

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) ,S. Domah (J.A) ,J. Msoffe (J.A)]

Civil Appeal SCA 23 & 24/2016

(Appeal from Supreme Court Decision MC 87 & 86/2016)

Linyon Sanzman

Lafors Sosyal Demokratik

Appellants

Versus

Linyon Demokratik Seselwa

The Electoral Commission

Respondents

Heard: 30 November 2016

Counsel: Mr. S. Rajasundaram for Appellant

Mr. A. Derjacques for Respondent No. 1

Mrs. S. Aglae for Respondent No. 2

Delivered: 09 December 2016

JUDGMENT

S. Domah (J.A)

- (1) This is a sad case. No judge sits in judgment of another judge, with a happy heart. But human law like natural law applies to the prince and the pauper alike. And as judges, we are bound by our oaths, to give judgment, according to law, without fear or favour, affection or ill will. We are blind-folded to status.

- (2) This case is not a reflection of how our Courts are run. It is an isolated case and provides a model of how and why courts and judges should exercise the required degree of judicial scepticism when litigants in an election campaign rush them into situations where angels fear to tread.

- (3) It is a case where one learned Judge lent his office and his name to hear a case with relative caution and the other with caution cast to the winds. Renaud J decided that the election matter should be thrashed out before the Electoral Commission under the law under the direction of the Court. Karunakaran J saw no difficulty in assuming jurisdiction, hearing the two applications which generated 7 Miscellaneous Applications and Counter-Applications all of which were disposed of – in the very words of the learned Judge – in record time of 9 days. In the whole process, a litigation-minded court user was able to use the court system to prevent two parties from exercising their rights under the Constitution. This would not have happened without the indulgence of court and counsel in the case. Those denied that democratic right is the Appellant in the Appeal in SCA 23 of 2016 arising out of MC 86 of 2016 and Appellant in the Appeal in SCA 24 of 2016 arising out of MC 87 of 2016. The Respondents are common to both cases: Respondent no. 1 is the litigant and Respondent no. 2 is the authority whose decision became the subject matter of the court cases.
- (4) The Grounds of Appeal with respect to MC 86 of 2016 and MC 87 of 2016 are identical. The relevant facts are the same except that the parties are not the same. They were heard together but judgement was given separately. We shall give one judgment and a copy will be filed in each case. The facts are inextricably linked. The grounds of appeal in MC 86 are the same as those in MC 87 of 2016.
- (5) The grounds of Appeal in both cases are:

GROUND OF APPEAL

Ground No. 1: The learned Judge erred in his finding that there is no locus standi for the Appellant to intervene in that his order was based on his interim ruling (in an ex-parte injunction) on the Judicial Review petition of the 1st Respondent against the 2nd Respondent dated 17th August 2016 in which Order this Appellant was not at all a party;

Ground No. 2: The learned Judge failed to appreciate that the Appellant was a registered political party at all material times in the records of the 2nd Respondent, thus it

was having legal entity. The order (4) in para 11 of his ruling dated 17th August 2016 is only to the effect of striking off, cancelling and accepting the **nomination and not the party itself.**

Ground No. 3: The learned Judge grossly omitted to appreciate that the Appellant was a necessary party (a political party) involved in the proceedings held between the 1st and 2nd Respondent and apprising fully well himself of the necessity (as his order includes the service of a copy on the Appellant) of the Appellant's presence in the case, and ordered that this Appellant is not a fit and proper person to be intervened by completely omitting the averments of the Appellant in his Affidavit dated 19th August 2016.

Ground No. 4: The learned Judge failed to consider the Appellant's submissions that in order to enable the Court effectually and completely to adjudicate and settle all questions involved in a case can only be with the necessary intervention of this Appellant.

Ground No. 5: The learned Judge caused a grave error in his interim order dated 17th August 2016 which affected the rights and interest of the Appellant and this is a clear violation against the principles of procedural and substantive laws of Seychelles.

Ground No. 6: The interim order/ruling of the learned Judge dated 17th August 2016 is grossly an error in that the interim order substantially disposes off the main issue, namely the Judicial Review between the 1st and 2nd Respondent which resulted in the Appellant from being disqualified from participating in the National Assembly Elections 2016 however the learned Judge rendered a Judgment that confirms the interim order.

