

# IN THE CONSTITUTIONAL COURT OF SEYCHELLES

(Corum: Twomey CJ, McKee J, Akiiki-Kiiza J)

(CP 01/2016)

(2016) SCCC 11

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Wavel John Charles Ramkalawan      Petitioner

Versus

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|-----------------------------|-------------------|
| 1. The Electoral Commission | First Respondent  |
| 2. James Alix Michel        | Second Respondent |
| 3. Attorney General         | Third Respondent  |

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Heard:            14 January – March 2016

Counsel:        Bernard Georges and Annette Georges for Petitioner  
                     Samantha Aglaé for First Respondent  
                     Basil Hoareau and Laura Valabhji for Second Respondent  
                     Ronny Govinden, Attorney General and Ananth Supramanian for Third  
                     Respondent

Delivered:      31 May 2016

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## JUDGMENT OF THE COURT

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### **Judgment of the Court**

[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 First Respondent, the Electoral Commission, which is a politically independent body constitutionally mandated to conduct and supervise elections in Seychelles (see article 115(3) and article 116(1) (a) of the Constitution of the Republic of Seychelles, hereinafter referred to as “the Constitution”). The Petitioner, Mr. Wavel John Charles Ramkalawan, and the Second Respondent, Mr. James Alix Michel, were both candidates for the presidency for their respective political parties, 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<sup>rd</sup> to 5<sup>th</sup> 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 percent 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 percent of the vote. In this election, the Second Respondent, who was running for his third term of office, secured the highest percentage of votes (47.76%). However, he failed to secure the required fifty percent of the votes in the election in order to be appointed as the president (see in this regard schedule 3, paragraph 5 of the Constitution). The Petitioner secured 35.33% 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%. 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 First Respondent was required by law to run a second round of elections. According to Schedule 3 paragraph 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 Second Respondents were to run against each other.

- [5] The second round of the election was held on 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> 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<sup>th</sup> December 2015, the following results were declared by the First Respondent:-

31,319 (49.85% of the votes) votes in favour of the Petitioner.

31,512 (50.15% of the votes) in favour of the Second Respondent.

Hence, the Second 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 First Respondent, that the Second Respondent was validly elected President of Seychelles. The first case was brought as a Constitutional Petition in terms of Article 130 of the Constitution and given case number CP07/2015. The second, this Petition was brought under section 51 of the Constitution and section 44 of the Elections Act, Cap 68A (hereinafter “the Act”). This case is assigned the case number CP01/2016.
- [7] The Third Respondent, the Attorney General, was joined to the Petition under rule 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 the 5<sup>th</sup> January, 2016, and the Respondents filed their replies thereto. Since both cases involve the same parties the two cases, CP01/2016 and CP07/2015 were consolidated for the purposes of hearing the matters and the hearings commenced on the 14<sup>th</sup> 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 temporaneous 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.

**The case for the Petitioner against the First Respondent:**

- [10] The Petitioner avers that in a number of respects the First 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 First 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<sup>th</sup> 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<sup>th</sup> 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 voter cast in the three electoral areas.
- d. That the First Respondent failed to ensure that the dignity of the aged voters was protected while exercising their right to vote.

- e.** That there was withholding of identity cards, and coaching conducted by the Second 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 section 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 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 First 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.
- 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 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

*Case against the Second Respondent:*

[14] The Petitioner avers that there were illegal practices committed by the Second Respondent in connection with the election by or with the knowledge and consent or approval of his agents contrary to section 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 principally to influence the recipients thereof to vote for the Second Respondent contrary to sections 50 and 51(1)(r) of the Act.
- b. That on 16<sup>th</sup> 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 Second 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 SR 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 Second Respondent contrary to Section 50 and 51(1) (r) of the Act.
- d. That the offer by Mr. France Albert Rene, former President and an agent of the Second 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 Second Respondent. That this was contrary to section 51(3) (c) of the Act.

- e.** That between the ballots, the offer by Mrs. Sylvette Pool, an agent of the Second 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 Section 51(3)(a) and (c) of the Act.
- f.** That between the ballots and at the instigation of the Second 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 Section 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 Second 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<sup>th</sup> and 15<sup>th</sup> December 2015. That both instances were intended to induce the employees of the Airline to vote for the Second Respondent instead of the Petitioner.
- h.** That the Speaker of the National Assembly and a supporter of the Second 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 employee of the public service and other Seychellois to vote for the Second Respondent instead of the Petitioner.
- i.** That Mrs. Beryl Botsoie, a Headmistress of La Rosiere School, and a supporter of the Second 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 Second 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 wide spread giving of money and gifts by agents of the Second Respondent contrary to Section 51(3) (a) of the Act.

