

GAPPY v DHANJEE

(2011) SLR 294

R Govinden for the appellants
A Amesbury for the respondent

Judgment delivered on 2 September 2011

Before MacGregor P, Domah, Fernando, Twomey, Burhan JJ

FERNANDO J: This is an appeal from both the respondents and the petitioner in the Constitutional Court case numbered 3 of 2011 against the judgment of the Constitutional Court. This Court by its ruling dated 12 July 2011 disposed of the issue raised by the respondent to this appeal as to who should be treated respectively as the appellant and respondent in this appeal, and determined that since the respondents in the Constitutional Court case filed their notice of appeal before the petitioner, despite the delay in their paying the filing fees and furnishing security for costs, they should be treated as the appellants to this appeal and the petitioner, who filed his notice as a cross-appeal, subsequent to the filing of the notice of appeal by the respondents, be treated as the respondent to this appeal. I must emphasize that such determination has not in any way affected the rights of any party to this appeal since all issues raised by both parties and all matters necessarily arising from the pleadings and the judgment of the Constitutional Court have been considered and dealt with.

The respondent in this case filed his nomination paper as an independent candidate on the Nomination Day, namely on the 27 April 2011, for the presidential election of May 2011.

The respondent submitted along with his nomination paper, inter alia, the List of Supporters endorsing his nomination as a candidate.

The second appellant had by his paper dated 27 April 2011 and timed 13.00 hours stated: *"I acknowledge receipt of the following documents in respect of your nomination as a candidate for the May 2011 Presidential Elections"* (emphasis by me). The documents included the list of supporters. Thus what was acknowledged was the receipt of the nomination papers.

By his paper dated 27 April 2011 and timed 17.15 hours the second appellant informed the respondent as follows:

I have to inform you that in accordance with the Elections Act, *I have determined that you have not been validly nominated* for the forthcoming presidential Election, 2011. The reason for my determination is as follows; You have not complied with all the legal requirements of the above Act. (emphasis by me)

Here what was communicated to the respondent was the determination of the 2nd appellant, under section 15(9) of the Elections Act, as regards the validity of the nomination papers.

The respondent had averred in his petition before the Constitutional Court that the second appellant had -

acted illegally in disqualifying him as the right to object to the acceptance of a nomination paper of any other candidate on the grounds that the other candidate is not qualified to stand for election for which the candidate seeks to stand or that the nomination paper does not comply with provisions of the Election Act vests with one of the other candidates and not with the Chief Electoral officer or the Electoral Commissioner.

In particularizing the contravention of the Constitution, the respondent had claimed before the Constitutional Court -

Having not detailed the legal requirements that the Petitioner had to comply with, *He should have been given an opportunity (time) to cure the irregularity as the Nomination day ended at midnight, every effort should have been made to enable compliance and this, the 1st and 2nd respondent did not do (emphasis by me).*

We note at the outset that the respondent by this, had admitted that in submitting his nomination paper there had been non-compliance and an irregularity, which had to be cured.

The respondent, who was the petitioner before the Constitutional Court had prayed by way of relief before the Constitutional Court for:

- a. A declaration that his disqualification was illegal and was a contravention of the Petitioner's right to participate in a public office under article 24(1)(c) of the Constitution,
- b. A declaration that the failure to give him time until midnight on Nomination Day to cure any irregularity contravened his right under article 24(1)(c), For an order that that the respondent return the list of endorsements to the Petitioner,
- c. For an order that the presidential election is postponed until the final determination of this case,
- d. For granting such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner, and hearing this case as one of extreme urgency.

Expounding on (a) above the respondent had stated in his affidavit that his "right to participate in government as is contained in article 24(1)(c) and 24(2) were contravened as the right is not subject to any restrictions or limitation but should only be regulated by law that is necessary in a democratic society." (Verbatim from affidavit) thus bringing into issue the constitutionality of the Elections Act itself.

Thus as I see it, the issues raised before the Constitutional Court by the petitioner, the respondent to the instant appeal, were:

- a. The right to object to the nomination paper of a candidate, that the nomination paper does not comply with provisions of the Elections Act vests with one of the other candidates and not with the Chief Electoral officer or the Electoral Commissioner,
- b. The second respondent had not detailed the legal requirements the petitioner had not complied with prior to rejecting his nomination paper,
- c. The petitioner should have been given an opportunity (time) to cure the irregularity,
- d. That the nomination day ended at midnight and not at 1400 hours on 27 April 2011, and
- e. The constitutionality of the Elections Act.

The appellants in their answer to the petition, filed before the Constitutional Court had taken up the position that the second appellant had "acted legally and in accordance with section 15(6) of the Elections Act in determining whether to accept or reject the nomination paper submitted within the time specified in the notice" and that the paper signed by the second appellant, informing the respondent of his disqualification was legal.

