

POPULAR DEMOCRATIC MOVEMENT v ELECTORAL COMMISSION

(2011) SLR 385

B Hoareau for the appellant
F Ally for the first respondent
R Govinden, Attorney-General

Before MacGregor P, Fernando, Twomey JJ

Judgment delivered on 9 December 2011 by TWOMEY J:

The Facts

In July 2011 a member of the Seychelles National Party, the main opposition party, voted with members of the ruling Parti Lepep to dissolve the National Assembly. General elections were held on 29 September to 1 October 2011. The Popular Democratic Movement (PDM) is a political party which registered under the Political Parties (Registration and Regulations) Act just before the said elections. As the other existing opposition parties decided to boycott these elections, the PDM was therefore the only party contesting the elections against the incumbent, the Parti Lepep.

The PDM fielded candidates in each of the 25 electoral areas for the National Assembly Elections.

The 1st respondent is a statutory body created by virtue of the Constitution charged with conducting and supervising elections and referenda in Seychelles.

The 2nd respondent is made a respondent in accordance with rule 3 of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules 1994.

The elections were duly conducted and supervised by the 1st respondent from 29 September to 11 October 2011, after which elections the 1st respondent through its chairperson announced the results in each of the 25 electoral areas on 2 October 2011.

The appellant failed to win any seats for directly elected members to the National Assembly. Further the 1st respondent declared that the petitioner having won only 7.4% of the total votes cast at the elections was not entitled to any proportionately elected members in the National Assembly. It is this declaration that culminated in the present appeal by the appellant.

The full results, insofar as they affected the appellant were as follows:

Total votes cast	51,592
Total valid votes	35,145
Votes cast for PDM	3,828

As an aside it must be noted that this was the first time so many spoilt votes were recorded in any elections in Seychelles, resulting largely from the boycott of the elections by the other opposition parties.

The Law

It is important at this juncture to look at the original article of the Constitution in relation to the computation of proportional representative (PR) seats to fully understand the appellant's case. The Third Constitution of the Republic of Seychelles was promulgated in 1993. Article 78 reads as follows:

The National Assembly shall consist of -

- (a) such number of members directly elected in accordance with -
 - (i) This Constitution; and
 - (ii) Subject to this Constitution, an Act,
as is equal to the number of electoral areas;
- (b) such number of members elected on the basis of the scheme of proportional representation specified in Schedule 4 as is equal to one-half of the number of directly elected members or, where one-half of the number of directly elected members results in a whole number and a fraction, as is equal to the whole number immediately following the result.

No Act in relation to the computation of the number of PR members was ever passed but the 1993 Constitution in its Schedule 4 provided for the calculation of such seats. Section 3(1) of the schedule provides that:

The following formula shall apply for the purpose of determining the number of proportionately elected members a political party may nominate -

$$A = \frac{B \times C}{D}$$

Where:

A = number of proportionately elected members a political party may nominate;

B = relevant number;

C = total number of votes cast or deemed to be cast in favour of the candidates nominated by the political party; and

D = total number of valid votes cast or deemed to be cast at the election.

Relevant number is defined in section 1 as "...the number of proportionately elected members referred to in article 78" (then 11 as there were 22 electoral areas).

One National Assembly election took place where this system was used - the July 1993 elections and under the said formula 11 PR seats were indeed returned; Parti Lepep (then SPPF) received 6, the Democratic Party 4 and the United Opposition 1.

Subsequently, an amendment to the PR seats was proposed. It is evidently clear and not disputed that the 1996 Amendment to the Constitution sought to reduce the number of proportionately elected seats. Its new article 78(b) states:

The National Assembly shall consist of -...

not more than 10 members elected on the basis of the scheme of representation specified in Schedule 4.

The amended section 2 of Schedule 4 now reads as:

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionately elected member for each 10% of the votes polled.

It is also pertinent to note that after this amendment the number of electoral areas was increased from 22 to 25.

The Constitutional Challenge

The declaration of the Electoral Commission that the appellant had only polled 7.4% of the total votes resulted in the appellant failing to reach the requisite quota for a proportional representative seat under article 78 (b) and section 2 of Schedule 4.

In the Constitutional Court the appellant argued that his rights had been contravened under the said article; that the said contravention was occasioned by the erroneous use by 1st respondent of the number of "votes cast" as opposed to the number of "valid votes cast" in the computation for the number for a PR seats. In the appellant's estimation if 10% of the total "valid votes" cast had been used instead, it would have resulted in the PDM obtaining 10.89% and hence they would have been entitled to nominate one PR elected member to the National Assembly. It is therefore the contention of the appellant that it was the usage of the literal interpretation of the words "votes cast" by the 1st respondent in section 2 of Schedule 4 under article 79(b) that resulted in his rights being contravened.

The appellant further argued that the Constitution used the terminology "votes cast" in several articles, namely articles 91(1), and sections 2(2) and 8(1) of Schedule 3 relating to the election of the President. He also contended that a parallel had to be drawn with the counting procedure laid out in the Elections Act 1995 for the election of directly elected members of the National Assembly which clearly eliminated invalid votes in the procedure for election.

In response the respondents submitted that the words "votes cast" included all the votes both valid and invalid put into a ballot box. He contended that that was indeed the intention of the legislature in varying the language from "valid votes" to "votes cast" in the amendment. The 1st respondent further contended that that was indeed the manner in which all computations of proportionately elected members had been done in previous elections of the Third Republic of Seychelles.

