

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
APPELLATE JURISDICTION

Civil Appeal No. 52 of 2020

BETWEEN
MISENGA JONES

Appellant

AND

THE GUYANA ELECTIONS COMMISSION ET AL

Respondents

Written Submissions of Bharrat Jagdeo and Mohamed Irfaan Ali

1. In her Notice of Appeal, the only relief sought by the Appellant is that the Honourable Chief Justice's decisions be wholly set aside or reversed. However, as in the Court below, it is apparent from the grounds of appeal that the Appellant is seeking a determination by this Honourable Court that section 22 of the Election Laws (Amendment) Act ("section 22") is unconstitutional, that Order 60 of 2020 made under section 22 is invalid, that the results of the recount carried out pursuant to Order 60 are invalid and cannot lawfully be used to determine the results of the election and that the declarations made by the Returning Officers under section 84(1) of the Representation of the People Act ("the RPA") are valid and must be used to declare the results of the elections. As such, it is the Appellant's case that GECOM's direction to the Chief Election Officer ("the CEO") that he must prepare his section 96 report based upon the results of the recount is invalid.

Jurisdiction

2. The primary question which arises in this appeal is whether the High Court has any jurisdiction to determine any of the issues which the Appellant would have the Court consider. Since, primarily, the Appellant is challenging the way GECOM has performed or is performing its functions, section 140 of the RPA is brought into play. That section, on its face, prohibits any review of the performance of GECOM's functions, except on an election petition. However, a majority of this Honourable Court held in *Ulita Moore v GECOM* (CA 38 of 2020, 3rd April 2020), [108], that section 140 did not protect GECOM from a judicial review challenge if it had acted or was about to act in excess of its unconstitutional or statutory powers but that it did shield GECOM from judicial review "in relation to functions which fall within the responsibilities of GECOM in its management of the elections process." The validity of its acts and omissions in carrying out those responsibilities were to be determined on an election petition.
3. This Court's ruling in *Ulita Moore* must now be read in light of the decision of the CCJ in the *Ali and Jagdeo v Eslyn David et al* [2020] CCJ 10 (AJ) GY. The CCJ determined that this Honourable Court did not have jurisdiction because Article 177(4) can only be invoked after a President had been elected and because in embarking upon the hearing of Ms. David's motion, this Court usurped the exclusive jurisdiction of the High Court under Article 163 of the Constitution.

4. In finding that Ms. David's motion was premature, the CCJ invoked (in footnote 53) the principle stated in *Nareyan Khare v Election Commission of India*, AIR 1957 SC 694 and *Ponnuswami v Retuning Officer* (1952) SCR 218 that any challenge to the validity of an election ought to be brought after the election has been declared, and not before. This is the principle which informed the position taken by the High Court in *Reeaz Holladar v The Returning Officer et al* (2020-HC-DEM-CIV-FDA-360) and by the Full Court in *Bharrat Jagdeo v Urita Moore and Others* (No. 2020-HC-DEM-CIV-FCA-26). It is the principle which was also applied in *Gladys Petrie -v- AG* (1968) 14 WIR 292 and *Seecomar Singh and Another v R C Butler* (1973) 21 WIR 34. In this regard, the CCJ (at para 49) expressly agreed with Persaud JA who, in finding that Ms David's motion was premature and could only be brought after a President had been elected, said: "This is consistent with the general scheme of legislation in Guyana that govern the election process which only permits challenge after that process is completed."
5. The finding in *Urita Moore* that the performance of GECOM's functions is reviewable before an election is declared is inconsistent with this principle.
6. Secondly, the CCJ reiterated and emphasised [40] the exclusive jurisdiction of the High Court under Article 163 to determine any question whether an election has been lawfully conducted or the result has been affected by any unlawful action or omission. In particular, their Honours emphasised [45] that "if the integrity of a ballot, or the manner in which a vote was procured, is questioned beyond the validation exercise, say because of some fundamental irregularity such as those alleged by Mr. Harmon, then that would be a matter that *must* be pursued through Article 163 after the election have been concluded." (Emphasis in the original) Their Honours continued (at para 47):

