IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Corum: Twomey CJ, McKee J, Akiiki-Kiiza J]

(CP 07/2015)

[2016] SCCC 10

Wavel John Charles Ramkalawan Petitioner

Versus

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

Heard: 15 February 2016

Counsel: Bernard Georges and Annette Georges for Petitioner

Samantha Aglae for First Respondent

Basil Hoareau and Laura Valabhji for Second Respondent

Ronny Govinden, Attorney General and Ananth Supramanian for Third Respondent

Delivered: 31 May 2016

JUDGMENT

Judgment of the Court

[1] Some matters have troubled the Court in regard to this Constitutional Petition. There has been a tendency in the public fora, from the newspapers to the market place, to construe provisions of the Constitution by the uninitiated together with inventive appraisals by

those who should know better. All without a studied and legal interpretative reading with the result of heightened tension around the case. This is regrettable and is not conducive to a mature and responsible democracy.

[2] We point out that although constitutional meaning emerges through the interaction of competing actors it cannot be the case that citizens assert the right to read the Constitution in any way they wish so as to serve a particular interest and to whip up a frenzy among those who are easily led. As Joseph Story, Justice of the Supreme Court of America in a letter to his wife in 1845 stated:

"How easily men satisfy themselves that the Constitution is exactly what they wish it to be. They can contract or expand it at pleasure" (William Wetmore Story, Joseph Story, 'Life and Letters of Joseph Story, Associate Justice of the Supreme Court, Volume 1, 514).

[3] It is the duty of the Constitutional Court of Seychelles to remain ever more resolved to serve the Constitution of Seychelles by interpreting its provisions according to their original public meaning while taking into account binding or persuasive precedent. The courts in Seychelles are independent and subject only to the Constitution (article 119(2)) and they apply the Constitution and the law "without fear, or favour, affection or ill will" (First Schedule, Official Oaths Act). And Article 40 of the Constitution makes special mention of every citizen's duty to further the national interest and foster national unity and generally to strive toward the fulfilment of the aspirations contained in the Constitution.

[4] We are therefore concerned with the politicisation of this Petition and the one with which it is joined. The Court of Appeal bemoaned the politicisation of such cases previously (see *Popular Democratic Movement v Electoral Commission (PDM*) (2011) 387, 396). Five years on, Seychelles does not seem to have learnt from the experience of such practices. The bitter and polarised approach to the elections and the personal attacks on election candidates and the use of intemperate and unbridled language on social media was the backdrop to a closely fought presidential election.

[5] However, as Fernando JA stated in *PDM*, "None of these factors can change the Constitution or the electoral process set out therein". The judiciary remains a mere spectator

of the political forces at play. The Court only engages with the law and the evidence presented before it. We approach this case with only this sentiment and will not permit any arrogation of our duties. As was pointed out by Lord Scarman in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142 169 "Justice …is not left to the unguided, even if experienced, sage sitting under the spreading oak tree" or in the case of Seychelles under the coconut tree.

[6] This matter arose as one of two Petitions brought to the Constitutional Court by the Petitioner in relation to elections held in Seychelles in December 2015.This is the first case, brought as a Constitutional Petition in terms of Article 130 of the Constitution and given case number CP07/2015. The second, was brought as an Election Petition under section 51 of the Constitution and section 44 of the Elections Act, Cap 68A (hereinafter "the Act"). That case was assigned the case number CP01/2016. Since both cases involve the same parties the two cases, CP01/2016 and CP07/2015 were consolidated for the purposes of hearing the matters and the hearings commenced on the 14th January 2016. Today we are handing down judgments in both matters separately under their assigned case numbers.

The Agreed Facts

[7] The Petitioner was a presidential candidate of the Seychelles National Party in two ballots of an election for the office of President held in Seychelles on 3, 4, 5 December 2015 and 16, 17 and 18 December 2015.

[8] The First Respondent is a Constitutional body vested with, inter alia, powers and duties to organise and hold elections in Seychelles. The Second Respondent was at all material times the incumbent President and the Third Respondent was joined as a necessary party to the proceedings in accordance with rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.

[9] Five other candidates stood for the said election, namely the Petitioner, the Second Respondent, Patrick Pillay, Philippe Boullé, Alexia Amesbury and David Pierre.

[10] In the first ballot none of the candidates received more than fifty percent of the votes. In accordance with Schedule 3 of the Constitution and section 37 of the Elections Act 1995 as amended, the First Respondent did not declare any President elected.

[11] The Second Respondent and the Petitioner having respectively received the highest and second highest number of votes proceeded in accordance with paragraph 8 (1) (c) of Schedule 3 of the Constitution to take part in a second ballot.

[12] After the holding of the second ballot, on 19 December 2016, the First Respondent declared the results of the second ballot as follows:

Total Votes Cast	63,983
Total Votes in Favour	62,831
Total Votes Not in Favour	1,062
Votes for Petitioner	31,319
Votes for second Respondent	31,512

[13] The Chairperson of the First Respondent, Hendricks Gappy further declared that the Petitioner had won 49.85% of the total votes cast and the Second Respondent 50.15% of the total votes cast.

The Issues

[14] In his Petition, the Petitioner avers that the declaration was incorrect and that the certificate of election issued by the First Respondent was erroneous, improper and illegal in that the Second Respondent had not received "more than fifty percent of the votes in the election" as required under paragraph 5 of Schedule 3 of the Constitution or "more than fifty percent of the votes cast in the election" as required by paragraph 8(1) of Schedule 3 of the Constitution. He prays inter alia for a declaration that the provisions of the Constitution had been contravened, that the certificate of election was null and void and for the court to order the holding of further ballots until such time as a single candidate receives more than fifty percent of the votes in the election.