**The Petitioner's prayer to the Court**

[16] The Petitioner prayed that at in view of the sum total of the above irregularities and non-compliance of the electoral laws, that the Court:-

1. Declare that for the reasons set out in paragraphs 23 and 24 of the Petition, there was non-compliance with the provisions of the law by the First Respondent relating to the election and the non-compliance affected the result of the election.
2. 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.
3. Order a recount of all ballot papers used on the 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 Stations.
4. Declare that, for reasons set out in paragraph 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 Second Respondent or of his agents.



5. Declare that the election is void.
6. Make such further order or give further direction as may be just and appropriate in the circumstances.

**The case for the First Respondent**

[17] The First Respondent opposes the Petition and contends that the election was held in accordance with the provision of 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 First Respondent averred that:

- a. There were no irregularities in the counting of ballot papers that affected the result of the election.
- b. The First Respondent ensured that indelible ink and proper quality visible spray were procured and used during the elections.
- c. The Special Polling Station which opened on Mahé during the morning of the 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 that 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 First 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 Polling Stations 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 ball point pens instead of the black marker, no objection was raised during the counting of votes regarding the two voters by either side's agents.
- 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 First Respondent prayed for the dismissal of the Petition with costs. It also prayed for such other order and relief the Court may deem fit to grant.

#### **The Second Respondent's case**

[20] The Second 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 First Respondent with the Constitution and other electoral laws and the alleged illegal practices raised by the Petitioner, the Second Respondent more or less repeated the averments made by the First 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 section 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 inquired 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 Second 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 Second 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 Second Respondent's agent, and therefore did not threaten any temporal loss in terms of section of section 51(3)(j) of the Election's Act.
- j.** That what Mrs. Beryl Botsoie is alleged to have said was in her personal capacity and not as the Second 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 Second Respondent's agents and never amounted to a threat of temporal loss within the meaning of section 51(3)(j) of the Act.
- l.** 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 Second 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 Second Respondent. This was contrary to Section 51(3)(b) of the Electoral Act.

[23] The Second Respondent prayed for the dismissal of the Petition with costs.

### **The Third Respondent's case**

[24] The Third 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 First and Second 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<sup>th</sup> 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 18th 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 Stations was made.
- c. On the 18<sup>th</sup> December 2015, the following counting Agents of the Petitioner, in their respective Polling Stations, 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, paragraphs 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 paragraph 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 the 18<sup>th</sup> 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 that 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 First 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 7pm. In the evening, he asked the presiding officer if they could check to see whether the ink and stray 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 First 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 was 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 18th 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 Stations 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 the 18<sup>th</sup> of 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 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 Stations prior to the main voting day on 18<sup>th</sup> December, there was a sorting out of all envelopes from the special polling stations on the night of the 17<sup>th</sup> of 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, First Respondent and Second 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 begins, 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 states which district he is 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 Stations, 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 First 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 2<sup>nd</sup> 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 first register (i.e. the one used on Mahé) to the 2<sup>nd</sup> 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 learned 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 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 fax 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 island 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 the 16<sup>th</sup> and 17<sup>th</sup> of December. They also periodically received a list of names of voters who had cast their ballots at National Library Station on the 18<sup>th</sup> 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 the 18th December, 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 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 didn't 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 were 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 the 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 18th 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 foolproof 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 Second 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 Stations 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 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 First Respondent failed to ensure that the dignity of the 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 averment 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 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 the 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 realize 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 Second Respondent’s agents.*

[89] On the morning of 16<sup>th</sup> 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 7.45am on the 16<sup>th</sup> 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 Second Respondent, and stated that she was a polling agent at North East Point for Parti Lepep, on behalf of Mr. James Michel on the 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 7.30am 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<sup>th</sup> 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 realized 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 First 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 section 25 (1) (a)(ii) of the Act.*

