

## IN THE SEYCHELLES COURT OF APPEAL

In the matter between

**THE ELECTORAL COMMISSIONER .....1st APPELLANT**

(Hendricks Gappy)

**THE CHIEF ELECTORAL OFFICER .....2nd APPELLANT**

(Charles Nlorin)

**THE ATTORNEY GENERAL .....3rd APPELLANT**

v.

**VIRAL VADILAL DHANJEE**

**RESPONDENT**

**SCA 16/2011**

**Before MacGregor, P; Domah, Fernando, Twomey, JJA and Burhan (co opted J)**

Counsel: Mr Ronny Govinden for Appellants

Mrs Alexia Amesbury for Respondent

### **JUDGMENT Twomey, JA**

1) This is an appeal and cross appeal consolidated for the decision of this Court. There have also been a total of four applications relating to interlocutory injunctions filed in relation to this case, supported by affidavits. All these applications have been disposed of by the Court but relate and form part of these appeals and I feel compelled to comment on one element of these applications which have a direct bearing on this appeal and cross appeal.

2) I am dismayed at the cynical, sarcastic, disparaging and overall disrespectful statements contained in affidavits and statements in court by Counsel during the proceedings. In the practice of law it is the tradition of the noble profession of the Bar to uphold the rule of law. It is a poor reflection of one's professional and ethical standards to slip into attitudes, tones, language and vocabulary that do not benefit the Bar. It does good to neither the legal practitioner, nor the profession, nor the client, nor the rule of law.

3) At the same time, for the proper discharge of their responsibilities, Courts require a minimum of respect. In this regard I direct Counsel's attention to rule 17 (6) (b) (ii) of the Seychelles Court of Appeal Rules 2005, which although is applicable to cases of criminal matters should apply to all appeals in general, namely:

17(6)"Every application, answer and reply-

i. (b) shall not...

ii. (ii) traverse extraneous matters.

4) The professionalism of the Bar is seriously called into question in such cases and such behaviour threatens the administration of justice and damages the whole judicial process of which we all form part and strive to improve. Members of the Bar are above all officers of the court. A basic tenet of most Bar Associations - and here I quote the American Bar Association Canon of Ethics in the absence of a parallel code of conduct for the Bar Association of Seychelles - is that

"...it is the duty of the lawyer to maintain towards the Courts a respectful attitude. This is not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

5) This Court is concerned with the constitutional and legal issues arising from the matter before it. It is neither interested in Counsel's opinion of the Court nor in the politics of the day. These will remain outside the door of this Court and all concerned are advised to take note.

6) I strongly urge all member of the Seychelles Bar to desist from such actions in the future and to focus their efforts on the legal issues to be decided instead. This may well improve the lack of erudition of late unfortunately common in this jurisdiction.

7) I now turn to the issues raised in the present appeals. I have read the judgment of my learned brother Fernando and concur. I wish however to add the following:

In this appeal some important points could have been canvassed but these were regrettably not raised in the grounds of appeals. In my view only three issues arise from the present appeals as filed:

- i. Can the Attorney General represent a party with an administrative and executive function in a constitutional case?
- ii. What is the procedure to be followed by the Electoral Officer in cases of defective nomination papers?

iii. Can the Constitutional Court grant general orders not specifically prayed for in constitutional cases and what remedies are available to the Constitutional Court in such matters?

8. Can the Attorney General represent a party with an administrative and executive function in a constitutional case? The Respondent submits that the representation of the Electoral Commissioners by the Attorney General violates the Attorney General's role as an independent person in a constitutional case.

9. This is not a valid submission. What is being missed here is the role of the Attorney General as laid down in the Constitution. Article 76 (4) of the Constitution states that the Attorney General shall be the *principal legal adviser to the Government* and hence, in my view, government departments and agencies with executive and administrative functions.

10. The Electoral Commissioner is in effect a constitutional 'entity' with both administrative and executive powers. I agree that in an ideal situation the Electoral Commissioner should have an independent legal adviser but nothing precludes him from being represented by the Attorney General except in cases where there may be a conflict of interest between them on a particular issue, which is not the case here. I would totally agree with Counsel for the Respondent that in cases where there is a public interest at stake conflicting with actions taken by a person employed by the government in the course of his duties or an agency of the Government, then the Attorney General in his role would not be in a position to represent that person or agency. Such was the case in the authorities cited by Counsel for the Respondent but is not the case in the present circumstances. Hence that ground of appeal by the Respondent fails. In terms of the use of the word "partisan," the Attorney General concedes that the use of such terminology was erroneous. In all cases where the Attorney General appears he serves the public interest and as such no element of bias should ever enter the arena.

11) I now turn to ii. What is the procedure to be followed by the Electoral Officer in cases of defective nomination papers? The Respondent's nomination to stand as a presidential candidate in the May 2011 elections was determined by the Chief Electoral Officer not to be valid in respect of the Elections Act 1995. The reasons given by the Chief Electoral Officer Charles Morin for the invalidity were seven fold namely:

1. No National Identity Numbers were provided for 78 supporters which did not permit the possibility of vouching their authenticity.
2. 6 supporters had not signed the nomination papers.
3. 69 supporters were unregistered voters.
4. 18 supporters authenticity was dubious since their names did not match their National Identification Numbers.
5. 2 supporters appeared twice on the nomination papers.
6. 1 supporter was below the age of 18.
7. 2 supporters were both unregistered voters and had not signed the nomination papers.

12) A total of 176 supporters were for the reasons stated above rejected from the list, thus the valid number of supporters amounted to 454, 46 short of the requisite number for a valid nomination.