"Whatever allegations of irregularity attended those votes (and we neither agree nor disagree as to the existence of such irregularities) must be adjudged by the High Court under Article 163 as was correctly stated by the Chairperson of GECOM."
7. It is significant in this regard that the CCJ in this paragraph referenced section 140 in a footnote with the comment that that section provides that "questions as to performance by GECOM of its functions are to be enquired into only pursuant to the jurisdiction conferred by the Constitution under Article 163." It had been argued before the CCJ that this Court's ruling in *Urita Moore* was inconsistent with decisions such as *Smith v East Elloe Rural District Council* [1956] AC 736, *R (A) v Director of Establishments of the Security Service* [2010] 2 AC 1 and *Farley v Secretary of State for Work and Pensions (No 2)* [2006] 1 WLR 1817, the application of which would mean that section 140 is not an ouster provision to which the traditional *Anisminic* analysis was applicable, but rather was part of a statutory scheme which allocates jurisdiction to determine the validity of GECOM's actions to a court other than the High Court exercising its common law supervisory jurisdiction.
8. Respectfully, in this light, the decision of this Court in *Urita Moore* can no longer be considered good law.

9. In any event, in *Ulita Moore*, this Court held that the effect of section 140 was that the following issues, which must be taken to fall "within the responsibilities of GECOM in its management of the elections process", could only be raised on an election petition:
- i) Whether the time had come to proceed under Article 177 of the Constitution and section 99 of the RPA [85];
 - ii) Whether to hold a recount or not [85];
 - iii) Whether there was unlawful non-compliance with Article 177 and section 99 [86];
 - iv) Whether Article 177 and section 99 have been triggered [88];
 - v) Whether the recount ordered by GECOM is lawful [88];
 - vi) Whether section 22 is unconstitutional and unlawful [107];
 - vii) Whether GECOM has utilised or utilises its powers under section 22 unlawfully [107].
10. In these regards, the following passage from the judgment of the Court of Appeal is pertinent:
- [106]... In *Petrie and Seecomar Singh*, the High Court declined to examine the constitutionality of election related legislation during the election period, allocating such questions to an election petition. The Court said that such a determination would be disruptive of the election process. Moreover, it is well established that constitutional questions can be determined at the hearing of a petition as discussed in *Peters and Chaitan v Attorney General and Another* (2001) 63 WIR 244.
11. As the Honourable Chief Justice held, this has serious consequences for the viability of the Appellant's case.
12. These Respondents accept, however, that the High Court does have jurisdiction to intervene before an election is declared where to do so would "subserve the progress of the election and facilitate the completion of the election" or would "correct or smoothen the progress of the election proceeding", but falling short of any determination which goes to the validity of the election itself. This principle, which owes its provenance to the decision of the Supreme Court of India in *Election Commission of India vs. Ashok Kumar* Civil Appeal Nos. 6843-6844 of 1999 dated 30 August 2000, was applied by the High Court in *Holladar* where the Court intervened where the Returning Officer did not carry out the exercise of adding up the votes under section 84(1) of the RPA in the presence of persons entitled to be present, thereby undermining the transparency of the exercise. On the other hand, the Honourable Chief Justice held (at paragraph 32) that many complaints such as the non-recognition of a counting agent, the legitimacy of an application for a final count under section 84(2) and the correct tabulation of the votes on the Statements of Poll, were not appropriate to be considered outside of an election petition.
13. These Respondents therefore accept that the High Court has jurisdiction to make appropriate orders to ensure that an election is brought to a successful completion, as long as it is not being called upon to resolve any question which goes to the validity of the election. Thus, if a Returning Officer refused to produce a declaration under section 84(1), the High Court would have jurisdiction to issue mandamus to compel him or her to do so. Likewise, if the CEO refused to produce any report under section 96.