[100] Mrs. Coopoosamy testified on behalf of the Petitioner that on 18<sup>th</sup> 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 the 18<sup>th</sup> 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 Stations, 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 prior 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 into 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 there 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 by 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 Stations.
- [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 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 error 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 First 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 Stations 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 out 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 Stations 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 Special Polling Stations. They were crossed off the registers. Mr. Henrie confirmed that on the list of persons who had voted at Special Polling Stations, there were 259 names recorded and called out. During the course of the day the envelopes from the Special Polling Stations were received from Headquarters. 262 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 Stations, 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 Stations. 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 amount of votes reflected on the official list of the votes from the Special Polling Stations 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 7am, 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 Special Polling Stations. Later 144 votes in envelopes were received by the station. The official list states that 144 votes were cast at the Special Polling Stations 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 as received 244 envelopes. 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 Stations 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 First 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 districts 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 itemized 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 have not 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 Stations started at 7.30 pm and went on until 3am 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 number of names itemized. 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 itemized 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 on 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 the 17<sup>th</sup> 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 which 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 Second 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 the 16th December 2015 as she is a police officer and she was working on the 18th December 2015.

[169] The Second 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 the 3<sup>rd</sup> December 2015 and left on the 17<sup>th</sup> 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 Stations 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 Stations 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 station 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 Stations. 2409 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 in 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 the reason 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 realized 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 day of the main polling day, the 18<sup>th</sup> December 2015 as the electoral officers had done so prior 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 Stations, 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 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<sup>th</sup> 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 Special Polling Stations 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 Stations were counted separately from the votes cast in the station itself. 244 votes were received from the Special Polling Station (note 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 Stations. 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.

**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 principally to influence the recipients thereof to vote for the Second Respondent contrary to sections 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 for 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 25million 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 bribery to people. Mr. Gappy gave orders to a member from the Indian Ocean Commission Observer Mission, Mr. Romaine, to go and investigate.

[208] In cross-examination the Petitioner maintained his stance despite the Honourable 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 Second 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<sup>th</sup> 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 Second 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 applications 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 Rs. 167,455 and Rs. 250,970 respectively. Mr. Simeon testified that there had been an increase in the amount of money paid in 2015 because of a standard adjustments 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<sup>th</sup> 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 programs.

- a.** In December 2015 the total expenditure was Rs. 82.1 million.
- b.** During November 2015 it was 30 million and October 2015 was Rs.47 million.
- c.** During 2015 as a whole the expenditure was 405 million rupees, a 14% increase on the year before, 2014 which saw an expenditure on social programs of Rs. 356 million.
- d.** In 2014 the expenditure for December was Rs.54 million, for November was Rs.26 million and October was Rs.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 16th 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 Second 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<sup>th</sup> 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<sup>th</sup> 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 mobilizer for Parti Lepep for Perseverance. She described what a mobilizer 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<sup>th</sup> 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 welfare benefit. She stated that she did not go the DA office on the 16<sup>th</sup> December 2015.

[229] On cross-examination by Mr. Georges she said that the DA office was open on the 16<sup>th</sup> 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 4pm. 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 SR 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 Second Respondent contrary to Section 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<sup>th</sup> 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<sup>th</sup> 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 13-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<sup>th</sup> 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 the 24 December 2015. President Michel was not aware of his letter.

[234] Mr. Payet stated that the Government has 40% 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 13-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<sup>th</sup> September 2015 in relation to the 13-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 13-month salary would be paid. The reason why the 13-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 Second 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 Second Respondent. That this was contrary to section 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<sup>th</sup> December 2015, after Mr. Pillay had already publically 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 Second 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 Section 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<sup>th</sup> 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 Seslwa 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 the 5<sup>th</sup> 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 Second 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 Section 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 Second 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 14th and 15th December 2015. That both instances were intended to induce the employees of the Airline to vote for the Second Respondent instead of the Petitioner.*

[246] The Petitioner led evidence about an article which appeared on the front page of the Nation newspaper on 16th December 2015 which was about Etihad Airway. In the article the paper quoted Mr. Michel, the Second 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 are 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 patronize 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 Second 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 employee of the public service and other Seychellois to vote for the Second 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<sup>th</sup> 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 8pm 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 8pm news, however, a shorter English language interview was aired on the 7pm 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 Second 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 Second 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 Second 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 Guards had held a meeting with the soldiers at the Coast Guards 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<sup>th</sup> 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 were 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 Guards. He stated that he was not acting on behalf of Mr. Michel.