Ground No. 7: The learned Judge failed to consider that his order denies the Constitutional Rights provided for in the Constitution of Republic of Seychelles in not allowing the Appellant to hear its case; prohibiting the Appellant political party from participating in the National Assembly Elections 2016.

Ground No. 8: The learned Judge ought to have allowed himself by a proper recusal from this case despite the Appellant's failure in not invoking certain rules on the recusal issue. In any event, this matter before the Supreme Court was involving Election issue resulting in ex-parte orders, sensitive political party issues which did not permit the Appellant to invoke those rules cited by the learned Judge.

- (6) The grounds of appeal may be better dealt by this Court taking an integral approach to the issues raised inasmuch as the concerns of the Court go well beyond the narrow confines of the Grounds of Appeal. A model of how and why unelected judges, as they say, *malgré eux*, should watch their borders and exercise the required degree of professional scepticism not to get embroiled in politico-electoral wrangles. The issues raised on the right of intervention, legal personality, ex parte orders and the right to be heard, recusal, the right to participate in an election will answer themselves at the appropriate places in the course of our judgment.

THE FACTS

- (7) After the 2015 Presidential Election, the country moved into the election of members for the National Assembly. On 14th July 2016, the Electoral Commission, the independent body empowered under the Constitution to conduct and supervise elections, announced the two critical dates by Proclamation No. 1570 of 2016. The National Assembly Elections was fixed for 8th, 9th, 10th of September 2016 and the Nomination Date for 17th of August 2016.
- (8) It needs no reminder that at such times, the people whose will is sought for the election of the next government moves into a hyper activity mode. But more than most, it is the political parties who are principally, directly and immediately concerned in the exercise. The first milestone is the Nomination Day. They have a lot on their plates: the choice of candidates, the striking of party coalitions, the search for the right name, the selection of the party symbol etc. All these need to crystallize for the D-day. It is in the nature of the multi-party system of elections that coalitions between groups with vote banks are not

made after the elections. They are made before the elections. All these choices do not take place without strategies and, one would be tempted to say, without some degree of stratagem, unfortunately. It is also axiomatic that in such a cut-throat race, the first party to gel into shape would be the one to catch the worm. Seychelles was previously a one-party system. In 1992, the multi-party system was introduced. Any opportunity to test the new system have been few and far between.

- (9)** On 10 March 2016, at 9.06 hours, Mr Martin Aglae, had constituted himself the leader of one party which had gelled into shape, reached the Electoral Office and applied for the registration of the political party under the name of Linyon Sanzman. The Electoral Commission is under the law the Constitutional Authority to conduct and supervise elections. As regards registration of parties, it is bound by the provisions of the Political Parties (Registration and Regulation) Act which it should apply.
- (10)** Now Linyon Sanzman had been used by one group in the previous election, the Presidential Election, some months ago. Why and how they chose that appellation is not an issue. Was there a split in that group or not is only speculative. But the fact remains that at the Registration Office, no such party was registered under this name, whether by ignorance of law or by omission, reason of split or lack of leadership, sheer negligence or inadvertence.
- (11)** Or the lack of prior registration of Linyon Sanzman may have been due to the lack of the criteria for the registration: need for at least 100 registered members, details of office bearers, need for constitution and rules, specific registered office, name and identity of leader and office bearers etc.
- (12)** At 13.36 p.m., on the same day another group showed up to register for the elections under the same name of Linyon Sanzman. Registration is one thing. As per law, the legal duty rests on an applicant party to fill a prescribed form for the purpose. The allocation of a name on such registration is quite another. That legal duty rests on the Electoral Commission as a collegial body. There is no Registrar of Elections as one would have for the registration and approval of names as under the Companies Act.

(13) The law reads:

“5. (1) A political party consisting of not less than 100 registered members may apply in the prescribed form to the Electoral Commission for registration under this Act.

