

POPULAR DEMOCRATIC MOVEMENT v ELECTORAL COMMISSION

(2011) SLR 354

B Hoereau for the petitioner
F Ally for the first respondent
R Govinden for the second respondent

Before Egonda-Ntende CJ, Gaswaga, Burhan JJ

Judgment delivered on 25 October 2011 by Gaswaga J

The petitioner, Popular Democratic Movement (PDM) is a political party registered under the Political Parties (Registration and Regulations) Act.

The first respondent is a statutory body created by virtue of the Constitution and charged with the responsibility of conducting and supervising elections in the Seychelles, including the general elections in respect of the National Assembly. It is not in dispute that among other things the 1st respondent is also empowered to declare the number of proportionally elected members of the National Assembly which each political party is entitled to nominate, after a general election.

The 2nd respondent is made a respondent in accordance with rule 3 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.

It is common knowledge that from the 29 September 2011 to 1 October 2011, the 1st respondent conducted and supervised a general election, as per article 79(1) of the Constitution of Seychelles, during which election the petitioner was duly represented by a candidate nominated by itself in each one of the twenty-five (25) electoral areas in the country. The only other political party which nominated candidates for all the twenty-five (25) electoral areas in the said election was Parti Lepep.

The results of the general election were announced in the early hours of the 2 October 2011, by the 1st respondent, through its Chairperson Mr Hendrick Gappy. Pursuant to section 38(3)(a) of the Elections Act read with Schedule 4 of the Constitution, the Chairperson further declared that the petitioner was not entitled to nominate any proportionally elected member to the National Assembly as it had won only 7.4 percent of the total votes, including votes which had been rejected, whilst Parti Lepep was entitled to nominate six (6) proportionally elected members. The 1st respondent's said declaration gave rise to the dispute at the heart of this petition.

Petitioner's case

In the petition, it has been averred that the declaration of the 1st respondent that the petitioner is not entitled to nominate any proportionally elected members, has contravened article 78(b) along with Paragraph 2 of Schedule 4 of the Constitution or

alternatively the said declaration has contravened solely paragraph 2 of Schedule 4 of the Constitution, and that either of the contravention has affected the Petitioner's interest. The petition further outlines in paragraphs 9 and 10:

- (i) Particulars of Contravention of the Constitution and of the manner the interest of the Petitioner has been affected In terms of paragraph 2 of schedule 4 of the constitution, read with article 113 of the Constitution along with the provisions of the Election Act, the term 'votes cast' mean valid votes cast, *but not the total number of ballot papers cast*;
- (ii) When the total number of votes polled by the candidates of the petitioner, namely 3828 votes is calculated in respect of the total valid votes in the general election, namely 35145 votes, the petitioner clearly polled 10.89 percent of the votes cast and hence the Petitioner is entitled to nominate one proportionally elected member, of the National Assembly.
- (iii) As a result of the declaration of the 1st respondent as set out above at paragraph 8, the petitioner has been deprived of its constitutional right to nominate a proportionally elected member of the new National Assembly and thus of the opportunity and right to participate in the National Assembly The petitioner avers that at the General Elections of 2007, the Electoral Commissioner, Mr Hendrick Gappy in calculating the number, of proportionally elected members that each political party was entitled to nominate took into consideration the number of valid votes cast but not the number of ballot papers cast.

The petitioner seeks the following orders from the court:

- (i) To declare that the declaration of the 1st respondent, made through its Chairperson, Mr Hendrick Gappy has contravened article 78(b) of the Constitution along with paragraph 2 of schedule 4 of the constitution or alternatively paragraph 2 of schedule 4 of the Constitution, and that the contravention has affected the interest of the Petitioner;
- (ii) To issue a writ of mandatory injunction ordering the respondent to make a fresh declaration and decision, regarding the number of proportionally elected members that may be nominated as per the results of the general elections, on the basis that votes cast, are votes validly cast;
- (iii) Make any other order this Court considers appropriate.

1st respondent's case

The 1st respondent does not dispute paragraphs 1 to 7 of the petition. It however disputes parts of paragraphs 8, 9 and 10. The 1st respondent also stated that petitioner won 7.4 % of the total votes cast and 10.89% of the total valid votes cast at the said election. It was the contention of the 1st respondent that following the provisions of paragraph 2 of Schedule 4 of the Constitution the petitioner was not entitled to nominate any proportionally elected member of the National Assembly because it did not poll, in respect of its candidates, in aggregate 10% or more of the votes cast at that election.