[15] All three Respondents raise the same objection questioning the jurisdiction of this Court to hear this Petition, stating that the Constitutional Court has no jurisdiction to entertain the Petition in view of the provision of Article 130(9) of the Constitution. They state that the

matter ought to have been brought in terms of Article 51(3) of the Constitution read with section 44 of the Elections Act.

[16] The First Respondent also argues that the Petition is frivolous and vexatious and an abuse of the process of Court as the words "votes in the election" (paragraph 6, Schedule 3) and "votes cast in the election" (paragraph 8, Schedule 3) in the Constitution have already been judicially settled in previous Seychelles cases.

Powers and jurisdiction of the Constitutional Court

[17] Article 130 grants the Constitutional Court powers to hear and decide matters concerning violations of the provisions of the Constitution which are not violations of the rights contained in Chapter III of the Constitution. It provides in relevant part as follows:

(1) A person who alleges that any provisions of this Constitution, other than a provision of Chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention may, subject to this Article, apply to the Constitutional Court for redress.

….

(4) Upon hearing an application under clause (1), the Constitutional Court may –

a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;

(b) declare any law or the provisions of any law which contravenes this Constitution to be void;

(c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate

….

(9) Nothing in this Article confers jurisdiction on the Constitutional Court to hear or determine a matter referred to under Article 51(3) or Article 82(1) otherwise than upon an application made in accordance with Article 51 or Article 82.

[18] The constituting and subject-matter jurisdiction of the Constitutional Court originates in Article 129 of the Constitution. The subject-matter jurisdiction of the Court is with regard to all matters relating to the application, contravention, enforcement or interpretation of the Constitution [Article 129(1) to (3)] and it is properly constituted when there are at least two Judges sitting in these matters. Article 130 provides the standing for litigants to bring cases related to the contravention of the provisions of the Constitution other than those provisions contained in Chapter III (the Charter), namely where that individual alleges that "any provisions of this Constitution, other than a provision of Chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention" (Article 130(1)). The Court has taken a broad and encompassing approach to the matter of standing where a matter of significant public interest is the subject-matter of the Petition. (See in this regard *Michel and Ors v Dhanjee* [2012] SLR 258).

[19] Article 130(9) creates a procedural proviso to the expansive standing granted to litigants under Article 130(1) by stating that where a litigant is asking the Constitutional Court to hear matters relating to a matter referred to under Article 51(3) or Article 82(1), the Court will only be properly seized when the application is made in accordance with Article 51 or Article 82 respectively. Subsection 9 does not limit or preclude the powers of the Constitutional Court to hear such matters, it does not restrict the jurisdiction of the Court nor does it restrict the standing of a potential litigant. It merely requires that the cases which concern the jurisdiction under Article 51(3) or Article 82(1) must be brought in the procedural manner which is set by the processes under those Articles.

[20] Article 51(3) refers to the power of the Constitutional Court "to hear and determine whether a person has been validly elected to the office of President". Clause (6) of Article 51 makes provision for a law to "provide for – (a) the circumstances and manner in which and the imposition of conditions upon which an application may be made to the Constitutional Court for the determination of a question under clause (3);…"

[21] The provisions which purport to prescribe this process, are contained in section 44 of the Elections Act, Cap 68A and provide in relevant part as follows:

"(1) Article 51(3) and (5) of the Constitution shall apply for the determination of the question as to whether a person has been validly elected to the office of President.

….

(3) An Election Petition to determine the question referred to in subsection (1) may be presented within 14 days of the publication of the results under section 38(2).

….

(5) A Petitioner in an Election Petition may claim –

(a) a declaration that the election is void; or

(b) a declaration that the nomination of a proportionately elected member of the National Assembly is void;

(c) a recount of the ballot papers.

….

(7) The Constitutional Court may declare that an election or as the case may be, a nomination is void if the Court is satisfied –

(a) that there was a non-compliance with this Act relating to the election or relating to the nomination of a proportionately elected member of the National Assembly and the non-compliance affected the result of the election or nomination;

(b) that an illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the candidate;

(c) the candidate or the person nominated at the time of the election or nomination was not a person qualified to be elected as President or a directly elected member of the National

Assembly or to be nominated as a proportionately elected member of the National Assembly, as the case may be.

(7)[sic] The Constitutional Court may order a recount of the ballot papers where it is satisfied that there was an irregularity in the counting of ballot papers that affected the results of the election or the nomination."

[22] Section 45 provides for the procedure that may be followed for the trial of the matter brought in terms of section 44. Section 46 provides for the Constitutional Court to certify the determination of the Court in a specific manner to the Electoral Commission. Section 47 requires the Constitutional Court to report as to any illegal practices which it believes have been proved to have been committed. Moreover, section 98 [NOTE section 95 as published in the gazette] provides that the Chief Justice may make rules for the Election Petition, which rules were published as the Presidential Election and National Assembly Election (Election Petitioner) Rules, 1998 (S.I. 10 of 1998). These Rules set out in further detail the procedure to be followed in bringing an Election Petition, and specifically provide a procedure where a Petition fails to comply with the Elections Act or rules.

Our Decision on the Jurisdiction of the Constitutional Court

[23] Now, this case concerns the interpretation of the phrase "fifty percent of the votes in the election" and "fifty percent of the votes cast" as contained in Schedule 3 to the Constitution, paragraphs 5 and 8 respectively. The Petitioner is specifically averring that these provisions have been contravened. Paragraph 5 of Schedule 3 provides that:

"subject to paragraphs 6 and 7, a person shall not be elected to the office of President unless he has received more than fifty percent of the votes in the election and the necessary number of ballots may, subject to the election being discontinued and recommenced in accordance with an Act, be held in accordance with the direction of the Electoral Commissioner to achieve that result."