It is the position of the appellants that the list of supporters attached to the nomination paper was not in accordance with the provisions of the Elections Act and was not in accordance with the notice published in the *Official Gazette* dated 18 February 2011 because after, verification, the second appellant was of the opinion that the number of supporters did not reach 500, as required by the Elections Act and the *Gazette* notification, and only came up to 454, in view of several discrepancies, which are set out below verbatim and as it appears in the defence of the appellants to the respondent's petition before the Constitutional Court:

- i. No National Identity Numbers were provided for some supporters in order to vouch their accuracy of which was a total number of 78.
 - ii. Some supporters names had not been signed of which there were 6 on the list having such discrepancy.
 - iii. Names of some supporters who were unregistered voters of which there was 69 on the list having such discrepancy.
 - iv. Some supporters on the list of supporters name did no match with the National Identification number which had been provided of which there was 18 supporters on the list was having such discrepancy.
 - v. Supporters name appears twice on the list of supporters which was submitted attached to the nomination paper of which the total number was 2 supporters on the list which were found to have such discrepancies.
 - vi. Some of the supporters' names provided where under 18 years of age of which there was only 1 of such supporters on the list.
 - vii. Some supporters were found to be unregistered voters and did not sign the supporters form of which there were 2 supporters from the list.
- (Verbatim from the appellants' skeleton heads of argument, without making any corrections).

The appellants in their answer to the petition had also taken up the position that the nomination day did not end at midnight since -

The appointed date and time of the nomination is fixed by section 14 of the Elections Act and according to the notice published in the Official gazette the time fixed for the purpose of the nomination of the Candidate was from 0900 hours to 1400 hours on the 27 of April 2011.

The appellants in their answer to the petition had not specifically dealt with the issues referred to in sub-paragraphs (b), (c) and (e) above. The Constitutional Court made the following orders in [24] to [28] of its judgment in respect of the relief prayed for by the respondent, as referred to at paragraph 8 above, before the Constitutional Court -

a) In this case the CEO failed to satisfy himself as he ought to have done on presentation of the papers by the petitioner. He acknowledged receipt of the papers and then purported to make a decision, at 17.15 hours, long after the time set for the nomination of candidates had passed. This decision was purportedly made under the second stage pursuant to section 15(6) of the Act, when in fact there was no such determination to make as there had been no objection filed by any of the other candidates. In so doing the respondent erred in law and consequently violated the petitioner's right to offer himself as a candidate for the office of the President. We are in agreement to this extent with the submission of Mrs Amesbury, counsel for the petitioner. We would grant the first declaratory order sought in this regard.

b) The petitioner seeks a second declaratory order that the failure to give him until midnight of the nomination date contravened his constitutional right under article 24(1)(c) of the constitution. We do not agree. The Electoral Commissioner was at liberty, in accordance with the law, to set the time within which the candidates would present their papers and as midnight was not the time set for the close of nomination this prayer cannot stand. No authority was advanced by Mrs. Amesbury to suggest that midnight on the day of the nomination must be closing time for nominations. Under section 15(2) of the Act candidates must present their nomination papers to the Chief Electoral Officer at the time and place appointed in the notice published under section 14 of the Act. We agree with Mr Govinden that the claim that the petitioner had until midnight on nomination day to submit his papers is without merit.

c) The petitioner seeks a third order. This is an executable order. He requires the respondents to return to him the list of endorsements. We see no reason why the petitioner may not have his endorsements as demanded. We direct the respondent to return the endorsements to the petitioner. Given this prayer we need not comment on the petitioner's submission that he had obtained the endorsements of 500 persons as required by the notice published in the Gazette.

d) The fourth prayer was that the presidential election be postponed until the determination of this case. We see no reason why we should make such an order given that we have heard and concluded this case within 7 days of filing and in light of the other prayers of the petitioner in this petition including the prayer for return of the petitioner's endorsements.

I note that the Constitutional Court has not granted or specifically commented on the relief prayed for at sub-paragraph (e) above. Instead the final paragraph of the judgment states:

In this particular case the petitioner has not, on the petition, sought any relief that would have the effect of erasing the transgression of his constitutional rights and freedoms. He basically sought only declaratory orders. He did not seek the quashing of the decisions made. Neither did he seek orders to compel the respondents to do certain acts beyond what he sought on the petition. Given the importance of the right in question officials administering elections ought to know and understand that their failure to properly observe the law may lead to grave consequences that may be very expensive to the tax payer.

The Constitutional Court granted a declaration that the petitioner's disqualification was illegal and was a contravention of the petitioner's right to participate in a public office under article 24(1)(c) of the Constitution on the following basis as set out in paragraphs [21]-[23] of the judgment. The stages of the procedure envisaged by the Constitution and the pertinent statute can be summarized as follows:

- a) The Electoral Commissioner fixes the date(s) when the elections are to be held.
- b) The Electoral commissioner then fixes the date(s) on or before which the prospective candidates are to present their nomination papers and other relevant documents. This is called the 'Nomination Day' and should not be earlier than 21 days before the election.
- c) On nomination day for a Presidential Election the Chief Electoral Officer (hereinafter referred to as CEO) receives the relevant nomination papers of the prospective candidates.
- d) *If a prospective candidate has not satisfied the requirements the CEO shall inform him where he has failed and return his papers to him.*
- e) If CEO is satisfied that a candidate has submitted all the required documentations, then the CEO will acknowledge receipt of these documents and then display them for the other prospective candidates to have access to and verify them. Any candidate may raise objections against other candidates.
- f) If any prospective candidate, after verifying the documentations of other prospective candidates raised any objection, the CEO has to determine the objection as soon as possible. His determination is final and can only be raised in an election petition after the election. (emphasis by me)

There is a two-stage process at nomination. Firstly on presentation of the nomination papers the CEO must satisfy himself that the papers are in compliance with the law under section 15(3) of the Elections Act.

