

2009

No. 111/M

DEMERARA

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**CIVIL JURISDICTION**

In an application for Writs of  
Certiorari and Mandamus by  
**JOHN KING.**

**BEFORE:**

**THE HON. MR. JUSTICE IAN CHANG – CHIEF JUSTICE (AG.)**

**MR. KHEMRAJ RAMJATTAN WITH MR. NEIL PERSARAM FOR THE  
APPLICANT, JOHN KING.**

**MR. ASHTON CHASE S.C. FOR MS. PAULINE SUKHAI, THE RESPONDENT  
NAMED BY THE COURT.**

**HEARD ON:**

**2009**

**August 14, 18**

**September 21**

**October 5.**

**DECISION**

**CHANG (Chief Justice (ag.))**

Orella and Siparuta constitute an Amerindian Village or Community to which the provisions of the Amerindian Act (No.6 of 2006) have application. The conduct of elections for the posts of Toshao and Village Councillors are governed by Part V11 (Sections 65 to 77) of the Act.

Acting under section 65 (3) of the said Act, the Minister responsible for Amerindian affairs, Ms. Pauline Sukhai, fixed the 28<sup>th</sup> April 2009 as the date for the holding of elections for the posts of Toshao and Village Councillors. The date fixed for the nomination of persons desirous of standing for election to the said posts was the 27<sup>th</sup> April 2009 i.e. the day before the day of polling.

The applicant, John King, was a willing nominee for election to the post of Toshao. So was Mr. Mc Lean Devair, the incumbent Toshao. Mc Lean Devair and others objected to the applicant's nomination on the ground that the applicant was not resident in the Village or Community for three years immediately prior to the day fixed for nominations as required by section 71 (1) (c) of the Amerindian Act. The then Regional Chairman, who was performing the functions of Returning Officer, upheld the applicant's claim to eligibility.

On the 28<sup>th</sup> April 2009, just before polling was to commence, Mc Lean Devair and others renewed their opposition to the eligibility of the applicant to stand for election to the post of Toshao. The Regional Vice Chairman, who was performing the functions of Returning Officer at Orealla, ruled that the applicant was ineligible to stand for election to the post of Toshao. Ballot papers were then shared out and it was discovered that the ballot papers had already omitted the applicant's name as a candidate for the post of Toshao. This omission necessarily indicated that even before the objection was raised on the 28<sup>th</sup> April

2009 by Mc Lean Devair and others, a decision was already made to disqualify the applicant as a candidate for the post of Toshao. The Regional Vice – Chairman explained that the decision to disqualify the applicant as candidate was made the night before on the basis of objection made by Mc Lean Devair. The elections were therefore conducted with the applicant being an unwilling non-contestant for the post of Toshao.

On the 30<sup>th</sup> April 2009, the applicant sought legal advice from Attorney-at-Law, Khemraj Ramjattan.

On the 6<sup>th</sup> May 2009, Mr. Ramjattan wrote a letter to the Minister of Amerindian Affairs, the named respondent. In that letter, he stated that he was writing to her on behalf of a number of Amerindians from the Orealla-Siparuta Mission and that the letter was a complaint under section 75 of the Amerindian Act. In that letter, Mr. Ramjattan outlined several alleged facts which he claimed constituted a number of illegalities and irregularities in the conduct of the elections. Significantly, Mr. Ramjattan did not sign the letter on behalf of any voter or adult resident of the Orealla-Siparuta Village or Community. Nor did that letter name any voter or adult resident on whose behalf Mr. Ramjattan was purportedly complaining nor was any signature of any voter or adult resident appended to Mr. Ramjattan's letter of the 6<sup>th</sup> May 2009.

However, in addition to the letter written by Mr. Ramjattan himself, Mr. Ramjattan also transmitted to the named respondent a letter of complaint dated the 29<sup>th</sup> April 2009 which purported to be a joint complaint from residents of Orealla and Siparuta.