[24] Paragraph 8 provides:

"(1) Where in an election to the office of President three or more candidates take part in any ballot and no candidate receives more than fifty percent of the votes cast…"

Clearly, there is no way that the Court can interpret the subject matter of this case as not regarding the valid election of the President. To say so would be to turn a blind eye to the very essence of the question before us. This matter falls squarely within Article 51(3).

[25] We do not agree with Mr. Georges that this is necessarily a matter arising out of Article 130 due to the nature of the remedy that he has requested. Mr. Georges' argument goes, as we understand it, that the Election Rules prescribes the averments which may be made by the Petitioner, and that these are limited by the provisions of the Elections Act and Rules. Section 44(5) states what a Petitioner *may* claim in the Election Petition. The Act here uses permissive language, indicating that these specific claims are amongst the remedies which may be claimed in the Petition. If we were to interpret section 44(5) narrowly, such that an Election Petition may only be brought when one of the three claims is brought, we would be restricting the jurisdiction of the Court. Such a move may result in the creation of certain lacunae, rendering some subject-matters unable to be brought under the Constitution or the Elections Act, as in this case where an interpretation with regard to the valid election of the President is sought which would be precluded by a narrow reading of section 44.

[26] It is our view that this Court retains its constitutionally granted jurisdiction and powers of remedy when hearing an Election Petition. However, the Elections Act governs the procedure for when the Court hears a matter falling within Article 51 of the Constitution and it has additional remedies which it may grant which originate in the Election Act, specifically the powers contained in Section 44(7) of the Act.

[27] We therefore find that the Petition ought to have been brought *procedurally* as an Election Petition in terms of the Elections Rules.

[28] However, we do not believe that this should defeat the Petition before us. We have several reasons to maintain the Petition, the first and strongest of these is the discretion which is found in Rule 8 of the Election Petition rules which grants the Court the power *to make an*

order where an Election Petition fails to comply with the Rules of the Election Act. This discretion is not circumscribed, and the rationale appears to be to allow the Court to entertain a Petition which may otherwise be dismissed for being improperly brought. Moreover, we note that this discretion does not require an application in order to be invoked, but can be raised *mero motu*.

[29] Furthermore, the very nature of this case is of such public importance that we would be hesitant to dismiss the matter on the basis of a procedural technicality, especially as "procedure is only the handmaid to justice" [*Gill & Ors v Film Ansalt* [2013] SLR Vol I 137].

[30] We note further that the Petition was correctly brought as a Petition to Court and within the 14 days which is required by section 44 of the Elections Act. The Petition contains a concise statement of the material facts on which the Petitioner relies and the relief which the Petitioner claims (Rule 7(1)) The Attorney General was correctly joined as a party (Rule 7(4)). Therefore, there has been substantial compliance with the Election Petition rules, even if this was not intentional. It therefore does not prejudice either party for us to consider this as an Election Petition, notwithstanding the fact that Mr. Georges was at pains to request that we consider it a constitutional challenge under Article 130.

The Substantive Issue: The Interpretation of *Votes Cast*

Submissions of the Petitioner

[31] Mr. Georges on behalf of the Petitioner has submitted that in order to achieve the requisite fifty percent threshold in the second ballot, the number of votes in favour of each candidate should be calculated by taking into account all of the votes contained in the ballot boxes at every polling station except perhaps for those votes that are mutilated or torn. He further submits that this approach is based on a clear interpretation of the phrase *votes in the election* in paragraph 5 and *votes cast* in Paragraph 8 of Schedule 3 of the Constitution.

[32] Mr. Georges has invited the court to adopt, in his view, this irresistible interpretation taking into account the rules of constitutional interpretation as contained in the Constitution. He refers specifically to those rules of interpretation contained in Schedule 2 to the

Constitution, the Preamble of the Constitution and Articles 21, 22, 24, 27 and 40 of the Constitution.

[33] It is important to set out *in extenso* those provisions on which he relies.

Paragraph 8 (a) of Schedule 2 of the Constitution provides in relevant part as follows:

"For the purposes of interpretation –

(a) the provisions of this Constitution shall be given their fair and liberal meaning;

(b) this Constitution shall be read as a whole…"

The Preamble provides in relevant part that:

"…

CONSIDERING that these rights are most effectively maintained and protected in a democratic society where all powers of Government spring from the will of the people

…

SOLEMNLY DECLARING our unswaying commitment, during this our Third Republic, to…

exercise our individual rights and freedoms with due regard to the rights and freedoms of others and the common interest;

Article 21 of the Constitution in relevant part provides that:

(1) Every person has a right to freedom of conscience and for the purpose of this article this right includes freedom of thought…

Article 22:

(1) Every person has a right to freedom of expression…

Article 24:

… every citizen of Seychelles who has attained the age of eighteen years has a right-

... to vote by secret ballot at public elections which shall be by universal and equal suffrage

Article 27:

(*1) Every person has a right to equal protection of the law… without discrimination on any ground except as is necessary in a democratic society.*

Article 40:

It shall be the duty of every citizen of Seychelles-

... to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution

[34] The Petitioner relies on all the provisions above to found and emphasise his submission that the overall philosophy in the Constitution of Seychelles is one providing counterweights and balance to a democratic society. He distinguishes between National Assembly elections which are one-round elections with a dual result: the election of a member for each Constitutional area on a First past the post system irrespective of the percentage of the votes obtained, and the election of a proportional elected member of the National Assembly for a political party that has polled more than 10% of the votes and a presidential election where a candidate must clear "more than fifty percent of the votes"(Schedule 2 paragraph 8 (2) supra).