The Constitutional Court by majority judgments delivered by Chief Justice Egonda-Ntende and Justice Gaswaga on 25 October 2011 used the plain and ordinary meaning of the words "votes cast" in the context of Schedule 4 concluding that had the legislature intended that the threshold be 10% of the valid votes it would have said so exactly. Justice Burhan in a dissenting judgment expressed the opposite view, namely that a change in language is not always indicative of a change of construction as the alteration in the language of a statute by a later statute could very well be for surplussage. In that context he surmised that the use of the word "valid" in the amending Act of 1996 would inevitably have been surplussage and it was for this reason that the word "valid" was omitted.

The result of the above judgment resulted in the dismissal of the petition and the appellant has now appealed to this Court. His seven grounds of appeal mirror his arguments in the Constitutional Court.

Grounds of Appeal

The appellant's contention and grounds of appeal may be summarised as follows:

- That the judges who delivered the majority judgment erred in law in not applying the definition of "votes cast" in the Elections Act to the term used in paragraph 2 of Schedule 4 to the Constitution.
- That the said judges erred in law in referring to the 1993 wording of Schedule 4 to the Constitution to construe the present meaning of the words "votes cast."
- That the said judges failed to appreciate the object of the amending Act, the deliberations of the National Assembly of the 9 July 1996 and the entirety of the new formula regarding the entitlement of political parties to nominate proportionately elected members to the National Assembly.
- That the judges failed to attach sufficient weight to the fact that the Amendment to the Constitution took place whilst the Elections Act 1995 was in force and hence the word "valid" in terms of the said Act was mere surplussage.
- That the judges had erred on the facts by accepting the precedent of computation used by the Electoral Commission in past elections.

In considering the contentions of the appellant it seems to me that the only real issue in the present case is the interpretation of the words "votes cast" in paragraph 2 of Schedule 4 of the Constitution. In trying to find a definition various methods have been used by the parties and the Constitutional Court to arrive at what each thought must have been the intention of the legislator. Hence different rules of interpretation have been followed. Before I embark on the same journey I have chosen to resort to some mathematical calculations for PR seats under both the 1993 and the post-1996 formulae. I have done so in order to satisfy myself what the purpose of the amendment was and to eliminate any perverse and unintended alternative that could not have been intended.

Under the 1993 formula of $A = B \times C$ but using the election results of 2011 and the present number of electoral seats (25), the PDM would have got 2 seats:

13 (half of the 25 seats rounded up to the next figure) x 3828 = 1.414

This would have resulted in the entitlement of the PDM to nominate 2 proportionally elected members under the 1993 provisions of paragraph 3(2) and 3 (3) (ii) of Schedule 4 of the original Constitution.

Under the 1996 amendment and the present day formula the two alternatives are the following:

- According to the argument advanced by the 1st respondent the formula should be 3828 of 51,592 = 7.4% (51,592 being all votes cast including spoilt votes). Hence 0 seat.
- According to the appellant and the 2nd respondent the formula should be 3828 of 35,145 = 10.89% (35,145 being only valid votes cast). Hence 1 seat.

The above computations clearly illustrate that under the 1996 provisions either of the above computation delivers the aim of the amendment, that is to reduce the number of PR seats, albeit that the first alternative delivers more drastic results.

Travaux Préparatoires

To establish the correct interpretation of the provisions I therefore have to be guided both by the intentions of the legislator as evidenced by the deliberations of the National Assembly as well as rules of constitutional interpretation.

In this respect I have perused the proceedings of the National Assembly of the 9 July 1996. I note that essentially the amendment sought to do 2 things:

- to reduce the number of PR seats from 11 to a maximum of 10.
- to raise the percentage required to obtain such a seat from 8% to 10% of party votes.

This is certainly borne out by the deliberations of the then SPPF members in the National Assembly, with a certain delicatessse by some members but with a great deal of crudeness and blatancy by others: viz p 28 National Assembly proceedings of 9 July 1996, verbatim extracts:

Minister Belmont "Bill pe propose ki sa nonm i vin 10, aktyelman I 11... sa lanmanmand i pou redwir par enn an term absolli, la kantite manm proposyonnelman elekte

(my translation "This Bill proposes that the number (of PR seats) becomes 10, which presently is 11, reduced in absolute terms by 1 in relation to those members who are proportionately elected")'

Honourable Herminie "I nesese Mse Speaker pou met an plas 10% pou lasemp rezon ki nou nepli kapab toler en sityasyon kot ou annan nou en minorite absolli ki pe fer en kantite tapaz 10 non lepep Seselwa."

(my translation.."It is necessary Mr.Speaker to impose 10% for the simple reason that we cannot tolerate a situation where an absolute minority makes a great deal of noise in the name of the people of Seychelles.")

This amendment was strongly resisted by the opposition who saw a further dilution of its mandate:

Honourable Daniel Belle (for Democratic Party)... "I vedit ki I *infringe the rights of the electorate* sa i enportan akoz si yer avek % i ti nobou ganny li en seat, ozordi elektora ki dan en parti politik, ki fodre i ganny li 10% pou ii ganny en seat. Donk lo pwen reprezantasyon, sa i en keksoz ki fodre pa nou oubliye. E dan en sistenm de demokrasie reprezantatif nou bezwen dan en serten fason, regard sa pou wvar si anmemtan nou pa pe infringe rights sa bann dimoun.