*That there was wide spread giving of money and gifts by agents of the Second Respondent contrary to Section 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<sup>th</sup> 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 the 9<sup>th</sup> of 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 SR500 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 two thousand rupees 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 SR3000 after the initial SR2000. 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<sup>th</sup> 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 SR500 for drinks and snacks before they went to Mr. Lesperance's office. He was invited along with the group. He was paid SR2000 specifically from Mrs. Elizabeth Lafortune, Mr. Lesperance's secretary. Each of them were paid SR2000 and were promised to be paid SR3000 which would be paid one day before the 2<sup>nd</sup> 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<sup>th</sup> December he was again contacted by Mr. Lesperance. He was offered SR3000 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 100metre perimeter of the station which he did.

[265] Ms. Lydia Jumeau testified that she had been present in a shop in Providence on 9th 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 Second Respondent, introduced a letter which the Petitioner had written to the Tamil Community on the 9<sup>th</sup> of 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 Second 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 section 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<sup>th</sup> 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 are always 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 section 29 of the Act which provided that a register of voters was to be included with 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 at 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 adapting 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 to 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 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 Articles 51(3) to 51(5) of the Constitution as read with section 44 of the Act and in particular section 44(7) of the Act in conjunction with Rule 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 section 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 vs 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 section 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 to have 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 Second Respondent by the Petitioner. She submitted that consideration of the issues was in terms of Articles 51 of the Constitution as read with the provisions of section 44 of the Act. She looked to the averments of the Petitioner relating to his allegations that the Election 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 summarized as follows:

1. The use of poor quality indelible ink and spray, possible easy removal by a voter and hence the danger of double voting,
2. 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,
3. A failure to safeguard the dignity of aged voters,
4. 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,
5. Non-compliance with section 25 of the Act in respect of the procedure for voting, and,

6. The difficulties encountered by a voter, one Barbara Coopposamy, 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 irregularity in the counting of votes that affected the result of the election. These three complaints can be summarized as follows:

1. 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 at the same polling.
2. 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,
3. 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 section 25 of the Act.

[310] Mrs. Aglaé set out in considerable detail the voting procedures for Special Polling Stations. She also referred to, in particular, the evidence of Mr. Gappy the Electoral Commissioner, as supported by Counting Agent at Glacis, Regina Esparon, and their explanations regarding small inconsistencies in eight electoral areas in respect of



numbers of votes cast and 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 said 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 Stations and able to record the counting process. At twenty three of the twenty five Polling Stations such Counting Agents for the Petitioner did sign the final ballot paper account. Of the remaining two Polling Stations, 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 First 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 Second Respondent and hence a breach of section 51(3) (a) of the Act. She recorded these allegations under the following heads:

1. Illegal Practices by the Social Welfare Agency. Mrs. Aglaé reviewed the available evidence and submitted that the Petitioner had failed to prove this allegation.
2. 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.

3. Breach of section 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 Second Respondent.
4. Breach of section 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 (paragraphs 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.
5. Breach of section 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.
6. Finally, breach of section 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 summarized as follows:

1. Where required by the provisions of the Act, the Petitioner had failed to prove the essential element of agency.
2. 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.
  3. 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 reasonable doubt.
  4. While not expressly stated as a final conclusion we take the position of the First Respondent to be no *allegation* of the commission of an illegal practice has been proved.
  5. 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 S.C.R. 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 Second Respondent. He reminded the Court of the limbs on which the Petition was based, namely:

1. Non-compliance with the Act which non-compliance affected the result of the election,
2. Illegal practices in connection with the election by or with the knowledge and consent or approval of the Second Respondent or by or with the knowledge and consent of his agent,
3. 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 First Respondent had denied all the allegations.