If at this stage he is not satisfied he may not accept the papers and must hand them back to the candidate who may choose to go and rectify whatever is wrong and present his papers again if he is within time. (emphasis by me)

The second stage is that envisioned under section 15(6) of the Act that makes it possible for other candidates to object to the nomination of other candidates after which the CEO would make a determination which is final for purposes of the nomination. Such a determination could take place outside of the time he had provided for the presentation of the nomination paper. (emphasis by me)

The appellants in their first and third grounds of appeal have challenged the existence of a two-stage process under the Elections Act as set out in paragraphs 21-24 of the judgment and referred to above and the mandatory obligation upon the Chief Electoral Officer to inform the prospective candidate before the time set for nomination of the candidate had passed that he has not satisfied the requirements of the Elections Act and where he has failed. In their second ground of appeal the appellants state that -

The Constitutional Court erred in holding that if the Chief Electoral Officer is satisfied that a candidate has submitted all the required documentations, then the Chief Electoral Officer will acknowledge receipt of these documentations and then display them for other prospective candidates to have access and to verify the documentations, in that the Elections Act only provides for the Chief Electoral Officer to permit them to have sight of the documentation upon request.

The respondent has in his cross-appeal raised the following grounds: that the Constitutional Court erred in failing to address the fifth prayer in the petition, namely to grant "such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner"; that it erred by not granting an order that the presidential election is postponed until the final determination of the case; and that the court erred in dismissing the petitioner's objection to the Attorney-General appearing for the first and second respondents. For an understanding of the various issues raised by both parties to this case and necessarily arising from its pleadings it is necessary to refer to the provisions in the Constitution and the Elections Act relevant to this case.

Article 24(1) of the Constitution states: "Subject to this Constitution, every citizen of Seychelles who has attained the age of eighteen years has a right: (c) to be elected to public office"; and article 24(2) states: "The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society."

Paragraph 2(1) of Schedule 3 of the Constitution states:

A person shall not be a candidate in an election for President unless the person submits to the Electoral Commissioner on or before the day appointed as nomination day in relation to the election..... the form provided for this purpose by the Electoral Commissioner completed and signed by that person and endorsed to the satisfaction of the Electoral Commissioner by such number, as may be prescribed under an Act, of other persons who are entitled to vote at the election under and in accordance with this Constitution (emphasis by me).

Section 14(1) of the Elections Act states:

The Electoral Commissioner shall, at least 21 days before the earliest date fixed under section 13 for a Presidential Election by notice in the Gazette, appoint the date, place and time for the nomination of candidates for the Presidential Election....and shall in a notice, specify- (b) the number of persons required to endorse the nomination paper of each such candidate.

Section 14 (3) states: The date appointed under subsection (1) shall hereafter be referred to as the "Nomination day".

The provisions relevant to this case in section 15 are:

- (1) Every candidate for a Presidential Election shall be nominated by means of a nomination paper provided for the purposes by the Electoral Commissioner.
- (1) The nomination paper shall be submitted by each candidate on the nomination day at the time and place appointed in the notice published under section 14-
 - (a) in the case of the Presidential Election to the Chief Electoral officer;
- (2) The nomination paper submitted by each candidate for a Presidential Election shall be signed by the candidate and-
 - (a) in the case of the Presidential Election shall be endorsed to the satisfaction of the Chief Electoral officer by such number of persons entitled to vote at that election as is specified in the notice published under section 14(1).
- (5) Any nomination paper submitted after the expiration of the time specified in the notice published under section 14(1) shall be invalid and shall be rejected.
- (6) After the expiration of the time specified in the notice published under section 14(1) for submission of nominations –
 - (a) in the case of the Presidential election, the Chief Electoral Officer; shall as soon as is practicable thereafter, determine whether to accept or reject the nomination paper submitted within the time specified in the notice.
- (7) For the purposes of subsection (6), the Chief Electoral Officer....shall permit each candidate to examine the nomination papers of other candidates.
- (8) A candidate may object to the acceptance of a nomination paper of any other candidate on the grounds that the other candidate is not qualified to stand for the election for which the candidate seeks to stand or that the nomination paper does not comply with subsections (1) to (4).
- (9) The Chief Electoral Officer shall consider the objections and determine whether to accept or reject the nomination paper.
- (10) The determination made under this section by the Chief Electoral officer shall be final.
- (11) The determination made under subsection (9) shall not prevent the validity of the nomination of a candidate from being questioned in an election petition under section

