

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Constitutional Appeal SCA CP 1/2016 (c)**  
**(Appeal from Constitutional Court Decision CP 7/2015 & CP 1/2016)**

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Wavel John Charles Ramkalawan

Appellant

Versus

The Electoral Commissioner

James Alix Michel

Attorney General

Respondents

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Heard: 29 November 2016

Counsel: Mr. Bernard Georges for Appellant

Mrs. S. Aglae for Respondent no. 1

Mr. B. Hoareau for Respondent no. 2

Mr. R. Govinden for Respondent no. 3 with Mr. A. Subramanian

Delivered: 09 December 2016

**JUDGMENT**

S. Domah (J.A)

- (1)** This appeal arising out of the consolidated cases of CP07/15 and CP1/16 is being heard with agreement of parties on the decision of the Constitutional Court which decided, inter alia, that: (a) illegal practices had occurred in the 2015 Presidential Election but they were not such that would lead to the annulment of the election; and (b) that proof of agency had not been made out against Respondent no. 2, the successful candidate.
  
- (2)** Soon after the declaration of the results of the 2015 Presidential Election, the Appellant, the Presidential candidate who obtained the next best vote after the elected President, had

brought an action against the three respondents. Respondent no. 1 is the Electoral Commission, the independent authority which in Seychelles has been entrusted with the power to conduct and supervise elections as per article 115(3) and article 116(1)(a) of the Constitution of the Republic of Seychelles. Respondent no. 2 is James Alix Michel, the elected President and Respondent no. 3 is the Attorney-General who has been joined to the Petition under rule 7(4) of the Presidential Election and National Assembly Election (Election Petition) Rules, 1998.

- (3) The Republic of Seychelles, as per its Constitution, is a Presidential democracy. The President is elected for 5 years at any one time by secret ballot. In the discharge of its responsibilities, the Electoral Commission follows the provisions of the Elections Act.
- (4) In December 2015, the then President James Alix Michel, who had already served two mandates stood for a third time. It is constitutionally enshrined in the Constitution of the Republic of Seychelles (“the Constitution”) that, when it comes to a Presidential election, a candidate should fetch more than 50% of the votes cast at the polls to be declared the winner. If none of the candidates – and there is no limit to the number who can stand in this first exercise – reaches that ceiling, then this deficiency triggers a second round for the completion of the election. In this second round, only the two best candidates from the first round may postulate. The over 50% suffrage is a constant for in the first or subsequent elections.
- (5) On 3<sup>rd</sup> to 5<sup>th</sup> December 2015 elections, no candidate had secured more than 50% of the votes cast. Accordingly, a second round was called for under Schedule 3 paragraph 8 of the Constitution. This was happening for the first time in its history. In this second round which took place between 16<sup>th</sup> to 18<sup>th</sup> December 2015, the 2 candidates were President James Alix Michel who had fetched, in the first round, 47.76% under the banner of Parti Lepep (PL) and Wavel John Ramkalawan who had fetched 35.33% under the banner of Seychelles National Party (SNP).
- (6) Late in the evening on 18<sup>th</sup> December 2015, the following results were declared by the

First Respondent: 49.85% with 31,319 of the votes in favour of the Petitioner (Appellant in this case); and 50.15% with 31,512 of the votes in favor of the Second Respondent. The declared successful candidate was, accordingly, President James Alix Michel with 50.15% of the votes cast, for a third time in office; and Wavel John Ramkalawan with 49.85% of the votes cast with 25 years of political career. The margin of votes was 193.

- (7) Wavel John Ramkalawan aggrieved by the outcome brought two cases before the Constitutional Court. The first case (CP 07/2015) was a Constitutional Petition in terms of Article 130 of the Constitution and the second (CP 01/2016) under section 51 of the Constitution and section 44 of the Elections Act, Cap 68A (hereinafter “the Act”).
- (8) In CP 01/2016, the petitioner, now appellant, had sought a declaration to annul the election on the ground that there had been instances of non compliance with the Elections Act and illegal practices corrupting the election. He prayed for fresh elections to be held. The Constitutional Court sitting as an Election Court, heard oral evidence from the parties and witnesses in a mega trial. Finally, in its judgment, it made a finding that there had been non compliance and illegal practices in some instances averred by the Appellant, then petitioner, but not in all. It also decided that the non compliance and illegal practices found were not of such a nature as to warrant a declaration nullifying the election as such.
- (9) In CP 07/2015, the appellant sought an order for annulling the election on the ground that there was a misapplication of the electoral law in that the counting should have been done on the basis of all the votes cast and not on basis of valid votes cast. Appellant contended that the two terms were not one and the same and the difference in application would lead to the conclusion that the constant of over 50% had not been attained by either candidate in the 2<sup>nd</sup> round of the Presidential Election.
- (10) Since both cases involved the same parties, questioned the same election and were seeking the annulment of the Presidential election, they were consolidated and the hearing commenced on 14<sup>th</sup> January 2016. The appeals raised a number of issues, some of which exacted urgent determination on account of the forthcoming National Assembly Elections fixed for 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> of September. A slot was allocated in the August

session of the Court of Appeal to accommodate that case on account of its dire urgency in view of the forthcoming National Assembly Elections where his participation would have been compromised.

- (11) The Constitutional Court had already found proved illegal practice against the Appellant but advisedly stayed the sanction on it. The sanction as per the law was reporting the finding to the Electoral Commission for a sanction that his name be removed from the electoral register for a period of 5 years. For the record, it is worth recall that the Constitutional Court could have very well forthwith made the reporting as a result of which the Appellant would have been unable to participate in the National Assembly Elections. But it used its discretion in his favour, on an application made, to stay the reporting pending the determination of the Appellate Court.
- (12) This aspect of the case had already been heard and decided by the Appellate Court and judgment delivered on 12<sup>th</sup> August 2016 in which this Court decided that the applicant be spared the reporting. see **Wavel John Charles Ramkalawan v Electoral Commission, James Alix Michel and Attorney General (no. 1) SCA CP01/2016**.
- (13) We are now concerned with the two outstanding issues demarcated. One is the application of the threshold of 50% in the counting of votes, more specifically, on the meaning of “votes in the election” and “votes cast” in the counting process in case **Wavel John Charles Ramkalawan v Electoral Commission, James Alix Michel and Attorney General (no. 2)**. The other is the meaning of agency, non compliance and illegal practice in application of the electoral law in **Wavel John Charles Ramkalawan v Electoral Commission, James Alix Michel and Attorney General (No. 3)**.
- (14) Before we come to the grounds of appeal, we may as well recall what the Constitutional Court found and decided.
  1. Regarding to the allegation of illegal practices against the second Petitioner affecting the results of the elections, it found that the Petitioner has not discharged the burden of proof to the standard required by law in this matter.

2. In individual acts of illegal practices, it accepted that some reprehensible acts did take place; however, the learned Judges were not persuaded that those acts or any of them satisfied the tests of agency to directly or indirectly link them to the Second Respondent as is required by the provisions of the Act.
3. Regarding the prayer for annulling the election, they concluded that it is a requirement of the law that the burden rests upon the Appellant to prove that the illegal practices if perpetrated by the Second Respondent or through his agency affected the result of the elections.
4. As regards non-compliance by the First Respondent with the Act, it took the view that although many irregularities occurred and procedures were not all the time followed, they were not breaches of the law as such but non observance of guidelines in the handbook which is not enforceable.
5. The learned Judges were satisfied that the counting procedures although not always orthodox did not reveal any stray votes or evidence of stuffed ballots or any interference in the count amounting to affecting the result of the election.

(15) On those findings and conclusions, the Appellant has put up the following grounds of appeal.

**Agency – Ground 1**

1. The constitutional court erred at paragraphs [427] and [428] of its judgment in:
  - a) Applying Seychelles law as to agency to the determination of responsibility for illegal practices committed on behalf of the second Respondent, and not a wider scope of agency appropriate to elections in terms of which a candidate is responsible for the actions of a wide range of persons who procure a benefit for the candidate.

- b) Placing an unduly high burden in paragraph 428 upon the petitioner to adduce evidence both of a contract of agency between the candidate and the agent and its acceptance by the agent.
- c) Ignoring the provisions of section 45 of the Elections Act that an illegal practice is proved against a candidate where at least the candidate or his agent has knowledge of the practice.