(my translation "it means that it infringes the rights of the electorate, this is important since if yesterday one could with 8% gain one seat, today the electorate of a political party will need 10% to get one seat. Hence on a point of representation that is something that must be borne in mind. And in a system of representative democracy we have in some way to ensure that the rights of these people are not infringed')

Honourable Ramkalawan for United Opposition (p 24-27 of the same proceedings)

"Kalkile si ki si dan lot eleksyon lopoziyon i reprezant li 49% me selman i pa ganny li en *first past the post*, atraver bann mannev ki zot fer...pou annan li zis 4 dimoun dan sa Lasamble. Eski sa i en sityasyon ki aksetab?

(my translation "Just think that if in another election the opposition proportionally receives 49% of the votes but no seat under the first past the post system, through your manoeuvres.... It would only have 4 members in the Assembly. Is this an acceptable situation?")

What is also clear from the proceedings is that members of the SPPF seemed unclear about the aims of the amendment. Some seemed to express the view that the amendment would result in 10 PR seats being returned, others that it would see a maximum of 10%. Some opined that the amendment would curb the representation of "rogue minorities" in the Assembly (viz the "Hizbollah" reference by Honourable de Commarmond at p 31). Minister Belmont indicates that it was purely to reduce and not to remove proportional representation. The focus of Assembly members seemed to be more on the amendment of the Constitution to allow for the appointment of a Vice President, which amendment was debated during the same proceedings.

Hence we now have an Act which provisions according to the parties, can be interpreted in two ways: one which would allow proportional representation and one to all but remove it. As the deliberations of the Assembly do not clarify the situation and does not aid in a literal interpretation of the provision I have no alternative but to look at the said provision in the context of the whole Constitution and at rules of interpretation contained in the Constitution but also in terms of constitutional rules of interpretation generally.

We have also been invited by counsel for the appellant to refer to the provisions of the Elections Act which are in pari materia with the constitutional provisions but I do not think I need even make the comparison. I do however accept submissions of counsel for the appellant that some help may be derived from provisions of the Elections Act as for all intents and purposes it addresses the same subject-matter, namely elections. As the Act deals directly with the manner of elections, specifically National Assembly Elections, and figures emanating from votes cast for directly elected members of the Assembly have a direct and immediate bearing on the computation of the total PR seats attributable to each party, then it would be illogical to use one method in one (valid votes) and a different one (total votes) in the other.

The interpretation of the Constitution

In terms of rules of interpretation this Court is guided by the fact that the Constitution should be interpreted to give effect to it. Paragraph 8 of Schedule 2 of the Constitution states that the provisions of the Constitution should be given their fair and liberal meaning, that the Constitution should be read as a whole and should be treated as speaking from time to time. Similarly, we cannot overlook the provisions of article 48 which requires that the interpretation shall be done in such a way so as not to be inconsistent with inter alia international obligations and that judicial notice of international instruments, constitutions of other democratic States, decisions of the courts of the States or nations in respect of their Constitutions.

The decisions of *Atkinson v Government of Seychelles* SCA 1 of 2007 and *Paul Chow v Gappy and ors* SCA of 2007 support this view and are authorities for the proposition that constitutional provisions have to be interpreted in a purposeful manner. It must be noted that the rules of interpretation of written constitutions differ from the interpretation of ordinary statutes. There is general recognition that constitutions are the products of political bargains and arrangements for the government of a country and as such merit a general and liberal interpretation. Hence the Privy Council in *Home Affairs v Fisher* [1980] AC 319 held that -

Written constitutions were a consequence of their purpose and aim, quite distinct from legislation and subsidiary legislation. Accordingly they should have their own rules of interpretation especially in relation to fundamental rights.

This principle was extended to all provisions of constitutions in general in another Privy Council case, that of *AG of Fiji v DPP* [1983] 2 AC 672 where it was held that -

The political nature of the constitution should be acknowledged. They contain principles, norms and values amongst other things which relate to constantly changing social and cultural values rather than some eternal unchangeable meaning....

Obviously these rules only apply when interpretation is necessary; If there is no ambiguity, no interpretation is required. The obvious meaning has to be declared. If interpretation is required, this has to be done in the context of the constitution as a whole. In this respect the Latin maxim *Nemo aliquam partem recte intelligere potest*

antequam totum perlegit –No one can properly understand a part until he has read the whole - is relevant.

The most entrenched principle in our Constitution is that of democracy; all the provisions of the Constitution are suffused with the principles of the rule of law, democracy and equality. The Preamble to the Constitution contains those principles together with the declaration that all citizens should be able to exercise their individual rights and freedoms with due regard to the rights and freedoms of others and the common interest. It is my view that all this serves in the interpretation of any individual provision of the Constitution.

The Preamble to the Constitution can also assist in the purpose of interpretation. In *Re Remuneration of Judges* [1997] 3 SCR 3, the Supreme Court of Canada held that;

...the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

Dworkin in his seminal work *Law's Empire* (at 255) states the following in relation to interpretation of the American Constitution:

The effort of each judge should be to construct the best interpretation of equality of which he or she is capable. The inquiry might turn to any number of texts, precedents, or historical events, as well as moral intuitions and principled arguments. The best interpretation is that which achieves the greatest harmony among these diverse sources. We distort this process if we conceive of it as an effort to put into place a local community's unique concept of equality, instead of the constitutional goal of equality that is a common aspiration of American life. The same can be said of liberty, due process, and the other broad values of our constitutionalism.

