

IN THE SEYCHELLES COURT OF APPEAL

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

Civil Appeal SCA 05/2016

(Appeal from Supreme Court Decision CP 07/15 & CP 01 /2016)

Major Simon Dine

Colonel Clifford Roseline

Beryl Botsoie

James Lesperance

Appellants

Heard: 05 April 2017

Counsel: Mr. Elvis Chetty for Appellants

Delivered: 21 April 2017

JUDGMENT

S. Domah (J.A)

[1] In an election petition brought before the Constitutional Court sitting as the Election Court under section 44 of the Elections Act, the Court found that the four appellants had committed illegal practices contrary to Section 51(3) of the Elections Act. In the exercise of their powers under section 47(1) of the Act, the learned Judges proceeded to mete out the sanction that flows from such an act: namely, reporting the illegality to the Electoral Commission for the removal of their names from the Register of Electors for a period of 5 years. This is an appeal against the finding of illegal practice as well as against the sanction.

[2] Even if the findings of fact by the Constitutional Court have been different with respect to each one of the appellants, this appeal has been made jointly by all four of them with grounds common to all. The appeal with respect to Ground 1, 2 and 3 follows the same grievance in law that the learned trial judges erred in law and on the evidence in holding

that Appellants have committed an illegal practice, with regard to Appellants 1, 2 and 3 contrary to Section 51(3)(j) of the Elections Act; and, with regard to Appellant no. 4, contrary to Section 51(3)(h) of the Elections Act.

- [3] They all seek the protection of section 45(4) of the Elections Act which relates to the statutory mitigation of sanction so that they may be spared the consequences that flow under the Elections Act from their impugned acts or omissions.
- We shall deal with the case of each in its own right.

Major Simon Dine

- [4] Major Simon Dine was at the material time the Coast Guard Commander. The Constitutional Court had made a finding to the effect that he had committed an illegal practice in breach of Section 51(3)(h) of the Elections Act in the following circumstances. He was party to the political statement made by a candidate that *“if change happens and the opposition comes to power may be there will be instability in the small country of Seychelles. It will no longer be stable ... when a government comes to power after there is a change, the new government will have to dissolve the National Assembly... Where will it get the money to go to the Election Commission to organize new elections? ... the country will know total darkness and with change we will be like Africa if we are not careful ... We have achieved a lot and what [the President] has promised he has delivered. There is more to come, but because of certain difficulties this will take time. ... I believe we need to honour our loyalty for the force, for our lives, for the system that is in place so that we can continue to give all our ability.”*
- [5] The defence of Commander Dine has been that, in his address to his men, he was only reminding them of their professional duties and what was required of them during the election period; that was only giving the soldiers a better picture of the situation before them; that all through, his intention was to remain neutral in advising the soldiers on their duties; that it was never his intention to induce or force anybody into voting or not voting for any party in particular; that as a superior, it was his duty to provide the soldiers with support, advice and guidance; that at no point in time during the meeting did he intend to create fear of any kind or intend to coax anybody to do anything they did not want to do; that his reflection was on the sincere development of his department and on what they had

achieved in the preceding few years; that he wanted to remind the soldiers that their loyalty was to their country, their duty to the people and the need to perform their task diligently; and that he did not intend to cause anyone any prejudice by his discourse. He also expressed his sincere apology if his activities may have crossed the line.

[6] The learned Judges of the Constitutional Court decided that his address violated section 51(3)(j) of the Act in that it comprised threats of temporary loss in the form of instability, violence and political uncertainty and that the only feasible intention behind these threats could be to induce the soldiers to vote or refrain from voting in a particular way.

[7] We agree with the conclusion of the learned Judges that there was a breach of section 51(3)(j) in the circumstances. The scary picture made would still have passed as freedom of expression had it not been for the fact that it was made not as a general apprehension genuinely held but as a partisan speech. What was innocence did not turn out to be so innocent when he was echoing the President: *“We have achieved a lot and what [the President] has promised, he has delivered.”* At that point in time, he had doffed his political neutrality as a military officer. His genuine concern for possible chaos after a change at the head was viciated when he specifically brought in the President into his equation.

[8] In terms of finding of culpability, therefore, we would not disturb the findings of the Constitutional Court as regards Major Simon Dine.