Paragraph 9 of the petition and paragraph 10 of the supporting affidavit are specifically denied by the 1st respondent. The said respondent avers that

as per the provisions contained in Schedule 4 to the Constitution, as amended by Act 14 of 1996, (The Fourth Amendment), a political party which has nominated one or more candidates in a general election is entitled to nominate a proportionally elected member to the National Assembly if the political party has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election.

Further, that the petitioner's candidates at the election failed to poll in aggregate 10% of the votes cast at the election and as a result thereof the petitioner is not entitled to nominate any proportionally elected member to the National Assembly and it is for this reason that the 1st respondent made such declaration in relation to the petitioner. The 1st respondent also avers that Act 14 of 1996 (The Fourth Amendment) repealed paragraph 3 of Schedule 4 to the Constitution, which repealed the specific text providing that "valid votes cast" shall determine the number of proportionally elected members. In other words, Act 14 of 1996, in amending Schedule 4 and providing for a new paragraph 2 to replace paragraphs 2 and 3 thereof omitted the words "total valid votes cast".

The first respondent therefore avers that its said declaration in relation to the petitioner has not contravened article 78(b) along with paragraph 2 of Schedule 4 to the Constitution or solely paragraph 2 of Schedule 4 to the Constitution in relation to the petitioner's interest as averred in the petition and the affidavit or at all.

2nd respondent's case

The 2nd respondent averred that in his capacity as Attorney-General and in pursuance to Rule 3(3) of the Constitutional Court (Application, Contravention Enforcement or Interpretation of the Constitution) Rules, 1994, he will be appearing as *amicus curiae* in these proceedings. He also averred that it is the opinion of the Attorney-General that Schedule 4(2) of the Constitution should be interpreted so that the provision:

...has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election" be constructed by this Honourable Court to mean: "has polled in respect of the candidates in aggregate 10% or more of the non rejected votes cast at the election...

The Attorney-General presented legal arguments in favour of and in support of this opinion during the course of the hearing of this matter. In essence, the Attorney-General's submission is in agreement with that of the petitioner.

The Law

Article 78 shows the composition of the National Assembly and the procedure and law to be followed in electing each category of members. It states:

The National Assembly shall consist of –

- (a) Such number of members directly elected in accordance with -
 - (i) This Constitution, and
 - (ii) Subject to this Constitution, an Act, as is equal to the number of electoral areas;

- (b) Not more than 10 members elected on the basis of the scheme of proportional representation specified in Schedule 4.

For us to understand better the current formula of determining the number of proportionally elected members a political party may nominate as well as the submissions of the parties herein on the matter, it is important that we bring into purview all the relevant provisions of the law and the earlier formula in the amended schedule 4, paragraph 3 thereof -

Under the said formula, the number of proportionately elected members a political party may nominate could be arrived at by multiplying the relevant number with the total number of votes cast or deemed to be cast in favour of the candidates nominated by a political party, all divided by the total number of votes cast or deemed to be cast at the election.

It further stated in paragraph 3(3)(1) -

where there are any political parties that have not qualified to nominate a proportionately elected member on the application of the formula under sub paragraph (1), but have received not less than eight percent (8%) of the total valid votes cast at the general election, the political party with the highest remainder amongst those political parties shall be entitled to nominate a proportionately elected member and, if necessary, the political party with the second highest remainder amongst those political parties shall next be entitled to nominate a member and so on until the shortfall is eliminated.

Paragraph 2 of Schedule 4 provides:

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionately elected member for each 10% of the votes polled

The main issue in this matter is whether the phrase ‘...has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election...’ in paragraph 2 of Schedule 4 of the Constitution should be construed to mean or to refer to 10% or more of the total valid non-rejected votes cast or of the total votes (valid and invalid/rejected) cast at the election. Definition of terms - according to the *Oxford Dictionary* a formal or valid vote is a ballot paper which has been correctly marked and counts towards the result of an election while an invalid or informal or rejected vote is a ballot paper which is declared invalid or rejected as it does not comply with the instructions governing the election, in this case as prescribed by section 34(2) of the Elections Act, and cannot therefore be accepted into the count. Polling, just like casting the ballot, refers to the process of voting in an election. It also means the casting, recording or counting of votes in an election, a voting, the result of such a voting, any counting or enumeration. All this in connection with the votes put in the ballot box.