14. This is one case in which the High Court would have jurisdiction to intervene under this limited principle. GECOM, as it is entitled to do, directed the CEO to produce his section 96 report in accordance with the recount. He has refused to do so, insisting that GECOM declare the election on the basis of the declarations made by the Returning Officers under section 84(1) and that GECOM totally ignore the recount which was conducted over a period of some 34 days. The question before the High Court, as it is before this Court, was whose position must take precedence so that the election may be completed?
15. The Honourable Chief Justice was therefore right to find [24] that the High Court had jurisdiction to exercise its supervisory power in judicial review to attempt to resolve the impasse. She held that the CEO must abide by GECOM's direction and produce his report in accordance with the recount. Respectfully, she was plainly right.
16. These Respondents however take issue with the breath with which the Honourable Chief Justice expressed the High Court's jurisdiction to intervene before an election is declared. She was wrong to find [25], it is respectfully submitted, that in the exercise of this limited jurisdiction she was entitled to "interpret the constitutionality of the s 22 and O 60, as well as art 177, to determine if they are acting lawfully." Even though she described this as an enquiry on a narrow basis, this formulation runs contrary to the jurisprudence described above.
17. In the result, it is respectfully submitted that this Court is bound to hold that it has no jurisdiction to determine any of the issues raised in Ms. Jones' Claim. They must all be raised in an election petition after the election is declared. However, it is entitled to intervene to resolve the impasse between the CEO and GECOM, consistent with the above principles.

GECOM's Constitutional and Statutory Authority

18. GECOM is established by Article 161(1) of the Constitution. It consists of a full-time Chairman, three members appointed by the President in his own deliberate judgment and three members appointed by the President acting on the advice of the Leader of the Opposition – Article 161(3). The Chairman is appointed in accordance with a finely calibrated procedure designed to identify a consensus candidate satisfactory to both the government and the opposition - Article 161(3) and *Zulficar Mustapha v Attorney General* [2019] CCJ 9 (AJ).
19. The Chairman and members of the Commission enjoy security of tenure – Articles 161(6) and 225. They may only be removed from office for inability to discharge the functions of their office or for misbehaviour and only after the elaborate procedure set out under Article 225 is followed.
20. Article 226(1) mandates that GECOM shall not be subject to the direction or control of any person or authority.
21. GECOM is responsible i) for the efficient functioning of the Secretariat of the Commission, which comprises the officers and employees of the Commission; and ii) for the appointment

of all the staff to the offices thereof and is empowered to remove and exercise disciplinary control over such staff – Article 161A(1). By Article 162(1)(a), GECOM is also empowered to “exercise general direction and supervision over ... the administrative conduct of all elections of members of the National Assembly.” It is also specifically empowered by Article 162(1)(b) to “issue such instructions and take such action as appear to it necessary or expedient to ensure impartiality, fairness and compliance with the provisions of this Constitution or of any Act of Parliament on the part of persons exercising powers or performing duties connected with or relating to the matters aforesaid.”

22. By Article 162(1), GECOM has such functions connected with or relating to the conduct of elections as are conferred on it by or under the Constitution or any Act of Parliament. An Act of Parliament which confers power on GECOM is the Elections Laws (Amendment) Act. Specifically, section 18 provides that notwithstanding anything in any written law, the CEO “shall ... be subject to the direction and control of the Commission.” Section 22 is well known to this Court. It empowers GECOM, by Order, if any difficulty arises in connection with the application of the RPA, “to make any provision, including the amendment of the said legislation, that appears to the Commission to be necessary or expedient for removing the difficulty ...”

23. The CEO is an officer employed by GECOM. As any employee, he is subject to the direction and control of his employer. But more than that, GECOM is empowered to remove and exercise disciplinary control over him, is specifically mandated by the Constitution to supervise him and, to remove all doubt, he is rendered by section 18 of the Elections Law (Amendment) Act subject to the direction and control of GECOM. There is no provision in the Constitution or any other law which gives the CEO the power to direct GECOM. Indeed, by Article 226(1) of the Constitution, GECOM is not to be subject to the direction or control of anyone.