[35] In his view the right to vote as enshrined in Article 24 means that every vote should have an equal value. In this regard, he submits, a vote in which there is a clear indication for a candidate must be equal to a vote which is rejected. In his submission, the exercise of the right to vote may be limited but not the right to vote or the manner in which one votes. As there is neither an obligation to vote, nor provision for a protest vote or for a "none of the above" option, once a voter has his ballot paper in the ballot box the voting cannot be deleted. In his submission votes being equal in the voting process, one can either choose a

candidate or refrain from voting or even cast a protest vote. In his view the freedom of expression of a voter cannot be ignored.

[36] The only distinction that can be made according to Mr. Georges is that between those who stay away from voting and those who take part in the process of voting. In his submission, all the votes in the ballot box must be counted as Seychellois law is silent on the meaning of *valid vote*. He makes comparison with other constitutions, for example that of Brazil in which Article 77(2) of its constitution expressly states that the candidate obtaining a majority of valid votes excluding blank and invalid votes will be elected and Kenya which defines a spoilt ballot paper in section 77(1) its Elections (General) Regulations 2012 and which adds that such ballots will not be counted. He submits that section 34(2) of the Elections Act of Seychelles only defines a rejected vote but does not state that it is void.

[37] He relies on the Kenyan case of *Raila Odinga v The Independent Electoral and Boundaries Commission and ors* [2013] eKLR, para 281 which interpreted section 77(1) of Kenya's Election (General) Regulations. He cites page 102 from the judgement where the Supreme Court states that "a ballot paper marked and inserted into the ballot box has consistently been perceived as a vote…"

[38] He submitted that in many cases rejected votes may not be invalid. He relied on the English authority of *Morgan & Ors v Simpson & ors* [1974] 3WLR 517 which is proposition for the view that if a ballot is unstamped through the error of the Election Commission and not the voter, the vote may still be valid. Similarly, he submits that a voter who identifies himself on his ballot paper has only surrendered his right to secrecy but has validly exercised his right to vote and that that vote ought therefore to be counted. He submits that where however a ballot is torn or mutilated there can be no valid vote. However he disagrees with the Court of Appeal decision in *PDM v Electoral Commission* (2011) SLR 385, namely with the pronouncement that a vote cast should be rejected in circumstances where it is unclear for whom a voter has voted. In his view the status of such a vote is that it is still cast and should be counted.

[39] The status of the rejected votes in his submission must be viewed against the backdrop of the Constitution read as a whole and as emanating from the will of the people. It was the

people's will that the president must be elected with a threshold of fifty percent. In his submission, the words *votes* and *votes cast* must be given a fair and liberal meaning to enlarge the meaning of the words rather than to restrict them. The calculation in a presidential vote must necessarily be made by the counting of all the votes in the ballot box. The Petitioner argues that the fact that the phrase votes cast is used in Schedule 3 and the words *valid votes cast* was used in the original paragraph 3(1) of Schedule 3 (since amended) in relation to proportionately elected members indicate that a distinction must be made between them. In his view the drafters of the Constitution purposely omitted the words *valid* in Schedule 3 to indicate that all votes cast including those rejected should be counted to calculate the threshold percentage for a presidential election.

[40] In his view, the *PDM* judgement construed as wide and liberal a meaning as possible to the provisions of the Constitution to achieve the intent of the drafters for the election of proportionately elected member of the Assembly. Similarly in the present case it is the duty of the court to interpret the threshold to be as high as possible and not as low as is required.

Submissions of the First Respondent

[41] Mrs Aglaé on behalf of the First Respondent invited the Court to undertake a simple but contextual reading of the provisions of Schedule 3 to the Constitution. She referred specifically to paragraph 5 of Schedule 3 which provides:

"Subject to paragraphs 6 (sole candidate) and 7(death of candidate), a person shall not be elected to the office of President <u>*unless he has received more than fifty percent of the votes in the election*</u> *and the necessary number of ballots may, subject to the election being discontinued and recommenced in accordance with an Act, be held in accordance with the direction of the Electoral Commission to achieve that result."* (Emphasis Mrs. Aglaé's).

[42] In her submission, an indication by the voter of his choice of candidate must be read into the word *vote*. Unless the voter has indicated his/her preference, then there is no vote for the candidate. In her view this interpretation is reinforced by section 34 of the Elections Act which defines what constitutes a rejected vote and provides for the procedure in relation to all votes and their endorsement as such before counting proper takes place. In

any case, she submits, the matter was already laid to rest in the *PDM* case and in the present case the Petitioner has brought nothing new for the Court to interpret or for it to enlarge the definition as stated in the *PDM* case.

[43] She also submits that no provision is made in the Constitution for a subsequent ballot post the second round. This necessitates the logical interpretation of section 34 that one of the candidates in the second round has to receive more than 50% of the valid votes cast.

[44] She also submits that there is no distinction between the words *votes cast* or *valid votes* as employed either in relation to a presidential election or a National Assembly election, both for direct and proportionately elected members.

Submissions of the Second Respondent

[45] Mr. Hoareau, on behalf of the Second Respondent, also submits that the *PDM* case substantially settled the law on the issue of *votes cast*. The Court of Appeal had laid an emphasis on the Preamble of the Constitution and the entrenched principle of democracy and the democratic process.