Facts

For the above question to be aptly answered it is imperative that certain pertinent facts are looked at. It is beyond the region of dispute that in the election referred to

one independent candidate and two political parties participated, and the Party Lepep won in all the twenty-five (25) electoral areas. The total votes cast were 51,592 of which 16,447 were rejected, leaving a total balance of 35,135 valid votes. The petitioner (PDM) party polled 3,828 votes representing 10.89% of the total valid votes cast (and 7.4% of the total votes cast in the election) while Parti Lepep garnered 31,123 votes representing 88.56% of the total valid votes cast (and 60.3% of the total votes cast in the election). Party Lepep was therefore entitled to six (6) seats of proportionately elected members in the Assembly while the petitioner was entitled to none.

Resolution of the issue

I must say from the outset that this court has been invited to interpret the Constitution, paragraph 2 of Schedule 4 thereof, as formulated or described in the issue above. It must also be noted that when interpreting the Constitution - the Supreme law of the land - especially a provision like Schedule 4 which is a code on its own, or if I may say, self-contained, you need not invoke provisions of inferior legislation, even if they are enabling laws like the Elections Act. It is true, statutes or laws in *pari materia* (upon the same subject-matter) shall be construed with reference to each other. Thus one statute may be called in aid to explain what is doubtful in another. However, where the superior law can stand and speak on its own on a given matter, such reinforcement would be irrelevant and of no consequence, if not, a total surplusage.

Focus must not be lost of the fact that the matter in dispute pertains to the manner in which the proportionally elected members of the National Assembly are nominated as opposed to those directly elected. A perusal of the Constitution would reveal that unlike many other aspects contained therein, this scheme or formula is distinctly and exhaustively outlined in Schedule 4 to the extent that one need not trouble oneself to go elsewhere, outside the Constitution, to seek assistance. Moreover, the Constitution itself is the best tool of interpretation. Article 78(a) further supports this position. It outlines the law applicable to the process of directly elected members of the National Assembly as the Constitution and the Act. For purposes of emphasis the Elections Act does not apply to proportionally elected members otherwise the constitution would have expressly said so. It is clear that Act No. 14 of 1996 (The fourth amendment) repealed paragraph 3 of Schedule 4 of the Constitution. The same Act further amended Schedule 4 by replacing paragraphs 2 and 3 with a new paragraph 2 which specifically omitted the words 'total valid votes cast' and instead replaced the said words with 'votes cast'. One would wonder why the executive would move the legislature to remove a more specific word 'valid' and replace it with the words 'votes cast'. The words must be carrying different meaning and their application to the electoral process obviously produces different results.

Legislative intent may be determined by examining secondary sources such as committee reports, treatises, law review articles and corresponding articles. A reading of the objects and reasons in respect of the Bill in question as well as the Assembly's debate (see Hansard of 9 July 1996) leading to the said Fourth Amendment of the Constitution (in particular Schedule 4) evidently reveals the intention behind that amendment. Indeed two intentions are apparent. The first one was to reduce the number of proportionally elected members from eleven to ten. The

second was to raise the threshold for a political party in qualifying for such seats, from 8% of the total valid votes cast to 10% or more of the votes cast. In essence, the amendment narrowed the gate and at the same time raised the bar to 10% or more of the votes cast, thereby making it even more difficult for the small political parties to secure proportional representation in the National Assembly. Needless to emphasize, the Constitution is to be read as a whole. It is not disputed that the framers of our Constitution in 1993 included and used the terms 'votes cast' and 'valid votes' to carry and convey different meaning.

That intention is evident in Schedule 4 itself as well as article 91 and paragraph 8(1) of Schedule 3 where the said terms are used. The framers had the option to use only one of the terms ie if they referred to or meant one and the same thing. It is the practice of the legislature not to enact laws with words which are ambiguous. All this time, until 1996 (fourth amendment) the Constitution, in respect of the said terms, was speaking one language which was abruptly terminated with regard to Schedule 4 and or without taking into account the other provisions where they remained applicable. This obviously would create confusion. Had that sudden change in the meaning and application attributed to these terms been introduced in the spirit of the whole Constitution or wherever the terms in question appeared, then I would have acceded to the submission that votes cast refers to total valid votes and not total ballot papers cast in the ballot box.

