

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Coram: M. Burhan. J. (Presiding), S. Nunkoo.J. and M. Vidot.J.]

CP 06/2016

[2016] SCCC 1 6

LINYON DEMOKRATIK SESELWA

(rep. by Mr. Roger Mancienne of Arpent Vert, 1st Floor, Mont Fleuri, Mahe)

Petitioner

versus

THE GOVERNMENT OF SEYCHELLES

**(herein rep. by the Attorney General, Hon. Mr. Ronny Govinden, of National
House, Victoria, Mahe)**

First Respondent

THE ATTORNEY GENERAL

(Hon. Mr. Ronny Govinden, of National House, Victoria, Mahe)

Second Respondent

Heard: 26 July 2016

Counsel: Mr. Anthony Derjacques Attorney at Law for petitioner

Hon Mr. Ronny Govinden Attorney General for respondents

Delivered: 2 September 2016

JUDGMENT OF THE COURT

- [1] This application concerns the constitutionality of provisions of an Act which amends the Elections Act, Cap 68A.
- [2] Section 2 (a) of the Elections (Amendment) Act, (Act 13 of 2016) (hereinafter referred to as the “Amendment Act”) amends section 10 of the Elections Act with the insertion after Part II of Part II- A, containing the following sections:

10 A. Notwithstanding section 5, where an electoral area published under Article 116 (5) of the Constitution has not come into operation and an election or referendum is held before the dissolution of the National Assembly a citizen who is resident of the electoral area so published and who has registered as a voter in any electoral area may vote in the electoral area where he or she has registered.

10 B. Notwithstanding section 5, a citizen residing in an electoral area published under article 116 (5) and who has attained the age of eighteen years, may register as a voter in the electoral area of his or her last known residence and vote in an election or referendum specified in section 10 A unless he or she is disqualified from registration under section 5 (1).

10 C. Notwithstanding section 5 (3), any citizen of Seychelles living overseas who is residing in an electoral area published under article 116 (5), may register as a voter in an electoral area where he or she last resided before leaving to reside

overseas unless he or she is disqualified from registration under section 5 (1).

- [3] Further by section 2(b) of the Amendment Act, section 12 of the Elections Act was amended as follows:

(A) in subsection (1)-

(i) by repealing in paragraph (a) the word “or” appearing at the end;

(ii) by inserting after paragraph (b) the following paragraph-

“(c) an election for a new electoral area published under article 116.”;

(B) by inserting after subsection(3), the following subsections-

“(4) An election to an area specified under subsection 1 (c) shall be held within a period of 1 year from the date of the next dissolution of the National Assembly after the electoral area is so published.

(5) The Electoral Commission may, for holding an election under subsection (4), require the residents to register as voters or apply for transfer of their registration, or by itself transfer the voters residing in that electoral area who are registered as voters in other electoral areas having regard to the census of residents held immediately before or after the coming into operation of the electoral area under article 116”.

- [4] The petitioner for reasons stated in his petition, avers that the aforementioned amendments contained in section 2 (a) and section 2 (b) (B) (4) of the Amendment Act which came into effect on the 20th of June 2016 are unconstitutional because the amendments contravene article 24 of the Constitution of the Republic of Seychelles (hereinafter referred to as the Constitution), which contains the right to vote. Article 24 (1) (b) specifically provides that *“[s]ubject to this Constitution every citizen of Seychelles who has attained the age of eighteen years has a right to be registered as a voter for the purpose of and to vote by secret ballot at public elections which shall be by universal and equal suffrage”*. The Petitioner avers that the aforementioned amending sections contravene article 24 because they allow those voters who are resident in a newly created electoral area to vote twice, first in the National Assembly elections in the electoral areas where they are registered immediately prior to the coming into effect of the order creating the new electoral area, and secondly for their own member of the National Assembly within one year. Therefore

the petitioner states that the amending provisions contained in Act 13 of 2016 are unconstitutional.