Colonel Clifford Roseline

[9] As regards Colonel Clifford Roseline, he was at the material time the Chief Military Adviser of Government. The Constitutional Court had made a finding that he had committed illegal practice in breach of Section 51(3)(j) of the Elections Act.

[10] To come to that conclusion, the Constitutional Court had examined and considered the following material. In an address to his men he stated that the only objective that *“they [Linyon Sanzman] have is to remove James Michel from power. That’s all – remove James Michel from power. [The Opposition] drive by, they see people, they look at them and they say ‘on the 19th, we are coming to get you to hang you.’ If ever these people come to power next week, they will never be able to work with this assembly. They will need to dissolve the assembly. ... From where will you get your salary? ... If Lepep comes to*

power, the budget is there With change there will be no stability and peace. Seychelles will sink, it will be finished. ... we have to give Mr Michel his mandate.”

- [11] The explanation of Colonel Roseline was: that he had merely appraised them of the current state of affairs during the elections period and to remind them of their professional duty as soldiers; that he had tried only to give the soldiers a better picture of the situation prevailing; that it was never his intention to guide them but only to advise them nor to dictate them nor to order them in what particular way they had to exercise their democratic right other than as they wished; that he felt he had an obligation to assist them in making an informed choice on the matter; that it was not his intention to tell them for whom they should or shouldn't vote and that the choice was theirs alone; that what he stated did not amount to threat of temporal loss or amount to election interference; that it was his responsibility to advise and assist all military personnel; that part of his role was to make sure they have sound judgment and that in the process his personal opinion may have come out but it that was not meant to interfere with their right to vote. At the end of the day, he expressed his regret and sincerely apologized, if his intentions had been misapprehended. The Constitutional Court did not accept his explanations and found him culpable of violation of section 51(3)(j) of the Act. We take the view that, on those facts, the conclusion is unassailable. His explanation does not hold. His partisan address was patent.

Beryl Botsoie

- [12] As regards Beryl Botsoie, the latter was at the material time the Head Teacher of the La Rosiere School. The Constitutional Court found that she had committed an illegal practice in breach of Section 51(3)(j) of the Elections Act.
- [13] The case against her was as follows. In a meeting with the colleagues at school, she stated that: *“We are seeing someone [Wavel Ramkalawan] who is proposing himself as a President with arrogance .. I can never see him becoming a good President he makes a lot of noise and attack. Is that really what we want as President for Seychelles? Is this what you really want in future? With a new government there will be no salaries since there isn't any budget. And when there is no salary, whoever comes in power will not have a minister of finance to provide control and they will go to the Central Bank and do whatever they want. I am friends with you all whether you wear the green colour, or yellow*

or in blue, I will always wave hello to you, when I see you wearing the red colour, I will shout in joy, the decision is yours ...”

- [14] Beryl Botsoie gave her version of facts in her affidavit evidence. She explained: that in one of the innocent discussions she had with some of her colleagues, she only expressed her personal views on the candidates; that at no point in time did she attempt to induce, prevent or threaten anyone to vote or refrain from voting; that, in fact, she concluded the discussion by stating that there would be ‘no enmity’ amongst any of her colleagues regardless of which party they affiliated with; that she was for a fruitful and academic discussion and her colleagues were free to correct her and voice their own opinions; that the points she had raised were not intended for garnering support for a particular candidate; and that she did clearly state ‘vote for who you want’. She finally added that she cared for her country and wanted to convey the message that despite all we must look after Seychelles. She denied she was acting as an agent for the second Respondent. She, finally, expressed her sincere apology in case her intentions were misunderstood.
- [15] The Constitutional Court found that she was culpable of illegal practice and was in violation of section 51(3)(j) of the Act. The reason for such a finding was stated to be: “the threat of temporary loss should one vote for the Opposition.” That seems to us to be a timid reason, timidly expressed. The case of this defendant should have fallen in the category of cases where the Constitutional Court had found that no illegal practice had been committed: David Savy, Louis Agathine. The only reason for which we think the balance tilted on the side of a culpability in the case of Beryl Botsoie was because Beryl Botsoie had been a little too subjective in her personal comments on the complainant himself.
- [16] Be that as it may, that finding of culpability of Beryl Botsoie is unsafe. The threat which section 51(3)(j) speaks of is the threat emanating from the defendant and not any threat extraneous or unrelated to the defendant. What Mrs Botsoie was referring to in this case is the apprehension, in her thinking, that there would be no salaries for the payment of staff in the eventuality of a power change. Such uncertainty of the unknown is not unknown to electors, the more so in a likely regime change which follows an election. That was her opinion and the expression of a personal opinion even if mistakenly held cannot be considered to be unlawful: see **Ellis v National Union of Conservatives and**