Following the above circumstances and discourse, it is my considered view that the words 'votes cast' do not, and/or cannot lend themselves to the meaning assigned and ascribed to and advanced by the counsel for the petitioner and the Attorney-General; that they refer to valid votes cast at an election. Had that been the case then the text of the relevant provision would have specifically stated so. In the same vein, with due respect to the counsel for the petitioner and the Attorney-General, I decline the invitation, and I hope I will be acquitted of discourtesy, to hold that the phrase '...has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election...' in paragraph 2 of Schedule 4 of the Constitution should be construed to mean or to refer to 10% or more of the total valid / non-rejected votes cast at the election, as the phrase plainly refers to the total votes (or ballot papers) cast at an election in the box, whether valid or invalid.

This being the case, and after once again diligently considering the pleadings and submissions of the parties, I am satisfied that the same formula as in paragraph 2 Schedule 4 of the Constitution was applied in determining the number of proportionally elected members of the National Assembly each political party was entitled to nominate in the general elections of 2002 and 2007. To be precise, the said scheme was based on the number of votes or ballot papers cast. The 1st respondent had properly explained this in paragraph 8 of the petition and also attached a table on its pleadings clearly tabulating the pertinent information (figures and percentages and how the number of proportionally elected members was arrived at for each political party) for the general elections conducted in the years 2002, 2007 and 2011. In any case, either way, one would arrive at the same result. Accordingly, I find as unsubstantiated the petitioner's allegation on the matter. The allegation would be dismissed.

Perhaps I should mention at this point that there is ample evidence to suggest that

the 1st respondent has been consistent in the application and enforcement of Schedule 4 of the Constitution and cannot be faulted. Further, even if it had come to the notice of the Court at this point in time that in the previous elections the 1st respondent had applied the said Constitutional provisions wrongly to the electoral process, that in itself would not have in any way affected the decision on or outcome of this petition. Two wrongs cannot make a right.

In conclusion, I find that the petitioner has not proved all the allegations in the petition and I would dismiss it but with no order for costs.

EGONDA-NTENDE CJ:

I have had the benefit of reading in draft the Judgment of my brother, Gaswaga J and I agree that this petition should fail. The facts of the case have been fully set forth in the said judgment and I shall not repeat them. Article 78 of the Constitution states -

The National Assembly shall consist of –

- (a) such number of members directly elected in accordance with –
 - (i) this Constitution; and
 - (ii) subject to this Constitution, an Act, as is equal to the number of electoral areas.
- (c) not more than 10 members on the basis of the scheme for proportional representation specified in Schedule 4.

The election of directly elected members was to be subject to both the Constitution and an Act, which is now the Elections Act. The proportional members were to be elected in accordance with a scheme specified in Schedule 4 of the Constitution. It is clear that under article 78 that Schedule 4 provided a complete code for the election of proportional members. There is simply no need to turn to the Elections Act in order to understand or apply Schedule 4 of the Constitution, the scheme for proportional representation.

The previous Schedule 4 which was repealed used certain expressions which included ‘total number of votes cast or deemed to be cast’ equivalent to ‘c’ in the formula for election of the proportionately elected member and ‘total number of valid votes cast or deemed to be cast’ equivalent to ‘d’ in the said formula. It is clear that a distinction was made in the total votes cast (valid and invalid) and total valid cast (only valid votes excluding rejected votes).

In the 1996 amendment to Schedule 4 the formula was done away with. It was simply replaced by the following provision:

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionately elected members for each 10% of the votes polled.

I take it that ‘votes cast’ in the context of Schedule 4 must mean and can only mean the total number of votes cast (whether valid or not) and the ‘votes polled’ to be the valid votes a party has received. The former sets the threshold a party must achieve

before it can become eligible for proportional representation and then the number of such seats is determined by the valid votes (votes polled) it received. Had the legislature intended that the threshold be 10% of the valid votes, it would have said so exactly. It was familiar with the expression. Words must be given their ordinary meaning within the context in which they are expressed. Once a vote is cast into a box regardless of whether it will turn out to be valid or not that vote has been cast and belongs to the context of votes cast. I am persuaded by Mr Frank Ally, counsel for the respondent no 1, that this can only be the intended meaning of votes cast as used in Schedule 4.