The scheme governing elections

24. Members of the National Assembly of Guyana are elected under a system of proportional representation. Voters vote for a list of candidates. A vote for a list is deemed to be a vote from the person designated as the Presidential candidate on the list. Under the RPA, votes cast are first counted by the Presiding Officer of each polling station and recorded on a Statement of Poll. Under section 84(1) of the RPA, Returning Officers are required to “ascertain the total votes cast in favour of each list in the district by adding up the votes recorded in favour of the list in accordance with the Statements of Poll.” As the description of the exercise to be undertaken so clearly indicates, the Returning Officer’s task is a purely arithmetical one. There is also no mystery to what he or she is required to do. The exercise is to be carried out in the presence of members of the Commission, duly appointed candidates, and counting agents. In addition, the accuracy of the Returning Officers' additions can be easily verified because, mandatorily, copies of the Statements of Poll from which the Returning Officers cull the votes which they are required to add up, are provided by the Presiding Officers to the duly appointed

candidates or polling agents and to the CEO. As such, any of these persons are able to check the accuracy of the vote count which the Returning Officers allocate to each list.

25. It is a notorious fact that in this case the PPP/Civic added up the votes on the copies of the Statements of Poll in their possession in relation to District 4 and found that the Returning Officer, Mr. Clairmont Mingo, had declared on the 13th March, 2020 that the APNU/AFC coalition had received over 19,000 more votes than the PPP/Civic had derived from their own additions [**para. 10 (Exh. BJ 1) and para. 13 of Affidavit of B. Jagdeo-No. 9 of ROA**]. Dr. Bharrat Jagdeo has exhibited to his affidavit in opposition an analysis of the copies of the Statements of Poll in the PPP's possession carried out by the world renowned accounting firm Deloitte & Touche, which confirms the PPP's claim that Mingo manufactured more than 19,000 votes in favour of the APNU [**paras. 6 and 7 (Exh. BJ 22) of Supp. Affidavit of B. Jagdeo-No. 20 of ROA**]. This has now been confirmed by the recount conducted under the direct supervision of the CEO. The recount shows that for District 4, 116,941 votes were cast for the APNU and 80,920 votes were cast for the PPP [**Exh. BJ 4 to Affidavit of B. Jagdeo-No. 9 of ROA**]. Mingo's declaration on the other hand records 136,057 votes for APNU and 77,231 for the PPP [**Exh. BJ1 to Affidavit of B. Jagdeo-No. 9 of ROA**]. It is therefore undisputed in these proceedings that Mingo's declaration is fraudulent or at the very least is a gross misrepresentation of the true result of the elections in District 4 and cannot be relied upon for the purposes of the election.
26. Under section 96(1) of the RPA, the CEO is required to calculate the total number of valid votes cast for each list of electors and ascertain the result of the election in accordance with sections 97 and 98. By section 96(2), he is required to prepare a report in terms of section 99 for the benefit of the Commission, which is to be the basis for the Commission to declare and publish the election results under section 99. The report must contain, inter alia, the number of votes cast for each list of candidates, the number of seats allocated to each list of candidates and the names of the persons who have become members of the National Assembly.
27. By section 99, GECOM must publicly declare the results of the election and publish in the Gazette a notification specifying the matters just mentioned.
28. By Article 177(2)(b), the Chairman of GECOM must declare the person who is deemed to be President "acting only in accordance with the advice of the Chief Elections Officer, after such advice has been tendered to the Elections Commission at a duly summoned meeting." It is implicit that the CEO's advice to the Chair would include a statement as to the list of candidates in respect of which more votes were cast and the name of the person designated as the Presidential candidate on that list.
29. It is because of the controversy relating to Mingo's declaration and his denial of requests for recounts, that GECOM issued Order 60 requiring the recounting of all the ballots in all 10 Districts. The recount was to be carried out under the supervision of the CEO who was required to report on the results of the recount. GECOM was then to decide whether to require the CEO to produce his report in accordance with the recount.