[319] Firstly, he drew the attention of the Courts 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 terms of his written pleadings and evidence given, but outwith 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<sup>th</sup> 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 Second Respondent. Mr. Hoareau stated that it was not pleaded that the said Principal Secretary was acting as an agent of the Second

Respondent nor that the letter was sent with the knowledge and consent or approval of the Second Respondent or any of his agents. He was further of the view that the complaint as drafted did not satisfy the requirements of section 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 paragraph 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 summarized 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 as 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 section 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<sup>th</sup> December 2016 he submitted that paragraph 30(b) of the Petition was incorrect. Rather paragraph 19(b) (i) of the Defences of the Second Respondent was the true position. He also submitted that the Petitioner had also stated that the Second Respondent had distanced himself from the said article and a reading of the said article 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 Second 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 Second 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 section 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 Second Respondent, although it was acknowledged that she was a polling agent with duties inside a Polling Station at 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 Second 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 in 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 Second 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 Coopoosamy 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:

1. 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.
2. Misallocation of votes and missing voters names from Special Polling Stations. Mr. Hoareau set out fully the position as he saw it relating to incidents at a number of Polling Stations and summarized 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.
3. The marking of ballot papers by ball point 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 ball point pen would be considered a valid vote.
4. 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.
5. 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 summarized the evidence of checking procedures both before the voting opened and after 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 Second 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 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 (our italics)*.

- [357] He then applied the doctrine of the shifting burden of proof and submitted that in numerous instances the First 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 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 amount to such a degree of non-compliance that the result of the election has been affected.
- [361] Finally in respect of the First Respondent, Counsel for the Petitioner brought further matters collectively for 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 section 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 First 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 Stations 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 (our italics)*.

[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 Coopoosamy. Mr. Georges again invited the Court to make the inference that occurrences of a similar nature could have occurred *at other Polling Stations (again our italics)*.

[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 with the Act. He further submitted that to conform with 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 Second Respondent. He dealt with the main allegations of illegal practices committed by the Second Respondent or, as Mr. Georges puts it, 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 (05 November 2008) Privy Council Appeal No 58 of 2007 case 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 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:

1. 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;
2. the purchase of identity cards by a Mr. James Lesperance
3. the allegation of money being offered by the Social Protection Agency;
4. the allegation of money being offered by the Ministry of Finance to the company, Indian Ocean Tuna Limited, in respect of its Seychellois employees;
5. 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;
6. an offer and inducement involving Ms. Dania Valentin and Mr. Flossel Francois; and
7. 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 First 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 provide 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 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 Article 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 ours)

[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) 8KIR 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 denie[s] that a state of affairs existed given the difficulties which ar[i]se where proof of a negative was required.”(McVicar v United Kingdom, Eur. Ct. H.R., 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*, 9<sup>th</sup> Edition page 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*, 4th Edition, vol. 17, parag. 15).

[384] Hence, we agree with Mr. Hoareau quoting Adrian Keane (*The Modern Law of Evidence*, 9<sup>th</sup> edition) 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 (page 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 section 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 ours)

- [389] More problematic is the fact that the Election Petition brought by the Petitioner alleges both non-compliance with the Act (section 44(7) (a)) and illegal practices (section 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 section 45(1) provides that election Petitions are private legal processes, sections 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 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] 1QB247, a civil matter where fraud was alleged, Lord Denning expressed the standard of proof 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 (page 258).*

[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:

*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 of Proof) [1996] AC 563, 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 before a court to find the allegation proved on the balance of probabilities (paragraph 55).*

[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 corruption 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:

*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.*(parag 47)

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 Second Respondent has pointed out in this case, the Judicial Committee of the Privy Council was giving effect to the provisions of section 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 SR20,000.

[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



but 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 section 44(7) (a) and (b) of the Act which provide 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, section 45 of the Act provides in relevant part that :

*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 section, 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 other 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 section 44(7) (a) and 45(4) (b) that the ingredients for the proof of such a breach are evidence of:

1. the acts of non-compliance
2. 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 (4th Edition, Volume 15 at paragraph 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 S.C.R. 76, the Canadian Supreme Court stated:

*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 ideal 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.” (p. 198 per Rothstein and Moldaver JJ).*

[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] Q.B. 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:

*(1) 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...*

*(2) 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...*

*(3) 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 noncompliance 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 section 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 endeavour 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 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 endeavour 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 endeavour 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 endeavours 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 at an election;*

[424] The totality of these provisions together with those of sections 44 and 45 of the Act indicate that the essential elements for the proof that an illegal practice voids an election are:

1. That the illegal practice as outlined in provisions of section 51(3) was committed
2. In connection with the election
3. By the candidate or his agent
4. With the knowledge, consent or approval of the candidate or his agent.
5. The illegal practice was not done in good faith, inadvertence, or by accidental miscalculation or reasonable cause
6. 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 Second Respondent it is also necessary to consider the law on agency. Both Mr. Georges and Mr. Hoareau have relied on the English law in relation to agency. These submission 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 provides 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 (Article 1989).