**Affecting the result - Ground 2**

- 2. The constitutional court erred in its interpretation of the law at paragraph [524] of its judgment that, in addition to proving an illegal practice, the Petitioner was also required to prove that the illegal practice had affected the result of the elections in that the second element is not a legal requirement.

**Making Registers - Ground 3**

- 3. The constitutional Court erred in paragraph [521] and [526] of its judgement in not finding that the lack of marking of the register in each polling station was contrary to the law and therefore a reconciliation of the registers used in each polling station was required, and as a result erred in not ordering recount of all votes in all polling stations after a reconciliation of the registers used, as prayed for by the petitioner.

**Shifting Burden of proof - Ground 4**

- 4. In each case where the Constitutional Court had found an illegal practice to have been committed in favour of the second Respondent, the Constitutional Court erred in not shifting the burden onto the second Respondent to prove that the illegal practice had been made in circumstances affording a defence or an excuse in law.

**Mr Rene and Mr Pillay - Ground 5 and 6**

- 5. The Constitutional Court erred in paragraph [436] of its judgment in not finding that Mr Rene was an agent of the second Respondent on the basis of evidence adduced that he had been the predecessor of the second Respondent as President, belonged to the same party and had appeared for the second Respondent in political broadcasts of the second Respondent during the election. All of these factors rendered the possibility that Mr Rene

was either the agent of the second Respondent's knowledge or had acted with Second Respondent's knowledge, more probable than not.

6. The Constitutional Court erred in paragraph [436] of its judgment in finding that Mr Rene had not been proved to have asked Mr Pillay to vote for the second Respondent in that such a requirement is not a necessary element of the offence, as stated by the Constitutional Court itself at paragraph [424] of its judgment.

**Dania Valentin and Flossel Francois - Ground 7**

7. The Constitutional Court erred in paragraph [438] and [439] of its judgment in ignoring the evidence of the improbable timing of the release of Mr Francois to coincide with the public shift in support of Ms Valentin from the opposition to the Second Respondent (as manifested by her appearance in a political party broadcast for the Second Respondent), and in not concluding thereby that the Petitioner had discharged the burden on him and that, in the absence of an evidence in rebuttal by the second Respondent, to whom the evidentiary burden had shifted, the illegal practice had been made out.

**Etihad Airways - Ground 8**

8. The Constitutional Court erred in paragraph [442] of its judgment in not finding that Mr David Savy at least acted with the knowledge of the second Respondent on the basis of evidence that he had made on the face book post, the same threats that the second Respondent had previously made and which had been reported in the Seychelles Nation Newspaper about Etihad Airways leaving Seychelles in the event of the Appellant being elected.

**Mrs Beryl Botsoie - Ground 9**

9. The Constitutional Court erred in paragraph 455 of its judgment in not finding that Mrs Beryl Botsoie was an agent of the second Respondent, ignoring that Mrs Botsoie was both a head teacher in the government of the second Respondent and his polling agent in an electoral area. These factors rendered it more probable than not that Mrs Bosoie was an agent of the second Respondent, or at least that he had knowledge of her actions.

**SPDF Officers - Ground 10**

10. The constitutional Court erred in paragraph 458 of its judgment in not finding that at least Lt Col Roseline was an agent of the second Respondent, or that the second Respondent had knowledge of what Lt. Col. Roseline was doing, in that Lt Col Roseline was proved to be the Military Adviser of the Second Respondent, their Commander in chief. These factors rendered it more probable than not that all three officers were agents of the second Respondent, or at least that he had knowledge of their actions.

**James Lesperance - Ground 11**

11. Th Constitutional Court erred in paragraph [461] of its judgment in not finding that Mr James Lesperance was an agent of the second Respondent, or had been action with the knowledge of the second Respondent or his agents, in that the coincidence of Mr Lesperance’s presence as a front-line guest at the inauguration of the second Respondent, in the absence of an innocent explanation therefore, rendered proof of agency or knowledge of his actions more probable than not.

**Dolor Ernesta - Ground 12**

12. The constitutional Court erred in paragraph [464] of its judgement in finding the alleged illegal practice unproved in that the court ignored the uncontroverted testimony that Mrs Dine was disheveled and badly dressed, and had expressed her wish not to vote. These factors rendered it more probable than not that Mrs Dine was being taken to vote against her will.

**Indian Ocean Tuna (IOT) - Ground 13**

13. The Constitutional Court erred in paragraph [469] of its judgment in not finding the illegal practices proved, in that the court -
  - a. Ignored evidence that the promise made to the Seychellois workers at Indian Ocean Tuna was made for the first time in time for the second ballot, had never been made before and was in respect of a group of workers not covered by previous, publicly announced, schemes for a 13<sup>th</sup> month salary.
  - b. Erred in its statement that the Petitioner had offered the same incentive in that the offer made by the Petitioner was not as an inducement to vote for him, it



had been made in his manifesto and had been limited to public service employees and not those at Indian Ocean Tuna (IOT).

### **RELIEFS SOUGHT BY THE APPELLANT**

(16) By way of relief, the Appellant has prayed for the following orders:

1. That by reason of proven illegal practices by persons for whom the second Respondent was responsible, the Presidential Elections of December 2015 were null and void and would have to be held afresh.
2. That the Constitutional Court consider whether to report the second Respondent to the Electoral Commission.
3. That the first Respondent be ordered to make arrangements to hold fresh presidential Elections.
4. Alternatively to the previous orders, that the first Respondent recount the ballots cast in the Second Ballot on 18<sup>th</sup> December 2015, after reconciling all electoral registers used in all polling stations, and declare the results of the recount.

(17) Before we come to the factual issues, we shall circumscribe the applicable law to the issues raised in this appeal. They are: inter alia: the jurisdiction of the Court and its powers with respect to the order of voidance of an election; the procedure and the nature of the action; the provisions that have to be complied with for the conduct of an election, the breach of which will lead to non-compliance; the acts which may constitute illegal practice. We shall then deal with the law of agency (Ground 1), burden of proof and affecting the result (Ground 2), marking of registers (Ground 3), standard of proof and shifting of burden of proof (Ground 4) before moving to the factual application of the law under Grounds 1 to 4 in Grounds 5 to 13.

## JURISDICTION, PROCEDURE, NATURE OF ACTION

(18) Section 43 of the Elections Act provides that the result of a Presidential Election or a National Assembly Election shall not be questioned or subject to review in any court except on an election petition presented to the Constitutional Court under the Elections Act. In the decision we gave in August in this case relating to Reporting, we dealt with the unique nature of the Constitutional Court sitting as an Election Court and the combined adversarial and inquisitorial nature of its jurisdiction.

(19) The Elections Act vests the Constitutional Court with powers under section 45(2) whereby the court may not stay content with only the dispute between the parties but need to go further. It may order *proprio motu* and compel any person concerned with the election to attend as a witness to depose. The trial is not only the trial of the persons directly before court but it is one of the election itself. That is apparent by the wording of section 45(2) which reads:

*“45(2) The Constitutional Court may—*

*(a) by an order, compel any person who appears to the Court to be concerned in the election to attend as a witness at the trial; and*

*(b) examine a witness referred to in paragraph (a) or any person in Court, although the person has not been called as a witness.*

*(3) A witness or a person referred to in (3) subsection (2) may be examined or cross examined, as the case may be, by the petitioner, respondent and Attorney-General or his representative, if present at the trial.”*

(20) The Constitutional Court has other powers: that of pronouncing an election void if it is satisfied that this should be so, as per section 46(1) which reads:

*“At the conclusion of the trial of an election petition, the Constitutional Court shall determine –*

*(a) whether the election is valid;*

*(b) whether the election is void .... ;”*

(21) Further, it has the power to order recounts under section 44(8) which reads:

*“The Constitutional Court may order a recount of the ballot papers where it is satisfied that there was an irregularity in the counting of the ballot papers that affected the results of the election.”*

## **THE ELECTIONS ACT**

(22) In the case of **Wavel v Electoral Commission & Ors (No. 1) CP1/2016, 12 August 2016**, we explained the co-existence of the two regimes in the Act: the civil action and the criminal action. We need not elaborate except to refresh ourselves on the fact that two types of actions are possible under the Elections Act. One is a civil action initiated by any individual based on the same facts which will lead to ultimate sanctions such as removal of names from the register or the rendering of the avoidance of an election of the impugned candidate. The other is a criminal action initiated by the State in the name of the Attorney-General against an individual who may be in breach of any of the provisions of the Elections Act. The sanctions here are the classical penalties of fines and imprisonment.