30. GECOM in fact so decided and directed the CEO to do so [para. 46 (Exh. BJ 12) of Affidavit of B. Jagdeo-No. 9 of ROA]. However, despite the express terms of section 18, the CEO refused to comply with GECOM's instructions but instead prepared a report using Mingo's fraudulent declaration and accordingly giving the APNU the majority of the seats in the National Assembly and presumably returning Mr. Granger as the President [para. 47 (Exh. BJ 14) and para. 48 (Exh. BJ 15, BJ 16 and BJ 17) of Affidavit of B. Jagdeo-No. 9 of ROA]. He did so because he was of the view that the recount was unlawful. GECOM repeated its instructions that he prepare his report in accordance with the recount.
31. This prompted those backing the Appellant to launch these proceedings in essence seeking orders which would compel GECOM to declare the elections based on the CEO's report which was based on Mingo's fraudulent declaration. But in order to make her case that the CEO was not bound to prepare his report in accordance with the results of the recount, the Appellant perforce had to establish that the recount was unlawful. But since the recount was carried out pursuant to an *ex facie* valid Order made under section 22, she had to establish as well that Order 60 was invalid. This she attempted to do by asking the High Court to determine that section 22 was unconstitutional.
32. The immediate difficulty which the Appellant faced in that quest, and still faces, is the fact that this Court has ruled in *Ulita Moore* that the High Court had no jurisdiction, except on an election petition, either to determine the constitutionality of section 22, or the validity of GECOM's decision to order a recount, or consequently the validity of the recount which was held. As such, for the purposes of these proceedings, and until the High Court on an election petition determines otherwise, section 22 must continue to be treated as valid law in accordance with the presumption of constitutionality; Order 60 must continue to be treated as valid subordinate legislation; and the recount carried out thereunder must continue to be treated as a valid determination of the votes cast at the election.
33. The Appellants seek to distinguish this Court's decision in *Ulita Moore* and to diminish its binding nature by pointing out that Order 60 was not in existence when *Ulita Moore* was decided and that the Appellant was not a party to those proceedings. Respectfully, it is fruitless spending any time on examining the niceties of the law on *res judicata*. This Court determined, in relation to the 2nd March elections, that it had no jurisdiction to pronounce upon the constitutionality of section 22, or the legality of the exercise of GECOM's power under section 22, or whether or not a recount should be held, or whether the recount which GECOM had then decided upon was lawful, or whether the time had come to proceed under Article 177 of the Constitution and section 99 of the RPA or whether those provisions had been triggered or whether there was unlawful non-compliance therewith, except on an election petition. These are all decisions by this court on the extent of the High Court's jurisdiction at this stage. These are declarations of law made *in rem* which bind everyone, including the Appellant. Being a decision made in a civil matter, it is also binding on this Court - *Young v Bristol Aeroplane* [1944] 1 KB 718, 729. Order 60 is a manifestation of the exercise of the GECOM's power

under section 22. *Ulita Moore* stands for the proposition that this Court has no jurisdiction to enquire into the legality of the exercise of GECOM's power under section 22. *Ulita Moore* is therefore on all fours and indistinguishable from this case.

34. It follows inexorably, therefore, that the directions given by GECOM to the CEO to prepare his report in accordance with the recount must also be treated as a valid direction which the CEO is required by section 18 to obey. Whether it is in fact invalid for the reasons which the Appellant wishes to advance must await an election petition.

35. Section 96(2) of the RPA does mandate that the report prepared by the CEO under section 96(1) "shall be the basis for the Commission to declare and publish the election results under section 99." Article 177(2) of the Constitution also provides that the person who is deemed to be elected as President must be declared by the Chairman of GECOM "acting only in accordance with the advice of the Chief Elections Officer." It is the Appellant's case that what this means is that GECOM has no choice but to act on the CEO's report, presumably, whether or not he prepared his report based upon the votes cast at the election. Respectfully, the Appellant's case is misconceived.

36. First of all, section 18 specifically provides that the CEO is under the direction and control of GECOM, "notwithstanding anything in any written law." This means that notwithstanding the requirement in section 96(2) that the CEO's report shall be the basis of the declaration of the results of the election, the CEO must comply with GECOM's direction as to the basis upon which he must prepare his report. Once he prepares his report in accordance with that direction, section 96(2) kicks in.

