly fell under Article 177(4). By a majority, the court held that it did. Justice Reynolds found that a new election regime had been created by Order 60 and that the Constitution established separate elections for the National Assembly and the President. Justice Gregory found that Order 60 had sufficient force to impact the words in Article 177(2)(b) of the Constitution. Both judges agreed that the words in Article 177(2)(b) of the Constitution, “if more votes are cast in favour...” must be interpreted to mean ‘if more *valid* votes are cast in favour’.

- [9] In a dissenting opinion, Justice Persaud held that the Court of Appeal did not have jurisdiction to hear the Application as Parliament had not made any provisions giving effect to Article 177(4) and no genuine question was raised concerning the validity of the election of the President. He also held that the Application was premature as no President had as yet been declared to have been elected. It was his view that the High Court had the exclusive jurisdiction to determine the validity of an election pursuant to Article 163 of the Constitution.
- [10] Although the Court of Appeal granted a stay of its judgment for three days, the CEO, on the day following the delivery of the judgment, submitted another report to GECOM. In this report, which he based on the Court of Appeal’s decision, the CEO invalidated votes he determined were invalid. This amounted to the exclusion of over 100,000 ballots previously counted and certified as valid during the recount process.
- [11] On 23 June 2020, Messrs Ali and Jagdeo applied to this Court for special leave to appeal the Court of Appeal’s decision. Given the urgency of the case, it was decided that the hearing of this Special Leave Application and, in the event special leave were granted, the merits of the appeal, should be heard together. We gave permission for all parties, including all political parties who contested the Elections that were not already part of the proceedings, to make written and oral submissions to us on the following broad issues:
- (i) Whether the Court of Appeal had jurisdiction to entertain Ms David’s Application;
 - (ii) If the Court of Appeal lacked jurisdiction, what is the consequence in relation to this proposed appeal;

- (iii) If the Court of Appeal rightly assumed jurisdiction, what is the consequence in relation to this proposed appeal; and
- (iv) If the Court of Appeal rightly assumed jurisdiction but they exceeded their jurisdiction, what is the consequence in relation to this proposed appeal.

[12] Among the parties' submissions, two clear approaches were discernible: those supporting the Court of Appeal's assumption of jurisdiction under Article 177(4), thus making its decision final and unappealable to this Court and those submitting that Article 177(4) was not triggered by Ms David's Application and therefore this Court was entitled to set aside the Court of Appeal's decision as not having been made *under* Article 177(4)..

[13] This court first recognised that Article 123(4) of the Constitution gives Parliament the power to make the CCJ the final court of appeal for Guyana. Under this authority, the Caribbean Court of Justice Act, Chapter 3:07 ("the CCJ Act") was enacted, rendering this court the apex court for Guyana. The CCJ Act, which implemented the Agreement Establishing the CCJ and gave it force in Guyana's domestic law, must guide the question of the CCJ's jurisdiction.

[14] Citing the Barbadian case of *Barbados Rediffusion Service Ltd v Mirchandani*, the Court determined that the CCJ had jurisdiction to entertain Applications for Special Leave to appeal from any decision of the Court of Appeal in any civil matter. This power was to be juxtaposed, however, against section 4(3) of the CCJ Act which provides that the court has no jurisdiction to hear matters from the Court of Appeal which were declared to be final by any law. The Court confirmed that Article 177(4) is such a law.

[15] This court defined Article 177(4) as a limited and circumscribed carve out of its broad jurisdiction to grant special leave applications and determine appeals from the Court of Appeal. The Court noted that Article 177(4) is also a carve out of the exclusive jurisdiction over the validity of elections granted to the High Court by Article 163. The Court held that Article 177(4) should be strictly and narrowly construed. There was no doubt, that in instances where the Court of Appeal hears a question concerning the validity of an election of a President, where the question depends on that person's qualifications or the interpretation of the Constitution, that decision would be final and

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unappealable to the CCJ. If no such question arose, however, or if the validity of the election did not depend on a question of the qualification of the person or the interpretation of the Constitution, then the Court of Appeal would not have jurisdiction. In such cases, questions about the validity of any elections must be referred to the High Court, under Article 163. And once the matter commenced in the High Court it was appealable right up to this Court as the final court of appeal.