(23) We are here concerned with such an action started by a petition by Mr Wavel Ramkalawon, now a Member of the National Assembly but at the material time an unsuccessful candidate in the Presidential Election.

## **THE CONDUCT AND SUPERVISION OF AN ELECTION**

(24) The responsibility to conduct and supervise a Presidential Election, a National Assembly Election or a Referendum is entrusted to an Electoral Commission, an independent body under the Constitution: see article 115(3) and 116(1)(a). In the exercise of its powers, the Electoral Commission is not under the direction and control of any person or authority in the performance of its functions. The conduct and supervision is done under the law, in this case the Elections Act. The Electoral Commissioner elects independent officers to carry out the tasks entrusted to them under the Act. It has produced a number of Guidelines for the purpose. There is published a Code of Conduct for stake holders which

was signed by all the political parties published in November 2015.

### **THE RELEVANT LAW ON COMPLIANCE WITH THE ACT**

(25) The law with respecting to the voidance of elections is found in section 44 of the Elections Act. It enables a petitioner to challenge the validity of the election of a President by way of an election petition in which he can seek a prayer that the election is void. The grounds on which the election may be held to be void is provided for in section 44(7).

(26) The relevant part of this section reads:

*“The Constitutional Court may declare that an election ... is void if the Court is satisfied –*

*(a) That there was a non-compliance with this Act relating to the election ... and the non-compliance affected the result of the election ;*

*(b) That an illegal practice was committed in connection with the election by and with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the agents of the candidate.”*

(27) The Elections Act (“the Act”) itself deals comprehensively with how an election should be carried out. It is open to every citizen of Seychelles who has registered himself under the Act to vote at the electoral centre where his name appears in the Electoral Register. The Register is updated annually in terms of residence: see section 7. The Act also speaks about the manner in which the polling station shall be arranged (see section 21(1)); the timely notices with regard to the location of polling stations (see section 17(1)); the times at which voting may commence and end and the manner in which the closing time will apply (see section 17(1)(b). The Act further provides for sufficiency of ballot boxes at the centres (section 18(5); for the appointment of polling agents by each candidate whose task is to be present at the time the voting is taking place (see 20(1)); for facilities given to the polling agent to see the ballot paper being handled and see the

entrance of the voter into the voting booth (see section 20(5)) etc.

- (28) More importantly, section 25 provides for voting to be conducted in substance and as nearly as possible in the manner provided for in the Act: by personal attendance and on production of the National Identity Card. The Electoral Officer should also be satisfied that the person has not voted at the station or elsewhere at the election. When a voter appears, his number is called out with his particulars, a stamped ballot paper is handed out to him authenticated by an official stamp and the fact that the voter has exercised his vote is marked. All this takes place within sight of the polling agent of the candidate so that the system is protected against any malpractice. At the end of the day, the ballot boxes are closed and sealed in presence of the respective polling agents. Polling agents are also allowed to place their seals if they so wish. A ballot paper account is carried out and a Statement made to that effect. The counting takes place on the very same day, unlike in many jurisdictions where they are kept under official custody under lock and key until the next morning when voting starts. Before the counting starts, the candidates and their polling agents are allowed to inspect the seals before they are broken.
- (29) Under section 34(2), there are clear indications of what ballots are to be valid and what are to be rejected. And if there is a controversy over it, any objection is recorded. As per section 36(1), upon conclusion of the counting, the Electoral Officer, in presence of the candidates, if present, or the counting agents of candidates, proceed to verify the ballot paper account by comparing the number of ballot papers recorded in the account with the number counted, rejected and unused.
- (30) That is the law, by and large, as far as compliance with electoral process is concerned. We wanted to elaborate on the above to reassure that the system in place is sound, democratic and credible. And persons who may abused the system may be caught by the civil and criminal law applicable.

#### **THE RELEVANT LAW ON ILLEGAL PRACTICE**

- (31) Now with regard to illegal practice, we go to sections 44, 45 and 51(3). Section 51(3) reads:

“For the purposes of this section and sections 44, 45, 47 and 51(3), a person commits an illegal practice where the person –

(a) directly or indirectly, by that person or by any other person on that person’s behalf, gives, lends or agrees to give or lend, offers or promises to procure or to endeavour to procure, any more or valuable consideration to or for any voter or to or for any other person on behalf of a voter or to or for another person, in order to induce the voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at an election.

(b) directly or indirectly by that person or by any other person on that person’s behalf, gives or procures or agrees to give or procure or to endeavor to procure, any office, place or employment to or for a voter, or to or for any person, in order to induce the voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of the voter having voted or refrained from voting at an election;

(c) directly or indirectly, by that person or by any other person on that person’s behalf, makes an gift, loan, offer, promise, procurement, or agreement referred to in paragraph (b) to or for an person in order to induce such person to procure or to endeavour to procure the vote of a voter at an election ...”

(32) The Elections Act creates a wide range of offences criminalizing activities related to registration, ballot boxes, election notices, disturbances, obstruction of Electoral Officer to do their duty, electioneering, conditions for posting bills, posters, pamphlets, or circulars, non compliance with the Act, illegal practice etc. all designed to ensure that the election runs smoothly as an election should run in a democratic system of government: see section 51.

(33) In this case, we are concerned principally with section 51 (3) (a) to (c), even if some of

the other sections come up sometimes as reference. In non legalese language, the gist of section 51 (3)(a), is that a person shall not attempt to buy the vote of an elector by money or money's worth either to vote differently or not to vote: see section 51(3)(b). The same applies if he is attempting to do so in exchange for any office, place or employment: see section 51(3)(b). Nor can he do so by making any gift, loan, offer, promise, procurement or agreement: see section 51(3)(c). He cannot do any of these things either by himself or through an agent, either directly or indirectly: see 51(3)(c) to (d), inter alia.

- (34) Now with respect to the procedure and power of an election court, we refer to section 45. An application should be by way of petition and the hearing in the same manner as a trial before the Supreme Court in its original civil jurisdiction. But there is more. An election court, unlike other courts, is vested with powers of investigation. As per section 45 (2) to (3), it can summon witnesses, examine them and cross-examine witnesses who have deposed.
- (35) The Constitutional Court sits for matters of election as an Election Court. Section 46(1) binds the Court to determine at the conclusion of a trial whether the election was valid or void, whether a recount is required, the procedure to conduct it and the procedure to declare the outcome.
- (36) Section 47 deals with the sanctions that should follow a finding of illegal practice on the individuals, candidates and agents: i.e. a reporting to the Electoral Commissioner for the purpose of removing the name of the person from the Electoral Register for a period of 5 years.
- (37) With respect to this aspect, section 47(4) provides that if the act and omission was made in good faith through inadvertence, or accidental miscalculation or some other reasonable cause, the person shall be spared the consequences of this Act.
- (38) Now that we have referred to the applicable laws above, we may consider the grounds in the order in which they have been raised. Agency (Ground 1); affecting the result (Ground 2) Marking of Registers (Ground 3); Burden of Proof Ground 4 before considering the factual issues in Ground 5 to 13.

## **GROUND 1**

### **AGENCY**

- (39) In point of law, under Ground 1, the contention of learned counsel for the Appellant is that it is the law of agency of elections which should be applied and not the civil law of agency as obtains in the Seychelles Civil Code. The question is raised to gauge the relationship between the Second Respondent and the various individuals whose acts and doings were regarded as illegal practices. They were Mr Albert René, Mr David Savy, Mrs Beryl Botsoie, Lt. Col. Roseline and Mr James Lespérance.
- (40) The Constitutional Court decided that there was no relationship of agency between these aforementioned people and the second Respondent. It also decided that the law of agency which should apply is the law of agency under Chapters 1-IV of Title XIII of the Civil Code of Seychelles provides for the rules relating to agency.
- (41) Article 1984 defines agency as:  
*“An act whereby a person called the principal gives to another called the agent or proxy the power to do something for him and in his name.”*
- (42) In other words, the principal-agent relationship is an arrangement in which one entity legally appoints another to act on its behalf. Agents, by definition, have rights and responsibilities and are to act within the scope of the authority if the principal is to be bound by the agent’s acts and doings.
- (43) The reasoning of the Constitutional Court was that members of the wider public who merely manifest support for the candidate cannot and should not be held to be agents of the candidate.
- (44) That proposition of law is perfectly sound to us and stands valid whether in the common law jurisdictions, civil law jurisdictions, in election law or in any other field of law. There is no need for a formal agreement for the relationship of agency to apply in any of these jurisdictions or fields of law. It can be implied by facts and circumstances. The rule is for a formal appointment but agency may be implied or may be orally established: **see**



**Article 1985.** Acceptance may be implied by circumstances and may be purely gratuitous (see **Article 1986**). It is either special and for one case or certain cases only, or general covering all the cases of the principal: see **Article 1987**.