(2) An application for registration shall be signed by the office bearers of the political party and shall be accompanied by -

- (a) two copies of the constitution, rules and political programme or manifesto of the party duly certified by the leader of the party,*
- (b) the particular of the registered office of the party;*
- (c) a list giving the name, address and national identity number of not less than 100 registered members of the party;*
- (d) a list giving the name, address and national identity number of the leader and other office bearers of the party;*
- (e) such further information or document as the Commission may require for the purpose of satisfying itself that the application complies with this Act or that the party is entitled to be registered under this Act.*

(14) On such an occurrence, a Notice is given in the Government Gazette for the world at large.

“(3) The Commission shall, as soon as practicable, give notice of the registration of a political party in the Gazette.”

(15) The Electoral Commission is not empowered to refuse registration of any party except under the law which is found section 7 of the Act.

“7. (1) The Commission may refuse to register a political party if he is satisfied that

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- (a) the application is not in conformity with this Act;*
- (b) the name of the party -*
 - (i) is identical to the name of a registered political party or a political party which has been cancelled under this Act or a*

political party whose application precedes the present application;

(ii) so nearly resembles the name of a registered political party or a political party which has been cancelled under this Act or a political party whose application precedes the present application as to be likely to deceive the members of the party or the public; or

(iii) is provocative or offends against public decency or contrary to any other written law as to be undesirable;

(c) any purpose or object of the party is unlawful.

(16) Mr Roger Mancienne showed up at the office of the Electoral Commission to apply belatedly for the name under which his group had conducted its previous campaign more particularly in the second round of the 2015 Presidential Election. He pressed for a right to the name Linyon Sanzman for the National Assembly Elections. Clearly, he had no legal right to so vindicate. Linyon Sanzman not a registered party prior to 10 March 2016 at 9.06 hours. The law is quite clear that the Commission may refuse to register party after being satisfied that “the name of the party is identical to the name of a ... political party whose application precedes the present application.” Mr Martin Aglae’s application clearly preceded the application of Roger Mancienne. That is the long and the short of it under the law.

(17) The Electoral Commission could very well have decided the matter straightaway. But it decided to be over cautious. It sought guidance from the Office of the Attorney-General.

(18) On legal advice obtained, the Commission took a decision as a collegiate body and, on 5 April, communicated its decision to the parties. The Commission had decided that the name should go to the first applicant in time, account taken of the fact that the applicant was otherwise compliant. The name Linyon Sanzman could not be said to have been owned by any person or group.

(19) Linyon Demokratik Seselwa thereafter applied for registering his party as Sanzman 2015 which was declined by the Commission following which it chose the name Linyon Demokratik Seselwa under which it is currently registered. We shall now look at the cases brought by this litigant and the extent of the mileage he obtained in our court system during Vacation time, with the indulgence of his counsel and the Judge.

1. CASE 59 OF 2016: DECISION OF RENAUD J.

(20) For a decision which had been taken and communicated to the appellant on 5 April, Linyon Demokratik Seselwa through Roger Mancienne, waited until 3 June to bring an action in Judicial Review against the decision of the Electoral Commission on the ground of urgency and to compete for the use of the name of Linyon Sanzman.

(21) The Electoral Commission (the EC”) raised objections to the application in law and on the facts. It was the case of the EC: that any party aggrieved by the decision of the Electoral Commissioner had an available remedy under the law in that he had a right to appeal within 21 days of the decision under section 8 of the Act which the Applicant had not used; that an Application for Judicial Review is a review of the decision-making process and not the decision itself; that the Electoral Commission had also shown extreme caution in coming to the decision even if the law was clear; that it had sought the views of the Attorney-General and had not done so without having obtained legal advice; and that the decision was taken on a first come first served basis, in the application of the law, after it stood satisfied with the application of the first applicant that the particulars therein were in order.

(22) Now, it is a mandatory provision under Rule 4 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 that a petition for Judicial Review should be made promptly. This application had been, on the very facts recited in the affidavit attached to the application, far from prompt. The applicant had allowed over two months of election campaign to pass by before he had chosen to come to court.