Similarly Justice Breyer of the Supreme Court United States believes that judges must be concerned with purposes and consequences as well as plain meaning when interpreting the Constitution. (See Stephen G Breyer *Active Liberty Interpreting Our Democratic Constitution* (2005).

I am of the view that what would most serve the present circumstances is a functional approach that will see the provisions of the Constitution operate as a whole in a coherent and harmonious way. I am also guided by the provisions of other constitutions of democracies. I am further aware that constitutionalism in this day and age struggles to reconcile the rule of law with the rule of popular interests. I am therefore minded to interpret the Constitution only in the light of the wider commitment to the principles of liberty, fraternity, equality, justice and due process as expressed in the Preamble.

I have also trawled through different constitutions and looked at different methods of computing the number of PR seats including First Past the Post, Run-offs (Alternative Vote and Instant Run Of Transferable Vote (Single, Hare-Clark, D'Hondt and Sainte Lague), PR largest remainder (Hare quota) and Parallel systems (such

as the Seychelles system). What I can say with certainty is that the number of seats under each system is calculated in different ways but what is equally certain is that none of the systems outlined above take into account the number of spoilt votes in computing the number of directly elected or PR seats to assemblies.

The reason for this is self evident. If one includes spoilt votes in such computations, one is interpreting the intention behind the spoilt votes. What we can guess perhaps, in the present case is that a large number of persons in the elections of October spoilt their votes as a gesture of protest against what they saw as illegal elections taking place as a result of the purported illegal dissolution of the Assembly. However, a number of people also spoilt their votes as they did not know how to validly cast their votes or inadvertently spoilt their votes as is evidenced by previous figures in other elections. It is impossible to separate those "real" spoilt votes from the "intentional" spoilt votes; It is also impossible to say how any of these persons voted. To count the number of spoilt votes into total votes and ascribe to it the meaning of valid votes is to deliberately interpret the latent vote of a voter into a patent one. This then makes meaningless the distinction between spoilt votes and valid votes.

To ascribe the meaning of "total votes" to "votes cast" I must therefore be persuaded that such a perverse intention was indeed intended by the 1996 Amendment. As I have pointed out above, deliberations in the Assembly do not elicit such a clear intention by those who proposed the amendment. If we are to keep faith with the Constitution and with its underlying basic principles of democracy and the rules of interpretation outlined above I cannot infer such an intention in the amendment.

The assertion by the Electoral Commission that they have always used only "total votes" as opposed to "valid votes" in the computation for the number of proportionally elected members does indeed show the Commission's consistency but as has been pointed out by Justice Gaswaga in the Constitutional Court this, however, does not make it right.

Finally, it would also seem to me, that there is a very obvious point missed by all parties concerned. This alone may have been enough to explain the reason for the different terms used in the original constitutional provision and the amendment. Since the original (1993) provision contained a formula which had to distinguish between "votes cast" (termed "C") and "valid votes" (termed "D") both expressions had to be used. The new formula adopted in 1996 is one solely based on percentages and the term "votes cast" does not need to be distinguished from "valid votes" as it is not employed in the formula at all and hence can only bear the meaning of "valid votes".

Why then may we ask was this computing error not spotted since the introduction of the formula in 1996? The answer is simple. A review of election results since 1996 shows the average number of spoilt votes in the National Assembly Elections (of 1998, 2002, and 2007) was 1189. Thus the margin in the computation for PR would have been slight between the use of the number of "valid votes" and "votes cast." The error becomes manifest in the 2011 elections because the number of spoilt votes was 16,647.

In the circumstances and for all the aforementioned reasons I hold that the term "votes cast" in Schedule 2 part 4 of the Constitution means, "valid votes cast" and cannot include the number of spoilt votes for the computation of proportional representative seats to the National Assembly of Seychelles.

I am satisfied that the declaration of the 1st respondent made through its Chairperson Hendrick Gappy has contravened article 78(b) of the Constitution and paragraph 2 of the Schedule 4 of the Constitution.

I am further satisfied that the said contravention has affected the rights and interests of the appellant.

I direct the 1st respondent to compute the number of PR seats based on "valid votes cast" where the term "votes cast" is used in paragraph 2 of Schedule 4 of the Constitution. For the avoidance of doubt this includes the computation of the number of proportionately representative members of both the Parti Lepep and the Popular Democratic Movement.

I make no order as to costs.

MACGREGOR P:

I have read the judgments of Justice Fernando and Justice Twomey and concur with them.

FERNANDO J:

This is an appeal against the majority judgment of the Constitutional Court, namely the judgments of the Chief Justice Egonda Ntende and Gaswaga J, dismissing an application by the appellant to the Constitutional Court wherein he prayed:

- i. To declare that the declaration of the 1st respondent, made through its Chairperson, Mr Hendrick Gappy has contravened article 78(b) of the Constitution along with paragraph 2 of Schedule 4 of the Constitution or alternatively paragraph 2 of Schedule 4 of the Constitution, and that the contravention has affected the interest of the Petitioner;
- ii. To issue a writ of mandatory injunction ordering the respondent to make fresh declaration and decision, regarding the number of proportionately elected members that may be nominated as per the results of the general elections, on the basis that votes cast, are votes validly cast;
- iii. Make any other order this Honourable Court considers appropriate

I wish to state at the very outset that this case has been politicized to a very great extent in view of the political background of the Leader of the Popular Democratic Movement (PDM), the early dissolution of the National Assembly, the manner of its dissolution, the sudden emergence of the PDM in the political arena and the call by the Seychelles National Party, the New Democratic Party and other politicians to the people of Seychelles to stay away from voting at the last general election. None of these factors can change the Constitution or the electoral process set out therein. In *Scott v Sandford* 19 How 393 (US), 15 L Ed 691, it was held that -

Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action, and therefore, the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founder.

