

DHANJEE v ELECTORAL COMMISSIONER

(2011) SLR 117

A Aymesbury for the petitioner
R Govinden for the respondents

Judgment delivered on 11 May 2011

Before Egonda-Ntende CJ, Renaud, Dodin JJ

The petitioner is an independent presidential candidate for the May 2011 presidential election. Respondent no 1 is a constitutional appointee whose duties are inter alia the conduct and supervision of the registration of voters and of elections and referenda under the Constitution. Respondent no 2 is subject to the directions of respondent no 1 and is responsible for the supervision of elections. Respondent no 3 is a necessary party in these proceedings. In conformity with the Elections Act hereinafter 'the Act', respondent no 1 designated 27 April 2011 as 'nomination day'.

The petitioner avers that on 27 April 2011 in compliance with the provisions of the Act, he submitted such documents as were required for his nomination as a candidate for the May 2011 presidential election, and at 13.00 hrs of the same day, respondent no 2 acknowledged the receipt of the following documents - nomination paper, nomination form with attached list of supporters, designation of Vice-President, consent of designated Vice-President, certificate of authority issued by candidate's political party, certificate of Electoral Commissioner, specimen of symbol/colour, and two passport sized photographs of the candidate.

The petitioner avers that respondent no 2 acted illegally in disqualifying him, as the right to object to the acceptance of a nomination paper of any other candidate on the grounds that the other candidate is not qualified to stand for election for which the candidate seeks to stand or that the nomination paper does not comply with provisions of the Elections Act vests with one of the other candidates and not with the Chief Electoral Officer or the Electoral Commissioner.

Secondly the petitioner avers that respondent no 2 failed to detail the legal requirements of the Act that the petitioner had not complied with, making it impossible to cure any possible irregularity before midnight on the day of the nomination. The petitioner therefore avers that his –

disqualification as a presidential candidate and matters incidental and connected therewith as averred above has contravened his constitutional right to be elected to a public office under article 24(1)(c) thereby denying him his right to participate in government.

The petitioner prays for the following orders:

- (a) Declaring that the disqualification was illegal and thus a contravention of the petitioner's right to participate in public office under article 24(1)(c);

- (b) Declaring that failure to give him until midnight on nomination day to cure any irregularity if it existed, contravened his right under article 24(1)(c);
- (c) ordering that the respondents return the list of endorsements to the petitioner;
- (d) Ordering that the presidential election is postponed until the final determination of this case;
- (e) Granting such other orders or writs as may be appropriate to enforce the provisions of the Constitution in relation to the petitioner; and
- (f) Hearing this case as one of extreme urgency.

The petitioner has appended an affidavit in support of his petition. He also appended a copy of two documents that were issued to him by the Chief Electoral Officer. The first one marked exhibit VVD1 is dated 27 April 2011 at 13.00 hrs, entitled 'Acknowledgement of Nomination for the Presidential Election, 2011.' That document states –

I acknowledge receipt of the following documents in respect of your nomination as a candidate for the May 2011 Presidential Elections.

- 1. Nomination paper
- 2. Nomination form with attached list of supporters
- 3. Designation of Vice-President
- 4. Consent of designated Vice-President
- 5. Certificate of authority issued by candidate's political party
- 6. Certificate of Electoral Commissioner
- 7. Specimen of symbol/colour
- 8. Two passport sized photographs of the candidate.

The second document entitled 'Nomination for the Presidential Election 2011', dated 27 April 2011 at 17.15 hours is addressed to the petitioner and states as follows:

I have to inform you that in accordance with the Elections Act, I have determined that you have not been validly nominated for the forthcoming Presidential Elections, 2011. The reason for my determination is as follows:

You have not complied with all the legal requirements of the above Act.

Yours faithfully

Dated this 27th day of April 2011, at 17.15 hours.

(Sgd)by Chief Electoral Officer

The respondents filed a joint answer to the petition and opposed the petition. They stated that respondent no 1 appointed the place, date and time for the nomination of candidates for the presidential election as provided for in section 14(1) of the Act. In particular, the time appointed was from 0900 hours to 1400 hours rather than until midnight.

The respondents contend that the list of supporters attached to the nomination form of the petitioner was not in accordance with the provisions of the Act and was not in accordance with the notice published in the *Official Gazette* of 18 February 2011, which specified the number of persons required to endorse the nomination paper of each candidate to be 500. Respondent no 2 had examined the accuracy and

authenticity of the list of supporters submitted and disqualified 176 supporters on account of absence of national identity numbers, no signatures by some supporters, presence of unregistered voters on the list, the national identity numbers provided did not match with the names of the supporters, supporters appearing twice on the list, supporters being below the age of 18 years, and some supporters were unregistered voters. Only 454 supporters were found to be valid.

The respondents further contended that there was no contravention of article 24(1) of the Constitution as the disqualification of the petitioner was legal and made under section 15(6) of the Act. Respondent no 2 had power to accept or reject the nomination of the petitioner in accordance with section 15(6) of the Act. The respondents further contend that the nomination did not end at midnight but ended at 1400 hours as published in the *Official Gazette*.