- (23) Another mandatory requirement under Rule 6 is that “the Supreme Court shall not grant the petitioner leave to proceed unless the Court is satisfied that the petitioner has a sufficient interest in the subject matter of the petition and that the petition is being made in good faith.” There was hardly anything arguable about the promptness of the application or the good faith in it or whether the applicant had any sufficient interest in the matter. The Applicant had lost its right to make the application having registered itself now not as Linyon Sanzman but as Linyon Demokratik Seselwa.
- (24) The application failed on all the three pillars on which such applications need to rest: culpable delay, lack of good faith and lack of requisite standing. These were patent on the very application and the affidavit attached. Renaud J allowed the application but was cautious in the orders he made. This is not an appeal against that judgment but we are stating the facts to show how Judges become vulnerable to abuse by litigants and others in opening their legally set borders and not deferring politico-electoral disputes to where they belong. The latter is what Renaud J did even if he did not do so at the initial stage.
- (25) On 1 August, Renaud J. decided that the first come first served rule which the Electoral Commission had used was incorrect. He quashed the decision of the Electoral Commission which had allocated the name Linyon Sanzman to the Respondent. The terms of the relevant part his order were:
- (a) Writ of Certiorari is hereby issued quashing the decision of the Respondent in registering a political party using the name of “Linyon Sanzman.”
 - (b)
 - (c)
 - (d) For the avoidance of doubt, no political entity or grouping is authorized to use the term “Linyon Sanzman” as its name for any intent or purposes until the final determination of the contentious issues ... by the Respondent.” (Underlining ours)
- (26) The above has been reproduced to show that the learned Judge removed all doubt on the fact that he was at any stage concerned with the registration of any group or political party.

He was concerned with the use of the name “Linyon Sanzman” by any group or party. Registration of the political party was not in issue. This is important to note for the reasons that will be obvious in later orders made by another Judge.

(27) On 1 August 2016, the Electoral Commission wrote to Martin Aglae to advise him of the court order and to notify him not to use the name Linyon Sanzman. On 8 August 2016 and 9 August 2016, the Electoral Commission met both Roger Mancienne and Martin Aglae to make their representations as directed by Renaud J. In compliance with the directions of the Court, the Electoral Commission came up with 11 reasons spelt out as to why use of the appellation “Linyon Sanzman” should be restored to Mr Martin Aglae. The task of the Electoral Commission became easier by the fact that, at the hearing of the two contestants, the Linyon Demokratik Seselwa of Roger Mancienne was no longer interested in using that name for the forthcoming election but for future use for, as matters stood, it stated it would create more confusion. That should have been the end of the matter. But not for Linyon Demokratik Seselwa of Roger Mancienne.

2. CASE 86 OF 2016: KARUNAKARAN J.

(28) Two weeks later, on 16 August 2016, Linyon Demokratik Seselwa made a second application before the Supreme Court for judicial review. The grounds were: “allocating the name Linyon Sanzman” to another political party would be unreasonable and irrational as it is likely to deceive the members of the party or public.”

(29) Our records show that this case did not follow the normal route of case allocation which obtains at the Supreme Court which is through the Registry via office of the Chief Justice, in this case, the Ag Chief Justice. The Supreme Court was in Vacation. The learned Judge assigned himself the case. We shall at this point assume that there was no forum shopping by Counsel who appeared in the case.

(30) In strict application of the Rules, this application had more reasons to be refused than the one before Renaud J., on the very face of it. Linyon Demokratik Seselwa having been registered and campaigning as it was as Linyon Demokratik Seselwa may have had an

interest in the matter: namely for other elections. But it did not have “sufficient interest in the subject-matter.” The subject-matter was the use of the name for the forthcoming election, which LDS had abandoned. A speculative future interest is not a sufficient interest for the purposes of an Application in law. It must be a real interest in the subject-matter of the action. The fact that, as Linyon Demokratik Seselwa, it wanted to preserve it for later elections was clearly irrelevant and immaterial to the case in hand.

(31) *Ex facie* the application again, LDS’s claim rested on the single ground that the decision of the Electoral Commission was unreasonable and irrational against the 11 reasons given by the Electoral Commission for allocating the name to another group than Linyon Demokratik Seselwa, LDS sought to justify it by the fact that the name was used in the second round of the 2015 Election and subsequently for campaigns, events, publications letterheads and also in the media. But, to the Electoral Commission, that did not justify a claim on the name for lack of prior registration. We have alluded to it before. We need not come back to it again. The Electoral Commission applied the law as it should have been in accordance with section 7(1)(b). If LDS had failed to register the name it had used before, it had itself to blame. It had no moral right to shift that blame upon any other party, let alone a legal right. Prior registration is the law against which later applications are tested, nor prior use of any name wherever used, however used, whenever used. Legitimacy is claimed by the registration and not by prior use.