- [5] The petitioner moves the Constitutional Court for a declaration that the said amendments to the Elections Act are unconstitutional and for an order that the voters in the new electoral area of Ile Perseverance are not lawfully barred nor prevented from voting in the upcoming National Assembly Election. The petitioner alternatively seeks that the Government, the first respondent, enacts appropriate legislation to ensure that the voters of Ile Perseverance can fully participate and vote in the next National Assembly Election to be held prior to 11th September 2016.
- [6] Prior to dealing with the merits of this case, it would be appropriate to deal first with the background facts as brought to the notice of Court by both counsel.
- [7] On the 15th of July 2016, it was announced in terms of section 13(1) of the Elections Act that the National Assembly Elections would be held on the 8th, 9th and 10th of September 2016. This would mean that, in terms of section 8 (1) A of the Elections Act, the register of voters would be closed with effect from the said date.
- [8] Prior to this date, the Electoral Commission had recommended that Ile Perseverance be considered as a new electoral area under article 116 of the Constitution. Accordingly the draft order was by resolution approved by the National Assembly on the 6th of October 2015. Thereafter, order 2016 (SI 29 of 2016) was published in the official *Gazette* on the 29th of April 2016.
- [9] It would be pertinent at this stage to set out article 116 (5) of the Constitution which relates to the coming into force of the draft order creating an electoral area and reads as follows:

When the draft order laid before the National Assembly under clause (4) is approved by resolution of the National Assembly, the President shall make an order, which shall be published in the Gazette, in terms of the draft and the order shall come into force on the next dissolution of the National Assembly after the order is so published. (Emphasis ours).

- [10] Instances when the dissolution of the National Assembly would take place are referred to in article 106 (1) and (2) of the Constitution:

Article 106 (1) and (2) of the Constitution reads as follows:

(1) A session of the National Assembly shall begin on the first meeting of the Assembly summoned under article 107 and, unless sooner dissolved under clause (2) (b), article 110 or article 111, continue for a period of five years thereafter.

(2) The National Assembly shall stand dissolved –

- a) subject to clause (3), on the day next following the end of the period of five years referred to in clause (1);*
- b) where a general election is held before the period of five years referred to in clause (1), on the day next following the declaration of the results of the election; or*
- c) in accordance with article 110 or article 111.*

- [11] It is apparent, therefore, that there are instances where the National Assembly would stand dissolved prior to a National Assembly election (general election) being held, as set out in articles 106 (2) (a), 110 and 111 of the Constitution and instances where the National Assembly stands dissolved after a general election is held as envisaged in article 106 (2) (b). In such an instance, the National Assembly would stand dissolved only on the day next following the declaration of the results of the election.

- [12] It is accepted by all parties that the National Assembly election, also referred to as a general election, as per article 79 (1) of the Constitution, will be held on the 8th, 9th and 10th of September 2016 and is an election to be held pursuant to article 106 (2) (b) of the Constitution.

- [13] Therefore taking into consideration the background facts before us in this instant case, only after the general election results in respect of the general election to be held on the 8th, 9th and 10th September 2016 (for convenience hereinafter referred to as general election 2016) are declared, will the existing National Assembly stand dissolved.

- [14] Further on a reading of article 106 (2) (b) and article 116 (5) where an order in respect of an electoral area has been published as per article 116 (5), which has been done in the instant case in regard to the electoral area of Ile Perseverance, the order creating the electoral area shall come into force on the next dissolution of the National Assembly after the order is published, which in this instant case would be the day following the declaration of the results of the concluded National Assembly election (general election 2016) held between the period 8th and 10th of September 2016. Therefore it is our considered view that the new electoral area would come into force, existence or operation AFTER the election of the National Assembly has been concluded and completed.
- [15] Learned Counsel Mr. Derjacques submitted that one of the principles of democracy in Seychelles is that persons should be registered where they reside, and no person shall be registered in more than one electoral area. Mr. Derjacques relied on section 5 and 51 of the Elections Act. The latter creates a criminal offence if a voter is registered in more than one electoral area. Learned Counsel submitted that since the National Assembly has not yet been dissolved under article 116 (5), Ile Perseverance has not yet become an electoral area and the residents are entitled to vote in accordance with the amended provisions of the Act as set out above. Ile Perseverance will become a district on 11 September 2016, and a member of the National Assembly would be elected within a year of that date according to impugned provision 2 (b) (B) (4). This means that in effect the residents of Ile Perseverance will have voted twice for the members of the same National Assembly – once in their previous districts and once for their own member which learned counsel argued contravened article 24. He further stated this will have an impact on the other districts as well. Learned Counsel denied the submission of the respondents that these are different elections, because the results will be felt in the same National Assembly. Furthermore, counsel submitted that the provisions are repugnant to the Universal Declaration of Human Rights which further provides for equality, equal protection of the law and no discrimination.
- [16] Mr. Derjacques further submitted that in these elections there will not be any equitable representation because the residents of Ile Perseverance will be voting in the other districts and in their own district, which will diminish the overall value or weight of the votes cast