Mr Basil Hoareau, counsel for the petitioner, placed great reliance on the Election Act, in order to interpret Schedule 4. Whatever could be said in favour of this approach I am of the view that it was totally unnecessary given that Schedule 4 is a complete code on the election of proportionately elected members. One need not go for assistance to another law dealing only with the election of the President and directly elected members of the National Assembly. Schedule 4 is a complete code and was intended to be such by virtue of article 78 of the Constitution.

For the foregoing reasons I was unable to accept the case advanced by the petitioner and respondent 2. As Gaswaga J agrees the said petition is dismissed. Each party shall bear its own costs.

BURHAN J, DISSENTING:

The petitioner, Popular Democratic Movement, is a political party registered under the Political Parties (Registration and Regulations Act) and represented by its leader Mr David Pierre, filed a petition against the aforementioned respondents, seeking the following relief from the 1st respondent Election Commission;

- i. To declare that the declaration of the 1st respondent, made through its Chairperson, Mr. Hendrick Gappy has contravened Article 78 (b) of the Constitution along with paragraph 2 of the Schedule 4 of the Constitution or alternatively paragraph 2 of Schedule 4 of the Constitution, and that the contravention has affected the interest of the petitioner;
- ii. to issue a writ of mandatory injunction ordering the respondent to make a fresh declaration and decision, regarding the number of proportionally elected members that may be nominated as per the results of the general elections, on the basis that votes cast are votes validly cast.
- iii. make any other order this honourable court considers appropriate.

The salient facts of the case are that the petitioner party (hereinafter referred to as the petitioner) nominated 25 candidates to participate in different electoral areas for the general election held from 29 September 2011 to 1 October which was conducted and supervised by the 1st respondent the Electoral Commission. Having concluded the general election, the 1st respondent, through its Chairperson Mr Hendrick Gappy announced the results of the general election in all 25 electoral areas. Thereafter the 1st respondent through its Chairperson, Mr Hendrick Gappy pursuant to section 38(3)(a) of the Elections Act read with Schedule 4 of the Constitution, declared the number of proportionally elected members of the National Assembly and in doing so declared that the petitioner was not entitled to nominate any proportionally elected member as it had won only 7.4 percent of the total votes,

including votes which had been rejected, while Party Lepep was entitled to nominate six proportionally elected members.

The petitioner avers that the declaration of the 1st respondent that the petitioner is not entitled to nominate any proportionally elected member has contravened article 78 (b) along with paragraph 2 of Schedule 4 of the Constitution or alternatively, the said declaration has contravened solely paragraph 2 of Schedule 4 of the Constitution and that either of the contraventions have affected the petitioner's interest.

The particulars of the contraventions averred by the petitioner are:

- i. In terms of paragraph 2 of schedule 4 of the Constitution read with Article 113 of the Constitution along with the provisions of the Election Act, the term 'votes cast' mean valid votes cast but not the total number of ballot papers cast;
- ii. When the total number of votes polled by the candidates of the petitioner namely 3828 votes is calculated in respect of the total valid votes in the general election namely 35145 votes, the petitioner clearly polled 10.89% of the votes cast and hence the petitioner is entitled to nominate one proportionally elected member of the National Assembly.
- iii. As a result of the declaration of the 1st respondent as set out above at paragraph 8, the petitioner has been deprived of its Constitutional right to nominate a proportionally elected member of the new National Assembly and thus of the opportunity and right to participate in the National Assembly.

The Attorney-General was made a party pursuant to rule 3 of the Constitutional Court (Application, Contravention Enforcement or Interpretation of the Constitution) Rules 1994 in his constitutional capacity.

The main facts pertaining to this case as laid out by the petitioner in his petition are admitted by all parties. The principal issue to be decided in this case revolves round paragraph 2 of Schedule 4 of the Constitution of the Republic of Seychelles –

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionally elected member for each 10% of the votes polled.

It is the contention of counsel for the petitioner that the petitioner party had polled at the said general election in aggregate more than 10% of the votes cast at the said election and thus was entitled to have a proportionally elected member in the National Assembly. He submitted that if the total number of the valid votes cast for the petitioner party were taken into consideration, it would amount to 3828 votes which was 10.89% of the valid votes cast namely 35145 votes and thus the petitioner was entitled to nominate one proportionally elected member to the National Assembly.

Counsel for the 1st respondent while admitting the number of valid votes obtained by the petitioner and that counted at the said general election, however took up the position that votes cast referred to in paragraph 2 of Schedule 4 included the total votes cast at the election ie not only the valid votes but the invalid votes as well. In

this method of calculation it was the position of the 1st respondent that the petitioner received only 7.4% of the total votes cast.