[16] The Court recognised and re-affirmed its duty as Guyana’s final court of appeal to ensure adherence to the Constitution. In all the circumstances, and given the constitutional implications and the public importance of this case, the Court granted special leave to Messrs Ali and Jagdeo to argue the appeal.

[17] In addressing the merits of the appeal, the Court looked at Guyana’s electoral system generally and also at Article 177 of the Constitution. Guyana’s electoral system was described as a hybrid presidential system, based on proportional representation. Parliament consisted of the President and National Assembly. At General Elections, electors cast a single ballot in favour of a list of candidates vying for seats in the Assembly. Each list designates one person as a Presidential candidate. The electors’ ballots serve to determine the members of the National Assembly and also the person who is ultimately deemed to be President. The votes are counted and information is furnished by the returning officers under the Representation of People Act. The Presidential candidate on the list for which more votes are cast is elected as President and so declared by the Chairman of GECOM.

[18] The Court noted that Order 60 was applicable only to the elections of 2 March 2020. It was introduced for the specific purpose of catering to the disputes and contentions which arose by providing a transparent and accountable recount of the votes cast in the presence of representatives of political parties.

[19] The court stated that the exclusive jurisdiction of the High Court under Article 163, to determine, among other matters, any question in relation to whether an election has been lawfully conducted, was unaffected by Order 60. Similarly unaffected was the National Assembly (Validity of Elections) Act (“the Validity Act”) which provides the method of questioning the validity of an election through the filing of an election petition. The Validity Act set out that such a petition must be presented within 28 days

of the publishing of the election results and that the High Court had the power even to order a fresh election in whole or in part.

[20] Article 163 provides a constitutionally mandated and evidence based open justice process under the exclusive jurisdiction of the High Court, with the right of appeal, if necessary, to the Court of Appeal and ultimately to this Court. The irregularities complained of by Mr Harmon and alluded to by the CEO, were required to be addressed under the jurisdiction conferred by Article 163, by an election petition filed in the High Court. The Court held that the GECOM Chairperson was right to state that GECOM lacked the legislative authority and the machinery to embark upon a determination of such irregularities.

[21] The Court then turned to Article 177 which addressed the election of the President. Article 177(2)(b) states that a person is deemed to be elected as President when “*more votes are cast* in favour of the list in which [that person] is designated as Presidential candidate than in favour of any other list”. The President is deemed to have been elected because, in the electoral process, an elector’s single ballot is really cast in favour of a list of candidates. There is now no separate election of a President as there used to be when Article 177(4) was originally introduced as Article 30(13) of the Constitution. In earlier times the President was elected *by the votes of the members of the National Assembly, who had already been elected to that body* but that is no longer the case. Article 177(4) was always intended to operate *after* the President had been elected, originally by the National Assembly, or, as is now the case, when the President had been deemed and declared to be President after it was determined that more votes were cast in favour of the list in which she or he was designated as Presidential candidate than in favour of any other list. Questions as to the validity of the President’s election were never intended specifically to impugn or relate to the validity of ballots cast by electors at the election of members of the National Assembly.

[22] Article 177(4) only affords jurisdiction to the Court of Appeal if the question raised as to the validity of an election of a President *depends upon the qualification of any person for election or the interpretation of the Constitution*. It is evident from the nature of Ms David’s complaints and the issues she placed before the Court of Appeal that the question(s) raised by her did *not* depend on the qualification of any person for election or on the interpretation of the Constitution. Ms David’s complaint was really about the

impact of Order 60 and the conduct of GECOM. What the Court of Appeal majority did was to embark upon an exercise of interpreting Order 60 and a consideration of the effect of that Order on the responsibilities of GECOM. In neither instance was there any need for an interpretation of any Article of the Constitution. Article 177(4) of the Constitution has always said what it meant and meant what it said. There was therefore nothing in Ms David's Application to trigger the Court of Appeal's jurisdiction under Article 177(4). The Court of Appeal therefore lacked jurisdiction to make the orders that were made. Those Orders were not made *under* Article 177(4) of the Constitution.