by other voters who actually reside in their voting districts. It is the contention of learned counsel for the petitioner that the principle of “equal suffrage” means not only that every voter should have a vote, but also that every vote should have equal weight. Mr. Derjacques encouraged the Court to pronounce on the matter, and invited the Court to consider whether the Constitution could be amended to enable the residents of Ile Perseverance to vote for their candidate in the upcoming elections. Mr. Derjacques moved the court to look at the *Sullivan* principles laid out in *Sullivan v Attorney General and Ano SCA 25 of 2015* when assessing whether the provisions were constitutional or not. He further invited the Court to consider *Talma v Ministry of Land Use [2015] SCSC 733* which he relied on as precedent to show that Judges have vast discretion to strike down legislation after deciding whether the law was “reasonable and fair”.

- [17] It is the contention of the Hon. Attorney General that in terms of article 24, every citizen has a right to vote which is not an absolute right. He further submits that, in terms of article 78, the National Assembly shall consist of directly elected members in accordance with the Constitution and subject to the Constitution an Act as is equal to the number of electoral areas. Therefore, his submissions argue, one cannot keep an electoral area which comes into effect after the forthcoming general election unrepresented until the next general election. Furthermore, the respondents submitted that one cannot read article 24 alone, it must be read with articles 113, 114, 116, 79, 78a and 27 amongst others. These together create a scheme which article 24 cannot on its own override as the wording of article 24 itself makes it subject to the other provisions of the Constitution.

- [18] Article 24 of the Constitution reads as follows;

(1) Subject to this Constitution, every citizen of Seychelles who has attained the age of eighteen years has a right –

- a) to take part in the conduct of public affairs either directly or through freely chosen representatives;*
- b) to be registered as a voter for the purpose of and to vote by secret ballot at public elections which shall be by universal and equal suffrage;*
- c) to be elected to public office; and*

d) to participate, on general terms of equality, in public service.

(2) The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society.

It is to be borne in mind that article 24 is an article found within the Seychellois Charter of Fundamental Human Rights and Freedoms.

[19] Having given due consideration to the submissions of both learned counsel in addition to our findings made in paragraph 14 that the electoral area of Ile Perseverance comes into force or operation after the general election 2016 and having considered the contents of article 24 of the Constitution, we observe that article 113 of the Constitution refers to only three types of elections in which voters in an electoral area are entitled to vote.

Article 113 of the Constitution reads as follows:

A citizen of Seychelles who is registered as a voter in an electoral area shall be entitled to vote in accordance with law, in the electoral area-

- a) at an election for the office of President,*
- b) at an election of the members of the National Assembly; or*
- c) in a referendum held under this Constitution.*

Unless any circumstances have arisen which, if the citizen were not so registered, would cause the citizen to be disqualified under an Act made under article 114(1) on ground (a) ground (b) of article 114 (1).

[20] Article 79 of the Constitution specifies the ways of electing the National Assembly – either by general election in terms of article 79 (1) or through by-election in terms of article 79 (2) of the Constitution. This is mirrored in the unamended section 12 (1) of the Elections Act which states that “[a] National Assembly election may be (a) a general election; or (b) a by-election, for the election of the directly elected members of the National Assembly.”

- [21] Voting in a newly created electoral area cannot be considered to be a by-election for the purpose of article 79, neither do the circumstances of this instant case before us fall under the provisions of article 113 (a) or (c) referred to above. The only other remaining provision that would apply to an election being held in a newly created electoral area, especially when considering the wording of article 116 (5), would be a general election under article 113 (b) of the Constitution held on the next dissolution of the National Assembly after the order is so published.
- [22] Therefore, having come to a finding that the new electoral area of Ile Perseverance comes into existence after the general election 2016 is concluded and the National Assembly is properly constituted, if one is to act within the framework of the articles of the Constitution, one cannot permit an election for an electoral area created in this manner until the next general election to be held after the general election 2016.
- [23] It is our considered view that the legislature decided to bring in the amendments to the Elections Act by the insertion of the aforementioned amendments in section 2 (a) of the Amendment Act, to ensure that the persons residing in the published electoral area of Ile Perseverance would not be disenfranchised at the general election 2016 and therefore could vote in any electoral area where he or she has been previously registered.
- [24] The test for constitutionality of a provision averred to infringe a Charter right is laid down in *Sullivan v the Attorney General and Ano* SCA 25 of 2012 wherein Twomey JA (as she was then) laid out the test to be applied by the Courts. Firstly, the court has to determine whether the impugned provision as framed is formulated with sufficient precision to be a 'prescribed' law. Secondly, whether the exception (or limitation on a Charter right) is necessary in a democratic society. Implicit in this second limb of the test, the Court must first make a finding that the impugned provision affects or limits a Charter right. Thirdly, whether there is proportionality between the restrictions on the fundamental Charter right imposed by the law and the objective of the legislation identified.
- [25] If we consider first the impugned provisions contained in section 2 (a) of the Amendment Act, clearly the provisions satisfy the first limb of the *Sullivan* test as the provision was enacted as law in the proper manner. With regard to the second limb, we find that these