Although this point was not canvassed before us there is a need to bring the Elections Act in line with the Constitution in regard to the person who needs to be satisfied in respect of the endorsement of the candidate by the electors. For according to paragraph 2(1)(a) of Schedule 3 of the Constitution as referred to above, it should be to the satisfaction of the 'Electoral Commissioner' whereas according to section 15(3) of the Elections Act and as referred to above, it should be to the satisfaction of the 'Chief Electoral Officer'. In the interpretation section of the Elections Act the "Electoral Commissioner" has been defined to mean the Electoral Commissioner appointed under article 115 of the Constitution. There is nothing in the Constitution to the effect that the functions or powers of the Electoral Commissioner may be exercised by the Chief Electoral Officer or by subordinate officers acting in accordance with his instructions, save the provision in the Elections Act that the Chief Electoral Officer shall subject to the directions of the Electoral Commissioner, now Electoral Commission, be responsible for the supervision of elections. There was no evidence to the effect that the Chief Electoral Officer had been directed by the Electoral Commissioner to accept nomination papers. There has also not been a transfer or delegation of the powers and functions of the Electoral Commissioner to the Chief Electoral Officer under the Transfer and Delegation of Statutory Functions Act. Whether such a transfer could be made in respect of the powers and functions vested in the Electoral Commissioner by the Constitution, under the provisions of the said Act, is another issue. Even the 18 July 2011 amendments to the Constitution and Elections Act which made way for an Electoral Commission has not made provision to bring in line section 15(3) with paragraph 2(1) (a) of Schedule 3 of the Constitution. I call upon the Attorney-General to look into this immediately.

In view of the respondent's, (then petitioner) own averment at paragraph 3 of his petition filed before the Constitutional Court that the second appellant is subject to the directions of the first appellant and is responsible for the supervision of elections, and its admission by the present appellants who were the respondents to such petition, I find that the respondent had not taken issue that the paper dated 27 April 2011 and timed 17.15 hours issued by the second appellant to this appeal, rejecting the nomination paper of the respondent as not valid, for want of authority on the part of the second appellant. This in my view was an acceptance by the respondent that the second appellant had de facto authority in determining the validity of a nomination paper of a candidate, subject however as argued by him to an objection being raised by another candidate.

The Constitutional Court in its judgment has drawn the attention of the Legislature to an "irregularity in the electoral law." According to the Constitutional Court this is based on the inconsistency between paragraphs 2(1) of Schedule 3 of the Constitution which states: "endorsed to the satisfaction of the Electoral Commissioner by *such number, as may be prescribed under an Act*, of other persons who are entitled to vote at the election...." (emphasis by me); and the Elections Act which does not prescribe the number of electors who need to endorse the nomination paper of the candidate but leaves it in the hands of the Electoral Commissioner and now the 'Electoral Commission' to determine and specify by a notice in the Gazette, under section 14(l)(b) of the Act. This according to the Constitutional Court militates against the principle of *delegatus non potest delegare*. They have pointed out that the same irregularity in the electoral law is to be seen as

regards the security to be furnished by a candidate which is required by the Constitution to be prescribed in the Elections Act itself and not left to be determined and specified by way of a notice in the *Gazette* by the Electoral Commissioner and now the 'Electoral Commission', under section 14(1)(a) of the Act. What I observe is that that the Constitution requires the specification, of the number of electors to endorse a candidate and the security to be furnished, "under an Act ". The words "under an Act" simply means 'pursuant to' or 'by the authority' or 'in accordance with' an Act. This is in my view is different from the words 'by an Act' or 'in an Act' and thus does not therefore offend the principle of 'delegatus non potest delegare'. This is the, fair and liberal meaning that needs to be attributed to the words "under an Act" in view of the fact that there can be a change in the circumstances from election to election and to avoid the necessity to go before the National Assembly each time a change in the numbers of electors to endorse the candidate or the security to be furnished is considered reasonably necessary. However I note that the Electoral Commission should act judiciously when fixing the number of persons required to endorse the nomination paper or as regards the amount of security to be furnished by a candidate, so as not to have the effect of violating the right of a citizen under article 24(1)(c) of the Constitution, referred to above.

I now turn to the grounds of appeal raised by the appellants. The appellants as stated earlier, in their 1st and 3rd grounds of appeal have challenged the existence of a two-stage process under the Elections Act as set out in paragraphs 21-23 of the judgment and referred to above and the mandatory obligation upon the Chief Electoral Officer to inform the prospective candidate, before the time set for nomination of the candidate had passed that he has not satisfied the requirements of the Elections Act and where he has failed. I have carefully read paragraphs 21-23 of the judgment and the provisions of the Elections Act referred to above but fail to see a two-stage process at nomination nor anything in the Elections Act which states: "If a prospective candidate has not satisfied the requirements the CEO *shall* inform him where he has failed and return his papers to him." (emphasis by me), thus placing a mandatory obligation on the CEO to return the nomination papers of a candidate where he finds them to be defective and to inform him of the defect. Such an interpretation would belittle the constitutional provision that: '*A person 'shall not' be a candidate in an election for President 'unless':*

(a) the person submits to the Electoral Commissioner (now Electoral Commission) on or before the day appointed as nomination day in relation to the election the name of the person the candidate designates as the candidate's Vice-President together with a written consent accepting to be so designated signed by the other person and attested to the *satisfaction of the Electoral Commissioner(now Electoral Commission)* by a notary in Seychelles and the form provided for this purpose by the Electoral Commissioner (now Electoral Commission) completed and signed by that person and endorsed to the satisfaction of the Electoral Commissioner(now Electoral Commission) by such number, as may be prescribed under an Act, of other persons who are entitled to vote at the election under and in accordance with this Constitution;

(b) the person deposits with the Electoral Commissioner (now Electoral Commission), or gives security to the satisfaction of the Electoral Commissioner (now Electoral Commission), for the payment of such sum as

may be prescribed under an Act as the amount to be deposited by a person who is a candidate to the election for the office of the President. emphasis by me).