- (45) We are a hybrid jurisdiction and we borrow the best from both the common law and the civil law to supply the deficiencies in our own laws. But in this area, the differences are more apparent than real. Every article in the Civil Code rezones every judicial decision in the common law system.
- (46) Thus, agents are distinguished in respect of authority as general or special agents both in common law and civil law. This distinction is made to determine the authority of that agent. It has been stated in the case of **Jacob V Morris [1902] 1 CH 816**.

*“A general agent has the full apparent authority due to his employment or position and the principal will be bound by his acts within that authority though he may have imposed special restrictive limits which are not known to the other contracting party. A special agent has no apparent authority beyond the limits of his appointment and the principal is not bound by his acts in excess of those limits whether the other contracting party knows of them or not.”*

- (47) An election agent is not a general agent in any system of law. He is a special agent for the purposes of the election with specific tasks of canvassing votes for the candidate and representing him in a limited number of places in course of the electoral campaign and formally in proceedings for the election vis-à-vis the Electoral Commission or the Chief Electoral Officer simply because the candidate cannot be everywhere.
- (48) Comparative jurisprudence is not dissonant in this regard. In the Nigerian case of **Wali V. Batarawa (2204) 16 NWLR**, the Court of Appeal decided that where the allegation of electoral malpractices or corrupt practices are committed by the agents of the person returned as duly elected, the petitioner must establish the following: (a) that the alleged agent claimed to be the agent of the elected person; (b) that the offences were committed in favour of the elected person either (i) with his knowledge; or (ii) with the knowledge or

consent of a person who is acting under the general or special authority of such a candidate with respect to the election.

- (49) The aforementioned case illustrates that one cannot be deemed to be an agent merely by association but that there must be proof to demonstrate that there was some arrangement or agreement between the alleged agent and the principal. There are rules that govern agency in both systems of law. Thus, an agent who goes “beyond the scope of his authority” cannot bind the principal. The concept of scope of authority exists in both systems.
- (50) The law of agency is of general application in all fields of law. It is one and not different in different areas of the law. It is all a question of fact whether there is or there is no agency in a particular situation. There is merit in the decision of the court that agency should be the civil law of agency of Seychelles for no other reason that the Code is explicit on the subject-matter. There is virtue in it and no heresy. A loose interpretation of it may end up by making those who are defendants today plaintiffs tomorrow.
- (51) In Seychelles, a small community of about 95,000 souls, where everyone virtually knows everyone else, any relaxation of the classical law of agency, if applied in the election cases, would end up by having virtually everybody the agent of everybody else. Learned counsel referred to, inter alia, the cases of **Wakefield Case XVII(1874) 2 O’M&H 100**, **Barnstaply Case (1874) 2 O’M&H 105**, **Tauton Case (1874) 2 O’M&H 73** and **Ringadoo v Jugnauth [supra]**. All we need to say is that those decisions were valid for those places and those times and elections are hyperactive exercises and generate considerable passion from all sides. A realistic view should be taken of the fact that elections are no longer what they used to be before. The characteristics of the jurisdiction should be taken into account.
- (52) The realistic view is well expressed in **Erlam & Ors v Rahman and Anor M/350/14**:  
*“a distinction should be made between the candidate’s team of supporters,*

*canvassers and those whole unconnected members who may support and engage in unsolicited acts of corrupt or illegal practice.”*

- (53) In the application of civil or criminal sanction in electoral law, what the law requires is the existence of a nexus between the candidate and the alleged agent. The operative nexus would be satisfied where, no matter whether it is an official relationship, a party relationship or a personal relationship, the candidate has knowledge of the misdeed of the other, consents to it or gives his approval for its commission. In this jurisdiction, where the sense of community living is quite strong, some have party allegiances, some party identity, some have historical ties with party. Some have personal allegiances, family ties, personal friendships and common interests and philosophy. The dishonest nexus between the alleged agent of the illegal practice and the candidate must be shown. That nexus will be satisfied if no matter what that relationship is, the candidate has knowledge of the malpractice, consents to it or gives his approval for it. The reference to Seychelles law of agency should be understood in the sense it was meant in the context. To use the digital language, the author and the candidate should in the first place connect. Without the connection there cannot be agency. The connection may be implied by facts and circumstances with regard to the degree of knowledge, consent or approval, express or implied that was given but there should be the connection. Only he is unseated in a democratic election who obtains it by corrupt means. The mischief is in the corruption that connects.
- (54) In the case of **Kalence V Muknshya & Electoral Commission of Zambia & Attorney General [2013] ZMSC 27**, the Court held that the election of a candidate as a member of the National Assembly shall be void where it can be shown that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents. If unknown to the prospective candidate and without his/her consent, that certain members of the public who support his/her party are engaging in corrupt or illegal practices to ensure his/her party wins the election, those supporters should not, in law, be deemed to be his agents:

*“The mere interferences on the candidate’s part with persons who, feeling interested in the candidates success, any act in support of his campaign is not sufficient to saddle he candidate with any unlawful acts of theirs of which the candidate and his election agents are ignorant.”*

- (55) In the absence of authorization or ratification of the candidate, there must be evidence that the agent was acting on behalf of the candidate or that the candidate put himself in the agents’ hands or to have made common measure with him for the purpose of promoting the candidates election.
- (56) The scope of the agent’s mandate is another important factor. The rule is that acts done by the agent outside the scope of their authority cannot bind the principal. At **paragraph 619 of Halsbury’s of England Volume 15, 4<sup>th</sup> Edition**, we read a “voluntary canvasser who canvasses without authority is not an agent.”
- (57) We hold, therefore, that Seychelles law on agency, albeit in the Seychelles Civil Code, which applies in electoral law is not in any way different from what obtains in other jurisdictions.

## **GROUND 2**

### **AFFECTING THE RESULTS OF THE ELECTION**

- (58) With this, we come to the view taken by the learned Judges that even if some illegal practices had occurred, those illegal acts did not have the effect of impacting on the final result for the purpose of voiding the election.
- (59) The law on this matter is found in section 44(7)(a) of the Act. We have referred to this earlier. However, we reproduce the relevant part for convenient readability:

*“The Constitutional Court may declare that an election ... is void if the Court is satisfied –*

- (a) That there was a non-compliance with this Act relating to the election...and the non-compliance affected the result of the election or the nomination;*

(b) *That an illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the candidate.”*

- (60) As can be seen, section 47(1)(a) requires proof of two elements: *non compliance* with the Act is one and non compliance *affecting the result of the election* is another. On the other hand, section 47(1)(a) lacks that linking between illegal act and the results of the election. However, it is also worth noting that illegal act *per se* may not lead to the election being annulled. The illegal act is linked to the issue of “*knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of the agents of the candidate.*”
- (61) The legislator was aiming not at the illegal act itself but at the crucial question whether the candidate had caused himself to be elected by illegal and corrupt means. That makes complete sense since those who are the representative of the people who happen to get themselves elected by dishonesty may not benefit from the fruits of their poisoned tree.
- (62) In this particular case, the Appellant was engaging his legal battle under two fronts: section 47(1)(a) and section 47(1)(b). Under 47(1)(a) non compliance with the Act is one element and how it affected the result is another. Under section 47(1)(b), illegal act is one element and the candidate’s knowledge is another element.
- (63) With regard to non compliance, we read from **Halsbury’s Laws of England (4th Edition, Volume 15 at paragraph 581)**, that an election should not be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal, having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections and that the act or omission did not affect the result.