[428] In our view where the Petitioner claims illegal practices have been carried out by agents of the Second 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 Second 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 spend 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 weights used for means testing for receiving assistance was 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 the 20<sup>th</sup> of December in time for Christmas. Mr. Commettant produced documentary evidence to show that the government had spent 82 million rupees, 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 Second 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 and the Second 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 Second 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 Second 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 on 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 Second 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 Second 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<sup>th</sup> December 2015. However although in the article the Second 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 Second 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 section 51 (3) (j) of the Act.

[442] However these acts cannot be attributed to the Second Respondent as no evidence was adduced to show that Mr. Savy was acting as an agent for the Second 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 section 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 Second 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 the 15<sup>th</sup> 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 Article 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 Article 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 under 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 section 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 Second 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 to be 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 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 of 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. (212)*

It can be argued therefore that the doctrine of judicial notice obliges courts to accept certain facts before it without 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 from 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 Second Respondent.

[456] Mrs. Botsoie may well have engaged in an illegal practice under the provisions of section 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 section 47(3) of the Act.

#### *SPDF officers*

[457] The evidence adduced by the Petitioner in relation to the three army officers are 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 Second Respondent affecting the election result, no evidence was brought by the Petitioner to demonstrate that these officers were acting as agents of the Second 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 Second 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<sup>th</sup> 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 two thousand rupees in exchange for their identity cards with a promise of a further 3000 rupees, 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 was 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 Second Respondent on the evidenced adduced. The evidence suggests that he acted illegally. However, the



fact that he was observed at the inauguration ceremony of the Second Respondent does not amount to proof of agency. His acts must have been done with the knowledge, consent or approval of the Second 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 were 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 lead 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 SR15, 000 monthly a thirteenth month incentive salary. This in his view was to induce workers of the company to vote for the Second 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 Second Respondent as far back as June 2015.

[468] The letter was sent just before the second round of elections on 15<sup>th</sup> 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 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 Second 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 Second 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 induce them to vote for him or to refrain from voting for the Second 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.

[475] We take this opportunity to warn future candidates to be careful about their conduct and the potential when making electioneering promises in contravention of 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 was not complied this did not result in double voting. Hence, the election result was not affected in any way. The provisions of section 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 section 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 ours)

[480] It must be noted that section 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 section 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 section 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 Stations*

[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] It is 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 First 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...”.[Our emphasis.]

[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 Stations, 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 section 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:

*18. (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.*

*(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 section 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 First Respondent pursuant to section 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 page 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 Stations which run concurrently, the National Library on Mahé and the Polling Stations 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 special Polling Stations in advance of the main elections day were transmitted to the Polling Stations before the Polling Stations even 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 Stations 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 Stations 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 incongruency 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 Stations 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 itemized 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 Elections 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 First Respondent's performance of its duties and note our concern.

#### *Aged Voters*

[507] The Petitioner alleged that there was 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 allegations of ongoings 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 Stations 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 Stations. 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 Stations 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 First and Second 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 section 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 (section 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 (section 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 (section 29(1)(d)) and of storing and sealing the unused ballots, the register of voters and other documents in terms of section 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 (section 8) and certified (section 9). Prior to voting “sufficient copies” of the register of voters are to be provided to the Polling Station (section 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 (section 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 (section 25(1)(b)(iii)). After the voting is completed, section 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 section 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 section 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 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 not 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 second Petitioner 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 agency to directly or indirectly link them to the Second 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 Second 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, and 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 section 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 section 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 First 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 First 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 section 47(1) (a) of the Act.
- [530] We are unanimous on the matters brought before us in these proceedings and make the following orders:
- i. Constitutional Petition No. 1 of 2016 in the Consolidated Petitions is hereby dismissed.

- ii. Each party shall bear its own costs.
- iii. We order the following persons to appear before us on Tuesday 28<sup>th</sup> June at 9.00 am to show cause why they should not be reported to the Electoral Commission in terms of section 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.

Signed, dated and delivered at Ile du Port on 31<sup>st</sup> May 2016.

M. TWOMEY  
Chief Justice

C. McKEE  
**Judge**

D. AKIIKI-KIIZA  
**Judge**