In making such a statement the Constitutional Court appears to have lost sight of the fact that a prospective candidate at a Presidential Election is one aspiring to be the Head of State, Head of Government and Commander-in Chief of the Defence Forces of Seychelles and on whom the Constitution has placed an obligation under article 40(a) also as a citizen of Seychelles to uphold the Constitution and thus to ensure compliance with Schedule 3 which deals with the election of President. I am at a difficulty to understand how this obligation placed on the candidate to satisfy the Electoral Commissioner (now Electoral Commission) has been turned into an obligation on the part of the Chief Electoral Officer towards the candidate by the Constitutional Court. No doubt the Constitution has enshrined and entrenched in article 24(1) of the Constitution the right of every citizen of Seychelles who has attained the age of 18 years to be elected to public office and thus be a candidate at a Presidential election but that right has been subjected to the constitutional obligation placed on him in paragraph 2(1)(a) of Schedule 3 of the Constitution to satisfy the Electoral Commissioner (now Electoral Commission) that his candidature has been validly endorsed by the required number of electors as prescribed under the Elections Act and which Act, undoubtedly is a law to regulate the right to be elected to public office and necessary in a democratic society.

The respondent did not challenge the second appellant's determination that the nomination papers submitted were defective. In fact it had been acknowledged in the petition filed before the Constitutional Court that there was an irregularity that had to be cured as stated above. The Constitutional Court, too, in stating: "In this case the CEO failed to satisfy himself as *he ought to have done* on presentation of the papers by the petitioner" appears to hold, that the papers are defective. The Constitutional Court has not made a pronouncement that the nomination papers presented by the respondent, despite the discrepancies highlighted by the appellants above were valid and ought to have been accepted by the second appellant. The respondent has not in his grounds of appeal raised the issue of the validity of the nomination papers as presented. Therefore to sneak it into the respondent's skeletal heads of arguments by saying that -

The Elections Act does not stipulate that persons endorsing the Appellant's candidature must have ID cards or that they must have their ID cards with at the time they are endorsing the candidate.

in my view was totally inappropriate. However I wish to state that the Constitution requires that the endorsements should be to the "satisfaction of the Electoral Commissioner ". For the Electoral Commissioner, now Electoral Commission, to be satisfied there has to be some means of identifying the persons who endorse a candidate's candidature. From a mere name, it is not possible for the Electoral Commissioner, now Electoral Commission to know whether he/she is a real or living person, whether he/she is a citizen of Seychelles, whether he/she has attained the age of 18 years, is entitled to be registered as a voter, and is registered as a voter in an electoral area. In this case there were not any National ID numbers in respect of

78 of the names of persons set out in the nomination form as those who had allegedly endorsed the respondent's candidature.

The Constitutional Court stated that if on the presentation of the nomination papers, which they decided to call the first stage, the CEO is not satisfied that the papers are in compliance with section 15(3) of the Elections Act -

he may not accept the papers and must hand them back to the candidate *who may chose* to go and rectify whatever is wrong and present his papers again if he is within time. (emphasis by me).

According to the Constitutional Court at this first stage there is no determination to be made by the CEO. I am unable to agree with this finding since non-acceptance of the papers and handing them back to the candidate for rectification as the Constitutional Court states would certainly in my view amount to a determination. Further the futility of this approach is exposed if the candidate chooses not to rectify or comes back without rectifying or with further glaring defects. To state that the CEO or the Electoral Commission has to accept the nomination papers if there is no objection by another candidate and despite glaring defects in the papers would turn the CEO or the Electoral Commission into a dummy and make a mockery of the constitutional requirement that the Electoral Commission shall satisfy itself that the candidature of the candidate has been correctly endorsed.

It is clear from the wording of section 15(6) of the Elections Act, referred to above, that the determination of the CEO whether to accept or reject the nomination paper is made after the expiration of the time specified in the notice and according to the provisions of section 15(7), referred to above, the CEO shall permit each candidate to examine the nomination papers of other candidates for the purposes of making the determination. It is at the discretion of a candidate to object to the acceptance of a nomination paper of any other candidate on the ground that the nomination paper does not comply with subsections (1) to (4) of the Elections Act. This is clear from the word "may" in section 15(8), referred to at paragraph 23(8) above. This further confirms the position that the CEO or the Electoral Commission's determination to accept or reject a nomination paper is not always dependant on an objection raised by another candidate. At an election where there are several candidates there is a possibility of collusion among candidates not to object to the candidature of another with the purpose of splitting the votes of a rival candidate.

I therefore have no hesitation in upholding the appellants' 1st, 2nd and 3rd grounds of appeal as set out in paragraph 18 above and hold there is no two-stage process at nomination in regard to acceptance or rejection of nomination papers and that the CEO's or Electoral Commission's determination in this regard is not dependant on an objection being raised by a candidate, to the candidature of another at nomination day. I also hold that there is no constitutional or statutory obligation on the CEO or the Electoral Commission to tutor prospective candidates as how they should present their nomination papers. I am however of the view that there should have been some provision in the Elections Act giving an opportunity to a candidate on the presentation of his nomination papers, to correct a minor error in his nomination papers, for example a mistake as to the numbers in a National Identity Card/s of an endorsee/s, either of his own motion or on being pointed out by the Electoral

Commissioner, now the Electoral Commission. This is a matter the Attorney-General could bear in mind when considering amendments to the Elections Act.

