IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

Petition Questioning An Election To The National Assembly Under
The National Assembly (Validity of Elections) Act, Chapter 1:04

ELECTIONS HOLDEN ON THE 2ND DAY OF MARCH 2020

2020-HC-DEM-CIV-P-88

In the Matter of Articles 60, 161A, 162 and 163 of the Constitution of the Republic of Guyana.

-and-

In the Matter of the Representation of the People Act, Chapter 1:03

-and-

In the matter of the National Assembly (Validity of Elections) Act, Chapter 1:04

-and-

In the Matter of the Election Laws (Amendment) Act No. 15 of 2020

BETWEEN:-

1. CLAUDETTE THORNE
2. HESTON RAYMOND BOSTWICK

Petitioners

-and-

1. KEITH LOWENFIELD, the Chief Election Officer

2. DAVID GRANGER, Representative of A Partnership for National Unity + Alliance for Change

3. HORATIO EDMONDSON, Representative of Federal United Party

4. BHARRAT JAGDEO, Representative of the People's Progressive Party/Civic

5. JOHN FLORES, Representative of the Liberty and Justice Party

6. ASHA KISSOON, Representative of The New Movement

7. VISHNU BANDHU, Representative of United Republican Party

8. ABEDIN KINDI ALI, Representative of the Change Guyana

9. PATRICK BOURNE, Representative of the People's Republican Party

10. JONATHAN YEARWOOD, Representative of the A New United Guyana

11. SHAZAAM ALLY, Representative of the Citizen Initiative

12. GERALD PERREIRA, Representative of the Organisation for the Victory of the People

Respondents

Mr. John Jeremie SC, Mr. Roysdale Forde SC, Mr. Raphael Trotman Ms. Olayne Joseph Mr. Rondelle Keller

Mr. Anthony Astaphan SC and Mr. Arudranauth Gossai for the first respondent

Mr. Basil Williams SC for the second respondent

Mr. Ryan Crawford and Mr. Chandra Sohan for the third respondent

Mr. Douglas Mendes SC, Mr. Devindra Kissoon, Mr. Sanjeez Datadin, Mr. Clay Hackett, Ms. Theresa Hadad and Mr. Rishi Dass for the fourth respondent

Mr. Hari Narayan Ramkarran SC for the fifth respondent

Mr. Timothy Jonas SC for the sixth respondent

Mr. Ganesh Hira and Mr. Donovan Rangiah for the seventh respondent

No appearance by or for the eighth and ninth respondents

Mr. Kamal Ramkarran for the tenth respondent

Mr. Kashir Khan, Mr. Mohamed Khan, Mr. Ivan Alert, Mr. Kalesh Loakman and Mr. Joshua Abdool for the eleventh respondent

No appearance by or for the twelfth respondent

Mr. Mohabir Anil Nandlall, SC, Attorney-General, intervening with Ms. Prithima Kissoon, Ms. Rehanna Clarke and Mr. Chevy Devonish

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

Petition Questioning An Election To The National Assembly Under
The National Assembly (Validity of Elections) Act, Chapter 1:04

ELECTIONS HOLDEN ON THE 2ND DAY OF MARCH 2020

2020-HC-DEM-CIV-P-**99**

In the Matter of Articles 60, 161A, 162 and 163 of the Constitution of the Republic of Guyana.

-and-

In the Matter of the Representation of the People Act, Chapter 1:03

-and-

In the matter of the National Assembly (Validity of Elections) Act, Chapter 1:04

-and-

In the Matter of the Election Laws (Amendment) Act No. 15 of 2020

BETWEEN:-

1. MONICA THOMAS

2. BRENNAN JOETTE NATASHA NURSE

Petitioners

-and-

1. KEITH LOWENFIELD, the Chief Election Officer

2. DAVID GRANGER, Representative of A Partnership for National Unity + Alliance for Change

3. HORATIO EDMONDSON, Representative of Federal United Party

4. BHARRAT JAGDEO, Representative of the People's Progressive Party/Civic

5. JOHN FLORES, Representative of the Liberty and Justice Party

6. ASHA KISSOON, Representative of The New Movement

7. VISHNU BANDHU, Representative of United Republican Party

8. ABEDIN KINDI ALI, Representative of the Change Guyana

9. PATRICK BOURNE, Representative of the People's Republican Party

10. JONATHAN YEARWOOD, Representative of the A New United Guyana

11. SHAZAAM ALLY, Representative of the Citizen Initiative

12. GERALD PERREIRA, Representative of the Organisation for the Victory of the People

Respondents

Mr. Rex McKay SC, Mr. John Jeremie SC, Mr. Khemraj Ramjattan, Mr. Mayo Robertson, Mr. Keith Scotland, Ms Geeta Chandan-Edmond, Mr. Rondel Keller, Mr. Gary Best and Mr. Darren Wade for the petitioners

Mr. Anthony Astaphan SC and Mr Arudranauth Gossai for the first respondent

Mr. Basil Williams SC for the second respondent

Mr. Ryan Crawford and the Third respondent in person

Mr. Douglas Mendes SC, Mr. Devindra Kissoon, Mr. Sanjeez Datadin, Mr. Clay Hackett, and Mr. Rishi Dass for the fourth respondent

Mr. Hari Narayan Ramkarran SC for the fifth respondent

Mr. Timothy Jonas SC for the sixth respondent

Mr. Ganesh Hira and Mr. Donovan Rangiah for the seventh respondent

No appearance by or for the eighth and ninth respondents

Mr. Kamal Ramkarran for the tenth respondent

Mr. Kashir Khan, Mr. Mohamed Khan, Mr. Ivan Alert, Mr. Kalesh Loakman, Mr. Joshua Abdool for the eleventh respondent

No appearance by or for the twelfth respondent

Mr. Mohabir Anil Nandlall, SC, Attorney-General, intervening with Ms. Prithima Kissoon, Ms. Rehanna Clarke and Mr. Chevy Devonish

November 24, 30, 2020, January 18, 2021.

JUSTICE ROXANE GEORGE, CHIEF JUSTICE (ag)

DECISION ON VALIDITY OF ELECTION PETITION 99P/2020

and

DIRECTIONS ON PETITION 88P/2020

Introduction

1. The petitioners filed these elections petitions, 88P/2020 and 99P/2020, to challenge the results and validity of the national and regional general elections held on March 2, 2020. The results of these elections were published by the Guyana Elections Commission (GECOM) on August 20, 2020 in the Official Gazette.

2. The National Assembly (Validity of Elections) Act and Rules appended thereto in Chapter 1:04 (Chapter 1:04) govern the practice and procedure for challenging elections and the election of candidates to the National Assembly. As is well known, the procedure for challenging an election must be strictly followed. A number of authorities so hold. I need refer to only two local cases in which a number of authorities are cited as being illustrative of this - **Payne & Anor v Hammond & Ors.** 206/1986 P (D'ra) **(Payne)** and **Melville v Chief Election Officer & Ors.** 262/2006 P (D'ra) **(Melville)**.

3. This decision is primarily in relation to a challenge to the validity of Petition 99P/2020 based on whether service of the petition was properly effected. As a consequence, the issue whether the second respondent is a proper party in both petitions became a live one. The narrative below will reveal why.

4. The factual matrix is as follows as regards the service of 99P/2020. This petition was filed on September 15, 2020. Pursuant to s 8 and rule 9 (1) of Chapter 1:04, the petition with affidavit in support, the notice of presentation of petition and notice of security for costs (required documents), had to be served within five days of the filing of these said documents with the date of filing being excluded. Thus, the required documents in 99P/2020 had to be served on or before September 21, 2020, there being a *dies non* (Sunday) during this period that could not be counted pursuant to s 40 (d) of the Interpretation and General Clauses Act, Chapter 2:01 and s 34 (2) of the High Court Act, Chapter 3:02.