- (64) We adopt that proposition of law as far as the interpretation of sections 47(1)(a) is concerned. It is axiomatic that the matter should be guided by the principle of proportionality. The consequence should be commensurate with the act or omission as a basic fairness dictates.
- (65) Now with regard to the operation of section 47(1)(b), the question to ask is whether Respondent No. 2 had knowledge of, gave his consent to or signified his approval of, the illegal acts. If he had, his election should be declared null and void. If he did not have knowledge of what the alleged agents were doing and that they were acting of their own accord, out of zeal, self-interest or other motive, liability cannot be imputed to Respondent No. 2. Any suggestion of absolute liability is dispelled by the existence of a subjective element written in the law: i.e. that the candidate should have the necessary knowledge, give his consent or signify his approval.
- (66) In this particular case, the illegal acts which the Constitutional Court found had been committed were few and far between. Of the number of election centres, doubts – unreasonable ones – were raised only on a couple of them. They were not a generalized nature. None happened to be grave and serious nature in the sense that none was of a corrupt nature within the meaning of the Act. Nor were they prevalent. In other words, the election was substantially free and fair as a whole, in compliance with the Act to an appreciable degree.
- (67) The Constitutional Court was not satisfied as it was incumbent upon them to do under section 46(1) (b) for the issue of a Certificate to the Electoral Commissioner to that effect. That conclusion survives our scrutiny.
- (68) It is to be noted that the principle of proportionality which should obtain between the act or omission and the consequences that flow from the act or omission is inbuilt in the Elections Act. Section 45 provides:
- “4) Where it appears to the Constitutional Court on an Election Petition –*
- (a) that an act or omission of a candidate or the agent of a candidate or any other person, which, but for this section, would be an illegal practice*

*under this Act, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; or*

*(b) that upon taking into account all the relevant circumstances it would be just that the candidate, agent of the candidate or the other person should not be subject to any of the consequences under this Act or such act or omission.”*

(69) That section has been applied in the case of the Appellant himself: see **Wavel v Electoral Commissioner & Ors (No. 1) 16 August 2016**. The Court is empowered to make an order allowing the act or omission which would otherwise be an illegal practice under this Act, to be an exception to this Act and the candidate, agent or other person shall not be subject to the consequences under this Act.

(70) In the recent Ugandan case of **Amama Mbabazi V Yoweri Kaguta Museveni And Others, Election Petition No 1 Of 2016**, the court decided that there was not enough substantial evidence of irregularities in the election, or that the irregularities would have affected the result. Similarly, in **Odinga v Independent Electoral and Boundaries Commission & Ors [supra]**, the Court commented that:

*“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance had not affected the validity of the elections. This emerged from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Therefore the petitioner must have set out his petition by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”*

(71) We are unable to see the cause and effect in the type of non compliance and the final result. There is no merit in Ground 2. It is dismissed.

### **GROUND 3**

## REGISTERS

(72) Under Ground 3, the non-compliance with Elections Act made by the Appellant related to the unsatisfactory state of some of the Electoral Registers. Learned counsel submitted that the Constitutional Court erred in not ordering a recount of all votes from all polling stations on account of the unsatisfactory maintenance of the Registers. They were not reconciled with one another, despite discrepancies on names which had been crossed and some names not crossed. It was the contention of the Appellant that there was accordingly a non-compliance with the section 25(1)(b)(iii) of the Elections Act which requires the marking of the register as well as section 29(1)(c) and (e) of the Elections Act which requires that at the end of the polling all the Registers should be sealed.

(73) Section 25(1)(b)(iii) reads:

*“the Electoral Officer ... shall place a mark against the name of the person on the copy of the register of voters to denote that a ballot paper in respect of the election has been delivered; ...”*

And section 29(1)(c) reads:

*“The Electoral Officer shall, as soon as practicable, after each ballot box is full and in respect of other ballot boxes after the close of the poll, in respect of other ballot boxes after the close of the poll, in the presence of the respective polling agents who wish to attend ... mark the copy of the register of voters.*

(74) Frankly, we are unable to follow in what was these purely administrative matters which may be useful for collating, if not complied with to the letter as they should have had an impact on the result. If any doubt was envisaged on the matter, it should have been addressed administratively to the Chief Electoral Officer, leaving it to the Electoral officer to make a decision as he saw fit. If the Constitutional Court did not see much in the argument, they were right.

(75) Appellant had testified to the effect that he had been provided with three Electoral



Registers containing the names of persons entitled to vote in the electoral area of the Inner Islands. The Respondent No. 1 had informed him that they should be used for marking off all voters who voted on La Digue. Appellant added that he had been further told by Mr Gappy that the third (more comprehensive) register was drawn from the 2<sup>nd</sup> Register (which was not the one at the door when people came in, but a different register). Appellant's case was that he was to discover later that several names had not been transferred from the first Register (i.e. the one used on Mahe) to the 2<sup>nd</sup> Register (the main register on la Digue).

This meant that a number of persons who voted on Mahe were not crossed off the list on La Digue.

- (76) The Registers from the Inner Islands certainly showed several incongruities which could not be explained away by the relevant officers as names were marked off in some registers and not in others with little consistency between the three registers produced. It was the argument of Mr Georges, therefore, that “the marking only of the Register where a voter presents him or herself leaves the possibility open for voters returning to another table and voting again” and that “there is only one way for these problems to be satisfactorily resolved. This is to use the electoral register, properly marked, as the base for the tallying of voters who had voted.”
- (77) We take the view that it is unsafe for a Court to find a complaint proved on a possibility that unauthorized voters had cast votes. Registers of voters are handled by officials and polling agents alike. A reconciliation is not the work of an Electoral Officer. It is that of the polling agents to undertake that task in the proper discharge of their duties.
- (78) In our view, there is no doubt that there is a purpose for which Registers are prepared: for the purpose of recording those who had voted and those who had not. Where they have been well maintained, the sums add up. They give added confidence in the credibility of the electoral process. But the important point to remember is which Register are we comparing with which inasmuch as there is an Official Register and those of the polling agents. As such, the state of completeness or incompleteness of the Registers is flimsy

evidence that there was double voting. If anything it will show that polling agents have either not understood or not done their work properly. The crucial question is the prevention of double voting. No person is entitled to be registered in more than one electoral district as per section 5(2) of the Elections Act. If the concern of the Appellant is that one registered voter may have voted twice if his name is not crossed in one, then that is unlikely inasmuch as there was a system indelible dye and invisible spray used to prevent double voting. The Appellant is making a confusion in what really counts in gauging the credibility of the electoral system. The tracing is not in Registers but in the tally sheets.

- (79) In the matter of the Parliamentary General elections for the **Mumbwa East Constituency; Loongo V Shepande (1983/Hp/Ep/25)**, an application was made for a recount of votes on the ground that the statutory procedure had not been followed. The courts had to determine whether on the facts, there had been non-compliance of the provisions of the Electoral Act and if so whether the said non-compliance affected the result of the election. The evidence of the petitioner's election agent, who was present at the counting, was that during the counting of ballot papers in the respondent's tray, he observed a bunch of ballot papers which had been counted twice. When he queried, the Returning officer ignored him. The Returning officer admitted in court that there had been discrepancies in the counting. He attributed this to human error. The judge ordered a recount on being "satisfied that a case for a recount has been made out."
- (80) In the case of **Akidi S Adong & Anor (Election Petition No.0004 Of 2011) [2011] UGHCCD 8 921 July 2011**, the Petitioner contested for the woman Member of Parliament for Nwoa District which was part of the general election held throughout the Country on the 18<sup>th</sup> February 2011. Her opponent had been declared the winner for having won by 7,253 votes as against the Petitioner who had obtained 5,522 votes. The Petitioner contended, among other things, that there had been non-compliance with the electoral laws in force and that there were several electoral offences committed by the successful candidate by herself as well as through her agents with her knowledge, approval and consent. The Petitioner contented that all those offences and non-

compliances affected the results of the election in a substantial manner.

- (81) The Court held that the issue of non-compliance affecting the results substantially has to be appraised on proven irregularities. The Petitioner had failed to prove that there was non-compliance with the electoral laws and that the non-compliance affected the results in a substantial manner.
- (82) The two cases above can be distinguished from one another in that in the first case, the non-compliance related to a core concern of the vote count. In the second case, the non compliance related to a matter collateral to the vote count. There was evidence in the former and no convincing evidence in the latter.
- (83) Reference is made to the case of **Raila Odinga v The Independent Electoral and Boundaries Commission & Ors [2013 ECLR which** held that:

*“The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the date and information capture during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the 1<sup>st</sup> respondent, for the purpose of causing prejudice to any particular candidate.”* (see also **Mumbwa East Constituency; Loongo V Shepande (1983/Hp/Ep/25)**).