All counsel agreed that there was no formal definition of the term votes cast and counsel for the 1st respondent in his “skeleton heads of arguments” and submissions relied on the literal dictionary definition of the term “votes cast” as being votes put into a ballot box. He therefore contended that votes cast included all the votes, both valid and invalid, put into a ballot box.

Counsel for the petitioner submitted that in terms of article 113 of the Constitution a person had a right to vote in accordance with the law and article 79 (8) specially provided for the existence of a law for any matter not otherwise provided for in this Constitution. Article 79(8) reads as follows:

A law may provide for any matter, not otherwise provided for in this Constitution, which is necessary or required to ensure a true, fair and effective election of members of the National Assembly.

When one peruses article 24(2), article 113 and article 79(8) of the Constitution, it is apparent that the Constitution expressly provides for a law to deal with matters not otherwise provided for in the Constitution. This introduced the Elections Act which came into effect on the 20 November 1995 to assist and regulate the purposes set down in section 1 of the said Act and thus the provisions contained in the Constitution, should be read with the Elections Act which is permitted by the aforementioned articles of the Constitution which Act is subject to the Constitution.

Prior to interpreting the term “vote cast” it is to be noted that the words “votes cast” appear in several articles of the Constitution in addition to being contained in paragraph 2 of Schedule 4 referred to above. It appears in article 91(1) in respect of a referendum conducted in the passing of a Bill for the alteration of entrenched articles, It also appears in paragraph 2(2) and paragraph 8(1) of Schedule 3 relating to the election of the President.

Further it is to be noted that the nomination of proportionally elected members results from a count of the votes cast at a general election of directly elected members of the National Assembly and therefore in terms of section 1 of the Elections Act reference could be made to the law contained in the Elections Act to interpret the term “votes cast” as set out in paragraph 2 of Schedule 4.

Counsel for the petitioner submitted that as no provision exists in the Constitution defining the term “votes cast” one must refer to the provisions contained in the Elections Act. It is pertinent at this stage to consider section 34 (1) and (2) of the Elections Act which reads as follows:

- (1) The Electoral Officer or the Designated Electoral Officer, as the case may be, shall in respect of an election or, where the Presidential Election and a National Assembly Election are held simultaneously in respect of each such election separately, in the presence of the candidates, if they are present, and the counting agents of candidates who may be present with the help of enumerators examine, count and record the number of ballot papers contained in each ballot box.

(2) Where the ballot paper –

- i. does not bear the official mark referred to in section 25;
- ii. has anything written or marked by which a voter can be identified;
- iii. is mutilated or torn; or
- iv. does not contain a clear indication of the candidate for whom the voter has voted,

the ballot paper shall be rejected and shall be endorsed with the word “rejected” by the Electoral Officer or the Designated Electoral Officer, as the case may be, and if a candidate or a counting agent of a candidate who may be present objects to the decision of the Electoral Officer or the designated Electoral Officer, as the case may be, also with the words “rejection objected to”.

When one considers the wording of this section, it is apparent that this section refers to the counting procedure to be adopted at an election. What initially starts the counting process is a counting of all the ballot papers in the ballot box and a separation of the ballot papers that fall under subsection (2) from the others. Ballot papers that come under the category of section 34(2) are not referred to in the Elections Act as invalid but “rejected” ballot papers. The other ballot papers are not referred to as valid but as “other than those rejected”. At this stage therefore it is of importance to determine the meaning of the word “rejected.” As the word rejected is not defined in Constitution or the Elections Act or referred to in the interpretation section, reference to *The New Collins Dictionary and Thesaurus in One Volume* gives the meaning as, “cast aside, to discard”.

The next question to determine is whether a “rejected ballot paper” as mentioned above could be considered to be a “vote” cast in favour or in respect of a particular candidate. From the aforementioned meanings given to the word rejected, it is apparent that a rejected ballot paper is a ballot paper “cast aside” or a ballot paper to be “discarded.”

At this juncture it would be useful to define the word “vote” which according to *The New Collins Dictionary and Thesaurus In One Volume* means, “an indication of choice, opinion or will on a question such as the choosing of a candidate” and if one is to consider the definition relied on in the submissions of Attorney-General, “an expression of an intention in favour of a person.” Therefore it appears that a rejected ballot paper is nothing but a ballot paper cast aside as it does not indicate a choice or an intention in favour of a candidate and therefore it cannot even be considered to be vote.