provisions on their own do not in any way violate the article 24 right to vote, but rather give greater clarity as to how persons residing in an electoral area which has not yet come into existence may exercise their right to vote. We are of the considered view that it is fair and justified that the citizens of Ile Perseverance electoral area who are eligible to vote but cannot vote as the electoral area they reside in as it has not come into force at the time of the general election 2016, should be granted an opportunity to vote at the oncoming general election 2016 in their original districts. Therefore, the challenge to the constitutionality of the provisions in section 2 (a) of the Amendment Act must fail on the second limb of the *Sullivan* test as there is no violation of a Charter right.

[26] When one considers the other impugned amendment as contained in section 2 (b) of the Amendment Act, in relation to section 12 of the Elections Act, it is apparent that it provides for an for an election to a new electoral area published under article 116 and further provides by section 2 (b) (B) of the Amendment Act that the said election be held within a period of one year from the date of the next dissolution of the National Assembly after the electoral area is so published. We find that this provision satisfies the first limb of the *Sullivan* test. With regard to the second limb of the test, we consider first whether there has been a violation of the article 24 right to vote. Having determined that the amendments as contained in section 2 (a) of the Amendment Act are constitutional, it would mean that the citizens of Ile Perseverance have already been provided an opportunity to cast their vote for members of the National Assembly at the oncoming general election 2016 and are now to be given another opportunity to vote for the same National Assembly. We cannot accept the Hon. Attorney General's submissions that this is a separate election as the effect of the vote will be felt in the same National Assembly.

[27] Learned Counsel for the petitioner argues that this is a violation of article 24 because the citizens of the Ile Perseverance, the newly created electoral area, would have already voted at the general election 2016 in their registered electoral districts, for a particular candidate in the new National Assembly. If this amendment was permitted they would, unlike the registered voters of other districts, have an added opportunity of voting again at another special election for another candidate to the same National Assembly. In net effect this inflates the value of the vote of a person who is a resident in the new electoral district, and

proportionally decreases the value of the votes of other citizens in Seychelles. On the face of it, this infringes article 24 (1) (b) which incorporates the principle of “one person one vote” by reference to “universal and equal suffrage”.

- [28] Therefore, having found an infringement of a Charter right, we have to ask whether this limitation of the article 24 right is “necessary in a democratic society”. In our opinion it cannot possibly be so. An underlying principle in the Constitution is that elections must be “true, fair and effective”, referred to in articles 79 (8) and 116 (2) of the Constitution. The notion of fairness in this principle will be undermined if the above amendment is allowed as certain citizens who are eligible to vote are permitted to vote more than once to elect members to the same National Assembly. Furthermore, the principle of “one person, one vote” is zealously guarded with regard to the election of National Assembly members by article 114 (3) of the Constitution and sections 5, 5(2), 51 (1) (b) of the Elections Act. We are grateful to learned Counsel for the Petitioner in this regard who referred the court to helpful international jurisprudence on this point, namely *Evenwel et al v Abbott, Governor of Texas et al*, *Reynolds v Sims*, *Constitutional Law of India* by M. Hidayatullah and *Human Rights in Constitutional Law* by Banerjee and Massey.
- [29] It appears that this current debacle has arisen as the creation of the electoral area Ile Perseverance has been done with scant regard to the structure of article 116 of the Constitution and other provisions relating to the dissolution of the National Assembly.
- [30] It is our view that the very structure of article 116 of the Constitution is to ensure that electoral areas are not created arbitrarily. This is borne out by article 116 (3) which requires, recommendation of a new electoral area by the Electoral Commission, at very specific intervals of time. Further, article 116 (4) requires that the proposed electoral area be approved by the National Assembly while article 116 (5) sets out a specified date of coming into force of the created electoral area. It is our view that all these articles are safeguards that prevents the possibility of any party benefiting from creating electoral areas. We also note that this article is not subject to any other provisions of the Constitution.
- [31] What this means in practice is that the electoral area of Ile Perseverance will come into effect as a voting district on 11th September 2016, after the conclusion of the general

elections, and after the National Assembly for the next five years has been properly constituted in the general election 2016. On 11th September 2016, the electoral area for Ile Perseverance will begin to exist, the Electoral Commission can begin compiling the official electoral register for the district and it will be eligible to vote in any future elections or referendums. What it cannot do is affect the composition of the existing National Assembly that came into existence at the general election 2016.