- (84) In our view, Chief Justice Twomey, with whom the other judges agreed, put it succinctly:

*“the failure to reconcile the registers is not a form of non-compliance with the law as there is not law requiring that the registers be reconciled in the first place. However, they do need to be sealed and placed in the care of the Chief Electoral Officer as required by the Act.”*

- (85) In the case of **Opitz V. Wrzesnewskyj 2012 Scc 55, [2012] 3 S.C.R. 76**, the Canadian Supreme Court stated:

*“The practical realities of election administration are such that imperfections in the conduct of elections are inevitable...A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences it is difficult to see how workers could get practical on-the-job experience...The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system. This overarching concern informs our interpretation of the phrase “irregularities... that affected the result.” (p. 198 per Rothstein and Moldaver JJ).*

(86) Seychelles is not geographically as expansive as Canada. But the hundreds of Seychellois hired for the few days, the detailed work entrusted upon them for the long hours, the stressful condition in which they work where each activity carries a legal meaning is unfamiliar to them. Most of them have had little or no training on or outside a job that comes to them only once every five years. The Electoral Office itself is under tremendous pressure with each one trying to keep his head where many are near losing theirs. If the current system of Canada was not designed to achieve perfection, *a fortiori* Seychelles, just learning to get into grips with the multi-party system introduced in 1992. Be that as it may a realistic view should be taken of ensuring that progressively this near perfection is achieved.

(87) In the case of **Rtd. Col. Dr Kizza Besigye v Electoral Commission, Yoweri Kaguta Mueveni [2007] UGSC 24**, the Court held:

1. It was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles laid down in the Elections Acts and the

Constitution, affected the results of the Presidential election in a substantial manner.

2. The fact that these malpractices were proved to have occurred is not enough. The petitioner had to go further and prove their extent, degree, and the substantial effect they had on the election.

**(88)** In the case in hand, the soundness of the reasoning and the conclusion of the learned Judges cannot be impeached, all the more so when the evidence on record portrayed that the focus was on registers rather than on the tally sheets. The few administrative lapses and the reprehensible conduct of the few individuals who were found to have committed illegal practice by the Constitutional Court could not reasonably be said to have corrupted the stream of the electoral process to such a degree that the election should be annulled. The core process that can be regarded as material are: the credibility of the Registration Process; the timely and public issue of Notices; the opportunity given to electors to make up their minds; the transparency in what takes place for the procedure for voting at the polling centres; the confidentiality in the elector casting his vote; the inviolability of the ballot boxes between the start of voting and the start of the counting; the tally in the ballots issued and the ballots counted etc.

#### **GROUND 4**

##### **THE SHIFTING OF THE BURDEN OF PROOF**

**(89)** We now turn to address the issue of proof and shifting burden of proof. The rule bears no repetition that in the trial of the civil matter the burden of proof is on the plaintiff or the petitioner, i.e. the party who brings the lawsuit. It rests upon him to show by a “preponderance of evidence” or “weight of evidence” that “all the facts necessary to obtain a judgment are probable true.” In civil cases, the onus is on he who alleges to both aver and prove his allegation. The defendant has nothing to prove unless he is required to do so under any provision of law. In the event that the defendant has a counter claim, then the burden of proof lies on the defendant in relation to the counter-claim. There are numerous cases across jurisdictions that have adopted this rule of the common law

system for generations. In hybrid systems, the rule has remained the same where the procedure is adversarial.

- (90) In the case of **Joseph Constantine Steamship Line Limited V Imperial Smelting Corporation (1942) AC 154**, it was held that the burden of proving their claim was upon the claimant, and this burden, they had failed to discharge with the result that the claim had to be dismissed. This rule has continued to apply in election petitions. Thus, in the case of **Opitz vs Wrzesnewskyj (2012) SCC 55-2012-10-56**, it was held that an applicant who seeks to annul an election bears the legal proof throughout. In the Ugandan case of **Col. Dr. Kizza Besigye vs Museveni Yoweri Kaguta And Electoral Commission (2001) UGSC**, it was held that the burden of proof in electoral petitions as in other civil cases is settled, it lies on the petitioner to prove his case to the satisfaction of the court. In the Zambian case of **Khalid Mohamed V Attorney General (1983) ZR49**, we read:

*“A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents” defence does not entitle him judgement. I would not accept a proposition that even if a plaintiff’s case has collapsed of its inertia or some reason or other, judgment should nevertheless be given to him on that the defence set up by the opponent has also collapsed.”*

- (91) The Nigerian Supreme Court in the case of **Buhavi Vs Obsanjo (2005) CLR 7K**, stated as follows:

*“He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded facts, it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party”.*

- (92) In our case, the Constitutional Court applied the rule that he who alleges proves.

However, it was the contention of learned counsel that all that he was expected to do was to bring such facts as were within the knowledge of Appellant and thereafter, the burden shifted upon the Respondents to show that there was no illegal practice. The Constitutional Court did not accept that proposition of law. It decided that the burden of proof did not shift on to the second Respondent to rebut the allegations.

- (93) We would agree with the Constitutional Court for the reasons they gave. From our part, we would add the following. The way the law is worded provides the clue to what proof is needed and on whom rests the onus of anything at all. If the provision of the law is worded in such a way that the elements are indicated therein, then he who alleges needs to both aver and prove all those elements. The other party has nothing to prove. On the other hand, if the provision of the law is worded in such a way that a defence is specifically inbuilt in the section itself or that the defence is provided outside the section, then the burden shifts upon the defence to come up with the elements of exculpation. An actual example in both situations would be apposite.
- (94) An illustration where a defence is inbuilt in the very section would be section 51(1)(f) which reads: “A person who, without due authorization, supplies a ballot paper to any person is guilty of an offence.” In such a case, the plaintiff still bears the burden of proving that the defendant had no authority. At that time, the burden shifts upon the defendant to show that he had “*due authority*.”
- (95) An illustration where the defence is built outside the section of the law is section 45(4) where the illegal practice is found at section 51 but the defence at section 45(4): namely that the illegal act was committed “*in good faith through inadvertence or accidental miscalculation or some other reasonable case of a like nature*.” That is the standard rule.
- (96) We are not permitted to read or write into section 45(1) something which it does not contain either expressly or impliedly. Section 45(1) provides that “the trial of an election petition shall, subject to this Act, be held in the same manner as a trial before the Supreme Court in its original civil jurisdiction. The legislator did not intend that the

burden should shift on the defendant at any stage in an election petition. Section 51(3) (a), (b), or (c) does not contain any such defence either inbuilt in it or outside it, other than what we have just stated.

- (97) Learned Counsel argued that surely all that a petitioner needs to do is to establish all the material facts and then the burden should shift upon the defendant to come up with facts within his knowledge for the purpose of exonerating himself. That proposition which is one of *Res Ipsa Loquitur* (the facts speak for themselves) does exist but it is applied in limited number of cases in the law of evidence. If a shopper slips and falls in a Supermarket on a spilled Yoghurt, the shopper has nothing more to do than to bring the evidence that she slipped and fell down in the course of doing her shopping. It is then that the evidential burden shifts upon the Supermarket to show that they were not negligent, that their system of health and safety is such that the moment there is a spill on the floor, the attendants clear it within a reasonable time. The facts on which *Res Ipsa Loquitur* applies relate to an abnormal happening in a normal situation. If a bag of flour falls from a loft upon someone walking in, he may not be expected to do more than adduce evidence of his presence and the fall inasmuch as in the normal course of things, bags do not fall from lofts; if it does, it must be due to the negligence of someone: see *Byrne v Boadle* (2 Hurl. & Colt. 722, 159 Eng. Rep. 299, 1863). In an election case, the abnormality should be shown for the burden to shift. While it is important that the justice system should encourage litigants to come to court to prove electoral malpractices, courts should bear in mind the statement made in **Jugnauth v Ringadoo [supra]** that litigants who did not make it at the polls may wish to try their luck through Court.
- (98) We hold, accordingly, that the burden of proof lies solely on the Appellant to prove that there were illegal practices committed in connection with the election and that the Constitutional Court did not err in keeping to the classical application of burden of proof and standard of proof.
- (99) With the above, we come to the standard of proof, burden of proof and the shifting of the evidential burden of proof in the civil cases brought under the Elections Act.