(32) The learned Judge should have exercised a degree of professional scepticism to check on the good faith of the application. Had he done so, the latent flaws in the application would have been more than evident. Instead, he readily granted the application *ex parte*. What is more, he issued a number of wide-ranging orders, in themselves not asked for in the prayers of the application. As may be seen, the challenge was not of the decision-making process but of the decision itself. The application had no merit even for the Leave Stage. It should have been rejected.

3. CASE 87 OF 2016

(33) Linyon Demokratik Seselwa made another application for Judicial Review the next day, 17 August 2016. This time he challenged the decision of the Electoral Commission for

granting a registration to Lafors Sosial Demokratik on the ground that the acronym of Linyon Demokratik Seselwa which is LDS will confuse the public with the acronym of LSD, that of Lafors Sosial Demokratik.

- (34) A cursory reading of the law should have alerted the Judge that the acronym of a political party is for nothing in the determination before the Electoral Commission. The law is with reference to the name not the acronym. The application should also have failed on the question of “sufficient interest” as the two earlier applications. It should also have failed on the issue of good faith. It was more in the nature of settling a political score with a party which had stolen a march on it on the registration than anything else. There was also no full and frank disclosure on the fact that all those events mentioned related to past events without registration.
- (35) The learned Judge who had self-assigned the application granted leave as a matter of course, without any comment on the basis flaws in law and on the facts. He did so by a standard and a stereotype paragraph. More about this later.

4. MISCELLANEOUS APPLICATION 257/16

- (36) On 16 August 2016, Linyon Demokratik Seselwa made another application for provisional injunction, again *ex parte*. It sought an order from the Judge that the name Linyon Sanzman be not allocated to the party led by Martin Aglae nor that the said party be allowed to nominate candidates.
- (37) The learned judge says he “*carefully perused the affidavits in support, meticulously considered the arguments advanced by Mr Derjacques, diligently analyzed the relevant provisions of the law, case law and jurisprudence*” and felt satisfied “*that he issued the ex parte application on account of the fact that today is Nomination Day.*”
- (38) Had he really done what he said he had done, he would have recalled that Injunction is a remedy in Equity. One of the principles of Equity is that Equity looks at the vigilant and not the indolent. Another principle of Equity is that One who seeks Equity must do Equity.

Yet another principle of Equity is that one who seeks Equity must come with clean hands. It was public knowledge that the name had been granted to the party on 10 March 2017. To come on the last day to make such an application on the face of it carried an element of mischief and lack of good faith. Yet it was granted.

(39) That is not all. The *ex parte* was granted wider than the prayer in the application. The prayer was for an “injunction quashing the decision of the Electoral Commission allocating the name Linyon Sanzman to a political party led by Mr Martin Aglae and compelling the Electoral Commission not to accept the candidature of any person from the party presently allocated the name of Linyon Sanzman led by Mr Martin Aglae.” The order made was “prohibiting the Electoral Commission from registering any political party/entity in the name of Linyon Sanzman” and from accepting, approving or registering any nomination of candidate/s submitted by “Linyon Sanzman” to contest the forthcoming elections for the members of the National Assembly (underlining ours). Registration is the right of an applicant. It does not belong to the Commission. It is permissible to think that an Administrative body may for some reason decide to deny an applicant to apply and to contest an election but it is not permissible for the Supreme Court to think so and to actually make such an order. What belongs to the Electoral Commission is a right to refuse, if only for non compliance with the Act.

(40) The order goes further and states:

“For the avoidance of doubt, if any nomination of candidate/s submitted by the said political party “Linyon Sanzman has already been registered or any nomination had been accepted, approved or registered as such, I direct the Election Commission to strike off and cancel such acceptance, approval or registration in this respect, and give effect to the interim injunction ordered hereof.”