I however dismiss the appellants' contention as set out in ground 2 that the Elections Act only provides for the CEO to permit the other prospective candidates to have sight of the nomination papers filed upon request. Elaborating on this the appellants have in their skeleton heads of argument submitted:

It submitted that the key word is "permit" or "to permit". In the Appellant submission "permit" in the context used here means "to allow access". Accordingly, the access to the nomination papers of a candidate by another candidate must be upon demand and cannot be something which is imposed on a candidate without expression of the will and intention of the said candidate to want to do so and if so requested the relevant officer will not be able to refuse such access given the imperative sued of the word "shall in s 15(7). (verbatim from the Appellant's Skeleton Heads of Argument, without making any corrections).

Section 15(7) of the Elections Act as referred to above certainly does not convey that meaning and the words "upon request" or "upon demand" is an addition by the appellants, and extraneous to the Act. The words "shall permit" means, shall make them available and this is done for the purposes of helping the CEO or the Electoral Commission in arriving at a determination whether to accept or reject the nomination paper.

I now turn to the respondent's grounds of appeal as set out above. The ground of appeal relating to the failure of the Constitutional Court to address the 5th prayer in the petition, namely to grant "such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner", has been based on the pronouncement of the Constitutional Court made at paragraph 34 of the judgment and referred to above. The ground of appeal relating to the refusal to grant an order that the Presidential Election is postponed until the final determination of the case, has been based on the ruling of the Constitutional Court's refusal to grant him such relief as set out above.

An answer to the grounds raised above necessitates a reading of the relevant provisions of article 46 of the Constitution, under which the respondent's petition was filed before the Constitutional Court, and which sets out the remedies for infringement of the Charter thus -

(1) A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article apply to the Constitutional Court for redress.

(2) An application under clause (1) may, where the Constitutional Court is satisfied that the person whose right or freedom has been or is likely to be contravened is unable to do so, be made by another person acting on behalf of that person, with or without that person's authority.

(5) Upon hearing of 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 the Charter;
- (b) declare any law or the provision of any law which contravenes the Charter void;
- (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 issues relating to the application;
- (d) award any damages for the purpose of compensating the person concerned for any damages suffered;
- (e) make such additional order under this Constitution or as may be prescribed by law.

.....

(10) The Chief Justice may make rules for the purpose of this article with respect to the practice and procedure of the Constitutional Court in relation to the jurisdiction and power conferred upon it by or under this article, including rules with respect to the time within which an application or a reference may be made or brought.

The Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 made under article 46(10) referred to above specifically provide how an application to the Constitutional Court in respect of matters relating to the contravention of the Constitution shall be made and what particulars should be contained in a constitutional petition. According to the said rules such application shall be made by petition accompanied by an affidavit of the facts in support thereof and all persons against whom any relief is sought in the petition shall be made a respondent thereto. They also provide that except where the petition is presented by the Attorney-General, the Attorney-General shall be made a respondent thereto. Rule 5 of the above said rules sets out the particulars that shall be contained in a petition, namely, a concise statement of the material facts; a reference to the provision of the Constitution that has been allegedly contravened; the name of the person alleged to have contravened that provision and the date and place of the alleged contravention, (what has been referred to above are the provisions of the rule 5 relevant to this case). In my view rule 2(2), which states:

Where any matter is not provided for in these Rules, the Seychelles Code of Civil Procedure shall apply to the practice and procedure of the Constitutional Court as they apply to civil proceedings before the Supreme Court (emphasis by me)

It will have no application so far as the manner of making an application and the particulars to be contained in a petition filed before the Constitutional Court, in view of the wording of rule 2(2).

I am therefore of the view that that the Constitutional Court was in error in arriving at the decision referred to above in view of their finding at paragraph 24 of the judgment, referred to above. It was not necessary for the respondent to have "sought any relief that would have the effect of erasing the transgression of his constitutional rights and freedoms" or "the quashing of the decision made" by the CEO in his

petition. These were forms of relief the Constitutional Court was obliged to grant in view of the clear provisions of article 46(5) of the Constitution referred to above. All that a person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission need do, is, make an application to the Constitutional Court in accordance with the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 referred to at paragraph 35 above. The relief sought need not be prayed for in a constitutional petition, as in a plaint filed in a normal civil suit before the Supreme Court. Section 71 of the Seychelles Code of Civil Procedure in setting out the particulars to be contained in a plaint, specifically provides that the plaint must contain "a demand of the relief which the plaintiff claims." I am of the view that the Constitutional Court fell into error as a result of giving emphasis to section 71 and ignoring the wording of rule 2(2) of the Constitutional Court Rules 1994; which states: "Where any matter is not provided for in these Rules the Seychelles Code of Civil Procedure shall apply" as referred to above. I am surprised to find that the Constitutional Court having come to a finding that the respondent's rights under article 24(l)(c) of the Constitution had been contravened decided to leave the fate of the Respondent in the hands of the "officials administering elections" rather than making the orders sought. However in view of the finding by this Court that there was no such violation, I do not hesitate to state that the respondent's rights to relief under the Constitution have not been affected. I therefore uphold the 2nd ground of appeal subject to this qualification.