[46] He further submits that the reliance placed on Articles 1, 24 ad 113 of the Constitution by the Petitioner does not aid the interpretation of *votes cast*. He submits that the right to vote as provided in Article 24 is not absolute and is restricted as Article 24 provides in relevant part:

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

That law, he submits, is the Elections Act which provides for the exercise of the right to vote; hence if one does not act in the manner provided for in the Elections Act, one's vote may not be taken into account.

[47] Mr. Hoareau relied on the case of *Bappoo v Bughalloo and ors* (1978) MR 105 as cited with authority by Fernando JA in *PDM*. Mr. Hoareau cites the following excerpt from *Bappoo* which in his submission is relevant:

"While it is true to say that effect should be given to the intention of the voter if it can be 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 (p.107)."

[48] Mr. Hoareau further submits that Fernando JA in *PDM* was correct to distinguish between the right to vote and the right to vote in a valid manner. In Mr. Hoareau's submission although one may have a right not to express a vote, such a vote is not a right that should be given effect as it is not permitted by the provisions of the law.

[49] Further, he submits, in terms of the constitutional interpretation of the words "votes cast", a liberal meaning of the law, contrary to what is submitted by Mr. Georges, would entail a meaning that fosters and advances the principle of democracy as set out in the Constitution. In his view a liberal meaning entails a contextual interpretation with an inference of consistency when similar terms are used in the provisions of the Constitution.

[50] In any case he submits, the issue was settled in *PDM* by the pronouncement of Fernando JA that:

"…the term 'valid' in relation to a vote 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 (p. 404)."

[51] Mr. Hoareau also submits that Mr. Georges cites the Kenyan case of *Raila Odinga (supra)* out of context since that decision relied on the authority of the Seychellois Court of Appeal case of *PDM* to state that using a purposive approach of the definition of *votes cast* in Article 138(4) of the Kenyan Constitution necessarily meant:

"valid votes cast and [did] not include ballot papers, or votes cast but are later rejected for noncompliance with the governing law and Regulations." (Para 286)

[52] Mr. Hoareau further submits that since the Constitution must be read as whole, in construing the provisions of paragraph 5 of the Constitution one must read them together with the provisions of paragraph 8(1) which makes specific provision to the words *votes cast* but also refers to situations where there are three or more candidates and the election proceeds to the second ballot. In his view this logically presupposes that where there are only two candidates there is no subsequent ballot. In such a situation the term *votes cast* can only mean *valid votes cast.*

[53] In terms of the comparative study carried out by Mr. Georges with respect to other Constitutions such as Brazil where the word *valid vote cast* is expressly stated, Mr. Hoareau submits that laws can speak both expressly and impliedly. In the case of Seychelles and other countries in the region such as Uganda or Sri Lanka, the same wording *votes cast* is used and yet rejected votes are not included in the counting process similarly to Seychelles.

[54] Mr. Hoareau further submits that section 25 (1) (c) of the Elections Act expressly provides that in exercising one's vote, one does so in accordance with the notice set out in section 21 (1) (c). Such notice, he added, is the one placed outside the polling station which instructs a voter on the manner in which his vote should be recorded.

[55] Mr. Hoareau also submits that if the Petitioner concedes that a class of rejected vote, specifically those ballot papers which are torn or mutilated should not be counted, then all other rejected votes should also not be counted as the law in section 34(2) makes no distinction between rejected votes.

[56] Further, he adds, the counting process described in the provisions of section 34(2) indicate that before the count, the ballot papers are placed in groups to indicate the candidate for whom the voter has voted except for rejected papers. This together with section 36 of the Elections Act which provides for a ballot paper count classifying ballots as those, counted, rejected and unused leads to the inference that rejected ballots are not treated similarly to counted ballots. In his submission a ballot paper not used in accordance with the procedure indicated does not amount to a vote.

Submissions of the Third Respondent

[57] The Learned Attorney-General adopts the arguments of the Respondents. In his submission the Petition before the Court concerns a provision of law which was in *pari materia* to the one considered in *PDM*. The expression *votes cast* was interpreted by the Court and the expression now being challenged is contained in another part of the Constitution and should make no difference, regardless of whether it concerns executive or legislative elections. In terms of consistency, the term retains the same definition throughout the Constitution. One would have to distinguish the decision of the Court of Appeal in *PDM* on substantial facts to merit a departure from that authority.

[58] He further explores the consequences of reading into the definition of *votes cast*, total ballot papers in the ballot box in circumstances where there is a second ballot in a presidential election. In his submission if one was to compute the count on the basis of all ballot papers in the box regardless of whether they were valid or not, there was a possibility that the invalid votes might amount to more than 50% leading to a constitutional impasse as no candidate would ever achieve the threshold required.

Discussion

[59] The Petitioner has submitted that the certificate of election was incorrect in that it was wrong to either declare that the Second Respondent had received *more than fifty percent of the votes* in the election pursuant to paragraph 5 of Schedule 3 of the Constitution or that the Second Respondent had received *more than fifty percent of the votes cast* in the election pursuant to paragraph 8(1) of Schedule 3 to the Constitution of Seychelles. The basis for his submission, if we understand him correctly, is that the Second Respondent did not receive more than fifty percent of the votes as the words *votes* or *votes cast* refer to the total number of ballots in the ballot boxes and not valid votes.

[60] In this regard, we have looked for guidance to the International Institute for Democracy and Electoral Assistance (IDEA), an impartial organisation, working worldwide to support democracy. It is a permanent observer to the United Nations. It produces comparative knowledge in its key areas of expertise, which include electoral processes and political

participation and representation. Its publications include *International Electoral Standards* and the *Venice Commission's Code of Good Practice in Electoral Matters* and *Report on Electoral Law and Electoral Administration in Europe: Synthesis study on recurrent challenges and problematic issues*. We have consulted these publications.