Constitutional Associations, Middleton and Southall (1900) 44 Sol. Jo. 750. Nor are unlawful a mere argumentative statement of one's idea of a public man: see **Sunderland Borough Case (1896) 5 O'M & H 53.** Expressions of opinions on capabilities of candidates for a public office is in no way a negative comment. It is healthy in a democratic election for people to challenge the candidates on their perceived weaknesses and their ability to eventually deliver. It permits the candidates to make timely amends or refute them.

[17] In a democratic election campaign, people's views matter. As Lord Steyn stated in the Judicial Committee decision of **State v A.R. Khoyratty [2008 MR 210]**:

“The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary.”

[18] A democratic election is an exercise where the two concepts merge. People have to decide who should govern them. For people to usefully decide, there has to be freedom of expression for free flowing discussions, debates, exchanges and information sharing. We are here involved with giving effect to two of the three fundamental foundations of a democracy. In this case, Beryl Botsoie concluded her qualms by the words: *“I am friends with you all whether you wear the green colour, or yellow or in blue, I will always wave hello to you, when I see you wearing the red colour, I will shout in joy, the decision is yours ...”* That should not amount to an illegal practice.

[19] To muffle persons of influence to express their views in an election campaign is to allow too much space to the candidates to deal in demagogies and stratagems. Within guarded circles, officials have a right to speak out their fears without losing their neutrality. They have a right to have strong likes and dislikes, to put to good use their experience of life and society. Canvassed amongst colleagues, persuasive expressions do not stop being democratic expressions of one's likes and dislikes. In our view, in the case of Beryl Botsoie, there is no offence under section 51(3)(j) of the Act.

[20] Accordingly, we take the view that the case of Beryl Botsoie falls short of a finding of culpability under section 51(3)(j) of the Elections Act. We, for our part, refuse to think that the complainant in this matter was seeking to settle a personal score with the defendant on

account of the personal comment she had made against him. But other people may think otherwise. We allow the appeal in her case and quash the order of the learned Judges to report to the Electoral Commission.

James Lesperance

- [21] Now as regards, James Lesperance, the latter is a business man by profession. The allegation against him has been that he had bought identification cards (“ID cards”) so as to prevent the card holders from voting. He refutes this allegation stating it is an electoral vendetta.
- [22] That conclusion of the Constitutional Court was reached on solid evidence against him. Some persons had reported him to the complainant and the latter had, in turn, reported the matter to the Police as a result of which the ID cards had been returned. Two witnesses testified to the fact that their ID Cards were taken against payment of money just a couple of days prior to the elections. Another witness testified that she found him with several ID cards in his pocket. Lesperance was a Parti Lepep political activist.
- [23] In his affidavit sworn to refute the allegation, Lesperance explains that he had his preferred candidate in the December 2015 elections but that he never tried to and/or purchase identity cards to influence the election one way or the other. His version is that the nature of his business is such that he has to employ casual labourers on a daily basis. Since he pays them at the end of every two to three days, his company collects their identity cards, notes their national identity number and the amount of hours worked as an essential task for record keeping, tax purposes stemming from an overall good business practice. It then returns them to the holders. He explains that the company does not have the same people working every day as is the practice when large companies hire stevedores. That is the only reason he was seen in the possession of identity cards of some of the workers. He begged for excuse for any inconvenience and prejudice caused to anyone in the process.
- [24] The Constitutional Court did not accept his explanations but found difficulty in linking the taking of the ID Cards with the elections. The Court found him culpable of giving money, food and drinks to the workers in order to influence them to refrain from voting at the election. We endorse that finding which constitutes a violation of section 51(3)(h) of the Act.