(41) The retrospective nature of the order which the learned Judge made also boggles the mind. The law of injunction was never meant for such purposes neither to be interpreted in that fashion nor to be applied in that fashion.

- (42) Procedurally, one would have expected the learned Judge to place a necessary rider on the interim for the purpose of either discharging them or enlarging them after the Respondents had been heard with the earliest opportunity. But there is no such rider. The interim status is forgotten and the hearing goes straight to the merits. The orders were still *ex parte*, without the respondents having been heard. The standard caution is that, in such an application if an interim is granted, it is granted subject to its discharge or extension at the earliest opportunity and not necessarily at the next hearing date.
- (43) The second procedural flaw is that before making such orders, a Judge needs to measure the consequences of the impact of his order, commonly referred to as the balance of convenience. This is completely missing in his consideration.
- (44) A third requirement is that an applicant for injunctive relief should give an undertaking as to damages. This requirement is designed to prevent frivolous and vexatious applicants for Injunctions. Again, this was not one of the considerations of the learned Judge.
- (45) Using stereotype language and without measuring the consequences of an action for injunction i.e. the issue of balance of hardship and the undertaking for damages, the learned Judge granted the wide ranging orders well beyond the terms of the prayers in the Application on the unreal basis of urgency. The Electoral Commission had yet to be served. But that is not all.

5. MISCELLANEOUS APPLICATION 258/16

- (46) On the same day, Linyon Demokratik Seselwa made another application *ex parte* to the Judge, this time for a provisional order of Injunction for quashing the decision of the Electoral Commission to register Lafors Sosial Demokratik led by its Party Leader and President Mr Charles Jimmy Gabriel and further compelling the Electoral Commission not to accept the candidature of any person from the party presently allocated the name of “Lafors Sosial Demokratik.”
- (47) The learned judge uses the same stereotype language that he “*carefully perused the affidavits in support, meticulously considered the arguments advanced by Mr Derjaques,*

diligently analyzed the relevant provisions of the law, case law and jurisprudence and is satisfied that the application should be granted and he did grant it on the ground that it was Nomination Day.”

- (48) Had he really done so, it is more probable than not that he would have declined to grant the interim order:
- a. prohibiting the Election (sic) Commission (sic) from allocating the name LSD (sic) to any political party led by led by Mr Charles Jimmy Gabriel or by any other person for that matter, and
 - b. prohibiting the EC from accepting, approving or registering any nomination of candidate/s submitted by “LSD” to contest in the forthcoming elections for the National Assembly. (underlining ours).
- (49) Again, the wide-ranging and retroactive nature of his orders are mind-boggling. Not for that, they were not made clear in the next paragraph of his Ruling: *“if any nomination of candidate/s submitted by the political party “LSD” has already been accepted, approved or registered, the Election Commission is to strike off and cancel such acceptance, approval or registration in this respect in order to give effect to the interim order.”*
- (50) The case was put to 21 September 2016 at 9.30 a.m. Again nothing is mentioned as to the hearing for the discharge or the enlargement of the interim order.
- (51) The case is put straight for hearing. Considering the urgency of the matter the learned Judge should have put it for the hearing for discharge or enlargement of the interim order on Nomination Day itself. But he did not do so.
- (52) Any suggestion that learned counsel for the applicant had forum shopped for his chosen judge would not have mattered, if only the learned Judge had handled the applications judicially and judiciously.

MISCELLANEOUS APPLICATION 266/2016: CONTEMPT

- (53) On 21st August, LDS brought a case of contempt against the Chairperson and Members of the Electoral Commission, the Party leader of LSD and some others concerned with LSD

that they are in contempt of court for not having abided by the judge's orders, albeit interim. This matter was heard on 24th September.

- (54) The Judge decided that since there has been compliance at the earliest and with the first opportunity, the contempt proceedings should be set aside. It is worthy of note that the contempt proceedings were set aside not because it lacked merit. It has been because the Chairperson, in the circumstances he and the members were brought to Court, found themselves having no option but to comply with the orders made, no matter how abusively made.