[61] The latter publication sets out internationally-recognized standards applicable across a range of areas of electoral legislation and provides basic and general electoral principles. It emphasises that the purpose of electoral laws is to achieve clarity and simplicity so as not to confuse the electorate. The overall goal of electoral laws is to provide both consistency and harmonisation between the Constitution and laws made in accordance with it. In this regard the Report states:

"It is important to note that each successively inferior authority cannot make provisions that contradict or are inconsistent with those of a superior authority. For example, an act of the legislature cannot contravene the Constitution…

As Constitutions are generally more complicated and time-consuming to amend, Constitutional provisions should not go beyond describing the very basics of electoral rights and the electoral system. In order to allow for necessary flexibility, provisions related to the management of elections should be incorporated into parliamentary legislation, and administrative and procedural matters should be left to administrative rules and regulations. (pages 13-14)

[62] This simple and logical approach is overwhelmingly convincing. While Constitutions provide the broad brushstrokes of the citizen's right to vote and to take part in government, laws provide for the effective management of elections. Overall it is preferable that electoral laws avoid conflicting provisions in presidential elections, national elections and referenda. Moreover, stability of the law is crucial to the credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently confuse voters. It is therefore inconceivable that one should interpret an expression appearing in different parts of the Constitution or an electoral law in different ways. In our deliberations these are the considerations that guide us.

[63] We note that throughout the Constitution there are several references to the words *vote* or *votes cast* in relation to elections and referenda. These are contained in the following provisions:

Article 91 (1) The National Assembly shall not proceed on a Bill to alter Chapter I, Chapter III, this article, article 110 or article 111 unless -(a) the proposed alteration contained in the Bill has been approved on a referendum by not less than sixty percent of <u>the votes cast</u> in the referendum…

Article 110 (4) (a) of the Constitution: Where […]the National Assembly votes against any measure or proposal of the Government and on a referendum a majority of <u>the votes cast</u> in the referendum supports the measure or proposal … the President may…, dissolve the National Assembly..

Paragraph 2 of Schedule 3: Where a person receives <u>less than 5% of the votes cast</u> at the election for the office of President in respect of which the person is standing as a candidate, the person shall forfeit to the Republic the sum deposited or in respect of which security was given ….

Paragraph 5 of Schedule 3: … a person shall not be elected to the office of President unless he has received <u>more than fifty percent of the votes</u> in the election…

Paragraph 8(1) of Schedule 3: Where in an election to the office of President three or more candidates take part in any ballot and no candidate receives more than <u>fifty percent of the votes cast</u>… then, if the result of the ballot is that …
b) two or more candidates receive, equally, the highest number of votes…
only th[ose] candidates, shall take part in the subsequent ballot…

Paragraph 2 of Schedule 4: A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate <u>10% or more of the votes cast</u> at the election may nominate a proportionally elected members for each 10% of the votes polled.

Since the words *votes* or *vote cast* are used for all elections and referenda, it is our view that in terms of clarity and consistency the definition adopted by the Court for the present matter will necessitate a consistent application of such a definition to all the provisions of the Constitution and laws made pursuant to it where the words are used.

[64] It is true that the Constitution is silent as to the meaning of *votes cast*. However, we note that Article 51 (6) (c) of the Constitution provides in relevant part that:

"A law may provide for … any matter, not otherwise provided for in Schedule 3, which is necessary or required to ensure a true, fair and effective election of the President."

[65] It is therefore to the Elections Act that we must turn for the meaning of *votes cast*. The interpretation section of the Elections Act does not contain a definition of *votes cast*. In this respect the Elections Act is similar to electoral laws of other jurisdictions. Before we examine the specific provisions of the Elections Act of Seychelles, however, we find it helpful to examine the concept of *vote* generally.

[66] The ordinary dictionary meaning of the word vote is "an indication of choice, opinion or will on a question such as the choosing of a candidate" (see The Collins Dictionary and Thesaurus In One Volume) or "a formal expression of choice" (Oxford Dictionary and Thesaurus) and the phrase *to cast a vote* is to vote in an election or on an issue or to place one's ballot in the ballot box. Yet interestingly when someone has the casting vote he resolves a deadlock by casting the vote in favour of one side or the other (Cambridge Dictionaries Online). The simple issue in the present case is whether in Seychelles *casting a vote* is the act of inserting a ballot paper in a ballot box or indicating one's preference for a candidate on a ballot paper.

[67] Comparative studies in terms of electoral laws have been made by all parties to this Petition and these submissions have been helpful. It must be noted however that terminology in electoral laws is not consistent across jurisdictions. For example, the term *spoilt* vote has different meanings. In Seychelles, a *spoilt* vote is a ballot paper that never enters a ballot box. In Canada for example, a *spoiled* vote is the equivalent of what in Seychelles is termed a rejected vote, that is, a ballot paper in the ballot box that is rejected for different reasons.

However, although different terminology is used in different countries, generally those ballots considered spoilt, spoiled, void, null, informal, or stray are invalid and thus not included in the vote count. Spoiled ballots, rejected, and unused ballots are counted only to create a complete audit trail.