(100) We acknowledge that there is some Commonwealth jurisprudence on the question that the standard of proof should be higher than the standard of balance of probabilities obtaining in civil cases but lesser than the proof beyond reasonable doubt obtaining in the criminal cases. These cases apply the intermediate standard of proof. One of such cases is **Lewanika And Others V Chiluba [1998] ZMSC 11** where the petitioners had alleged that there was bribery, fraud and other electoral irregularities by the Respondent in a presidential election in Zambia and sought its nullification. Ngulube, CJ, giving the judgment of the court, stated:

*“... we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability”.*

(101) It is clear that according to the case of **Lewanika and Others v. Chiluba**, the Supreme Court reaffirmed the standard of proof needed in an electoral petition being somewhere between the civil standard, balance of probabilities and the criminal standard of beyond reasonable doubt. The reasoning behind was that, it would be a great injustice to bar a candidate from voting for five years and from contesting elections for that period only on the basis of the standard of balance of probabilities. When the consequences of evidence would result in serious impairment of one’s constitution rights, the interests of justice demand that a higher standard of proof be adhered to.

(102) The test used in Zambia is also used in Kenya. In the Kenyan case of **Sarah Mwangudza Kai V Mustafa Id Salim 7 Two Others Malindi Election Petition No.8 Of 2013**, the following regarding the special nature of election petitions was stated:-

*“Election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution This means that electoral disputes involve not only the parties to*

*the Petition but also the electorate I the electoral area concerned. It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required proving ordinary civil cases.”*

- (103) Similarly in the case of **Joho V Nyange & Anor (2008) 3 KLR (EP) 500**, Maraga J, as he then was, expounded on this principle and explained why election petitions are matters of great public importance and should not be taken lightly. He expressed himself in the following terms:-

*“Election Petitions are no ordinary suits. Though they are disputes in rem (?) fought between certain parties, election petitions are nonetheless disputes of great public importance **KIBAKI v MOI, Civil Appeal No. 172 of 1988**. This is because when elections are successfully challenged, by-elections court’s decision in **Wanguhu Nganga & Anor v Geroge Owite & Anor, Election Petition No. 41 of 1993** that “Election Petitions should not be taken lightly.*

- (104) The Supreme Court after reviewing several local and foreign decisions on this matter settled the law in Kenya in **Odinga v Independent Electoral And Boundaries Commission And Others [2013] EKLR** to the effect that:

*“... the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”*

- (105) In the case of **Jugnauth v Ringadoo [2007 PRV 58]** the Law Lords of the Judicial Committee of the Privy Council were categorical. *“The courts must simply be satisfied on a balance of probability.”*

- (106) In our view, it would not be right for our jurisdiction to import by judicial legislation a standard slightly higher than that of a balance of probabilities in electoral petitions

brought before the court. True it is that annulment of an election is a serious matter but an election is not voided in Seychelles law on the mere occurrence of illegal acts or omissions of compliance. Our Courts need to be satisfied from the facts that the ultimate measure is warranted. Illegal practice by itself is no ground for the avoidance of an election of someone democratically elected. It should be shown that the illegal practices have been so grave, so serious, so widespread that it cannot be said to have been democratic. On the face of it, an election may look democratic but there may be a latent flaw which may impact upon the final outcome by a serious doubt raised in it. In our law, illegal acts may not lead to the nullity of the election of the candidate in question. But once a candidate has knowledge of the illegal practice, once he has given his consent to it and once he has given his approval, he is a corrupt man at the top. Such a corrupt man may not find his seat in Parliament. His election is a fraud and void. If the standard is raised high in civil petitions which has only civil remedies and limited to cases only where the corrupt man is elected, then we are adding unnecessary hurdles in a democratic process. The answer in our view does not lie in changing the rule but ensuring that the rule is properly applied having regard to the principle of proportionality.

- (107)** An election is not voided unless the petitioner shows on a balance of probabilities that it is so multiple, so serious, so prevalent and widespread that it cannot be said that it is by and large or substantially in order. On the other hand, if there are illegal practices which have occurred in places and times which are few and far between, an election cannot be voided. Those culpable need to pay the penalty prescribed in the civil action. If an analogy is needed, we would use the one which has been used by the Supreme Court of India. The electoral stream should be kept pure. If it is corrupted at the very source, the source should be cut. The source will be corrupted if the candidate has knowledge of the illegal practice and he gives his consent or approval thereto. On the other hand, if it is not the source that is corrupted but the pollution lies in some tributaries which are few are far between, then those tributaries only should be cut to stop supply. On the other hand, if the pollution is so prevalent in most of the tributaries, then it makes sense that the stream itself is to be cut for supply.

- (108) Having dealt with the laws to agency (Ground 1), affecting the result (Grounds 2), marking of Registers (Grounds 3), burden and standard of proof (Grounds 4). We shall now move to the application of the above to the facts of this case under Grounds 5 to 13.

## **THE FACTS**

- (109) The Constitutional Court found that the Appellant had fallen short of proof that there was anything unlawful in the conduct of Mr Rene and Mr Pillay, Dana Valentin and Flossel Francois, Etihad Airways, Mrs Beryl Botsoie, SPDF Officers, James Lesperance, Dolor Ernesta and Indian Ocean Tuna which breached the Elections Act.
- (110) We shall consider them in the order in which they have been raised.

## **GROUND 5 & 6**

### **Mr Rene and Mr Pillay**

- (111) It is the contention of learned counsel for the appellant under Grounds 5 and 6 that the Constitutional Court erred in its judgment in not finding that Mr René was an agent of the second Respondent on the basis of evidence adduced that he had been the predecessor of the second Respondent as President; that he belonged to the same party and had appeared for the second Respondent in political broadcasts of the second Respondent during the election .All of these factors rendered the possibility that Mr Rene was either the agent of the second Respondent's knowledge, more probable than not.
- (112) He also contends that the Constitutional Court erred in its finding that Mr René not been proved to have asked Mr Pillay to vote for the second Respondent in that such a requirement is not a necessary element of the offence.
- (113) We have stated at paragraph 71 above that agency should be made of sterner stuff than inferred from historical, personal, social or political association. That is the jurisprudence in all democratic jurisdictions we have considered. When a committed election supporter is canvassing support of one person in favour of a candidate, it is not always that he

reveals his method to the candidate upfront. In many cases, he would do so after he has succeeded. There is in law a lack of a nexus of agency to link Mr René with Respondent No. 2. Agency may not be presumed from ambiguous and equivocal facts but from facts which have probative weight:

*“a défaut de circonstances clairement indicatives ou de ces relations particulièrement probantes, le mandat ne saurait se presumer.”* **Encycl. Civil, Dalloz. Mandat, para 86.**

- (114) The fact that Mr Rene belonged to the same party as the second respondent does not in itself make him an agent. The same is to be said for Mr David Savy. From the fact that Mrs Beryl Botsoie and Lt. Col. Roseline are government employees, one cannot safely assume that because of their position in these government institutions, they were agents of the Second Respondent. The Constitutional Court was cautious in not opening the net so wide for this case or cases for the future. Positions and ties do not make an agent. At **Paragraph 622 of Halsbury’s Law of England** we read:

*“The mere fact that the alleged agent is a brother of the candidate or the partner or son of an authorized agent is not sufficient to establish agency. A confidential employee, even though active in the election, is not necessarily an agent.”*

- (115) On the facts, we are unable to disturb the finding of fact of the trial Court that evidence of illegal practice in the conversation between Mr Pillay and Mr Rene was paucity. There is no merit in the argument of the Appellant in this instance. We dismiss it.