MISCELLANEOUS APPLICATION 263/2016: INTERVENTION

- (55) On 19 August 2016 Linyon Sanzman makes an application to intervene in the main case 87/16 on the grounds that it is an interested party and that the decision with respect to it has been given without a hearing. It also avers that as a result of the interim orders made it is unable to exercise its right to participate in the National Elections to be held on 8th, 9th and 10th of September 2016.

MISCELLANEOUS APPLICATION 264/2016: INTERVENTION

- (56) On the same day, Lafors Sosial Demokratik makes a similar application for intervention on the same grounds that it was not heard and as a result its right to participate in the election is being unlawfully curtailed.
- (57) On 24th August, the learned judge set aside both applications on the grounds that “all the applications filed by the so-called “proposed interveners” or (sic) *null and void ab initio* for having geminated from non entities unknown to our laws, and annulled by the order of the Court. They are incompetent and still born in the eyes of the law.” This is a classical case of use of bootstrap technique by the learned Judge. He used his own previous *ex parte* orders made to support his own substantive decision later. Accordingly, in his view, the applicants had no right to intervene, even if they were directly affected and prejudiced by the decision even at any other stage. He had by that device locked them out

of court to vindicate their constitutional rights to participate in the election and before the courts.

(58) The learned Judge added that the proposed interveners were third parties and third parties have no right to intervene in Judicial Review matters inasmuch as “in matters of judicial review, the Court simply scrutinizes the legality, rationality and reasonableness of an administrative decision. He refers to the jurisdiction of the Courts as a Constitutional Prerogative where the Rules do not provide nor permit any such intervention from third parties. Accordingly, he decided that “no such third party shall be allowed in breach of the said Rules.”

(59) On the issue of interim orders made following *ex parte* applications, his reasoning was as follows:

“It is common knowledge in civil proceedings the Courts, particularly the Supreme Courts (sic) have jurisdiction and powers to issue ex parte interim injunctions pending the final determination of the petition (sic). This is very normal practice, this happens every day in civil proceedings. If a person alleges that making such an ex parte order amounts to bias by a Judge, such allegation is absurd and to say the least, baseless and unsubstantiated, conjunctive and surmise.”

The bias was flagrant to anyone except to the learned Judge himself.

MISCELLANEOUS APPLICATION 267/2016: RECUSAL

(60) On 22 August, two days prior to the hearing of the main case, Linyon Sanzman makes a formal application to the Judge to recuse himself on account of the fact that they strongly believed that “the orders dated 17th August 2016 in passing restraining order directing the Electoral Commissioner from registering our party and even to cancel the registration if already registered is biased and prejudicial not only to the party Linyon Sanzman and also to the principles of democracy enshrined in the Constitution of the Republic of Seychelles.’

MISCELLANEOUS APPLICATION 268/2016: RECUSAL

- (61) On 22 August, Lafors Sosyal Demokratik makes similar application to the Judge to recuse himself on account of the fact that they strongly believed that “the orders dated 17th August 2016 in passing restraining order directing the Electoral Commissioner from registering our party and even to cancel the registration if already registered is biased and prejudicial not only to the party Lafors Sosyal Democratic and also to the principles of democracy enshrined in the Constitution of the Republic of Seychelles.”
- (62) The learned Judge was not persuaded that he was biased in any manner. The Judge also stated that the procedure for Recusal had not been followed so that he declined to recuse himself.

HEARING AND DECISION IN THE MAIN CASE 86/2016 AND 87/2016

- (63) The two main cases were heard on 24 of August during Court Vacations. At the end of the day, the judge only confirmed the decision he had made *ex parte*, and rendered permanent the *ex parte interim orders* he had made. The elections took place on 8. 9 and 10 September 2016. Linyon Sanzman could not participate in the Elections nor could LSD.
- (64) On the issue of granting of the name of Linyon Sanzman, the judge decided that the quashing of the Respondent’s impugned decision by Renaud J. meant that Linyon Sanzman was never registered to begin with. To date that entity remains non existent in the eye of law as it has not been registered after the writ effectively put an end to its existence.
- (65) That reasoning is neither supported in law nor in case law nor in common sense. Registration is one thing and giving corporate personality to a registration another. Registration is done by the applicants. Giving corporate entity to a registration is the work of the Electoral Commission.
- (66) Accordingly, the learned Judge erred in a fundamental element in applying the law of registration and the acquisition of corporate personality. There was nothing wrong with the meeting of the EC on 11th August 2016. They met in their Constitutional powers entrusted to them to the same extent as the Courts have constitutional powers. Under the doctrine of