[68] It is noted that in some countries such as those pointed out by Mr. Georges, namely Brazil, laws expressly state that the election of a candidate is dependent on it obtaining a majority of *valid votes excluding blank and invalid votes* and Kenya where section 77(1) of its Elections (General) Regulations 2012 defines a spoilt ballot paper and adds that such ballots will not be counted. Mr. Hoareau has pointed to Croatia, the only country where he submits elections are determined on the percentage of people who have voted. We have looked at the Croatian Act on Election of Representatives to the Croatian Parliament and note that even so, in such elections only valid votes are taken into consideration for the count.

[69] We have rigorously considered what constitutes a *vote* and the distinction between *ballot papers* inserted into a ballot box and *votes* in different electoral systems worldwide. We summarise our findings below.

[70] In Australia, the terminology *formal vote* is used to indicate those votes that are counted to elect a candidate and *informal votes* those that are not. Section 123 of the Electoral Act of Queensland for example, in relevant part provides as follows:

If a ballot paper has effect to indicate a vote, it is a formal ballot paper.
If a ballot paper does not have effect to indicate a vote, it is an informal ballot paper.

A vote in Australia is a formal expression of an individual's choice in voting, for or against some ballot question.

[71] Similarly, in New Zealand, sections 178-179 of the Electoral Act 1993 makes a distinction between a *vote* and an *informal vote.* Informal votes are rejected and not included in the count of the votes for the party or constituency candidate.

[72] In the United Kingdom, a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated. A distinction is also made between ballot paper and vote (see sections 47-50 of the Representation of the People Act 1983).

[73] Section 283(3) (f) of the Canada Elections Act 2000 stipulates that at the count, the Deputy Returning Officer shall:

examine each ballot, show the ballot to each person who is present, and ask the poll clerk to make a note on the tally sheet beside the name of the candidate for whom the vote was cast for the purpose of arriving at the total number of votes cast for each candidate.

Clearly this implies that only votes which indicate a preference of candidate are counted on the tally sheet.

[74] In Ireland, section 119(1) of the Electoral Act 1992 provides that the returning officer rejects invalid votes for the count of preferences for the election of a candidate.

[75] In the Netherlands, section J 26 (1) of the Elections Act 1989 provides:

1. After receiving the ballot paper, the voter shall proceed to a polling booth and cast his vote thereby colouring red a white spot opposite the name of the candidate of his choice.

Those ballot papers that are not marked as provided by the law are not counted as votes.

[76] In South Africa, section 47(3) of the Electoral Act of 1993 provides for the procedure for the rejection of votes and Regulation 25 of the Election Regulations of 2004 clarifies the procedure for counting the votes, clearly indicating that rejected ballots are not counted as part of the vote.

[77] In India, which partly uses electronic voting machines and also offers a None Of The Above (NOTA) option, the Conduct of Elections Rules made pursuant to section 64 of The Representation of People's Act 1951 makes a distinction between a ballot paper and a vote (see Rule 24). It provides that postal ballot votes should be rejected for the count where no preference or clear preference is shown for a candidate (Rule 54A). In terms of the

Electronic Voting Machines the "Result" of the election is captured by not taking into account the rejected vote or the NOTA votes. The NOTA vote only allows the electorate "the right to register a negative opinion." They are counted but do not affect the result as they are treated as invalid votes. Their purpose is only to put pressure on parties to nominate good candidates. (See *People's Union for Civil Liberties & Anor v Union of India & Anor* Writ Petition (Civil) No 161/2004, 27 September 2013).

[78] We have not been able to find a single jurisdiction where all votes cast are counted for the purpose of electing a candidate in an election. It would also appear that even in those jurisdictions where the phrase *votes cast* is used, only valid votes are counted for the election of a candidate. The word *valid* in this context is indeed mere surplusage. With this backdrop in mind our task is to examine the definition of votes cast in the context of the electoral laws of Seychelles. Should the expression *votes cast* be entrusted with different meanings across the Constitution?

[79] Sections 34 and 36 of the Elections Act makes it clear that rejected votes are not taken into account for the count of votes for a candidate. They provide in relevant part as follows:

34…

(2) Where a ballot paper—

*(*i*) does not bear the official mark referred to in section 25;*

*(*ii*) has anything written or marked by which a voter can be identified;*

*(*iii*) is mutilated or torn; or*

*(*iv*) does not contain a clear indication of the candidate for whom the voter has voted,*

the ballot paper, shall be rejected and shall be endorsed with the word "rejected" by the Electoral Officer …

(3) The ballot papers, <u>other than those rejected</u> under subsection (2), shall, in respect of an election or, where the Presidential Election and the National Assembly Election are held simultaneously, in respect of each such election separately, be thereafter sorted into different groups according to the indication of the candidate for whom the voter has voted,

the ballot papers in each group shall be counted and the Electoral Officer or the Designated Electoral Officer, as the case may be, shall record the number of ballot papers in each group.

36.

(1) Upon the conclusion of the counting of votes, the Electoral Officer or the Designated Electoral Officer, as the case may be, shall in respect of an election or, where the Presidential Election and a National Assembly Election are held simultaneously, in respect of each such election separately, with the assistance of the enumerators—

(a) in the presence of the candidates, if present, or the counting agents of candidates, as may be present, proceed to verify the ballot paper account referred to in section 29(1)(d) by comparing the number of ballot papers recorded in the account with the number of ballot papers counted, rejected and unused;

(b) shall seal in separate packets the counted, rejected and unused ballot papers;…

(*2) The Electoral Officer or the Designated Electoral Officer, as the case may be, shall, as soon as is practicable after the result of the election has been ascertained, transmit—*

(a) a statement of the result to the Electoral Commission… (Emphasis ours)

[80] However, while the Elections Act provides for the counting procedure in Seychelles and clearly shows that only valid votes are included for the vote count, the Petitioner's submission goes further in underlining the differences between Schedule 3 and the original Schedule 4 of the Constitution to demonstrate a difference between them.