## **GROUND 7**

### **The case of Dana Valentin and Flossel Francois**

- (116) In the case of Dana Valentin and Flossel Francois, the Appellant had averred that Dana Valentin had secured the release of her companion Flossel Francois in breach of section 51(3)(c) of the Elections Act which provides that a person commits an illegal practice where the person-

*“Directly or indirectly, by that person or by any other person on that person’s behalf, makes any gift, loan, offer, promise, procurement, or agreement referred to in paragraph (b) to or for any person in order to induce such person to procure or to endeavor to procure the vote of a voter at an election.”*

- (117) Evidence had been led to the effect that Dania Valentin who was a supporter of Mr Patrick Pillay shifted her allegiance to the President when the Petition of Presidential Pardon made by her companion Flossel Francois was granted for the latter’s release from prison. However, any suggestion of illegal practice was rebutted by evidence that there is a set procedure which must be followed for the exercise by the President of Presidential Pardon and on specified grounds. Mr Flossel Francois was released from prison in accordance with the law and on the strength of the Recommendation received from the Advisory Committee on pardons. It was on medical ground as he had a heart condition. The Appellant had admitted in his evidence that Mr Francois had a heart condition. The fact that there had been only two other Presidential Pardons which had been granted the previous year, one in June 2015 and another after the election in December 2015 cannot lead to the conclusion that in this case that Respondent No. 2 had committed an illegal practice by discharging his statutory duty under the law.
- (118) The deposition of Tony Dubignon, a former prison inmate, was that he also had a serious heart condition and had applied for 4 Presidential pardons, none of which had been successful. He was ultimately released from prison on a licence to receive treatment in Chennai because his condition reached a critical state. Evidence was led by Mr Hoareau through the cross-examination of the Appellant that the President does not act on his own in the matter. He is only advised by the Board of an Advisory Committee, which on receiving such applications, examine the application and makes Recommendations on which the President acts.
- (119) Any conclusion that Respondent No. 2 had committed an act of illegal practice by granting the Presidential Pardon as a result of which Mrs. Valentin had shifted her allegiance from the party of Appellant to that of Respondent no. 2 is unsafe.

(120) Section 51(3)(c) is intended to cover such cases where the first move – whether direct or indirect – is made by the defendant whose acts are called into question. It is not meant to cover such cases where an application is made by a citizen in the normal course of things and the process follows the prescribed course towards a prescribed result. Government does not stop functioning during an election campaign. Nor should it be inhibited from functioning normally when it comes to serving the people for the purpose for which it is elected. The section applies to situations where it is the defendant who “directly or indirectly makes” the impugned move and not where a citizen uses a set procedure to claim a benefit due and follows the correct procedure to obtain the prescribed benefit.

(121) The finding of the Constitutional Court cannot be disturbed on this aspect of the case.

#### **GROUND 8**

##### **Etihad Airways**

(122) This ground has been abandoned. It is accordingly dismissed for want of prosecution.

#### **GROUND 9**

##### **Mrs Beryl Botsoie**

(123) Mr Bernard Georges submitted under Ground 9 that the Constitutional Court erred in its judgment in not finding that Mrs Beryl Botsoie was an agent of the second Respondent, ignoring that Mrs Botsoie was both a head teacher in the government of the second Respondent and his polling agent in an electoral area. These factors rendered it more probable than not that Mrs Bosoie was an agent of the second Respondent, or at least that he had knowledge of her actions.

(124) We have addressed this matter above. The same reasoning applies as has been applied in Ground 5 and 6 above. If the nexus rule is not applied, all active public servants would become the agents of out-going governments.

#### **GROUND 10**

##### **SPDF Officers**

- (125) It is the case of Appellant under Ground 10, that the constitutional Court erred in paragraph 458 of its judgment in not finding that at least Lt Col Roseline was an agent of the second Respondent, or that the second Respondent had knowledge of what Lt Col. Roseline was doing, in that Lt Col Roseline was proved to be the Military Adviser of the Second Respondent, their Commander in Chief. These factors rendered it more probable than not that all three officers were agents of the second Respondent, or at least that he had knowledge of their actions.
- (126) For the same reasoning as under Grounds 5, 6 and 9, we are unable to disturb the finding of fact of the Constitutional Court. Many there are in an election who act on their own accord, out of faith, out of choice, out of conviction, out of liking, out of passion, out of common cause or simply out of self interest. In many situations, the one who should have known is the last to know. In law, inferences drawn should be reasonably drawn from solid facts and not from perceptions.

We are unable to see any merit in Ground 10 and it is dismissed.

## **GROUND 11**

### **James Lesperance**

- (127) It is the contention of the Appellant that the Constitutional Court erred in not finding that Mr James Lesperance was an agent of the second Respondent, or had been acting with the knowledge of the second Respondent or his agents, in that the coincidence of Mr Lesperance's presence as a front-line guest at the inauguration of the second Respondent, in the absence of an innocent explanation therefor, rendered proof of agency or knowledge of his actions more probable than not.
- (128) We are of the view that we shall be putting 2 and 2 to make it 22 instead of 4 if we subscribed to the conclusion that an inference of agency can be inferred from a front seat given to or taken by someone at a State ceremony. It would have been more probable if he had been given or assumed a prominent position among the hosts rather than among the guests.



## **GROUND 12**

### **The case of Dolor Ernesta**

- (129) With regard to the case of Dolor Ernesta, the Appellant had averred that Dolor Ernesta had “kidnapped Marie-There Dine, a blind octogenarian” to take her to the voting booth.
- (130) We are unable to see any evidence from which to draw the conclusion that the old blind lady was forced to vote against her will. Evidence adduced in the court below shows that there was a legitimate exercise that was been carried out in that such facility had to be afforded, including transportation, to the elderly at various polling stations in accordance with section 25(3) of the Act. The averment that the blind old lady was unwashed, uncombed and wearing a dress that was inside out, if anything, shows an authentic picture of taking an elderly to the voting booth, all the more when she is blind. The voter as she is found for the purpose of the exercise of her right to vote.
- (131) The finding and conclusion of the Constitutional Court cannot be disturbed in her case either.

## **GROUND 13**

### **The case of Indian Ocean Tuna (IOT)**

- (132) With regard to the case of Indian Ocean Tuna (IOT), the facts were as follows. The Principal Secretary of the Ministry of Finance, Trade and the Blue Economy wrote the General Manager of Indian Ocean Tuna Limited, a company in which the government is a share holder to announce that the government would pay all Seychellois employees of the company earning less than SR15, 000 a month a thirteenth month salary.
- (133) This in the view of the Appellant was caught by section 51(3)(c) whereby Respondent No. 2 had indirectly through the Principal Secretary of the Ministry of Finance, Trade and the Blue Economy and the Indian Ocean Tuna Limited induced them to vote for him. The documentary evidence produced by the Appellant bears out the fact that the payment of a thirteenth month salary had been made. It also transpired from the evidence that the salary of the Seychellois workers at the Indian Ocean Tuna company was an economic

issue which had to be resolved as a matter of policy, so much so that the Appellant himself had made that offer to the workers. What the government of Respondent No. 2 had decided, as far back as June 2015 is to take the cue.

- (134) The learned Judges decided that the thirteenth month salary was a *fait accompli*, that the matter was very much in the public arena as it had been Gazetted in November 2015 and that the workers were in a win-win situation regardless of who won the presidential elections.
- (135) We agree with the conclusion reached on the matter. The facts do not suggest the commission of an illegal act within the meaning of section 51(3) of the Elections Act. It cannot be said that the workers were thereby induced to vote for Respondent No. 2. In law, a pro-active government policy decision cannot be said to be an illegal act. Since the issue that been announced by the Appellant himself and implemented by the Respondent no. 2, it is difficult to say who got the credit for same in the ballot box. There were no witness for the Appellant who came forth to give evidence that at any one time Respondent No. 2 reached them to invite them to vote for him for that decision of policy. Unlike in the case of **Jugnauth v. Ringadoo**, the Minister had met the specific group of Muslims to induce them to vote for him for the policy decision taken by government.

## CONCLUSION

- (136) In conclusion, we hold that the Constitutional Court did not err in applying Seychelles law as to agency for the determination of the relationship between the alleged agents and Respondent No. 2 on whether or not the latter had committed illegal acts; that the impugned non compliance with electoral law were insufficient for a declaration that the election should have been voided or that a recount was called for; that the few illegal practices that were not found proved were not by themselves or by other attendant circumstances of such a nature as to go to the very root of the election so as to render it void; that the burden and the standard of proof was properly applied in the case; and that

the conclusions on individual cases where the Court found no agency and no illegal practice cannot be impeached.

(137) All the grounds raised on this appeal having failed, the appeal is dismissed with Costs.

S. Domah (J.A)

**I concur:.** ..... F. MacGregor (PCA)

**I concur:.** ..... J. Msoffe (J.A)

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