5. Chang CJ (ag) addressed this issue at pp 12 - 13 in **Melville** as regards the computation of the period in which service of an election petition had to be effected:

> "It is undisputed that the petition was presented on the 17th November 2006. The 17th November 2006 was Friday. Under section 3 (1) of the Public Holidays Act, Chapter 19:07, every Sunday is a public holiday. Under section 40 (d) of the Interpretation and General Clauses Act, Chapter 2:01,
>
> > "when an act or proceeding is directed or allowed to be done or taken –
> >
> > > (1) within any time not exceeding six days, public holidays shall not be reckoned in the computation of time."
>
> Since the 17th November 2006, the date of the presentation of the petition fell on Friday, Sunday the 19th November 2006 has to be disregarded in computing 5 days from the 17th November 2006. Exclusive of the 17th November 2006 (see section 40 (a) of the Interpretation and General Clauses Act), 5 days expired on the 23rd November 2006. Therefore, a Notice of the presentation of the petition and of the nature of the security or proposed security and a copy of the petition had to be served on the respondents on or before the 23rd November 2006 rather than on the 22nd November 2006.
>
> It must be mentioned at this juncture that, under section 34 (2) of the High Court Act, Chapter 3:02 (as amended by section 2 of the Law Reform (Miscellaneous Amendments) Act 1988 (No. 14 of 1988)):
>
> > "The holidays to be observed or kept by the Court shall, in addition to the vacation, be all public holidays and Saturdays."
>
> Even though Saturdays are Court holidays, Saturdays are not public holidays and therefore are not ***dies non***. Even though the Supreme Court Registry is not open for business on Saturdays, the service of the notice of the presentation of the petition and the nature of the security or proposed security and a copy of the petition could have been effected on Saturday the 18th November 2006. As such, Saturday (but not Sunday the 19th November 2006) had to be reckoned in the computation of the 5 days from the date of the presentation of the petition."

6. All of the respondents, except the second respondent, were served on either September 16 or 17, 2020. Affidavits of service were filed on diverse dates to wit September 29, 30 and October 1, 2020 to so confirm. With regards to the second respondent, the initial affidavits of service which were filed on September 29, 2020 revealed that the petition was served on September 25, 2020. Supplementary affidavits of service were subsequently filed. I will refer to these later.

Issues raised by the Court, and the fourth and eleventh respondents and the Attorney-General

7. A number of issues were raised by the Court at the case management conference to which counsel for the parties in both petitions were invited to respond. The main issue raised by the Court is whether 99P/2020 was properly served on the second respondent. Based on the relief sought that the Court "order that the Chairman of [GECOM] declare the presidential candidate designated on the APNU+AFC List of Candidates as the duly elected President of Guyana in accordance with article 177 of the Constitution of Guyana", the Court also raised the issue whether the said second respondent was a proper party given s 27(1) of Chapter 1:04 which provides that a respondent may give notice of intention not to oppose the petition.

8. The fourth respondent, and the Attorney-General, also filed applications to dismiss petition 99P/2020, the former mainly on the ground that service was not effected on a number of the respondents, including the second respondent, as required by Chapter 1:04. The fourth respondent contends that the affidavits of service reveal that all the required documents to be served – election petition, notice of election petition and notice of security for costs - were not served on the first, eighth, ninth, tenth and eleventh respondents, and that the second respondent was served out of time. The application by the AG focused on whether the second respondent was properly served contending that the petition should be dismissed for non-compliance with s 8 and rule 9 (1) of Chapter 1:04. The issue whether there was service of the required documents on the first respondent was also canvassed. The eleventh respondent supported these applications by filing submissions. As a consequence, as regards service, this became an additional reason why there is need to determine whether the second respondent is a proper and necessary party.

9. Procedural objections were raised on behalf of the petitioners in 99P/2020 as regards how these applications were made, that is, that summonses and not notices of application should have been filed. Suffice to say, these objections were not pursued. However, I do note that given the reliance on evidence that was already on the record, there was no need for the AG to file an application to strike out 99P/2020. I had so ordered to avoid having parties file applications that exhibited the same documents that are already on the Court's file, thereby adding to costs and the already voluminous record of the Court. That said, since it raises issues that were raised by the Court, and others that are being canvassed by the fourth respondent, there is no disadvantage to the petitioners.

10. Before I proceed, I must say at the outset that I do not accept the submissions on behalf of the petitioners that the contentions regarding what is claimed to be the contradictory evidence about service on any of the respondents amount to allegations of fraud which must be specifically pleaded and proven. This is a case where inconsistencies and discrepancies regarding service have been highlighted by respondents which they are entitled to do. It is for the Court to decide if these inconsistencies and discrepancies affect the validity of petition 99P/2020.

Service on first, eighth, ninth, tenth and eleventh respondents

11. As regards the first respondent, it is pleaded and contended that the affidavit of service and the exhibited return of service are inconsistent. The affidavit of service sworn to by the second petitioner, Brennan Nurse, reveals that she along with Trevon Chan and Mark Roberts, clerk and driver respectively to Mr. Mayo Robertson, attorney-at-law, went to effect service of the required documents on the first respondent. She further deposed that in the presence of these two persons she effected service of the required documents. Mr. Chan and Mr. Roberts deposed in supporting affidavits of service that it was Ms. Nurse who effected service. However, the return of service as exhibited to Ms. Nurse's affidavit records that it was Mr. Chan who effected service and that he only served a certified copy of the elections petition. The return stated:

> "On this day 16th September, 2020, I Trevon Chan Clerk to Mr. Mayo Robertson Attorney-at-law served a certified copy of the Elections Petition on Mr. Keith Lowenfield, the Chief Elections Officer at his home at Lot 1288 Spurwing Drive, South Ruimveldt Park.
>
> T. Chan".

12. It was submitted that the affidavits of service were inaccurate as regards who actually effected service on the first respondent and more importantly what was served. It was submitted that the affidavits of service cannot be relied on since it is unclear who effected service. In addition it was urged that since the return reflects that Mr. Chan effected service, that it is he who should have sworn to the affidavit of service. Thus, the affidavit deposed to by Ms. Nurse cannot be accepted as the statutorily required proof of service. Further, while the affidavit of service revealed that the required documents were served, the return of service referred to service of the petition only. As a result of these inconsistencies, the service of the required documents cannot be accepted and the petition has to be dismissed for these reasons.

13. As regards the eighth, ninth, tenth and eleventh respondents, the application advanced, and it was submitted by the fourth respondent, that whereas the return of service only evidences service of the petition, the affidavits of service purport to state that the notice of presentation of the petition and of the nature of the security provided were also served. Because of these anomalies, it was urged that the petition has to be dismissed.

14. The returns of service for the eighth, ninth, tenth and eleventh respondents state respectively:

> "2020-09-17th
>
> The petitioner, Monica Thomas on the 17th day of September 2020, in my presence, served Mr. Abedin K. Ali with a certified copy of the petition filed herein. Mr. Ali was served at Lot 166 Charlotte Street Lacytown Georgetown

[signed] Deion Liverpool."

"2020-09-16th

The petitioner, Monica Thomas served on Mr. Patrick Bourne, in my presence a certified copy of the petition filed herein at his residence 14 First Street, Helena No. 2 Mahaica.

[signed] Deion Liverpool."

"2020-09-16th

The petitioner, Monica Thomas on the 16th day of September 2020, in my presence, served Mr. Jonathon Yearwood with a certified copy of the petition filed herein. Mr. Yearwood was served at his place of employment 14 Barima Avenue, Bel Air Park Georgetown

[signed] Deion Liverpool."