The main complaint of those resident – voters was that, on the 27<sup>th</sup> April 2009, both the applicant and Mc Lean Devair were nominated without objection to contest for the post of Toshao but that, immediately prior to the commencement of voting on the 28<sup>th</sup> April 2009, the Returning Officer explained that, on the evening of the 27<sup>th</sup> April 2009, objections were raised against the candidature of the applicant resulting in the removal of his name from the list of nominees for the post of Toshao. The letter further contained a complaint that the Returning Officer had refused to allow the applicant to speak for his candidature and that there was collusion between Mc Lean Devair and his Councillors and the Regional Officers to remove the applicant as a candidate for the post of Toshao so that Mc Lean Devair could retain that post.

The further claim was made in the letter that the applicant had his home at Orealla since the late 1970's and had served as a teacher at Orealla for eighteen years and as a Village Councillor for twelve years or more. It cited instances where named persons not resident at Orealla for the past three years were allowed to vote and identified Mr. Carl Phoenix and the Regional Chairman as the masterminds behind a plot

to prevent the applicant contesting for the post of Toshao. It further alleged that several persons were shocked at expressions by Mc Lean Devair, his councillors and their supporters saying that Mc Lean Devair would retain the post of Toshao whether or not elections were held. The letter alleged that the Regional Officials and the Orealla Village Council orchestrated the removal of the applicant as a candidate for the post of Toshao.

That letter was not signed at its immediate end by the complaining residents. Rather, it stated:

“Yours truly,

Residents

See signature next page”.

On the following pages were a number of signatures under the caption “Voters supporting John King”.

On the 9<sup>th</sup> June 2009, there was a protest action in front of the Ministry of Amerindian Affairs. The protesters called upon the Minister to nullify the elections and to call fresh elections. The Minister later appeared at the press conference and stated that she would decide what to do within three months of the complaint.

On the 10<sup>th</sup> August 2009, after the expiry of three months, the applicant called the Ministry of Amerindian Affairs for information on

the Minister's decision and was informed by the Minister's Secretary that the Minister had "already finally determined the matter" and that there was nothing more to be said.

On the 13<sup>th</sup> August 2009, the applicant filed a Notice of Motion to the High Court seeking the following reliefs:

"1. An Order or Rule nisi of Certiorari directed to the Minister of Amerindian Affairs, Ms. Pauline Sukhai, quashing her decision to uphold the disqualification and ineligibility of the Applicant to contest as Toshao/Captain the Orealla/Siparuta Village Council Elections held on 28<sup>th</sup> April 2009, on the grounds that the said decision by the Minister to uphold the Applicant's disqualification and ineligibility is unreasonable, arbitrary, unlawful, in excess of and without jurisdiction and thus null, void and of no legal effect AND an Order directed to the said Minister to show cause why the said Order or Rule nisi of Certiorari should not be made absolute.

2. A Writ of Certiorari quashing the decision of the Minister of Amerindian Affairs, Ms. Pauline Sukhai, to uphold the disqualification and ineligibility of the Applicant to contest the Orealla/Siparuta Elections as Toshao/Captain of the 28<sup>th</sup> April 2009 on the grounds that the said decision to uphold the

Applicant's disqualification and ineligibility is unreasonable arbitrary, capricious, whimsical, mala fide, contrary to the rules of natural justice, unlawful, in excess of or without jurisdiction, null, void and of no legal effect.

3. An Order or Rule nisi of Mandamus directed to the Minister of Amerindian Affairs, Ms. Pauline Sukhai, to nullify the Orealla/Sipurata Elections for Councillors and Toshao held on 28<sup>th</sup> April 2009 and to set a date for fresh elections for Councillors and Toshao AND an Order directed to the said Minister to show cause why the said Order or Rule Nisi of Mandamus should not be made absolute.
4. A Writ of Mandamus directed to the Minister of Amerindian Affairs, Ms. Pauline Sukhai, to nullify the Orealla/Sipurata Elections for Councillors and Toshao and to set a date for fresh elections for Councillors and Toshao in Orealla/Sipurata Village Council.
5. Costs.
6. Such further or other Orders as may be just in the circumstances".

Section 71 (1) of the Amerindian Act provides:

“A person may not stand for election or be elected as Councillor unless he –

(a) is an Amerindian

(b) is resident in the Village on the day of the nominations.

**(c) has been continuously resident for a period of not less than three years immediately before his nomination provided that if a person has his principal home within the Village, any absences from the Village for education, employment or health care shall be disregarded in determining continuity of residence; and**

(d) has not been convicted of a serious criminal offence involving violence or dishonesty”.