I am guided by these sentiments expressed in arriving at a decision in this case.

A general election was held from 29 September 2011 to 1 October 2011, during which the petitioner and Parti Lepep nominated candidates in each of the 25 electorates. The results of the general election were announced in the early hours of 2 October 2011, by the 1st respondent, through its Chairperson Mr. Hendrick Gappy, pursuant to section 38(3)(a) of the Elections Act read with Schedule 4 of the Constitution, wherein the Chairperson declared that the petitioner was not entitled to nominate any proportionately elected member to the National Assembly as it had polled only 7.4% of the total votes (total votes cast 51592), including votes which had been rejected (Rejected votes 16447), whilst Parti Lepep which had polled 60.3% of the total votes was entitled to nominate 6 proportionately elected members. It is this declaration which gave rise to the application that was made to the Constitutional Court.

The petitioner at paragraph 9 of his petition before the Constitutional Court in particularizing the contravention of the Constitution and of the manner its interest has been affected has averred:

- (i) In terms of paragraph 2 of schedule 4 of the constitution, read with Article 113 of the constitution along with the provisions of the Election Act, the term 'votes cast' mean valid votes cast, but not the total number of ballot papers cast;
- (ii) When the total number of votes polled by the candidates of the Petitioner, namely 3828 votes is calculated in respect of the total valid votes in the general election, namely 35145 votes, the Petitioner clearly polled 10.89 percent of the votes cast and hence the Petitioner is entitled to nominate one proportionately elected member, of the National Assembly;
- (iii) As a result of the declaration of the 1st Respondent as set out above at paragraph 8, the Petitioner has been deprived of its constitutional right to nominate a proportionately elected member of the National assembly and thus of the opportunity and right to participate in the National Assembly.

The appellant has filed the following grounds of appeal:

- i. Egonda Ntende CJ and Gaswaga J erred in law in holding that the Constitution is a complete code and is self-contained, and as such there is no necessity to refer to the Elections Act for the definition of the term "votes cast" as set out at paragraph 2 of the Fourth Schedule of the Constitution.
- ii. Egonda Ntende C J and Gaswaga J erred in law in holding that the provisions of the Elections Act do not apply in respect of the nomination of proportionately elected members of the National

- Assembly, but rather applies only to the election of the President and directly elected members of the National Assembly.
- iii. Egonda Ntende C J and Gaswaga J erred in law in referring to the former provision of Schedule 4 of the Constitution, in that there was no necessity to do so in view that the term "votes cast" when considered in the light of the Election Act is unambiguous and clear.
 - iv. Egonda Ntende C J and Gaswaga J erred in law in failing to attach sufficient weight to the fact that the Fourth Amendment to the Constitution (by Act 14 of 1996) changed the entire formula of Schedule 4 regarding the entitlement of political parties to nominate proportionately elected members, rather than a simple amendment of deletion of the word "valid" from the provision of the said Schedule.
 - v. Egonda Ntende C J and Gaswaga J erred in law in failing to attach sufficient weight to the object of the bill and to the deliberation of National Assembly of the 9th of July 1996, to the effect that the intention of the amendment was merely to reduce the maximum number of proportionately elected members from 11 to 10.
 - vi. Egonda Ntende C J and Gaswaga J erred in law in failing to attach sufficient weight to the fact that at the time of the Fourth amendment to the Constitution, the Election Act was in force since 1995 and the term "valid" in schedule 4 was mere surplusage in view of the provisions of the Election Act;
 - vii. Egonda Ntende C.J. and Gaswaga J erred on the facts in holding that in the past elections the Electoral Commissioner had always calculated the number of proportionately elected members a political party was entitled to nominate on the total votes cast.

The appellant has prayed for from this Court, the same relief as prayed for in his petition before the Constitutional Court and as set out at paragraph 1 above.

Both respondents admit the number of votes polled (3828) by the petitioner and the percentage of those votes vis-a.-vis in relation to the total votes cast (7.4%) and valid votes cast (10.89%) at the election. The dispute is only in relation to whether it is the total votes cast (51592) including votes which had been rejected (Rejected votes 16447) or the valid votes cast (35145) that has to be considered in relation to the determination of the number of proportionately elected members a political party may nominate. This calls for an examination and interpretation of article 78 and paragraph 2 of Schedule 4 of the Constitution, bearing in mind that paragraph 8(b) of Schedule 2 of the Constitution requires that for the purposes of interpretation the Constitution shall be read as a whole. In *Old Wayne Assn v Mc-Donough* 51 L Ed 345, *Downes v Bidwell* 182 US 244, 45 L Ed 1088, *Myers v United States* 271 US 5271 LEd 60 it was held -

The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument.

Article 78 of the Constitution states:

The National Assembly shall consist of -

- (a) Such number of members directly elected in accordance with -
 - (i) this Constitution; and
 - (ii) subject to this Constitution, an Act, as is equal to the number of electoral areas;
- (b) not more than 10 members elected on the basis of the scheme of proportional representation specified in Schedule 4."

Paragraph 2 of Schedule 4 states:

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionately elected member for each 10% of the votes polled.