[81] In his submission, *PDM* was rightly decided. In *PDM* the Court of Appeal held that it should adopt a democratic and purposeful interpretation which narrowed the meaning of *votes cast* to mean *valid votes cast* to ensure a maximum amount or proportionately elected representatives to the Seychellois National Assembly. Interestingly enough, it must be noted the Petitioner's approach in the present case would result in an enlargement of the meaning of votes cast. In the Petitioner's view a holistic, democratic and purposeful interpretation of the Schedules of the Constitution is that a distinction with the meaning of *votes* in paragraph 5 or 8 of Schedule III was intended. Here, *votes cast* must mean valid and invalid votes.

[82] With respect, we fail to see how a democratic, purposeful and holistic interpretation of *votes cast* in Schedule 2 should deliver a different result. While the original provision of paragraph 3(1) Schedule 4 of the Constitution may assist in explaining the amendment to the provision (the present paragraph 2) it cannot supersede it. The Court of Appeal explained the reason for the amendment in *PDM*. While we do not see a need to repeat what was said in that decision, we do point out that Mr. Georges' submission cannot be sustained. It is the inconsistency in the interpretation of Constitutional provisions that *PDM* corrected; the *ratio decidendi* in *PDM* is an articulation of the consistency approach urged for by the IDEA in Constitutional and attendant electoral legislation.

[83] We do agree with the First Respondent's submission that the only distinction that ought to be made is between the insertion of a ballot paper in the ballot box and a vote so that, an indication by the voter of his choice of candidate must be read into the word *vote*. Unless the voter has indicated his/her preference, then there is no vote for any candidate.

[84] Mr. Georges has also urged the court to consider the principle of equality of the vote to ensure that all votes are given the same value. We are not persuaded by this argument. The principle of equality of vote operates to provide for direct universal suffrage and a vote of equal value so that equal numbers of voters can vote for proportionally equal numbers of officials or that each person's vote is equal to the other person's. It certainly does not mean that a rejected vote of one voter has the same value as a valid vote of another voter.

[85] As Fernando JA stated in *PDM:*

> *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."*

[86] The Petitioner has also strived to differentiate between *the right to vote* and *the exercise of the right to vote* with the former, in his view, being incapable of limitation. We cannot accept the distinctions that he is making. It is certainly not an interpretation that can be derived from the constitutional provision of the right to vote since article 24(2) clearly states that :

"The exercise of the right [to vote]…may be regulated by a law necessary in a democratic society."

If a right or its exercise is regulated it is ultimately limited in some way.

[87] In any case, should we adopt Mr. Georges' reasoning we would be equating the word *vote* with *ballot papers in the ballot box.* There are other reasons why we cannot venture down that path. Common sense is the most important of these. There must be a clear distinction between a ballot paper inserted into a ballot box and a vote counted for in the election of a candidate. The Achilles heel of Mr. Georges' argument is his concession that where a ballot is torn or mutilated it may not be counted. In making such a distinction he therefore also acknowledges that the value of votes are different. A valid vote does not have the same value as a rejected vote or a spoilt vote. The difficulty as pointed out by the Court of Appeal in *PDM* (supra), whose view was endorsed by the Kenyan Court in *Raila Odinga* (supra) is that:

"If one includes spoilt votes in such computations, one is interpreting the intention behind the spoilt votes. However, a number of people also spoi[l]their votes as they do not know how to validly cast their votes or inadvertently spoi[l] their votes. It is impossible to separate those "real" spoilt votes from the "intentional" spoilt votes; 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…"

[NOTE - *Spoilt* votes here means *rejected* votes].

[88] Similarly, their Lordships Goburdhun and Moollan in *Bappoo* (supra) expressed the view that if one were to give the returning officer the power to vet a ballot paper outside the expressed requirements of the law one would leave him/her the power to ascertain each and every vote to decide whether different intentions might be inferred from votes cast, which in their lordships' view was a recipe for chaos.

[89] As we have also pointed out, the comparative study above also indicates that in the process of counting votes for the election of a candidate, other electoral systems do not take into

account rejected or spoilt votes. All the legislative instruments cited above provide for a consistent treatment of rejected, spoilt or informal votes. Those votes are disregarded for the election of a candidate whether or not there is an express provision stating that they are void. The support Mr. Georges claims from the case of *Morgan & Ors* is ill founded. That case is only authority that a voter who correctly expresses his vote though a defective ballot, the latter not being attributed to him, will have his vote counted for the election. Similarly, every ballot paper that is challenged may be ruled valid on various grounds but a rejected vote that remains rejected is never included as a valid vote in the count.

[90] We are also supported in our decision by the submission of the Attorney General in respect of the provisions of a second or subsequent ballot in a presidential election. Our reading of paragraph 8 of Schedule 3 leads us to the conclusion that the reading of all votes into the phrase *votes cast* may well lead to a constitutional impasse where rejected votes outnumber valid votes. This cannot be said to have been the intention of the drafters of the Constitution.

Our decision

[91] There is no merit in this Petition. We are satisfied that the expression *votes* or *votes cast* in paragraph 5 and 8 of the Schedule 3 of the Constitution mean *valid votes cast*. The certificate issued by the Electoral Commission was therefore in order. For these reasons we dismiss the Petition.

Signed, dated and delivered at Ile du Port on 31st May 2016.

M. TWOMEY	**C. McKEE**	**D. AKIIKI-KIIZA**
Chief Justice	**Judge**	**Judge**