Section 71 (2) provides:

“A person shall not stand for election or be elected as Toshao unless he

**(a) is eligible to stand as Councillor**

(b) has not held the position of Toshao for two terms immediately preceding his nomination”.

Section 75 (1) of the said Act provides:

“Not later than thirty days after the declaration of the election results, a voter may complain in writing to the

Minister if he believes there was an irregularity in the election process because –

- (a) there was fraudulent or corrupt practice during the election;
- (b) there was a breach of the electoral procedure established by this Act,
- (c) the returning officer, the election clerk or any deputy election clerk committed an act or made an omission which prejudiced the outcome of the election”.

Section 75 (2) provides:

“The Minister shall consider the nature of the complaint, the number of electors bringing the complaint, the report and any other relevant factor, and may –

**(a) dismiss the complaint**

**(b) establish a committee to investigate the complaint**”

Section 75 (3) provides:

“If the Minister establishes a committee the Minister may direct the Village Council to remain in officer or may appoint an interim Village Council while the investigation is going on.”

Section 76 (3) provides:

**“The investigation committee shall present its report to the Minister within one month of being appointed.”**

Section 76 (4) provides:

**“The Minister shall take into account the report of the investigation and either dismiss or uphold the complaint.”**

Section 77 (1) provides:

**“If the Minister upholds the complaint the Minister –**

**(a) shall declare the election invalid**

**(b) set a date for new elections; and**

(c) may suggest the safeguards to prevent a recurrence of the irregularity.

Section 77 (2) provides:

“For the period of time from the declaration is invalid to the holding of new elections, the Minister may, if he has not already done so under section 75, appoint an interim Village Council”.

It is significant to note that the Motion challenges not the validity of the elections directly but rather the exercise of the statutory discretion of the Minister under section 75(2) in dismissing the complaints made by the voters and her consequent refusal to declare

the elections invalid and to set a date for new elections under section 77(1) of the Amerindian Act.

On the 14th August 2009, this court ordered the issue of Orders or Rules nisi of Certiorari and Mandamus calling upon the Minister to show cause why, in the light of the Affidavit in support of the Motion, such Orders or Rules nisi should not be made absolute. On the 24<sup>th</sup> September 2009, an Affidavit in Answer was filed. It was sworn to by one Norman Whittaker, the Liason Officer of the Ministry of Amerindian Affairs, who stated in paragraph (1) thereof that he was making that Affidavit **with the consent and approval of the Minister of Amerindian Affairs** but omitted to state whether he was making the Affidavit **on behalf of the said Minister**. After all, it was the Minister to whom the Orders or Rules nisi of Certiorari and Mandamus were directed to show cause and not the Liason Officer of the Ministry of Amerindian Affairs. Moreover, the Motion challenged the exercise of the statutory discretion of the Minister in respect of which the Liason Officer of the Ministry or any other officer of the said Ministry could not speak even with the approval or consent of the Minister unless the Minister had authorized him to speak on her personal behalf. It appears to this Court that it was necessary for the Liason Officer to satisfy the court not merely that he was speaking with the consent and approval of the Minister but further he was speaking on her behalf so that the Affidavit in Answer was in truth the Affidavit in Answer of the Minister herself. Nevertheless, *de bene esse*, this Court is prepared to view the Affidavit

in Answer as having been made on behalf of the Minister as if the Minister were speaking through the mouth of Norman Whittaker.

In the Affidavit in Answer, it was stated in paragraphs 3 and 4 as follows:

- “3. That my Ministry and its Minister have not received any complaint in writing from any voter in the Orealla/Siparatu Village Council Elections in accordance with the provisions of Act 6 of 2006 and which were held on 28<sup>th</sup> April 2009.
4. That the letter from Mr. K. Ramjattan Attorney-at-law and Parliamentarian dated 6<sup>th</sup> May 2009 was received by the Honourable Minister. The rest of this Affidavit is made without prejudice to the aforesaid advice on which reliance is placed, and out of respect for the Court”.