"2020-09-16th

The petitioner, Monica Thomas on the 16th day of September 2020, in my presence, served Mr. Shazaam Ally at his place of employment 21-22 Hink Street Georgetown (Medical Pharmacy) with a certified copy of the petition filed herein.

[signed] Deion Liverpool."

15. Mr. Jeremie and Mr. Robertson, for the petitioners, argued that there is a presumption of regularity that the required documents were served. On behalf of the petitioners it was urged that the evidence produced supports the presumption of regularity which presumption has not been rebutted by any other evidence. They further submit that the provisions and rules of Chapter 1:04 do not require a return of service to be filed and that this document is mere surplusage which need not be considered. It was also submitted that the persons who went to effect service acted as a team.

16. Mr. Mendes, for the fourth respondent, supported by the AG, countered that the presumption of regularity cannot be applied where, as here, service was effected by a non-State official. Reliance was placed on **Bennion on Statutory Interpretation,** 8th edn, **para 7.6: Presumption of Correctness** and the case of **Guyah v Commissioner of Customs & Anor** Civil App No. 34/2019, CA J'ca; [2018] UKPC 10; PC App No. 0085/2016 (**Guyah**). However,

these authorities merely explain the general principles regarding the application of the presumption of regularity. They do not support the specific submission made.

17. It was also submitted that the assertion that the petitioner and others acted as a team when they went to serve the required documents cannot be countenanced, and that the focus has to be on the exhibited returns of service and not the affidavits. I, however, note the submissions by Mr. Khan for the eleventh respondent, that the operative document that the Court must rely on for proof of what documents were served is the affidavit of service. As such, as regards service on all the respondents except the first and second, he accepted that the facts regarding service on the respondents is akin to the situation in **Melville**.

18. In **Eusi Kwayana et al v The Chief Elections Officer et al** No. 205 of 1986 D'ra (**Kwayana**) (p 11) Pompey J held that the marshal's return of service cannot be used as a substitute for an affidavit of service. However, where as in this case, a return of service is exhibited in support of an affidavit of service, it becomes part of the evidence to be considered. The petitioners cannot approbate and reprobate in this regard – tender a document as evidence and when it is found not to suit their interests, seek to abandon it. Therefore, all the evidence produced has to be considered in determining whether the respondents named were served or properly served with the required documents.

19. It is trite law that the rules as to service of election petitions must be strictly complied with. In **Williams v Mayor of Tendby & Ors** (1879) 5 CPD 135 notice of presentation of the petition and the nature of security were not served. As a result, the petition was struck out. Grove J said (p 138):

> "The question still is whether the provisions of the Act are or are not peremptory. I think they are peremptory, and that the terms not complied with are conditions precedent, which ought to be complied with before the petition could be presented. The appeal must be dismissed."

20. In **Payne**, K. George CJ, as he then was, stated at p 14 of the judgment: "In my opinion whether the service is effected by the petitioner or anyone on his behalf, the provision is clear. It requires the petitioner or his agent to file an affidavit of service. And of course any such affidavit can only contain such facts as are within the personal knowledge of the deponent. This, in my view, would mean that the affidavit must be made by the person who effected the service or by someone else including the petitioner or his agent, who was present when it was served."

21. In **Melville** there was a complaint regarding service. The affidavit of service stated that the required documents had been served by the petitioner, while the return of service by the marshal stated that he had served the election petition. Chang CJ (ag) applied the *omnia praesumuntur* rule or principle of presumption of regularity to hold that the required documents

were all served. He considered that there was no evidence to contradict the affidavit that all the required documents were served and that the marshal's return did not nullify the assertion in the affidavit.

22. As highlighted in **Payne** either the petitioner or an agent could be the person who can file the required affidavit of service. This decision also reflects that as distinct from the person who actually effected service, anyone who was present could swear to the affidavit of service. In **Kwayana**, Pompey J held at p 9 that the statutory provisions do not require that the petitioner himself or herself effect service, with the provisions leaving it open in relation to the means by which personal service would be effected. His Honour further held at p 10, that the affidavits must contain expressions of personal knowledge by the deponent about how service was effected.

23. The affidavits of service, sworn to by persons who were present, regarding the first, eighth, ninth, tenth and eleventh respondents reveal that the required documents were served. I have concluded that I would accept this evidence on behalf of the petitioners that the required documents were served on these respondents. I also accept the evidence as disclosed in the affidavits that the required documents were served on the first respondent although Mr. Chan's return of service states that he served the election petition. Since in effect s 8 and Rule 9 (1) delegate the authority regarding service to the petitioner, then the Court has to look to what the petitioner has done to determine if the statutory requirements have been complied with. If there is prima facie evidence of this, then the Court can presume that the statute was followed and that the action taken was regularly done. I therefore treat the returns of service as Chang CJ (ag) treated the marshal's return of service in **Melville**.

24. I accept that the persons who went to effect service did so together and acted as a team so to speak. To my mind, on the particular evidence in this case, since service was effected within the statutory five day timeframe, the focus has to be on whether the required documents were served, and whether they were served on the respondents personally. Importantly, unlike the cases of **Payne** and **Melville**, none of these respondents has complained that they were not served with the required documents. In my view the focus should not be on who served them though affidavits of service by someone who was present are required to prove that the particular respondent was served.

25. As such, I do not consider that on the particular evidence of service of this petition, 99P/2020, that the application for the dismissal of the petition on the basis of improper service or non-service on these respondents has merit.

Service on the second respondent

26. The issue is not so simple as regards service of the petition on the second respondent. As noted earlier (para [...]), the initial affidavit of service deposed to by the second petitioner, Ms.

Nurse, along with the affidavits in support of affidavit of service sworn to by Mr. Trevon Chan and Mr. Mark Roberts were filed on September 29, 2020. These affidavits which were all dated September 24, 2020 strangely stated that service was effected on September 25, 2020. An acknowledgement of service was exhibited which is stated to have been signed by Mr. David Granger. Below the signature it states: "David A Granger APNU+AFC 25th September 2020." As noted at para [4] above, the required documents should have been served on or before September 21, 2020. Therefore, September 25, 2020 would be outside of the statutory five day period required for service.

27. The petitioners in 99P/2020 concede that the affidavits of service assert that the second respondent was served on September 25, 2020 and that if accurate it would mean that he was not served within the statutorily required time. Indeed, Mr. Jeremie stated that "those difficulties appear regrettably on the face of the paper." However, subsequent to this issue being raised by the Court and the applications by the fourth respondent and the AG, without the permission of the Court to do so, the petitioners filed supplementary affidavits on November 11, 2020 to negate the September 25, 2020 date, and to explain that service was effected on the second respondent on September 18, 2020.

28. The fourth respondent, in particular, objected to these additional affidavits on the basis that permission was not sought to file them; and that the filing of these affidavits on November 11, 2020, nearly two months after service was effected, violates rule 9 (5) of the Rules which provides that an affidavit of service must be filed "as soon as may be" after service has been effected.

29. An affidavit that predates the activity to which it refers would not be acceptable as evidence of its contents. Apart from this, I have decided that the petitioners should not have filed supplementary affidavits without permission of the Court, more especially as the issue of late service was raised by the Court on October 22, 2020 when the cases were first called for case management. Also, they were filed after the fourth respondent and the AG would have filed applications to have the petition dismissed, with irregularity of service on the second respondent as a ground. Further, at this first CMC hearing, Mr. Robertson asserted that the service provisions had been complied with. In the circumstances, permission should have been sought before the filing of these supplementary affidavits. Therefore, these affidavits cannot be relied on as proof of the required timely service on the second respondent.

30. In addition, I consider that, even if accepted, the late filing of these supplementary affidavits would not be in compliance with the provisions of rule 9 (5) regarding the timeliness with which such affidavits are to be filed. Rule 9 (5) of Chapter 1:04 states:

"The petitioner or his agent shall, **as soon as may be, after service has been effected in accordance with any provisions of this rule,** file in the registry an affidavit of the time and manner of such service."