In the Preamble to the Constitution, the people of Seychelles, considering that all powers of Government spring from the will of the people, have, in exercising their natural and inalienable right to a framework of government which shall secure for themselves and posterity the blessings of truth, liberty, fraternity, equality of opportunity, justice, peace, stability and prosperity, have solemnly declared their unswaying commitment, during the Third Republic, to develop a democratic system. The Preamble of the Constitution is part of the Constitution. It is the basic structure of the Constitution and therefore serves as a key to understanding thereof. It derives source of power from 'We, the People of Seychelles'. The Preamble was enacted and adopted by the same procedure as the rest of the Constitution and expresses in a few words the philosophy of the Constitution. In the case of *Kesavananda Bharati v State of Kerala* (1973) AIR SC 1461 it was held that "the preamble of the Constitution was part of the Constitution." In *Charan Lal Sahu v Union of India* AIR 1990 SC 1480 and *J M Puthuparambil v Kerala Water Authority* (1990) AIR SC 2228 it was held that -

The recognition of the preamble as an integral part of the Constitution makes the preamble a valuable aid in the construction of the provisions of the Constitution because unlike the preamble to an Act, the preamble of the Constitution occupies the same position as other enacting words or provisions of the Constitution.

In order to translate the aspirations of the people of Seychelles into a reality the Constitution has, in article 24, enshrined and entrenched the right of every citizen of Seychelles who has attained the age of eighteen years to take part in the conduct of public affairs either directly or through freely chosen representatives and 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 Constitution has provided in article 113 that:

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

- (a) at an election of the office of the President;

- (b) at an election of the members of the National Assembly; or
- (c) in a referendum held under this Constitution,
unless disqualified to vote under the Constitution or the law.

The Constitution has also placed an obligation in article 40 on every citizen of Seychelles to uphold and defend the Constitution and the law, to further the national interest; and generally, to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution.

To develop a democratic system and to ensure that all powers of Government spring from the will of the people, the Constitution sets out a specified democratic process, namely participation in the electoral process through their freely chosen representatives. It sets out in detail at articles 78 and paragraph 2 of Schedule 4 of the Constitution, as referred to at paragraph 6 above, how the National Assembly must be composed.

The purpose of article 78 read in line with article 112(2) under which 25 electoral areas have been created, is to ensure that there is maximum representation in the National Assembly, namely 35 members, as far as possible, who shall be the freely chosen representatives of the citizens of Seychelles. This is borne out by the words, "The National Assembly shall consist of".

Article 1 of the Constitution states: "Seychelles is a sovereign democratic Republic." In explaining the word 'democratic' which appears in the Constitution and which describes India as a 'Sovereign Socialist Secular Democratic Republic' it was held in the case of *R C Poudyal v Union of India* (1993) AIR SC 1804 -

It is democratic because the Constitution ensures the creation and existence of the government at the will of the people through their participation in the formation of the government at regular intervals on the principle of universal adult franchise.

The above provisions make clear the type of representative democracy that is envisaged for the people of Seychelles by the Constitution and the people of Seychelles cannot therefore move out of this constitutional framework in expressing their will. To do so will amount to a breach of their fundamental duty to defend the Constitution and, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution and make a mockery of articles 1, 24 and 113 of the Constitution.

Within this backdrop I wish to consider the question whether a Seychellois citizen's right to vote includes his right not to vote or spoil his vote? No doubt as a general proposition one's right to vote undoubtedly includes his right not to vote or spoil his vote but to equate that right to his constitutional right "to take part in the conduct of public affairs" or to treat that as an exercise of one's "individual rights and freedoms with due regard to the rights and freedoms of others and the common interest" or to equate that to his constitutional duty "to uphold and defend the Constitution and the law; to further the national interest; and generally, to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution", namely to "develop a democratic system"; is farfetched. The rights set out in articles 24 and 113 taken in

conjunction with the duties of a citizen as set out in article 40 of the Constitution place an obligation on a citizen to cast a valid vote at any election or referendum.

It is inconceivable to think that the drafters of the Constitution expected of the citizens to stay away from voting, to spoil their votes deliberately or to vote incorrectly as a fundamental right and further more to give validity to such actions. Article 24(b) of the Constitution states that the right to vote may be regulated by a law necessary in a democratic society. According to article 113 of the Constitution a citizen's right to vote shall be in accordance with law. The law enacted making provision for any matter, not otherwise provided for in the Constitution, which is necessary or required to ensure a true, fair and effective election of members of the National Assembly is the Elections Act. Section 25 of the Elections Act specifies the procedure for voting. According to section 25(1)(c) a person wishing to vote at the polling station shall record the vote in the manner explained in the notices referred to in section 21(1)(c) and by the Electoral Officer. Section 21(1) (c) states that "A polling station shall be furnished with notices both inside and outside the station, containing instructions relating to the voting to be followed at the election." In view of the duty cast on a citizen under article 40(a) of the Constitution to uphold and defend the Constitution and the law, voting at an election to be valid, shall be in accordance with the procedure set out in section 25(1)(c). In the case of *Bappoo v Bhugaloo* (1978) MR 105, it was said:

While it is true that effect should be given to the intention of the voter if it can be so ascertained from the marking on the ballot paper, the voter must comply with certain discipline, at least such as is necessary to regulate the holding of an election according to the expressed requirement of the law. The moment the voter adopts a method of voting which conflicts with the orderly arrangement of election, his licence to express his vote as he chooses ends

....