[25] As a statutory sanction, the Constitutional Court reported the matter to the Electoral Commission under section 45(4) of the Act where the reporting is mandatory on a finding of illegal practice.

[26] The Constitutional Court correctly saw that there was a need to draw the line on the sand as to what, in an electoral campaign, is permissible to amount to freedom of expression and what is impermissible to amount to an illegal practice in terms of section 51 of the Elections Act. We fully endorse that view. We also understand their expressed qualms that none of the defendants pleaded for mitigation to enable the Court to exercise its discretion under section 45(4)(b). This section 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 for such act or omission,*

the Court may 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 in respect of the act or omission and the result obtained by the candidate shall not, by reason only of that act or omission, be declared to be void.”

[27] The defendants pleaded, through their affidavits, to be excused. The Constitutional Court was forthcoming. The Bench looked at the context in which they had acted in the light of the benefit which the section afforded them for non reporting. The key question was whether they had acted in good faith. To the learned Judges, they had not. They were all in positions of authority. They had attempted to exert influence over the electors under their employ, command or supervision, during working hours. That was an aggravating factor.

[28] It is said that conviction is an easy matter. It is like falling off a log. But sentencing is like getting back your balance on the log after the fall. Sanctioning in electoral offences is no different. There arises a civic duty on everyone of us to encourage a democratic process, to ensure a free and fair election, to encourage that people make informed choices through

proper public debates and discussions before they take their decision to express their votes for who is going to govern them for the next electoral mandate. There arises a complementary civic duty that the stream of a primordial democratic exercise by the people of the people for the people is not corrupted by those who use demagogies and stratagems, frauds and lies, dishonesty and disorderliness. The Constitutional Court underscores this concern.

[29] In their consideration of the sanction to be meted out, the learned Judges properly balanced themselves on the log. It took into account that the Court of Appeal had in a previous case where the complainant himself had been found to have been culpable of illegal practice had been spared the extreme sanction of reporting. In that case, the Constitutional Court had felt constrained by the law to report the matter to the Electoral Commission but it had not done so pending its appeal to this Court. Ultimately, this Court had decided that a report should not ensue, considering the facts and circumstances of the acts complained of. The Constitutional Court duly commented upon the outcome in that case in its consideration of the sanction for this case as follows: *“If a potential leader of a country advised by senior counsel commits an illegal practice through “inadvertence or misapprehension of the law, who is to say that lesser mortals may not have done the same?”* Law is blind to status: it treats the prince and the pauper alike.

[30] We are of the view that Dine and Roseline are entitled to benefit from the same final outcome of no reporting as had been the case of the complainant. What is sauce for the goose is sauce for the gander. However, the case of Lesperance is different. The illegal practice in the case of the former were by words committed through inadvertence or misapprehension of the law. In the case of the latter it was by physical acts and committed with deliberate intention to corrupt a democratic process. As was stated in the case of **Ringadoo v Jugnauth [supra]**:

“A candidate does not fall foul of our electoral law against bribery where he is selling so to speak government performance or electoral programme or party manifesto to attract votes. That is normal electoral campaigning. ... He will fall foul of the law when he is involved in buying votes: i.e. exchange vote for money or any other valuable considerations instead of using cogent arguments to influence the voters. There must be an element of bargaining and the corrupt motive will

stand out so obviously from the facts.”

[31] We take the view that while in the case of Major Dine and Colonel Clifford Roseline it would not be fair to report the illegal practice to the Electoral Commission for the purposes of removal of their names from the Register of Electors, the same indulgence could not apply to Lesperance. Such indulgences, however, should not apply to subsequent breaches.

[32] In the circumstances, we quash the finding of culpability in the case of Beryl Botsoie as well as the sanction imposed on her under section 45(7)(b) of the Elections Act. We uphold the finding of illegal practice under section 51(3)(j) of the Elections Act against Major Simon Dine and Colonel Clifford Roseline and quash the orders made under section 45(7)(b) in both their cases for reporting to the Electoral Commission. We uphold the finding of culpability and the sanction imposed under section 45(7)(b) of the Elections Act in the case of James Lesperance for reporting to the Electoral Commission.

[33] The appeal is otherwise dismissed with costs.

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 21 April 2017