In regard to the respondent's ground of appeal relating to the failure of the Constitutional Court to address the 5th prayer in the petition, namely to grant "such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner" the appellants in their skeleton heads of argument had stated:

In this regard the principle of such eus dem generis applies. As the first three prayers were asking for declaratory remedies the Constitutional Court in interpreting the 4th prayer could have reasonably determine that all the other prayer falling the 4th paragraph were of a declaratory nature only. It is humbly submitted that the situation would have differed fundamentally if the 4th prayer was specific nature. If the 4th prayer prayed for a specific non declaratory performance then the Constitutional Court would have erred to rule otherwise. However in general prayer, without any for a specific non performance or injunction could only have meant that the Petitioner was prayed for any other declaratory Orders the Constitutional Court shall deem fit. (verbatim from the appellants' skeleton heads of argument, without the Court making any corrections).

On a perusal of the petition filed before the Constitutional Court as set out above, I find that although the first two reliefs prayed for by the respondent were for declarations, the 3rd and 4th prayers were for specific orders from Court, namely "Ordering that the respondents return the list of endorsements to the petitioner" and "Ordering that the presidential election is postponed until the final determination of this case." It is to be noted that the 5th prayer was not for any declaration but for "Granting such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner". On being questioned by the Court the Attorney-General submitted before us that had the respondent not sought any relief

from the Constitutional Court he could have been granted relief under article 46(5) (c) of the Constitution and it is because the first three (sic) prayers sought only declarations the 5th prayer should also be treated as a prayer for a declaration. I am unable to agree with this submission.

The basis of the Constitutional Court's refusal to grant an order that the presidential election is postponed until the final determination of the case, is to be found at paragraph 28 of the judgment which states:

The fourth prayer was that the presidential election be postponed until the determination of this case. We see no reason why we should make such an order given that we have heard and concluded this case within 7 days of filing and in light of the other prayers of the petitioner in this petition including the prayer for return of the petitioner's endorsements.

The above decision is flawed, in view of its finding and declaration that the petitioner's disqualification was illegal and thus a contravention of his right to participate in a public office under article 24(1)(c) of the Constitution and its direction to the appellants of this case to return the endorsements to the respondent of this case, as set out at paragraph 27 of the judgment and referred to above. Hearing and concluding a case within 7 days of filing is of no consequence to an applicant under article 46(1) of the Constitution, if he does not get the relief which he expects to be granted by the Constitutional Court on making an application. The Constitutional Court upon hearing an application under article 46(1) of the Constitution is obliged to 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 issues relating to the application in view of the provisions in article 46(5)(c) of the Constitution. However in view of the finding by this Court that there was no violation of the respondent's rights under article 24(1)(c) of the Constitution, I do not hesitate to state that the respondent's rights to relief under the Constitution have not been affected. I therefore uphold the respondent's 3rd ground of appeal subject to this qualification.

The 1st ground of appeal of the respondent was to the effect that "The court erred in dismissing the objection regards to the Attorney-General appearing for the 1st and 2nd Respondents, by averring that "no authority whatsoever was argued in support of the objection" when it was expressly stated that the objection was grounded on constitutional principles. The question was whether the Attorney-General can be partisan in a constitutional case and not whether his appearance for the respondents "jeopardizes their independence".

The decision of the Constitutional Court on this matter is at paragraph 20 of the judgment and to the effect:

We have considered the objection raised by Mrs Amesbury and find no merit in it. She has advanced no authority whatsoever that supports the proposition she puts forward. In our view the independence of the Electoral Commissioner is not put in jeopardy by the Attorney-General acting as his attorney. This is not the first case in which the Attorney General is acting for

the Electoral Commissioner in this court and before the Court of Appeal. The objection is dismissed.

It is clear that there is no specific provision either in the Constitution or any other written law prohibiting the Attorney-General from appearing for any one of them. The objection of the respondent was to the effect that the Attorney-General's role in a case of this nature is one of *amicus curiae* and neutral and should not be appearing for any of the parties against whom this action had been brought. This is because this action was not brought against the Government but 2 independent persons and the Attorney-General may only appear when the action is against the Government.

The Attorney-General's response to this objection before the Constitutional Court was that the Attorney-General in view of the provisions of the Constitution is an independent person, not a political appointee, is not a Minister as in some Commonwealth countries and is not part of the Executive. According to Attorney-General the powers of the Attorney-General are derived from the Constitution and the manner of his appointment and the terms and conditions of the appointment guarantees his independence. According to the Attorney-General he is "distinctively independent from the executive" and can represent the Electoral Commissioner without fear of any interference whatsoever from any other arms of Government including the executive. As the Constitutional Court itself said, it cannot be subject to the control or direction of this other arm of the Government. Thus according to the Attorney-General, the Attorney-General can represent another independent person, namely the Electoral Commissioner and his staff. The Attorney-General informed the Court at the hearing that he will adopt this submission and not rely on his Skeleton Heads of Arguments filed before this Court on behalf of the appellants, in regard to this matter.