Staying away from voting or spoiling one's vote is not the constitutional formula to show one's protest to the electoral process, although certainly a right of any citizen and a factor that certainly should not be ignored by any Government that comes into power. This is similar to one's right to freedom of thought and religion, freedom to hold opinions and freedom of peaceful assembly and association but to expect from the exercise of those rights, that others should conform to your views, would amount to belittling of the rights of others enshrined in the Constitution. Another way of looking at this would be to examine the right of access to Court of a person who has a grievance. It is abundantly clear that such a person should conform to the time limits and the procedure set out for litigation, if he/she is to be entitled to a hearing. He/she loses his right on his failure to comply with the time limits and the procedure set out for litigation. Therefore in determining the membership of the National Assembly whether 'directly elected' or 'proportionately elected' it is only the wishes of those who decided to cast their votes correctly in favour of a candidate as expected of all Seychellois citizens, that needs to be considered and not those who sought to deliberately spoil the vote or vote incorrectly.

To determine otherwise will cause a further anomaly, namely there will be two different yardsticks to determine 'directly elected' and 'proportionately elected' members. That is 'directly elected' members would be determined on the basis of the valid votes cast and the 'proportionately elected' members would be determined on

the basis of the total votes cast. I find it difficult to conceive that this is what was envisaged by the drafters of the Constitution. Further to decide that 'proportionately elected' members are determined on the basis of the total votes cast, would amount to deprivation of the rights of those who cast valid votes at the election in having the maximum number of their freely chosen representatives in the National Assembly. This will amount to a violation of their enshrined and entrenched right under article 24(1)(a) of the Constitution.

There is no legal provision either in the Constitution or in any other law by which to assume that a spoilt vote that is rejected has any status in determining the will of the people to develop a democratic system or to be counted in the determination of the number of proportionately elected members. Undoubtedly the political realities of the times and the voices of the people, who decide to stay away from voting or deliberately spoil the vote, should have the consideration of anyone interested in the democratic process but to give effect to them in the selection of the members of the National Assembly, should be in accordance to the constitutional framework. One cannot ignore the fact that the two parties which contested the general election had received 67.7% of the total votes (both valid and rejected) cast, which indicates that a majority of those who voted exercised their right to vote with the intention of choosing their representatives to the National Assembly and to have maximum representation of their representatives in the National Assembly as envisaged by article 78 of the Constitution.

A democratic constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. Constitutional provision is to be interpreted in the light of the basic structure of the Constitution. The Constitution makes provision for an electoral process whereby every citizen may take part in the conduct of public affairs either directly or through freely chosen representatives. Therefore any constitutional interpretation which subverts or goes against the democratic process is anti-constitutional. It was held in case of *Prof Manubhai D Shah v Life Insurance Corp* (1981) 22 Guj LR 206 and *Fatechand Himatalal v State of Maharashtra* (1977) MP LJ 261 (SC) that;

It is the basic and cardinal principle of interpretation of a democratic Constitution that it is interpreted to foster, develop and enrich democratic institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions of their life is to deny to the people or a section thereof the full benefit of the institutions which they have established for their benefit.

The function of a Constitution is to establish the framework and general principles of Government, and hence, merely technical rules of construction of statutes are not to be applied so as to defeat the principles of the government, or the objects of its establishment. In *State of West Bengal V Anwar Ali Sakar* (1952) SCR 284 Bose J stated -

The true content of the words is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formulae which have their essence in mere form.

In *HH Maharajadhiraja Mahadav Rao v Union of India* (1971) SCC 85 it was held;

It is the duty of the court to determine in what particular meaning and particular shade of meaning the word or expression was used by the constitution makers. Moreover, in discharging that duty, the court will take into account the context in which it occurs, the object to serve which it was used, its collocation, the general incongruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the court will avoid repugnancy with accepted norms of justice and reason.

In view of what has been stated above I have arrived at the following conclusions.

Ground (i) of the appeal has been based on the finding made by the Gaswaga J to the effect that -

..... when interpreting the Constitution especially a provision like Schedule 4 which is a code on its own, or if I may say, self-contained, distinctly and exhaustively outlined one need not trouble themselves to go elsewhere. outside the Constitution to seek assistance or invoke provisions of an inferior legislation, even if they are enabling laws like the Elections Act, Cap 68A where the superior law can stand and speak on its own on a given matter, such reinforcement would be irrelevant and of no consequence, if not, a total surplusage;

And the views expressed by the Chief Justice in similar terms. I have no difficulty in agreeing with the views expressed by the C J and Gaswaga J that Schedule 4 is a code on its own, self-contained distinctly and exhaustively outlined and that "one need not trouble themselves to go elsewhere, outside the Constitution to seek assistance"; but in difficulty to understand why the Justices, having said that, decided to go elsewhere, outside the Constitution to seek assistance by relying on paragraph 3 of Schedule 4 which was repealed by the Fourth Amendment to the Constitution, namely, Act No 14 of 1996, in order to interpret paragraph 2 of Schedule 4 as one presently find in the Constitution, which is the 3rd ground of appeal. The words "votes cast" in paragraph 2 of Schedule 4 on a reading of the Constitution as a whole especially the provisions in the Preamble, articles 1, 24(1)(a), 40(a)(t), 78 and 113 are unambiguous and clear and one need not look into the repealed provision to understand its meaning. I am therefore of the view that although there was no necessity to refer to the Elections Act for the definition of the term "votes cast" as set out at paragraph 2 of the 4th Schedule of the Constitution, doing so will not in any way affect the meaning that can otherwise be attributed to them on a reading of the Constitution as a whole. It would only support it.