31. I acknowledge that these supplementary affidavits of service were not filed some ten months after the filing of the petition as in **Melville**. Also the petitioners have not delayed for as long as in **Payne** where the petitioners filed a summons for extension to serve respondents over three months after the petition was filed. However, like the petitioners in latter case, the petitioners, Ms. Thomas and Ms. Nurse, were aware of their default and should have moved speedily to address the issue. As noted by K. George CJ in **Payne** at p 36 "tardiness ... is the very antithesis of the urgency and dispatch with which elections disputes are to be resolved."

32. In **Melville**, Chang CJ stated (p 17 - 18):

"The prescription in Rule 9 (5) that an affidavit of service as to the time and manner of service of a copy of the petition and of a notice of presentation of the petition and of the nature of security for costs must be filed **"as soon as may be"** after service has been effected in accordance with Rule 9 underlines the importance which the drafters of the Rules attached to the expeditious and timely hearing of elections petitions and to ensuring procedural fairness of those hearings to the respondents. Rule 9 (5) speaks clearly to the need for the court to be made aware as early as possible as to whether the respondents have been in receipt of the core documents mentioned and whether the statutory prescriptions relating to service of the said documents have been complied with. If the affidavit of service has been filed, the court would be placed in a position to move towards the hearing of the petition." (Emphasis mine.)

33. And as also noted in **Melville** (p 12), the court has no jurisdiction to extend time for filing an affidavit of service outside of an "as soon as may be after service has been effected" time frame. Thus, as further found by Chang CJ (ag) in **Melville** (p 17), the delay in filing the affidavits means that they are in effect non-documents. I conclude that there is a breach of rule 9 (5) and as such there is no proof of service on the second respondent within the statutory timeline of five days after the filing of the required documents.

34. But even if the supplementary affidavits are accepted as evidence of service of the required documents on the second respondent, there is another fundamental reason why the affidavits cannot be relied on. I address this for completeness. The supplementary affidavits, sworn to on November 11, 2020 and filed on the said date, were deposed to by Ms. Nurse, Mr. Chan and Mr. Roberts. Ms. Nurse swore as follows:

"3. That this supplementary affidavit is supplemental to an affidavit sworn to on the 24th day of September, 2020, and filed on the 30th day of September, 2020.

4.That with respect to paragraph 3 (three) of the affidavit of service sworn to on the 24th day of September, 2020, and filed on the 30th day of September, 2020, it was inadvertently stated that on the 25th day of September, 2020, I along with Trevon Chan, clerk to Mr. Mayo Robertson, attorney-at-law, and Mark Roberts, driver to Mr. Mayo Robertson, attorney-at-law, went to effect service on David Granger, the second named respondent of the hereunder described documents in this petition which were issued out of the Registry against the above respondents by the petitioners, that is to say:

(a) The petition and affidavit in support thereof sworn to by the petitioners;
(b) Notice of presentation of petition;
(c) Notice of security for costs;

instead of the 18th day of September, 2020.

5. That the error in paragraph 3 (three) of the affidavit of service is obvious because it speaks to events that purportedly took place the day after my affidavit was executed. In addition, the exhibits attached to my affidavit were also stamped and marked on the day before the exhibit was purportedly created.
6. That on the 18th day of September 2020 I served David Granger, the second named respondent.
7. That on the 24th day of September 2020 as I was preparing my affidavit of service I realized that I did not have a signed acknowledgement from David Granger, the second named respondent.
8. That I therefore went back to David Granger on the 24th day of September 2020 and requested that the second named respondent to [sic] sign the acknowledgement.
9. That upon returning to David Granger the second named respondent, I saw him sign and date the acknowledgement. I then took that acknowledgment to the Commissioner of Oaths to Affidavits and exhibited it to my affidavit of service but unfortunately did not pay attention to the date placed on the acknowledgment by the second named respondent.
10. That had I done so I would have recognized that David Granger, the second named respondent, had incorrectly dated the acknowledgement of service since I witnessed him sign it on the 24th day of September and not the 25th day of September, 2020."

35. Mr. Chan and Mr. Roberts supported this narrative stating that they had accompanied Ms. Nurse to effect service on the second respondent. However, while Mr. Chan stated that he inadvertently said service occurred on September 25 instead of September 18, Mr. Roberts swore that service was in fact effected on "18th October, 2020". They nevertheless both swore "That the said David Granger, the second named respondent, signed the acknowledgement of service in my presence on the 24th day of September, 2020."

36. Section 8 of Chapter 1:04 provides for service of election petitions. It states:

"Within the prescribed time, not exceeding five days after the presentation of an election petition, the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition, and of the nature of the security or proposed security, and a copy of the petition, unless the Court otherwise directs on the application of the petitioner."

37. Rule 9 of the Rules of Chapter 1:04 prescribe how service is to be effected. The relevant part of this rule is:

"9 (1) The time and manner of service of an election petition are, for the purposes of section 8, prescribed by virtue of the following provisions of this paragraph and paragraphs (2), (3) (4). The time for service of a copy of an election petition and notice of the presentation of the petition and of the nature of the proposed security shall be five days, exclusive of the day of presentation."

38. It is an entrenched principle of election laws that the provisions regarding time must be strictly complied with. This has been confirmed as early as 1879 in **Williams v Tenby** which was cited earlier. This was also the decision by the Privy Council **Nair v Teik [1967] 2 WLR 846.** Non-adherence to the requisite timelines has been held by courts to result in the nullification of election petitions. In **Ahmed v Kennedy [2003] 1 WLR 1320**, the notice of the amount and nature of the security were not served within the statutory five day period. It was held by the Court of Appeal that such failure invalidated the petitions, Simon Brown LJ holding at para 32 that "[t]imeous service is an imperative in these cases."

39. There is a plethora of cases from the English speaking Caribbean which confirm that non-adherence to the provisions requiring service of all required documents within the statutory time allotted would result in the petitions being nullified and therefore dismissed. These are **Shemilta Joseph v Bowen** Suit 40/1994 14th July 1999 per K. Benjamin J (as he then was), **George Prime v Nimrod** GDVHCV 2003/0551 19th March 2004 per Pemberton J (as she then was), **Mahabir v Cuffie** Claim No. CV 2015-03123 per Dean-Armorer J (as she then was), **Browne v Gibson** (CA 11/1994, 9th Jan 1995, ECSC, and **Joseph v Reynolds** HCVAP 2012/14 31st July 2012 (St. Lucia) a decision of the ECSC CA.

40. But I need only quote K. George CJ to emphasise this point, which he made in **Payne** as follows (pp 20-21):

"The insistence on rigid adherence to the statutory provisions whether it be as to the time for doing or the manner in which an act should be done is one of the peculiar and distinguishing features of disputed election laws. Not only is the timeframe within which election petition should be filed considered a period of limitation and non-adherence fatal to its prosecution, but failure to comply with any of the other statutory requirements leads to a similar result."

41. I have a difficulty accepting the narrative of events as deposed to by the second petitioner and those who accompanied her to effect service on the second respondent. Even accepting an error in deposing to an event that was yet to occur, how is it that despite returning on September 24 the acknowledgement of service is not endorsed with this date, albeit September 24 would also be outside the period permitted for service. If service was indeed effected on September 18, on their return to Mr. Granger, great care should have been taken to ensure that this was correctly noted on the acknowledgement of service given the importance attached to service of election petitions. Mr. Jeremie acknowledged that particular care should have been taken. It is also passing strange that having been served on either September 18 or 24, that the second respondent would acknowledge service with a date of September 25.