Respondent no 2 swore an affidavit in support of the respondent's case setting out what occurred on the nomination day and his examination of the papers presented by the petitioner and why he found that the petitioner did not have the 500 persons eligible to vote to support his nomination.

Article 24(1)(c) and (d) of the Constitution states that:

Subject to this Constitution, every citizen of Seychelles who has attained the age of eighteen years has a right –
(a) to be elected to public office; and
(b) to participate, on general terms of equality, in public service.

Article 24(2) of the Constitution states that: "The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society."

Section 2(1) of Schedule 3 of the Constitution provides –

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

The above Schedule follows from article 51 of the Constitution which states:

- (1) A person is qualified for election as President if –
 - (a) the person is a citizen of Seychelles;
 - (b) the person is not disqualified from registration as a voter under this Constitution.
- (2) Subject to clause 6, Schedule 3 shall have effect with regard to the election of the President.

- (3) The Constitutional Court shall have jurisdiction to hear and determine whether a person has been validly elected to the office of President.
- (4) An application under clause 3 may be made by a person entitled to vote at an election of the President, a person who was a candidate at the election or the Attorney-General.
- (5) Where a person other than the Attorney-General makes an application under this article, the Attorney-General may intervene and may appear or be represented in the proceedings.
- (6) A law may provide for –
 - (a) the circumstances and matter in which and the imposition of conditions upon which an application may be made to the Constitutional Court for the determination of a question under clause (3);
 - (b) the powers, practice and procedure of the Constitutional Court in relation to the application; and
 - (c) any matter, not otherwise provided for in Schedule 3, which is necessary or required to ensure a true, fair and effective election of the President.

Under the provision of article 24(2) of the Constitution there is enacted an Act known as the Elections Act. Section 15 of the Act is the relevant section pertaining to 'requirements for nomination' –

- (1) Every candidate for a Presidential Election or a national Assembly Election shall be nominated by means of a nomination paper provided for the purpose by the Electoral Commissioner;
- (2) The nomination paper shall be submitted by each candidate on the nomination day at the time and place appointed in the notice published under section 14 – in the case of the Presidential Election to the Chief Electoral Officer; and
- (3) The nomination paper submitted by each candidate for a Presidential Election or a National Assembly Election shall be signed by the candidate and –In the case of the Presidential Election, shall be endorsed to the satisfaction of the Chief Electoral Officer by such number of persons entitled to vote at that election as is specified in the notice published under section 14(1);
- (4) Each nomination paper shall be accompanied by – a certificate issued by the Electoral Commissioner certifying the deposit of or securing the sum specified in the notice published under section 14(1); such number of photographs of the candidate in such form and of such size as the Electoral Commissioner may specify in the nomination paper provided by the Commissioner; and a symbol or colour to identify the political party of the candidate, or, if the candidate is an independent candidate, the candidate.
- (5) Any nomination paper submitted after the expiration of the time specified in the notice published under section 14(1) shall be invalid and shall be rejected.
- (6) After the expiration of the time specified in the notice published under section 14(1) for submission of nominations – in the case of the Presidential Election, the Chief Electoral Officer shall, as soon as is practicable thereafter, determine whether to accept or reject the nomination paper submitted within the time specified in the notice.

- (7) For the purposes of subsection (6), the Chief Election Officer or the Election Officer, as the case may be, shall permit each candidate to examine the nomination papers of other candidates.
- (8) A candidate may object to the acceptance of a nomination paper of any other candidate on the grounds that the other candidate is not qualified to stand for the election for which the candidate seeks to stand or that the nomination paper does not comply with subsections (1) to (4).
- (9) The Chief Electoral Officer or, as the case may be, the Electoral Officer shall consider the objections and determine whether to accept or reject the nomination paper.
- (10) The determination made under this section by the Chief Electoral Officer or, as the case may be, the Electoral Officer shall be final.
- (11) The determination made under subsection (9) shall not prevent the validity of the nomination of a candidate from being questioned in an election petition under section 44.
- (12) Articles 51(1) and (2), 113, 114 of the Constitution shall apply for the purposes of the Presidential Election.
- (13) Articles 79(3) to (7), 80, 113 and 114 of the Constitution shall apply for the purposes of a National Assembly Election.

All the possible constitutional and statutory provisions relating to the matter in issue have been set out. The question that is now required to be answered is whether the Chief Electoral Officer has the power under those constitutional and statutory provisions to reject the nomination of the petitioner. But before we do so we must deal with the preliminary point raised by Mrs Amesbury, counsel for the petitioner.

Mrs Amesbury submitted that the Attorney-General could not appear for respondents no 1 and no 2 in this case as the Attorney-General only appears in constitutional matters of this nature as '*ministre public*' and '*amicus curiae*' as a friend of court to assist citizens enforce their rights. Secondly she submitted that respondent no 1 is an independent body which cannot be represented by an official of the Government. She referred to a number of previous cases before this Court where independent bodies had been sued and had not been represented by the Attorney-General, not because any objection was taken.