13) The Respondent argues that the Gazette Notice for the elections does not stipulate that endorsors must have identity cards. Her argument is that it therefore follows that endorsors can be anyone and not necessarily a person entitled to vote as the Electoral Officer did not stipulate this fact in the gazette notice, despite the fact that the Act specifies that endorsors must be persons entitled to vote.

14. With respect, since the notice in the Gazette is issued pursuant to the Act its contents can only convey the meaning to give purpose to the provisions of the Act, specifically section 15 (3) (a) that the endorsement of the nomination paper of the candidate be by "such numbers of persons entitled to vote at that election." Any other construct would be nonsensical.

15. Persons entitled to vote at elections in Seychelles are registered as voters in an electoral area in accordance with the Election Act, and their names are contained in the Register of Voters (vide s.7(l) of the Act). That Register is compiled using National Identity Cards, the Register of Births and Deaths, the National Population Database, the Register maintained in pursuance of the Citizenship Act and other information, as specified in section 7(2) of the Elections Act, Cap. 68A 1975.

16) These mechanisms enable the Electoral Officer to verify both the identity and eligibility of persons to vote. Accordingly, although the Act does not specify that endorsors must carry National Identity cards or have National Identity Numbers, it is one of the mechanisms commonly utilised by the Electoral Officer in the performance of his duties to verify that the endorsors are registered voters. The burden of satisfying the Chief Electoral officer that the endorsors are entitled to vote according to sections 15(3) (a) rests with the candidate, hence it is up to the candidate to provide other means of proof of eligibility to vote if the endorsors do not hold National Identity Cards.

17) Having established that the nomination papers were defective what is the procedure to be followed by the Electoral Commissioner? The Constitutional Court found that there was a two stage process at nomination: the first in terms of the Electoral Officer satisfying himself that the nomination papers comply with the Act and the second handing the papers back to the candidate for rectification if they are defective. I respectfully disagree. No such process is envisaged in the provisions of the Act.

18) The pertinent provision is s. 15 of the Elections Act:

- a. First under s.15 (2) - the nomination paper is submitted at time and place as per notice in the official Gazette - in this case the April 27th 2011 between 9am and 2pm at the National Library Election Headquarters.

- b. Second, under s.15 (3) (a)- the nomination paper is signed by candidate and endorsed to the satisfaction of the Chief Electoral Officer: the endorsement as per the specifications as published in the Gazette of 18th February 2011 (pursuant to s. 14(1) (b), hence, 500 endorsements of "persons entitled to vote."
- c. Third, under s.15 (6)-*After the expiration of the time specified in the notice for submission of nominations-* hence 2 pm- *the Chief Electoral officer shall determine whether to accept or reject the nomination paper,* (my emphasis).

19) The provisions of the Act make it clear that the decision to accept or\* reject nomination papers comes after the closing time specified. The provisions therefore make no allowance for defective nomination papers to be amended or rectified!

20) This position remains the same whether or not a candidate *examines* (section 15(7)) and *objects* (section 15(8)) to the nomination papers of another candidate. The Act is categorical that the nomination papers and objections are carried out during the time allocated on nomination day. What is envisaged by the Act is that on nomination day the nomination papers are submitted by each candidate and scrutinised both by Chief Electoral Officer and other candidates, any defects apparent at this stage have to be made before the Chief Electoral Officer decides to accept or reject them. In these circumstances there was no violation of the constitutional or statutory right of the Respondent.

21) In this respect the Attorney General's submissions are therefore correct and his appeal on this ground must be allowed.

22) It is certainly unsatisfactory that the Act does not provide a procedure and time limit for amendments when defects are detected in nomination papers but it is not for this Court to remedy the shortcomings of the provisions of the Election Act, bearing in mind the adage that one cannot legislate from the bench. We can, however direct the attention of the Legislature to this fact, and this I hereby do, that the Act provides no remedies to a candidate whose nomination papers are defective to rectify such defects before the expiration of the time given for the submission of nominations.

23) I now turn to the last ground raised by the Respondent namely iii Can the Constitutional Court grant general orders not specifically prayed for in constitutional cases and what remedies are available to the Constitutional Court in such matters.

24) At this stage since the other grounds by the Respondent have been disposed of, I think the discussion in relation to this issue is purely academic. I do however think that as it is an important issue, it merits attention.

25) Article 46 of the Constitution provides for remedies for infringement of the Charter of Rights. It stipulates in Article 46 (5) that...

- d. "Upon hearing an application under clause (1) [contravention of the Charter] the Constitutional Court may-
- e. (c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application...
- f. (e) make such additional order under this Constitution or as may be prescribed by law."

26) The Seychelles Charter of Fundamental Freedoms and Rights is the single most important covenant between the Republic and its citizens and one that must be zealously guarded by the Court. Rights without remedies are meaningless. It is in this respect that the Court must strive in such cases to render a remedy to the party if it finds that any of his rights under the Charter has been breached, *even when the specific remedy is not sought by the party*. To do otherwise would restrict the true purpose of Article 46.

27) It is for this reason that I disagree with the Constitutional Court and find in favour of the Respondent on this ground. The Constitutional Court whilst rightly finding that the Respondent's right to participate in government is extremely important, proceeds to give only a declaratory judgment. The effect of such a decision is not only to deprive the Respondent of a meaningful remedy but to fetter the Court unnecessarily, given its wide powers under Article 46 of the Constitution.

28) In conclusion both appeals partly succeed. In the circumstances I make no order as to costs.

Mathilda Twomey Justice  
of Appeal

I concur

F. MacGregor  
President, Court of Appeal

I concur

S.B. Domah  
Justice of Appeal

I concur

AT. Fernando  
Justice of Appeal

I concur

M.N. Burhan  
Co-opted J

Delivered at Victoria, Mahe, this 2nd September 2011.