42. Mr. Jeremie stated that in the herculean effort to serve so many respondents, "there had been things which have slipped." This is an understatement to say the least. Such a slip or slippage is unacceptable given the stringency that is required in adhering to the Rules for service of election petitions. The second respondent has not sought to clarify what occurred given what appears to be his signature acknowledging service which is dated September 25, 2020.

43. And I must state categorically that the document exhibited as the acknowledgement of service by Mr. Granger is part and parcel of the evidence and cannot be treated as surplusage. Unlike the circumstances regarding service on the first, eighth, ninth, tenth and eleventh respondents, where I applied the presumption of regularity moreso as service was effected within the statutory five day period, the material inconsistencies disclosed as regards service on the second respondent cannot be countenanced. As held in **Guyah** (cited at para 16 above) at paras 59 and 62: "59. The presumption of regularity only applies if there is no indication of irregularity. In this case, there are several indications of irregularity. ... 62. Based on those indications, it would seem that the presumption of irregularity should not apply."

44. Realising the gravity of their obvious error, and it having been pointed out by the Court on October 22, 2020 that service was out of time, the petitioners have sought to correct this error and have failed miserably. The evidence produced is manifestly unreliable and cannot be acted on to prove that the second respondent was served on September 18, 2020. The presumption of regularity which the petitioners seek to rely on in relation to service on the second respondent has been rebutted by the very evidence they have produced. The objection raised by the fourth respondent and the AG cannot be considered to be a technical preliminary objection as submitted by the petitioners relying on the dicta of Martin J in **Stoddard v Prentice 1898 6 BCR 308; Carswell BC 82.**

45. I have therefore concluded that second respondent was not served within the five day period required by the Rules for doing so.

Consequences of late service on the second respondent: submissions on whether the second respondent is a proper and necessary party

46. The issue then is: what is the consequence of this grave error? There are eleven other respondents who have been or who, by this decision, I consider to have been properly served with the required documents. Does this error in the service of the second respondent nullify this petition or can it proceed against the remaining respondents? The fourth and eleventh respondents as well as the AG urge that it be nullified. In **Payne** it was clearly held that service out of time is fatal to the validity of an election petition.

47. The petitioners in 88P/2020 filed written submissions on whether the second respondent was a proper and necessary party which the petitioners in 99P/2020 relied on. In addition, Mr. Jeremie made oral submissions on this issue for the petitioners in both petitions. The petitioners argue that "even in the unlikely event that the Court were not to be persuaded by the petitioners' supplementary affidavits on the issue of the date of service, the untimely service on the second named respondent, a party who is not necessary and or a proper party is not an act that goes to the whole root of the petition so as to make the petition void." It was further claimed that it would be for the second respondent "to establish that he is a necessary party and that the requirement of service with respect to him has not been met and he was therefore not properly joined." Since the second respondent had not so asserted, then there was nothing "that would prevent the Court from proceeding with the adjudication of this petition."

48. It was urged that **Kwayana**, cited by the fourth respondent in support of his submissions, and in which s 4 (2) was discussed, should not be relied on as the decision on the issue of who is a necessary party is incorrect or should be restricted to its particular facts. It was stated that the reasoning of K. George CJ at p 37 of **Payne** is to be preferred. I will consider these cases in detail shortly. (See para 68 et seq below.)

49. Referencing the dictum of K. George CJ it was submitted that the second respondent is not a representative of a list that is in conflict with the contentions of the petitioners. This is because one of the prayers for relief in both petitions is for:

> "An order that the Chairman of the Guyana Elections Commission declare the Presidential Candidate designated on the APNU+AFC list of candidates as the duly elected president of Guyana in accordance with Article 177 of the Constitution of Guyana."

50. In this regard, it was urged that this contention can be distinguished from the contentions in **Kwayana** which were not similar to the above stated prayer for relief. It was submitted that this contention was not incompatible with the interests of the persons named in the list of candidates of which the second respondent was the representative. It was also stated that these petitions do not indicate contentions that are different from that of the second respondent.

51. Mr. Forde also submitted that s 4 (2) when compared with that of s 82 from India highlights a difference. Section 82 of the Representative of the People Act from India as quoted in the submissions, states:

> "82. Parties to the petition – A petitioner shall join as respondents to his petition –
>
> (a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates."

52. It was noted that this provision was discussed in **K Kamaraja Nadar v Kunju Thevar & Ors.** AIR 1958 SC 687 where it was held that the petitions were liable to be dismissed since the petitioners had failed to join as respondents candidates who the court found to be necessary parties.

53. In effect, it was contended that the second respondent was not a necessary or proper party to the petitions. Thus, the joining of second respondent amounted to a mis-joinder rather than a non-joinder. Since he was mis-joined, no adverse consequence would flow as he is not a necessary party. Applying **Payne,** it was urged that such mis-joinder was not fatal as such a party can merely be struck out. **Muraka Radhey Shyam Ram Kumar v Roop Singh Rathore & Ors** 1964 AIR 1545; 1964 SCR (3) 573 was also cited where it was held that "if all the necessary parties have been joined to the election petition, the circumstances that a person who is not a necessary party has also been impleaded does not amount to a breach of the provisions of s 82 and no question of dismissing the petition under subsec 3 of s 90 arises. It is open to the Election Tribunal to strike out the name of the party who is not a necessary party within the meaning of s 82 of the Act."

54. It was also canvassed that as a consequence no issue would arise regarding s 27 of Chapter 1:04, though it was recognized that if the second respondent were a proper party and had issued notice of intention not to oppose the petition, he would not be allowed to appear as a party against the petitioners.

55. In support of these submissions, it was asserted that "consequently, the second named respondent and the other named respondents who are list representatives of the persons for whom no person named on those lists are elected to the National Assembly are not persons who are required to be served in strict compliance with the National Assembly (Validity of Elections) Act, Cap. 1:04"; and that "the joinder of the second respondent as well as other respondents who are representatives of the list of candidates that were allocated any seats in the National

Assembly are not necessary and or proper parties to the election petition. Their joinder amounts to a misjoinder. It is further submitted that a misjoinder does not constitute a contravention of s 4 (2) of Chapter 1:04 and consequently cannot render the election petition liable to be dismissed."

56. The fourth respondent, on the other hand, submitted that the second respondent is a necessary party and the proven improper service on him means that the petition is a nullity. **Sabga v Solomon (1962) 5 WIR 66** was cited where the Court of Appeal of Trinidad and Tobago held that due to the complaint about the conduct of the returning officer, he was a necessary party. Thus, failure to serve the petition on this returning officer resulted in the nullification of the petition.

57. It was submitted that with the petitioners being electors so as to have *locus standi* to institute the proceedings, their contentions would thereby affect the list the second respondent represents. It was stated that because there are allegations in 99P/2020 that votes cast were invalid, this contention would presumably include votes cast for the list the second respondent represents. This contention would appear *prima facie* to be one that conflicts with the interests of the list of persons the second respondent represents. Thus, even though the relief that is sought may work in favour of the second respondent, the point is that Chapter 1:04 focuses attention on the contentions in the petition and not necessarily on the reliefs sought.

58. The point made was that the representative of a list is a respondent to an election petition if any contention in an election petition conflicts with the interest of the names of the persons on the list arising out of the election. So, it matters not that there may be relief which might favour the persons on the list. Nor does it matter that there are contentions in the election petition that might not conflict with the interests of the persons on the list. Because the section speaks to 'any contention', as long as there is any contention in the election petition which conflicts with the interest of the persons on the list, then that the representative of the list is a proper and a necessary party to the proceedings.

59. Applying **Kwayana**, it was submitted that like the situation in that case, where the PPP lost the election, if the petitioners are successful in obtaining the relief sought, even though the APNU+AFC lost the elections, if the entire election is declared invalid, then it would lose the seats allocated and would be put through the trouble and expense of a new election.