- [32] The composition of the National Assembly is referred to in article 78 of the Constitution which reads as follows;

"the National Assembly shall consist of –

(a) such number of members directly elected in accordance with-

(i) with the Constitution and

(ii) subject to this Constitution an Act, as is equal to the number of electoral areas".

(b) not more than ten members elected on the basis of the scheme of proportional representation specified in Schedule 4.

- [33] Therefore according to this article, the directly elected members to the National Assembly shall be elected in accordance with the Constitution and, subject to the Constitution, an Act. This according to the provisions of the Constitution, already mentioned in paras 19 to 21 herein, would be at a general election or a by- election. Therefore, the Elections Act cannot proceed to create a new type of special election not provided for in the Constitution. It therefore cannot be said that the election specified in the amending section 2 (b) of the Amendment Act is within the framework of the Constitution.

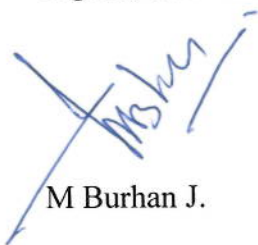
- [34] Further, article 78 not only refers to members elected in accordance with the Constitution and law but also refers to the number of members being equal to the number of the electoral areas which obviously are in existence at the time of the general election taking place. One cannot have a general election for a non-existing electoral areas or ‘futuristic’ electoral areas. Therefore it follows, the number of seats in the National Assembly would be equal to the number of electoral areas that are in force or in operation at the time of the general

election being held. It is apparent therefore, the Constitution envisages that the National Assembly would have been properly constituted at the general election to be held on the 8th, 9th and 10th of September 2016 or general election 2016. Ile Perseverance would not be in existence at this general election 2016 and therefore cannot be considered as a seat in the National Assembly at the 2016 general election.

- [35] We are aware that article 79(8) of the Constitution provides that a law may provide for any matter not otherwise provided for in the Constitution. This cannot however save the aforementioned amendment provision regarding voting within one year in the newly created electoral area, as the law in this instance, the Elections Act, should provide for matters within the frame work and dictates of the Constitution and not create laws which are not in conformity to the Superior law, the Constitution. There can be no saving of a law which is in violation of a provision of the Constitution. Therefore the impugned amending law contained in section 2 (b) of the Amendment Act cannot possibly be ‘necessary’ in a democratic society when it undermines the constitutional framework of that democracy.
- [36] We therefore hold that the said amendment contained in section 2 (b) of Act 13 of 2016 in respect of section 12 of the Elections Act is unconstitutional and should be struck down and uphold prayer 20 (d) of the relief claimed, in that the entirety of section 2 (b) of the Elections (Amendment) Act (Act 13 of 2016) is unconstitutional.
- [37] Learned counsel in the relief sought in prayer (f) that this court make order that the 1st respondent make the appropriate legislation to ensure that the voters of Ile Perseverance, can participate and vote for their own member. It should be borne in mind that the law has been amended by section 2 (a) of the Amendment Act, to ensure that the citizens residing at Ile Perseverance can vote at the electoral area they were previously registered and thus have their representatives in the National Assembly. We are satisfied that suitable and the necessary legislation has been passed to ensure that the voters of Ile Perseverance are not disenfranchised in the general election, 2016.
- [38] For the aforementioned reasons we proceed to make the following orders:

- a. We uphold prayer 20 (d) of the petition and dismiss all other prayers (a), (b), (c), (e), and (f) contained in paragraph 20 of the petition;
- b. We declare that section 2 (b) of the Amendment Act is unconstitutional and void;
- c. Accordingly, we direct the Registrar of the Supreme Court to transmit certified copies of this judgment to the President of the Republic and to the Speaker of the National Assembly in accordance with article 46 (6) of the Constitution; and
- d. Each party to bear their own costs.

Signed, dated and delivered at Ile du Port on 2 September 2016



M Burhan J.



S Nunkoo J.



M Vidot J.