I have no hesitation in agreeing with the submission made by the Attorney-General before the Constitutional Court referred to above. In order to ensure the independence and impartiality of the Attorney-General, there are several constitutional safeguards, like in the manner of his appointment, terms and conditions of appointment as argued by the Attorney-General before the Constitutional Court, and in the manner of his removal. The Constitution expects him to be non-partisan. We cannot therefore proceed on a presumption that he is partisan without a valid basis. It must be emphasized that the Constitution has in articles 76(4) and (10) vested in the Attorney-General the sole power in the institution and discontinuation of criminal prosecutions and of advising the Government without in any way being subject to the direction or control of any other person or authority. He has been given the power to make an application to the Constitutional Court for the purpose of determining whether a person has been validly elected to the office of president or validly elected as a member of the National Assembly under articles 51(4) and 82(2) of the Constitution. That being the case when the Attorney-General decides to undertake the defence of another independent authority, a court does not have to be wary in accepting the submissions of the Attorney-General on the basis he is partisan. This does not in any way mean that the Court is obliged to accept his submissions either. The fact that the Attorney-General is made a respondent in accordance with rule 3(3) of the Constitutional Court Rules does not in our view prevent the Attorney-General from appearing for another independent person who wishes the Attorney-General to

represent him. We would expect the Attorney-General to refrain from appearing for such a person where the Attorney-General believes his stance before the Constitutional Court would be or is likely to be in conflict with the views of the one who would want the Attorney-General to represent him. We have seen cases where the Attorney-General refrains from appearing for Government Departments and public officials when he finds that their actions cannot be defended. The Constitution has vested in the Attorney-General independence and a Court ought to respect his independence and expect of him, not to be partisan, unless there is good cause not to do so and depending on the issues involved in the case. We also cannot deny the Electoral Commissioner or his staff their basic right to a fair hearing from denying them of their right to be represented by a person of their choice. I therefore see no merit in this ground of appeal.

It is also necessary to deal with the issue of what 'nomination day' means, the appropriateness of fixing the time for nomination on the 27 April 2011 from 0900 hours to 1400 hours and the validity of section 14(1) in the Elections Act in giving the discretion to the Electoral Commissioner, now Electoral Commission to appoint a time on nomination day for the nomination of candidates vis-a-vis the provisions of paragraph 2(l)(a) of Schedule 3 of the Constitution. The relevant provision of paragraph 2(l)(a) of Schedule 3 states:

A person shall not be a candidate in an election for President unless - (a) *the person submits to the Electoral Commissioner (now Electoral Commission) on or before the day appointed as 'nomination day' in relation to the election.* (emphasis by me)

The Constitutional Court had this to say on this matter at paragraph 25 of its judgment:

The petitioner seeks a second declaratory order that the failure to give him until midnight of the nomination day contravened his constitutional right under article 24(1)(c) of the Constitution. We do not agree. *The Electoral Commissioner was at liberty, in accordance with the law, to set the time within which the candidate would present their papers* and as midnight was not the time set for the close of nominations this prayer cannot stand. No authority was advanced by Mrs Amesbury to suggest that midnight on the day of the nomination must be the closing time for nominations. (emphasis by me).

The Electoral Commissioner was certainly at liberty, in accordance with the Elections Act to set the time within which the candidates would present their papers but the issue is, is that provision of the Elections Act in accordance with paragraph 2(1)(a) of Schedule 3. No doubt article 24 states that the right to be elected to public office may be regulated by a law(Elections Act) but such regulation is subject to paragraph 2(1)(a) of Schedule 3 of the Constitution and shall be necessary in a democratic society.

A "day" necessarily connotes a period of time from sunrise to sunset and a 24 hour period. The Electoral Commissioner cannot restrict a 'day', to a 5 hour period as he did when fixing the time period for nomination. I am however conscious of the practical difficulties involved in leaving the nomination period open from 12 am to

11.59 pm on nomination day, but to leave the decision of fixing the time period for handing over nomination papers at the discretion of the Electoral Commission would not be in conformity with paragraph 2(1)(a) of Schedule 3 of the Constitution. This is a matter that needs to be looked into by the Legislature. In view of our holding that there is no constitutional or statutory obligation on the CEO or the Electoral Commission to return back defective nomination papers for correction to prospective candidates for correction or to tutor them as to how they should present their nomination papers the fixing of the time period for nomination on 27 April 2011 from 0900 hours to 1400 hours is of no relevance to this case.

There is a need to look into the issue of bringing the Elections Act in line with the Constitution in regard to the person who needs to be satisfied in respect of the various aspects in the nomination process and appointing a time on nomination day for the nomination of candidates. In view of the dissolution of the National Assembly and the pending general election I wish to state that that as a transitional measure the Electoral Commission should act according to what is stated in the Constitution in relation to these matters.

The judgment on the grounds of appeal raised by the two parties is summarised in the following manner:

- a) I uphold grounds 1, 2 and 3 in the appellant's notice of appeal subject to the comment made in respect of ground 2 at paragraph 33 above and allow the appeal on all 3 grounds and quash the declaration made by the Constitutional Court that the disqualification of the respondent was illegal and thus a contravention of his right to be elected to public office under article 24(1)(c) of the Constitution.
- b) I uphold grounds 2 and 3 of the respondent's grounds of appeal subject to the qualification that there was no violation of the respondent's rights under article 24(1)(c) of the Constitution.
- c) I dismiss ground 1 of the respondent's grounds of appeal and state that there was no constitutional or legal bar to the Attorney-General appearing for the 1st and 2nd respondents before the Constitutional Court, the first and second appellants to this case.
- d) I make no order as to costs as both parties to the appeal have somewhat succeeded in their grounds of appeal.