60. It was further advanced that the relief sought that relates to the other plea in the petition concerning the register of electors, is a contention that the register of electors is invalid for a number of different reasons. If such a finding were to be made by the Court, it could potentially impact the voters who would have been on the list who voted for the list the second respondent represents. Therefore the contention impacts upon and conflicts with the interest of the list the second respondent represents and votes cast in favour of that list.

61. It was further submitted that the petition cannot be saved by merely striking out the respondent in respect of whom there has been non-compliance for to do so "would present a respondent with Hobson's choice. If he or she is successful in his complaint of non-compliance, the 'reward' is removal from the proceedings with the result that he or she is denied the opportunity to participate in the important question whether the election was invalid or not. This is a case, in other words, where Hobson teams up with Pyrrhus. A victory on an application alleging non-compliance is secured at the high cost of exclusion from the proceedings."

62. The AG also submitted that while the petitioners sought relief for the nullification of the election, they also sought an order that the representative of the list be declared president from the very election they seek to invalidate. In this regard, it would be necessary for the second respondent to be a party as the relief sought for nullification would be in conflict with that for a declaration as president.

63. The fourth respondent and the AG submit that Pompey J was very clear that one cannot hear a case involving a party whose interest will be adversely affected by any inquiry by the Court, and by any orders made, without hearing them.

64. The eleventh respondent adopted the submissions made by the fourth respondent and the AG. Mr. Khan for this respondent added that if one seeks election by having ones name on a list and a petition is filed that seeks to upset that declaration then ultimately this results in a situation of conflict.

Consequences of late service on the second respondent: determination of the issue whether the second respondent is a proper and necessary party

65. The answer to this issue requires a consideration of s 4 (2) of Chapter 1:04 which states:

> "The person hereinafter referred to as **the respondent is the representative of such list of candidates for election** as comprises the names of persons **with whose interests** arising out of the election **any contention in the election petition conflicts**; and if the petition complains of any act or omission on the part of the Commission of any member thereof, or any such person as is mentioned in Article 162 (1) (b) of the Constitution, the Chief Election Officer shall, for the purpose of this Act, be deemed to be a respondent and, if it questions the qualification of any person to be elected to the National Assembly, he or she shall, for the said purposes, be deemed a respondent." (Emphasis mine.)

It also requires an analysis of **Payne** and **Kwayana** which discuss this provision.

66. The **Payne** case related to the 1985 general elections. Here, several parties contested the general election of December 9, 1985 the results of which were declared on December 24, 1985.

The petition was filed on January 23, 1986. The complaints regarding the validity of the elections were that it "was not conducted in accordance with law and in particular with the principles laid down in the Elections Regulations 1964, the National Registration Act 1967, and the Representation of the People Act, Cap. 1:03 and that such non compliance may be reasonably supposed to have affected the result of the said election." It was also complained that corrupt and illegal practices were committed in order to promote the election of members of the Peoples National Congress, that agents of this party's candidates were guilty of corrupt practices and that "the allocation of seats to the lists of candidates that contested the election was wrong and contrary to law." Therefore it was prayed that the court determine "that the members of the Peoples National Congress were not duly elected as members of the National Assembly."

67. Summonses were filed by a number of the respondents to have the petition dismissed on the ground of non-compliance with the statutory provisions regarding service as to the required documents and timeframe. Relying on s 4 (2), the respondents also contended that there was misjoinder of the sixth to thirteenth respondents who were all returning officers in circumstances where it was the Chief Election Officer who would be answerable for any of their acts or omissions. While agreeing with the submission by the Solicitor General that these respondents should not have been joined, K. George CJ held that he would have struck them out as they were not necessary.

68. On the issue of who is a necessary party and the interpretation of s 4 (2), as noted earlier, the following passage from p 37 of the judgment of K. George CJ was canvassed by the petitioners in preference to that of Pompey J in **Kwayana**:

> "... it must be noted that sec 4 of the Act requires that the representative of a list of candidates be made a respondent if the interest of any person named in that list conflicts with any contention in the election petition. Although two of the petitioners' contentions specifically refer to corrupt and illegal acts committed for the purpose of promoting the election of the forty-two persons named in the People's National Congress list of candidates who were declared members of the National Assembly and the prayer of the petition seeks a determination that they were not duly elected, **there are two other contentions which can be said to be in conflict with the interest of those other persons whose names were declared as elected members of that Assembly**. And in this regard, I construe the word 'conflict' in the section to mean not only a clash, but also an incompatibility with the interests of such persons." (Emphasis mine.)

69. However, counsel did not quote the entire paragraph of the decision. I do so now from pp 37 – 38 where His Honour further stated:

> "The complaints are that:

(i) 'the election was not conducted in accordance with law' and 'such non compliance may be reasonably supposed to have affected the results of the election' and

(ii) 'the allocation of seats to the lists of candidates that contested the elections was wrong and contrary to law.'

If either of the above contentions is successful then it could affect the interests of some or all of the persons named in the other lists of candidates who were returned as members of the National Assembly. It is therefore my opinion these contentions can be said to be incompatible with those interests. **Accordingly, in my judgment all the representatives of the lists that include candidates who were returned as members of the National Assembly should have been made respondents. And having been made respondents, it was incumbent upon the petitioners to serve upon them all those documents referred to in s 8 of the Act.**" (Emphasis mine.)

70. In **Kwayana** the petitioner prayed for orders that the said elections held on December 9, 1985 were not fair, free and valid; that the result was affected by unlawful acts and omissions that allowed the People's National Congress to secure a majority of the seats in the National Assembly; that there would be a different placing of the respective lists of candidates regarding the allocation of seats; that the election was ineffective and invalid; and that fresh elections be held. The respondents were the Chief Election Officer and Hugh Desmond Hoyte, Representative of the List of Candidates for the People's National Congress.

71. These respondents filed applications to have the petition dismissed on the grounds of firstly non-compliance with the statutory requirements regarding service, and secondly failure "to join as respondents all representatives (including in particular Cheddi Jagan and Marcellus Fielden Singh) of such lists of candidates for election as comprised the names of persons with whose interests arising out of the elections held on 9th December, 1985 the contentions in the election petition conflict within the meaning of section 4 (2) of the said Act."

The said Act referred to was Chapter 1:04.

72. Justice Pompey considered s 4 (2) and having noted (p 11) that the second ground related to the "the non-joinder of necessary parties as respondents" had this to say (pp 11- 12):

"It is very clear that the petitioners are seeking to declare the elections null and void and at the same time requesting this Court sitting as an Election Court (see case of **Petrie v AG** (1968) 14 WIR 290) to declare fresh and new elections. It is equally clear that in such an eventuality, that there is no guarantee that the same representation of seats in the House will result.

Further, it is an accepted fact that the other representatives of the lists, namely, Cheddi Jagan and Marcellus Fielden Singh, have not only taken up their seats but have also

participated in the business of the House. They have not sought to challenge the results of the elections. Petitioners maintain that the representatives of the list of the UF and PPP are not necessary parties to the petition requiring their presence for determination of issues raised therein. And further nowhere in the petition is their conduct raised as an issue nor are any of their seats challenged and accordingly, the petition is not in conflict with the other two minority parties.

...

If the representatives of the list of candidates are necessary parties to the petition, then they ought not to be excluded from the original petition as section four (4) of the Act requires that they be made respondents if their interests conflict with any contention in the election petition.

...

The petitioners on the other hand are insisting that there can only be a conflict arising if petitioners allege a commission or omission of an illegal act against the PPP and UF."