Ground (ii) of appeal is based on Gaswaga J's finding that "the Elections Act does not apply to proportionately elected members otherwise the Constitution would have expressly said so." According to him article 78(a) "outlines the law applicable to the process of directly elected members of the National assembly as the Constitution and the Act." The C J had also expressed himself in similar terms when he said: "One need not go for assistance to another law dealing only with the election of the President and directly elected members of the National Assembly." In saying this, the Justices have ignored the provisios section 79(8) which states:

A law may provide for any matter, not otherwise provided for in this Constitution, which is necessary or required to ensure a true, fair and

'effective election' of members of the National Assembly" (Emphasis by me).

This in my view and as stated earlier is to ensure maximum representation as possible in the National Assembly. I am of the *view* that the Elections Act applies, as the number of proportionately elected members is determined on the basis of the results of an effective general election, namely the aggregate number of votes polled by a political party that nominated candidates at the election. It is also worth noting that our Constitution makes reference to proportionately elected members rather than proportionately nominated members (emphasis is by me) as one finds in other constitutions and election laws. I therefore hold with the appellant on ground (ii).

Grounds iii, iv and v of appeal are all based on the reliance of the Chief Justice and Gaswaga J on the provision of the Constitution that was repealed by the Fourth Amendment in interpreting the words 'votes cast' in paragraph 2 of Schedule 4. According to Gaswaga J the Fourth Amendment to the Constitution -

Specifically omitted the words 'total valid votes cast' and instead replaced the said words with 'votes cast'. The words must be carrying different meaning and their application to the electoral process obviously produces different results.

The Chief Justice had also expressed himself in similar terms. What is to be noted is that the Fourth Amendment to the Constitution not only decreased the total number of proportionately elected members from 11 to 10 and increased the percentage of the aggregate number of votes a political party had to poll before they could become entitled to nominate a proportionately elected member to the National Assembly from 8% to 10% but changed the entire formula as correctly stated by the appellant of the process of selecting proportionately elected members. Gaswaga J on a reading of the objects and reasons in the Bill pertaining to the 4th amendment as well as the Assembly's debate on the Fourth Amendment to the Constitution as reported in Hansard, has stated that they reveal the intention behind the amendment and appears to find support for his conclusion that the words 'votes cast' in paragraph 2 of Schedule 4 mean the 'total votes cast' and not the 'valid votes cast'. The "objects and reasons" in the Fourth Amendment Bill merely state -

The Bill seeks to limit the number of proportionately elected members of the National Assembly to 10. In this connection Schedule 4 is sought to be amended to provide that only a political party which has nominated one or more candidates in a general election and which has polled a total of not less than 10% of the votes at the election qualifies to nominate proportionately elected members to the Assembly.

There is nothing in the said "objects and reasons" or in the Assembly's debate as reported in Hansard, that is helpful to interpret the words "votes cast at the election" in paragraph 2 of Schedule 4 of the Constitution. The general principle is that when an Act or clause therein is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act or the repealed provision completely from the record as if it had never been passed; it never existed except for the purpose of those actions which were commenced and concluded while it was an existing law. Therefore the Chief Justice and Gaswaga J

were in error in relying on the repealed provision of Schedule 4 to interpret the words 'votes cast' in paragraph 2 of Schedule 4 of the Constitution and more so because there is nothing in the 'objects and reasons' of the Amendment Bill or in the Assembly's debate as reported in Hansard which indicates that a change was been made to the meaning to be attributed to the words 'votes cast'. I therefore hold with the appellant on grounds (iii), (iv) and (v).

Ground (vi) of the appeal is to the effect that that at the time of the Fourth Amendment to the Constitution, the Elections Act was in force and the term "valid" in the repealed provision of Schedule 4 was mere surplusage in view of the provisions of the Elections Act and that the Chief Justice and Gaswaga I had failed to attach sufficient weight to that fact. I am of the view that the term 'valid' in relation to a votes cast at a presidential or National Assembly election or referendum has always been mere surplusage in view of our constitutional framework and does not become surplusage only in view of the provisions of the Elections Act.

Ground (vii) is misconceived as Gaswaga J did not err on the facts in stating what he did state. It is also clear that Gaswaga J I had not in any way been influenced in arriving at his decision based on the 1st respondent's interpretation of paragraph 2 of Schedule 4 of the Constitution for he had clearly stated:

Further, even if it had come to the notice of the Court at this point in time that in the previous elections the 1st Respondent had applied the said Constitutional provisions wrongly to the electoral process, that in itself would not have in any way affected the decision or outcome of this petition. Two wrongs cannot make a right

I am therefore of the view that there is no merit in ground (vii) of appeal.

I therefore on the basis of what is set out above, reverse the decisions of the Chief Justice and Gaswaga J and allow the appeal and declare that the declaration of the 1st respondent through its Chairperson Mr Hendrick Gappy made in the early hours of 2 October 2011 after the general election that was held from 29 September 2011 to 1 October 2011, that the petitioner was not entitled to nominate any proportionately elected member to the National Assembly has contravened paragraph 2 of Schedule 4 of the Constitution.

I also issue a writ of mandamus ordering the 1st respondent to make a fresh determination and declaration regarding the number of proportionately elected members the two political parties that contested at the general election of 2011, may nominate on the basis that the term 'votes cast' referred to in paragraph 2 of Schedule 4 of the Constitution means only the 'valid votes cast'.