[23] The authorities referred to the Court by counsel for Ms David were unhelpful. These were all cases where, in the face of a finality clause, the Privy Council declined jurisdiction to hear an appeal from a lower court. Unlike the case here, however, in none of these cases was there any suggestion that the lower court had acted without jurisdiction.

[24] Counsel for Ms David also suggested that the Court of Appeal had confined its jurisdiction to interpreting the words of Article 177(2)(b) "more votes are cast" in order to conclude that those words really meant "more valid votes are cast". It was argued that this brought their decision within the purview of Article 177(4). The Court did not accept that argument. The concept of "valid votes" is well known to the legislative framework governing the electoral process. The concept has a particular meaning in that context. The phrase appears several times in the Representation of the People Act including as s 96. That section calls on the Chief Election Officer to calculate "the total number of *valid votes* of electors which have been cast for each list of candidates" (emphasis added). Validity in this context means, and could only mean, those votes that, *ex facie*, are valid. The determination of such validity is a transparent exercise that weeds out of the process, for example, spoilt or rejected ballots. This is an exercise conducted in the presence of the duly appointed candidates and counting agents of contesting parties. It is after such invalid votes are weeded out that the remaining "valid" votes count towards a determination of not only the members of the National Assembly but, incidentally as well, the various listed Presidential candidates. If the integrity of a ballot, or the manner in which a vote was procured, is questioned beyond this transparent validation exercise, say because of some fundamental irregularity such as those alleged by Mr Harmon, then that would be a matter that *must* be pursued

through Article 163 after the elections have been concluded. At the point in the electoral process where Article 177(2)(b) is reached, there is no further need to reference “valid” votes because, subject to Article 163 (which is triggered by election petition after the election), the relevant validation process has already been completed. Unless and until an election court decides otherwise, the votes already counted by the recount process as valid votes are incapable of being declared invalid by any person or authority.

[25] By the unnecessary insertion of the word “valid”, the Court of Appeal impliedly invited the CEO to engage unilaterally in an unlawful validation exercise. This trespassed on the exclusive jurisdiction of the High Court established by Article 163. It was inconsistent with the constitutional framework for the CEO or GECOM to disenfranchise thousands of electors in a seemingly non transparent and arbitrary manner, without the due processes established in Article 163 and the Validation Act.

[26] Referring to the case of *Re Eusi Kwayana’s Application* that was cited to it, the Court noted that the Court of Appeal of Guyana had declined jurisdiction in that case to deal with an application challenging the validity of an election where it was alleged that there was a defect in the Oath of office taken by the President. The Court found that the case illustrated the strict and narrow interpretation by the courts of Article 177(4).

[27] For all these reasons the Court adjudged that the provisions of Article 177(4) were not triggered by Ms David’s Application to the Court of Appeal and the finality clause was inoperable. It follows that, under the laws of Guyana, this Court had jurisdiction to hear and determine the Application by Messrs Ali and Jagdeo to set aside the decision of the Court of Appeal. That decision was made without jurisdiction. It was therefore not final and is of no effect. This Court is entitled and required to declare it invalid and, likewise, the report issued by the CEO which was based on it. It follows that the Appeal of Messrs Ali and Jagdeo succeeds.

[28] The Court was addressed, with great passion, by some counsel to make a raft of consequential orders relating to the Elections. In this regard it is important to bear in mind that this case is essentially about *jurisdiction*, this Court’s jurisdiction, the jurisdiction of the Court of Appeal, and the manner in which the High Court’s exclusive jurisdiction under Article 163 of the Constitution is implicated by the Court of Appeal’s judgment.

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[29] Once we decide that the Court of Appeal's order was made without jurisdiction and should therefore be set aside together with the CEO's report that was based on it, there is nothing left upon which we would possess jurisdiction to make further orders. As Guyana's final court, we cannot, however, pretend to be oblivious of events that have transpired since December 2018. Indeed, we have had to pronounce on some of those events. It has been four months since the Elections were held and the country has been without a Parliament for well over a year. No one in Guyana would regard this to be a satisfactory state of affairs. We express the fervent hope that there would quickly be a peaceable restoration of normalcy.