73. Having outlined the contentions of the petitioners as outlined above, at p 13 he continued:

> "Section 4 (2) of the Act not only refers to deeming the Chief Election Officer, an official, as a respondent but relates to anyone having conflict of interest of those other persons whose names were declared as elected members of the House of Assembly.
>
> ...
>
> If any of the above contentions is successful then it could affect the interest of some or all of the persons named in the other lists of candidates who were returned as members of the National Assembly. In this case, I understand and construe 'conflict' in the section to mean in opposition to, disagreement with, or 'a clash or incompatibility' with the interests of such persons in the words of the learned Chief Justice in the matter of **Payne's Petition** (1986) No. 206 Demerara. Further should the Court accept the contentions of the petitioners, it would be imposing a disability, impediment, on someone who is not a party to the proceedings. In the case of **Lovering v Dawson (1875) 10 LR at p 711** Common Pleas a candidate who lost a seat could not be a respondent as he had no seat to defend. In this case the minority parties have seats in the National Assembly."

74. At p 14 His Honour further stated:

> "...
>
> It is otherwise in this case in which the petitioners seek a declaration that the whole of the election held on the 9th December be declared void. Further, if

petition succeeds, the interests of the other representatives of the lists with seats in the House appear to be prejudiced in three ways namely:

(a) Loss of those seats allocated to them.
(b) Loss of the right to fill any casual vacancy by extracting names of other members from the lists.
(c) Put to trouble and expense of a new election.

With their absence, the Court will be unable to carry out a meaningful enquiry and it would be a breach of the rules of natural justice (*audi alteram partem*) should the Court attempt to do so in their absence – see Indian case of **Udhav Singh v M. R. Scindia** [1976] 2 SCR 246.

Therefore, I am of the considered opinion that these contentions can only be said to be in disagreement or incompatible with the interests of the other representatives of the lists and I construe contention here to mean a mere dispute. It follows that all representatives of the lists which include candidates who were returned and allocated seats in the National Assembly should have been made respondents. In my view, their presence before the Court is necessary to ensure that all matters in dispute in the petition might be effectually and completely determined and it is encumbent on the petitioners to serve upon them all those documents referred to in section 8 of the Act."

75. Having so reasoned, apart from finding that there was non-compliance regarding the service provisions, Pompey J held that there was a failure to join the representatives of the lists of candidates for the PPP and UF who were necessary parties. Thus, the petition in **Kwayana** was struck out.

76. Clearly, from these decisions, both K. George CJ and Pompey J found that one had to consider the contentions alleged and the consequences of their possible success in determining whether there was conflict with any of the interests of the lists of candidates, moreso those whose members were returned as members of the National Assembly.

77. For the purposes of this case, the second respondent would fall into the first category of respondent in s 4 (2) - that is "as representative of such list of candidates ... whose interests arising out of the election any contention in the election petition conflicts." It must therefore be determined whether the interests of the persons on the list that the second respondent represents are in conflict with any contention in the petitions. This requires a consideration of the various contentions in the petitions, and not solely a prayer or the prayers for relief.

78. I agree with the submissions on behalf of the fourth and eleventh respondents and the AG that what is required is a determination that no contention is in conflict with the interest of the

list which the second respondent represents. The eleventh respondent canvassed that "interest" as contemplated in s 4 (2) refers not only to the representative of the list but rather to the interest of every person named on that list. Thus, the contentions of the petitioners may affect and therefore conflict with any or all of the persons on the list, moreso those who have taken up seats in the National Assembly and Regional Democratic Councils.

79. I do not agree with the submissions on behalf of the petitioners that Pompey J's decision cannot be accepted because he did not construe the word 'election' in s 4 (2). For that matter, neither did K. George CJ in **Payne**. There is no need to construe the word 'election' which appears three times in the subsection. The focus has to be on the contentions advanced in the petitions. In my opinion, Pompey J's decision, like that of K. George CJ in **Payne**, simply states that if the petitioner succeeds, then the orders granted would affect the interests of the list of candidates who have been elected to the National Assembly. In this way, the interests of such list or lists of candidates would be in conflict with or incompatible with and thereby prejudiced by the contentions advanced by the petitioner.

80. Importantly, it is clear from s 4 (2), and the judgments in **Payne** and **Kwayana** that this provision is meant to ensure that parties who contested the election are heard or given an opportunity to be heard. If they are not served or are not properly served, and therefore cannot be heard, then the petition would be a nullity. The subsection encapsulates the *audi alteram partem* rule, that is that interested persons or parties must be heard or be given an opportunity to be heard.

81. I also accept that what has to be considered and determined is not whether one contention does not conflict, as advanced by the petitioners in citing the prayer for a declaration that the presidential candidate of the APNU+AFC be declared President, but whether any of the contentions conflict. I consider that the reasoning of K. George CJ as quoted above [paras 68 and 69 above] supports this view. There, His Honour found that two contentions were in conflict with the interests of those other persons whose names were declared as elected members of that Assembly.

82. To my mind, a careful reading of the decision of K. George CJ in **Payne** confirms that it is any contention that has to be considered for a determination whether it is in incompatible with the list which the particular respondent represents. I do not find that there is any difference between the reasoning of K. George CJ in **Payne** and Pompey J in **Kwayana**. Indeed, Pompey J quoted K. George CJ in coming to his conclusion.

83. In this regard, it does not matter that the second respondent has indicated that no submissions were going to be made "until the Court fixes a date for trial. Thereupon, the second named respondent will determine whether he will give notice of intention not to oppose the

petition, at least six days before the date fixed for trial pursuant to section 27 (1) of the National Assembly (Validity of Elections) Act Chapter 1:04 and rule 25 (1) of the National Assembly (Validity of Elections) Rules Chapter 1:04." Nor does it matter that he ultimately filed notices in both petitions indicating that he was not going to oppose them, pursuant to s 27 (1) of Chapter 1:04, albeit prematurely, as a date for trial has not been fixed in either petition. In any event, in order to so file, he has to be a proper party and clearly thereby considered himself to be so; though it is recognized that while one may consider oneself a proper party, a court may rule otherwise.

84. Moreover, an indication that he is not opposed to the petitions does not remove the second respondent as a respondent. Once such a notice is filed, s 27 (2) merely provides that that respondent shall not be allowed to appear or to act as a party against the petition in any proceedings thereon. It does not say that the effect of issuing the notice is that that respondent ceases to be so.

85. While the issue whether the contentions conflict with the interests of the second respondent are relevant to both petitions, in the context of whether petition 99P/2020 should proceed, it is the contentions of the petitioners in this petition which will be of primary focus. I will address the contentions in 88P/2020, though much more briefly.

86. The contentions of the petitioners in 99P/2020, who depose that they were electors for Electoral District 4 at the March 2, 2020 General and Regional Elections, are many. They also depose that they were employed as election assistants to Mr. Joseph Harmon, the statutorily appointed election agent of the APNU+AFC. I should note however, that the fact that the petitioners were employed as election assistants to Mr. Joseph Harmon does not *ipso facto* mean that their contentions would not be in conflict with the interests of the list the second respondent represents.

87. While at first blush they appear to favour the list which the second respondent represents, a more nuanced consideration of the contentions has led me to conclude that indeed some of them conflict with the interests of the said list. Only a few of these contentions need be highlighted. In this regard, it is public knowledge that candidates of the list that the second respondent represents have taken up seats in the National Assembly as elected Members of Parliament. By joining the second respondent, the petitioners must have concluded that the contentions they advance are in conflict with the interests of this respondent and the other ten respondents who represent lists of candidates.

88. At para 7 of the petition they contend that the "elections were unlawfully conducted and/or that the result of the said elections (if lawfully conducted) were affected or might have been affected by unlawful acts or omissions." More specifically, there are assertions regarding allegations of failings on the part of GECOM prior to and in the conduct of the elections of

members of the National Assembly for which elections day was March 2, 2020. These contentions can be in conflict with interests of the list of second respondent in that they raise issues that could affect the representatives of this list who are elected members of the National Assembly. (See again the decision of K. George CJ as quoted above [para 68 and 69].)