Mr Ronny Govinden, the Attorney-General, opposed the objection. He submitted that the Attorney-General in his office as legal advisor is independent of any authority pursuant to article 76(4) of the Constitution. The Attorney-General is not a member of the Cabinet. Neither is he a minister of Government. He submitted that in this case and indeed many other cases in which he has acted for the Electoral Commissioner, he takes instructions from the Electoral Commissioner and no other person.

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

The stages of the procedure envisaged by the Constitution and the pertinent statute can be summarized as follows:

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

There is a two-stage process at nomination. Firstly, on presentation of the nomination papers the CEO must satisfy himself that the papers are in compliance with the law under section 15(3) of the Act. If at this stage he or she is not satisfied he or she may not accept the papers and must hand them back to the candidate who may chose to go and rectify whatever is wrong and present his or her papers again if he or she is within time.

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

In this case the CEO failed to satisfy himself as he ought to have done on presentation of the papers by the petitioner. He acknowledged receipt of the papers and then purported to make a decision, at 17.15 hours, long after the time set for the nomination of candidates had passed. This decision was purportedly made under the second stage pursuant to section 15(6) of the Act, when in fact there was no such determination to make as there had been no objection filed by any of the other candidates. In so doing respondent no 1 erred in law and consequently violated the petitioner's right to offer himself as a candidate for the office of the President. We are in agreement to this extent with the submissions of Mrs Amesbury, counsel for the petitioner. We would grant the first declaratory order sought in this regard.

The petitioner seeks a second declaratory order that the failure to give him until midnight of the nomination day contravened his constitutional right under article 24(1)(c) of the Constitution. We do not agree. The Electoral Commissioner was at liberty, in accordance with the law, to set the time within which the candidates would present their papers and as midnight was not the time set for the close of

nominations this prayer cannot stand. No authority was advanced by Mrs Amesbury to suggest that midnight on the day of the nomination must be the closing time for nominations.

Under section 15(2) of the Act candidates must present their nomination papers to the Chief Electoral Officer at the time and place appointed in the notice published under section 14 of the Act. We agree with Mr Govinden that the claim that the petitioner had until midnight on nomination day to submit his papers is without merit.

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

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

From the bar Mrs Amesbury claimed that we should declare that the petitioner had been validly nominated. This declaration is not among the declarations sought on the petition. There was no application to amend the petition to include this as one of her prayers for relief. It was made only in reply to the submissions of the Attorney-General. In our view such a prayer was not only an afterthought but it was incompetent at this late stage in the hearing of the case. Secondly it was inconsistent with the earlier prayer that the endorsements that the petitioner had presented to respondent no 2, we presume at the nomination stage, be returned to the petitioner.

Before we take leave of this case it appears pertinent to point out that Schedule 3 of the Constitution, section 2(1)(a), requires that the number of people to endorse the candidate's nomination to the satisfaction of the Commissioner is 'such number, as may be prescribed under an Act'. Under subsection (b) the same is provided for the sum of money to be deposited. Section 14 of the Act does not prescribe such number of persons eligible to vote. Neither does it prescribe the fees. This has been left to the Electoral Commissioner to determine.

It would appear to us under the principle *delegatus non potest delegare*, or that a delegate cannot delegate power delegated to him, that the legislature having been ordered by the Constitution to prescribe the number of persons to endorse a candidate or the sums to be deposited by candidate has wrongfully delegated this power to the Electoral Commissioner. The duty is for the legislature to prescribe both the number of persons to endorse a candidate and the sum to be deposited by the candidate. This duty cannot be passed on to the Electoral Commissioner. We draw the attention of the legislature to this irregularity in the electoral law for their action.

Lastly we wish to point out that the importance of the right to participate in government, as set out in article 24 of our Constitution, either as a voter or a candidate or both, is the cornerstone of a democratic society and the rule of law. It is important that those entrusted with the task of conducting elections are alive to the grave importance and fundamental nature of this right and freedom in order to maintain and build a democratic society as ordained by our Constitution.

The European Court of Human Rights considering a similar substantive right in *Petkov v Bulgaria* stated –

The Court observes that, while this might not be obvious from its wording, Article 3 of Protocol No. 1 enshrines the right to stand for Parliament as an individual right (see *Mathieu-Mohin and Clerfayt v Belgium*, 2 March 1987, §§ 48-51, Series A no. 113, and *Yumak and Sadak v Turkey* [GC], no. 10226/03, § 109 (i), ECHR 2008-...). This right, as, indeed, all rights guaranteed under this provision, is crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst v The United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX). It is subject to implied limitations, but these must not curtail it to such an extent as to impair its very essence and deprive it of its effectiveness. Such limitations must also be consistent with the rule of law and be surrounded by sufficient safeguards against arbitrariness (see *Yumak and Sadak*, cited above, § 109 (ii)-(v)).

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

The petitioner is awarded costs of these proceedings.