37. Secondly, GECOM is not obliged to use the CEO's report if his report is itself unlawful. Even where a public authority is mandated by statute to act on the advice or recommendation of another person, they are not obliged to act in accordance with that advice or recommendation if that advice or recommendation is itself unlawful. There are a number of authorities which establish this basic, common sense principle: *Ulufa'alu (Prime Minister) v Governor General* [2001] 1 LRC 425, 432; *Supreme Court Reference No. 1 of 2012* [2012] 4 LRC 490; *Parker v Miller* [1998] WASCA 124; *Real Estate Institute of Western Australia Inc v Kobelke* [2002] WASC 281 at 12; *Marquet, Clerk of the Parliaments of Western Australia v The Attorney General of Western Australia* [2002] WASCA 277; *Tonkin v Brand* [1962] WAR 2, 15. In *Tonkin*, Wolff CJ said (at p. 15):

"There is ample authority for the proposition that, when the Ministers are about to advise the Governor, or have advised the Governor, to assent to some act which is illegal or unconstitutional the courts may step between the Ministry and the Governor and declare the law and issue coercive process to prevent Ministers from doing an illegal act."

In *Ulufa'alu*, Muria CJ said (at p. 432):

"... the Prime Minister as the head of the Cabinet can render advice to the Governor-General who shall act in accordance with that advice. But the legitimacy of such advice is a matter which must be regarded as crucial for the Governor-General to act upon. An advice contrary to law or lacking legitimacy or which is unconstitutional cannot be the

type of advice contemplated under s 31(1) and the Governor-General must be entitled to disregard it or refuse to act upon it."

38. The CEO's report was not prepared in accordance with prevailing law. The prevailing law in this case is Order 60. Under that Order, GECOM directed the CEO to prepare his report based on the results of the recount. His report was not prepared on that basis and is accordingly not lawful. GECOM is accordingly not obliged in law to use it. The position would be the same if the declarations submitted by the Returning Officers under section 84(1) showed that the PPP had won the election, but the report prepared by the CEO under section 96(1) gave the APNU control of the National Assembly and anointed the APNU's presidential candidate as the winning President. GECOM would not be obliged to act on that report and would be duty bound to require him to re-submit his report using the actual results of the election.
39. It follows therefore that the Honourable Chief Justice was plainly right to find that the CEO was bound to prepare his report in accordance with results of the recount. Any question concerning the validity of the recount had to await the launching of an election petition.

The Constitutionality and Legality of the Recount

40. Despite the above, the Appellant has used up the majority of her limited allotment of pages in her submissions addressing the constitutionality of section 22 and the legality of Order 60 and the recount. In the end, she submits that, putting the alleged invalid recount to one side, all that is left for the CEO to prepare his report are the declarations made by the Returning Officers, including Mr Mingo, and GECOM is therefore obliged to declare the election based on that report.
41. To the extent that this Honourable Court considers itself free to depart from its previous decision in *Ulita Moore* and to consider and determine these issues in these proceedings, these Respondents respectfully rely on their submissions in the court below in answer [see paragraphs 36-60 & 71-74-No. 25 of ROA].
42. Furthermore, if this Court were to come to the unlikely conclusion that the recount was unlawful, for whatever reason, and that the CEO was prima facie right to use the section 84 declarations to prepare his report, it would be obliged, it is respectfully submitted, to consider all challenges to the legality of the declarations which have been put before the court, including in particular these Respondents' contention that the Mingo declaration is fraudulent and that any report based on it is likewise fraudulent and unlawful. In for a penny, in for a pound.
43. These Respondents made absolutely clear in their affidavits in opposition that they were contending that Mingo's declaration was fraudulent [Affidavits of B. Jagdeo-Nos. 9, 20 and 26 of ROA]. They presented evidence in the form of the Deloitte Report and the results of the recount in which the CEO reported that the PPP got more 'valid' votes than the APNU. The CEO is a party to these proceedings. He participated in the Court below. He is in possession of the Statements of Poll for District 4. He could have used those Statements to disprove these Respondents' allegations that Mingo had manufactured votes. He did not. This Court would

be acting contrary to law were it to bury its head in the sand and fail to give full effect to the undisputed evidence.