89. Further, the contentions in the particulars or grounds which speak to the validity or invalidity of the electoral list are matters for which evidence would have to be advanced, all of which could conflict with the interests of the second respondent's list, and indeed with the respective lists which all the respondents represent. The contentions regarding the validity, and application or implementation of Order 60 of 2020 by GECOM, and the invalidity of votes cast and/or counted and recounted could result in a reduction, rather than an increase, in the votes and allocation of seats to the APNU+AFC in a trial of the petition, a situation definitely in conflict with the interests of the list that the second respondent represents. In this regard, it cannot be presumed or assumed that the many generalized contentions and issues raised by the petitioners as anomalies and or irregularities in the conduct of the pre and post elections process would be advantageous to the APNU+AFC only. They may be disadvantageous, hence the necessity for the presence of the representative of this list as a party to the petition. Similarly, the many particularized contentions in which specific political parties represented by respondents, including the second respondent, in this petition are named as being potentially affected, indicate that they are all necessary parties.

90. As regards reliefs sought, while the petitioners claim that the elections were conducted unlawfully and therefore they should be nullified, they also seek an order that the Chairman of the GECOM declare the Presidential Candidate designated on the APNU+AFC list of candidates as the duly elected president of Guyana in accordance with Article 177 of the Constitution of Guyana. While these reliefs are seemingly inconsistent, the fact remains that a vitiation of the election would be in conflict with the interests of the list that the second respondent represents moreso as he was the said presidential candidate, hence in this regard he would be a necessary party.

91. The second respondent, because he was not served within the stipulated time, would not have had the chance to test the contentions and evidence which could affect the list he represents. In this regard, the reasoning and observations of Pompey J quoted above are relevant: that having the representatives of the lists of all who have been elected to the National Assembly before the "Court is necessary to ensure that all matters in dispute in the petition might be effectually and completely determined."

92. The contentions also have to be considered in the context and against the backdrop of ss 29 and 30 of Chapter 1:04 which permit the court to order a re-allocation of seats in the National Assembly. Those who have taken up their seats are entitled to be heard – heard as regards

challenging any evidence led and or submissions made, and heard in relation to advancing a position as contemplated by s 27 (1) that one does not intend to participate. If not served, or if service is null and void because there has been non-compliance with the service provisions, then the Court would not have the benefit of hearing the case for the representative of such list or of an intention not to oppose.

93. I have perused election petitions cases that have been filed over the years in Guyana. In all of them, the parties that secured seats in the National Assembly were always considered necessary parties through their representatives in elections petitions. The situation is no different in this case. Therefore, the submission that none of the parties who secured seats in the National Assembly should be considered a necessary party is preposterous to say the least. Similarly, the seemingly opposite position also advanced is equally absurd: that those representatives for whom no person named on their lists are elected to the National Assembly are also not persons who are required to be served. Indeed, these submissions appear to be inconsistent and beg the question: who could be named as respondents if these formulations are accepted? It begs an additional question: who would be a proper and necessary respondent? It is clear that these unmeritorious submissions were contrived to provide cover for the submission that the second respondent is not a proper and necessary party.

94. Importantly, the elections are not restricted to national elections which determine the presidency and the allocation of seats in the National Assembly, but apply to regional representation in the National Assembly as well as to regional elections. Indeed, to exclude the representative of a list which commands 31 of the 65 seats in the National Assembly and a list which has representatives on Regional Democratic Councils as declared in the Official Gazette of August 20, 2020, would be to deny a voice to the representatives of a large number of electors. Focus cannot be placed on the second respondent alone as the presidential candidate of the APNU+AFC, but as representative of the list of candidates of these parties. He does not only represent himself. Thus, I hold that the second respondent is a necessary party to election petition 99P/2020.

95. As a consequence, the late service of petition 99P/2020 on the second respondent amounted to non-service on him. This would lead to the nullification of petition 99P/2020 *ab initio*, moreso as the court has to consider the *status quo* at the time of service and not the proceedings or positions of a party or parties adopted thereafter. This is to say, from the time the petition 99P/2020 was served out of time on the second respondent as a necessary party, it was a non-starter.

96. The same cannot be said for petition 88P/2020. The procedures in filing and serving this petition were fully complied with. Indeed, to permit 99P/2020 to proceed would be a disservice to the petitioners in 88P/2020 who ensured that they complied with all statutory requirements.

97. This said, the petitioners in 88P/2020 depose that they were electors in the March 2, 2020 General and Regional Elections. It was contended that the elections were not held in conformity with the Constitution, the Representation of the People Act, Chapter 1:03, and Order 60 of 2020 and should be entirely nullified. It is also contended that the Elections Laws (Amendment) Act No. 15 of 2000 and Order 60/2020 made pursuant thereto are unconstitutional so that the recount of votes process that was conducted and declaration of results made under the auspices of these provisions are void. Given that as mentioned before, candidates of the list that the second respondent represents have been elected as and have taken up seats in the National Assembly as Members of Parliament, these contentions conflict with the interests of these candidates who are on this list.

98. These contentions conflict with the interests of the list the second respondent represents since, as noted above, their ventilation may impact the number of votes and thereby the seats that each list of candidates, including that of the second respondent, may receive. Depending on the arguments advanced, as Mr. Forde telegraphed that this petition will be prosecuted on the basis of legal submissions only, the list and these candidates can be adversely affected.

99. As stated above, in finding that the *audi alteram partem* rule applies, one would expect that apart from the petitioners considering that their petition is in conflict with interests of the list the second respondent represents, he had to have been given the opportunity to challenge whatever may be raised which would be disadvantageous to or in conflict with the list he represents. If he chooses not to, then notice of such intention would be given pursuant to s 27 (1) of Chapter 1:04, as has been done.

100. As such I hold that the second respondent is a necessary party to this petition also. But in the absence of missteps such as to nullify this petition, the fact that he is a necessary party but is apparently choosing not to oppose it, does not affect the prosecution of this petition. As stated earlier, in order to decide that he would not oppose the petition, the second respondent has to be a proper party in order to exercise this option.

101. And before I conclude, there is one other matter I feel I should mention briefly. When one considers the contentions in these two petitions, they are essentially no different from the contentions in **Payne** and **Kwayana**. In **Payne**, as mentioned earlier, the contentions were that the election was not conducted in accordance with law, including the National Registration Act 1967, and the Representation of the People Act, Cap. 1:03, legislation about which there is contention in these two petitions. It was also complained that corrupt and illegal practices were committed and that the allocation of seats to the lists of candidates that contested the election was wrong and contrary to law. In **Kwayana** the contentions were, as referred to earlier, that the election was not free, fair and valid, and was ineffective, that there were unlawful acts and

omissions, and that there should be a different placing of the respective lists of candidates regarding the allocation of seats. The language may be different, the particularization of the contentions may be different, but they are essentially the same. And it is in the circumstances of these similar contentions that it was held in both cases that the representatives of lists whose members were elected to the National Assembly were necessary parties.

Conclusion

102. Therefore as to petition 99P/2020, I declare that the petition is a nullity and cannot proceed for procedural non-compliance as to service of the said petition on the second respondent, who is a proper and necessary party. This petition is therefore dismissed.

Costs regarding petition 99P/2020

103. The respondents who appeared are awarded costs to be taxed if not agreed. If costs are not agreed, the application for costs to be taxed is to be filed on or before February 26, 2021, the said application to be dealt with by the Registrar of the Supreme Court.

Petition 88P/2020

104. Petition 88P/2020 will proceed. Directions will be given as to the progress of this petition.

Roxane George
Chief Justice (ag)
January 18, 2021