It is pertinent to mention at this stage that section 36(1)(b) of the Elections Act categorizes ballot papers into 3 categories namely counted, rejected and unused ballot papers. It is common ground that unused ballot papers do not come into the equation of votes cast. As set out above rejected ballot papers amount to cast aside or discarded ballot papers. No doubt the rejected ballot papers are counted but the purpose of counting them is specifically set out in section 36(1) ie only to verify the ballot paper account by comparing the number of ballot papers recorded in the account with the number of ballot papers counted rejected and unused. For the aforementioned reasons I am satisfied that rejected ballot papers are not to be

counted as “votes” and therefore the term “votes cast” cannot and will not include “rejected” ballot papers.

It follows that a “vote” can only arise from ballot papers “other than those rejected” as set down clearly in section 34(3) of the Elections Act. The term “votes cast” referred to in Schedule 4 of the Constitution can therefore only refer to votes arising from ballot papers “other than those rejected” as set down in section 34 (3) the Elections Act. It is apparent that on a reading of this section it is the ballot papers “other than those rejected” that are sorted into different groups according to the indication of the candidate for whom the voter has voted and the ballot paper in each group counted and considered a “vote” for that particular candidate.

I would venture one step further and state that even if it be considered that a rejected ballot paper on being counted assumes the status of a rejected vote, the definition already set out in respect of the word rejected, would make a “rejected vote” amount to a “vote cast aside” and not a “vote cast.” It is clear that the particular provision of the Constitution refers to “votes cast” and therefore quite obviously “votes cast aside” cannot be considered to be votes cast.

When one considers the submissions of counsel for the 1st respondent it is apparent that he relies solely on the literal definition of the term “votes cast” and refers to them as the total number of votes cast in a ballot box. However in the instant case the meaning of the word “votes cast” could be decided and derived from a reading of the Elections Act and therefore reliance should be on the meaning imputed by the statute itself and not on the dictionary meaning. In the case of *Ram Narain v State of UP* (1957) AIR SC 18 it was held: “The meanings of words and expressions used in an Act must take their colour from the context in which they appear.”

Therefore it is not necessary when the context of the Act is unambiguous, for one to look for its meaning from dictionaries. As the meaning of the words “vote cast” could be derived from the context of the Elections Act, the literal definition relied on by counsel for the 1st respondent is not acceptable.

Another ground relied on by counsel for the 1st respondent was that Act 14 of 1996 the Fourth Amendment to the Constitution repealed paragraph 3 of Schedule 4 to the Constitution which repealed the specific provisions providing that “valid votes cast” shall determine the number of proportionally elected members and the said Act 14 of 1996 in amending made it clear that it was not the valid votes that determined the number of proportionally elected members but the total number of votes including rejected votes.

It is to be noted that counsel for the 1st respondent refers to the term “valid votes” which is taken from a part of a formula that was used to calculate the number of proportionally elected members. It has not been incorporated in the body of the paragraph itself like the words “vote cast” have been, in the amended paragraph 2 of Schedule 4 but as stated earlier is only part of a formula which has been repealed in its entirety. Therefore one cannot bring that in aid to interpret the unambiguous provisions contained in the amendment and come to a finding that as the word “valid votes” have been changed to “votes cast,” it means that the intention of the legislature was to include rejected votes.

Even if one accepts the submissions of counsel for the 1st respondent that there was a change of wording from “valid votes cast” to “votes cast” in answer to this counsel for the petitioner in reference to the case of *Redrow Homes Ltd v Bett Bros Plc*. [1998] UKHL 2; (1998) 1 ALL ER 385 submitted that a change in language is not always indicative of a change in construction as the alteration in the language of a statute by a later statute could very well be for surplusage. On considering the fact that the Elections Act came into effect only on 20 November 1995 and as the meaning of the words “votes cast” could be derived from the context of the Elections Act and clearly did not include rejected ballot papers or rejected votes I am inclined to accept the view that the use of the word “valid” in the amending Act 14 of 1996 would inevitably have been a surplusage and it was for this reason that the word valid was omitted.