Separation of Powers, the EC had not usurped the powers of the Court. In fact, the Court should have deferred the matter to the EC as Renaud J. had done. In this case, the learned Judge had assumed the powers of the EC. Under a democratic system of government, it is not government by judges but government by the executive. The Judiciary enters the arena only to ensure that what government does is within the confines of the law.

- (67) The reasons he gave were that the decision was grossly illegal, improper, irrational and unreasonable. He reached that conclusion on the standard of the man on the Clapham omnibus:

“any reasonable man with average intelligence or the man on the Clapham omnibus would obviously find that the name/acronym “LSD” does appear to be very similar or the same as, or is likely to be confused with, or mistaken for, the name/acronym of LDS which is the name of an existing registered and recognized political party.”

- (68) It is trite law that in applications for Judicial Review, a Court is incompetent to look at the reasonability or unreasonability of the decision from its point of view as the learned Judge did in this case. He gravely erred when he applied the standard of the man on the Clapham omnibus, which appertains to delict. He should have applied the *Wednesbury* principle which appertains to Judicial Review cases.

- (69) This principle named after the case of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223**, was later articulated in [Council of Civil Service Unions v Minister for the Civil Service 1983 UKHL 6](#) by [Lord Diplock](#) in that the decision should be shown to be -

“So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

- (70) The record shows that so bent was the learned Judge to give judgment according to his will rather than according to law that he brushed aside completely and did not answer the submission of learned counsel for the EC that the law spoke of name and not acronym. The learned Judge equated the name with the acronym. In using the comparison Linyon 2015 and Linyon Sanzman” it should not have escaped his mind that he was referring to names and not to acronyms.

- (71) The end of the story is that these two entities could not participate in the National Assembly Elections. They have appealed and the case is being heard before us after all the issues have lost their lives.
- (72) We allow the appeal for whatever it is worth. The decision of the learned judge is quashed. We take into account the fact that the election is now over so that there is no live issue left except for the pending one: namely, whether Linyon Demokratik Seselwa would have the right to use the appellation “Linyon Sanzman” in the next election.
- (73) A Court should be vigilant in election matters to exercise some border control under the doctrine of Separation of Powers. The rule should be that the whole machinery of an Electoral Exercise should not be hampered by applications before the Courts. At a time when the Electoral Commission is organizing an election in stressful conditions of time and resources, it is not right for unelected Judges as they say to make it doubly stressful for them as the proceedings reveal.
- (74) In this case, parties have used the process of court to score political points. This we cannot allow. If we allow that we shall be introducing in our judicial system a virus. Future users will learn the methods, probably add to them, tomorrow and will use them against the present users. Shakespeare put in so well in Macbeth:

“The even-handed justice of this world brings the ingredients of our poisoned chalice to our own lips.”

History is too full of such examples. We cannot allow that to happen.

- (75) We were inclined to hold the view that the learned Judge took the case for no other reason than an upsurge in professional zeal. But professional zeal is one thing and lending one’s office of a judge and one name as a Judge to allow litigants to abuse the process of court is quite another. At that time, neither the office nor the judge is doing judicial work but abusing court process. This is nothing more than abuse of court process by a Judge. He allowed himself to use court process for an objective and in a manner not permissible

under the rule of law, within the limits of judicial discretion under the law or within the confines of the powers of his office as a Judge.

For the reasons we have stated, we quash the two decisions in MC 86 of 2016 and MC 87 of 2016 delivered by the learned Judge on 25 August 2016. The reliefs sought are identical in both cases. The decision of the Electoral Commission dated 11 August 2016 in MC 86 of 2016 is maintained and confirmed. The decision of the Electoral Commission in MC 87 of 2016 to register the name Lafors Sosyal Demokratik is maintained and confirmed. With costs in both cases.

S. Domah (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016