44. The major distinguishing factor between the recount and the declarations is the results in relation to District 4. Whether the recount was validly ordered or not, the fact is that the ballots in each of the polling stations in District 4 have been recounted under a process which the CCJ has described as open, transparent and accountable. The results of the recount of District 4 is before this Honourable Court, as it is before GECOM. It is under the hand of the CEO who is a party to these proceedings. There is no evidence that the recount of the ballots in District 4 is inaccurate. That recount shows that the APNU received 116,941 votes. On the other hand, Mingo's declaration shows that the APNU received 136,057 votes. It is now plain beyond any doubt that Mr. Mingo corruptly gave the APNU 19,116 more votes than were actually cast for that party's list.
45. If therefore Mingo's declaration is to be acted upon and the court accedes to the Appellant's request to grant relief requiring the Mingo declaration to be given effect to:
- i) the Court would be furthering and facilitating the commission of an unlawful act;
 - ii) the rights of the majority of the electors to representatives of their choice would be infringed;
 - iii) the will of the majority of electors who wished to install the PPP as their government would be frustrated; and
 - iv) the constitutional right to representative democracy would be undermined.
46. Guyana is declared by Article 1 of the Constitution to be a "democratic sovereign state." In *State of Mauritius v Khoyratty* [2007] 1 AC 80 Lord Steyn held [12] that "The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them." In *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519, McLachlin CJ said [34] that: "*The right of all citizens to vote ... underpins the legitimacy of Canadian democracy and Parliament's claim to power... More broadly, denying citizens the right to vote runs counter to our commitment to the inherent worth and dignity of every individual...*"
47. Were effect to be given to the 19,116 votes which were not cast for APNU, but which Mingo allocated to APNU, it would deny the right to vote to those citizens who voted the PPP into office and would undermine the founding principle of the Guyana Constitution that it is the people who must decide who should govern them. Giving effect to Mingo's declaration would allow Mingo, and not the people, to decide who should govern Guyana. Article 9 of the Constitution declares that "Sovereignty belongs to the people, who exercise it through their representatives..." Sovereignty does not belong to Mingo.
48. Simply put, Mingo's declaration is unconstitutional and unlawful. The CEO is not bound and would indeed be acting unlawfully if he were to act on that declaration. Likewise, in the face of this uncontroverted evidence, GECOM would be acting unlawfully and in violation of the electorate's constitutional right to vote and to representatives of their choice, if it gave effect

to Mingo's fraudulent declaration and returned a party which the electorate had rejected. Fraud unravels everything. This Court would also be facilitating an illegality if it were to make any order which effectuates the Mingo declaration.

Conclusion

49. Stripped to its bare bones, what this case is about is who should hold the Presidency and the reins of Government while the High Court, on an election petition, sorts out the disputes as to the validity of votes and the recount. Should it be the winner of the election as determined by the recount of the actual ballots in a process that all contesting parties agreed to and participated in, and which the CCJ has described as transparent and accountable? Or is it the beneficiaries of the Mingo fraud?

50. In this case, there is an impasse. GECOM directed the CEO to prepare his section 96 report in accordance with the recount. He refused. He prepared it in accordance with Mingo's fraudulent declaration. There is a difference of opinion on the validity of the declaration and the recount. That difference must be resolved so that the election can be declared. But given that the Constitution has vested direction and control over the election in GECOM, not the CEO; given that section 18 specifically mandates that the CEO must act in accordance with directions given by GECOM; and given that Parliament in section 140 of the RPA has deliberately sought to protect GECOM from challenges to the exercise of its functions except on an election petition, the only way to cut the Gordian Knot, consistent with the limitations on the High Court's jurisdiction at this stage, is to require the CEO to comply with GECOM's directive. The Constitution has reposed trust and power in GECOM to supervise and bring general elections to a successful conclusion and it and Parliament has endowed GECOM with ample powers to enable it to achieve that result. The CEO is not entrusted with these powers and must not be allowed to determine the result of the election in defiance of GECOM's orders. This Court must respectfully step aside and let GECOM do its job. The Honourable Chief Justice was correct to do so.

51. This appeal should be dismissed with costs to be paid by all those who support it.

Dated this 16th day of July 2020



Douglas L Mendes SC
Mohabir Anil Nandlall
Devindra Kissoon
Marcia Nadir Sharma
Clay Hackett