It is clear from the submissions of counsel for the petitioner that the objects and reasons for bringing about the amendment to paragraph 2 and 3 of Schedule 4 of the Constitution was to bring about a decrease in the number of proportionally elected members as borne out by the proceedings of the debate in the National Assembly and that nowhere in the proceedings is it mentioned that the intention to bring about the said amendment was to include rejected votes, a fact, not contested by counsel for the 1st respondent. It should be borne in mind that the amendment referred to above refers to “votes cast” and not to “total votes cast.” Therefore counsel for the 1st respondent’s contention that the word “valid” was repealed to enable the “total votes cast” including the “rejected votes” to be included bears no merit.

Even if one is to limit oneself to the perimeters of the Constitution to interpret the term “votes cast” in the context it appears in paragraph 2 of Schedule 4 of the Constitution, the basic concept of proportional representation is to ensure that every valid vote polled at a general election for contesting political parties has its value. Its purpose is not to make the rejected votes count but to make the valid votes count to avoid the “winner takes it all” concept. It is my considered view that if rejected votes were to be taken into consideration this would result in a valid vote losing its value as has happened in the instant case. In this regard the Attorney-General raised a very material contention. He submitted that to proceed to accept the rejected votes as the “votes cast” as set out in paragraph 2 of Schedule 4 would result in a situation where the constitutional rights of a directly elected member would be adversely affected as the same vote which was rejected for all purposes in the election of a directly elected member, is now being taken into account in respect of the nomination of another proportionally elected member.

At this stage it is of paramount importance while keeping the concept of proportional representation of political parties in mind, to ascertain what the aim or purpose of paragraph 2 of Schedule 4 is. Its main purpose is to assess the strength and popularity of all competing political parties and give them accordingly their share of representation in the National Assembly. The strength and popularity of each competing political party could be determined only by taking the percentage of valid votes received by it in relation to the total valid votes received by all the competing political parties. In my view therefore that the term “votes cast” referred to in paragraph 2 of Schedule 4 should be interpreted to mean the total of all the “valid votes cast” for or on behalf of all the competing political parties. To include rejected

votes into the equation, will not in actual fact represent the actual strength or popularity of the competing political parties as it is only valid votes that do so and would also as discussed earlier be in contravention of the provisions of the Elections Act mentioned above.

The Constitution of the Republic of Seychelles safeguards and encourages the right of suitably qualified persons to participate in the electoral process as candidates. The interpretation of its provisions should be such as to encourage persons to participate and vote in the electoral process. The electoral process even provides for persons not affiliated to registered political parties to come forward as independent candidates. If the constitutional rights of any political party or candidate are contravened during the electoral process, the Constitution provides for such party or person to seek redress in the Constitutional Court. I am inclined therefore to agree with Attorney-General that the Constitution must be interpreted in a purposeful and liberal manner as set down in the Constitution itself. Its provisions must be interpreted to encourage persons to participate in the electoral process and not in a way to manoeuvre or undermine it or to keep persons away from the electoral process. It must be interpreted to encourage people to vote which means to indicate their choice of a candidate or express an intention in favour of a candidate and not be interpreted in a manner to encourage persons not to vote or to spoil their vote. To give life in any manner to rejected votes which are votes cast aside would do just that which in my view would not be a liberal or purposeful interpretation of the provisions of the Constitution of the Republic of Seychelles.

The fact that in the previous general elections conducted in the years 2003 and 2007, the Election Commissioner took into consideration the rejected votes is not binding precedent on the Constitutional Court. For all the aforementioned reasons I would hold that “votes cast” as set out in paragraph 2 of Schedule 4 mean only “valid votes cast” and cannot be all the ballot papers cast at the said general election.

For the aforementioned reasons I am satisfied that the constitutional rights of the petitioner as set out in paragraph 9(i)(ii) and (iii) of the petition have been contravened by the 1st respondent.

Therefore I would declare that the declaration of the 1st respondent made by its Chairperson Mr Hendrick Gappy has contravened article 78 (b) and paragraph 2 of Schedule 4 of the Constitution and the said contravention has affected the interest of the petitioner.

Further I would issue a mandatory injunction ordering the 1st respondent to make a fresh declaration and decision regarding the number of proportionally elected members that may be nominated as per the results of the general elections of the year 2011 on the basis that term “votes cast” referred to in paragraph 2 of Schedule 4 of the Constitution are votes validly cast. No order is made in respect of costs.

For the foregoing reasons I was unable to accept the case advanced by the petitioner and respondent No 2.