Thus, it is the simple claim of the Minister that she never received any complaint in writing from any voter in the Orealla/Siparuta Village Council elections in accordance with the provisions of the Amerindian Act even though it was admitted that a letter from Attorney-at-law dated 6<sup>th</sup> May 2009 was received by her.

It is clear that the statutory discretion of the Minister under section 75 (2) of the Act:

“(a) dismiss the complaint; or

(b) establish a committee to investigate the complaint”

is premised on the making of a complaint in writing by a voter to the Minister within thirty days of the declaration of the elections results. While this court does not view the letter of Attorney-at-law, Khemraj Ramjattan, of the 6<sup>th</sup> May 2009 as a complaint under section 75(1) of the Act (since Mr. Ramjattan was not voter), it is clear from paragraph 22 of the Affidavit in Support of the Motion that there was the letter dated 29<sup>th</sup> April 2009 which was addressed to the Honourable Minister of Amerindian Affairs to which was appended a list of signatures of two hundred and eight (208) resident voters of Orealla. That letter which commenced as follows:

“Madam,

Complaint of election irregularities by Regional Election officials and the Orealla Village Council at the Council’s elections April 2009.

Please be informed that we the resident of Orealla and Siparuta are dissatisfied with the conduct of the Orealla Village Council Elections of April 2009 by the Regional Democratic Council (RDC) Chairman, Vice Chairman and the Orealla Village Council”.

was stated in paragraph 22 of the Affidavit in support of Motion to have been transmitted to the Minister with Mr. Ramjattan’s letter.

In paragraph 26 of the Affidavit in Support of Motion, the applicant stated that he called the Amerindian Affairs Ministry on the 10<sup>th</sup> August 2009 to verify what decision the Minister had made since over three months had elapsed since the complaint was made and the Minister's Secretary informed him that the Minister had finally determined the matter and that there was nothing more to be said on the matter. Having regard to such a response, it is clear that there was a written letter of complaint which warranted the consideration of the Minister and which the Minister either did consider and dismissed or refused to consider.

The Minister was under no statutory duty to consider any complaint made by Mr. Ramjattan as a non – voter but she was under such a duty in relation to the complaints made by the resident voters in their letter dated the 29<sup>th</sup> April 2009 (Exhibit D).

The essential or main complaint made in Exhibit B was that the Returning Officer, who was the Regional Vice-Chairman, had wrongly removed the name of the applicant from the list of nominees for candidature for the post of Toshao on the ground that he did not meet the residency qualifications as prescribed by section 71(2) of the Act. Although the applicant in his Motion and Affidavit in support thereof has sought to challenge the Minister's decision to dismiss the complaint on the basis that there were a number of irregularities in the conduct of the elections, it must be emphasised that the Minister's statutory duty

is confined to those irregularities which were contained in the **complaint** made under section 75(1). In other words, the Minister had to consider the complaint and not to determine the validity of the elections on the basis of irregularities which were not the subject matter of a **complaint** made under section 75 (1). As such, irregularities other than those mentioned in Exhibit D are irrelevant to this application. The Minister, can declare an election invalid under section 77(1) only if he upholds the complaint. Outside of the complaint, the Minister has no power to declare an election invalid.

The letter of complaint claimed that the applicant was having his home at Orealla since the late 1970's and served as a teacher at Orealla for eighteen years and as a Councillor for at least twelve years. The letter of complaint further claimed that the Regional Vice Chairman had removed the name of the applicant from the list of nominees for candidature for the post of Toshao on the ground that the applicant did not satisfy the residency qualification for such nomination as prescribed by section 71(2) of the Act. Exhibit D further contained the complaint that specified persons who did not satisfy the residency qualification for voters were allowed to vote and even a named non-Amerindian was allowed to do so. It is the view of this court that while it was open to the Minister under section 75 (2)(a) of the Act to dismiss a complaint based on irregularities which could not reasonably have impacted on the validity of the elections, she could not dismiss a complaint in so far

as the complaint was based on irregularities which could have affected the validity of the elections.

Under section 77(1), the effect of the Minister upholding a complaint is that she must declare the elections invalid and set a date for new elections. Thus, the Minister can only uphold a complaint if that complaint is based on a **material** irregularity. It could not have been the intention of Parliament to confer on the Minister a power to invalidate elections on the basis of a complaint based on a non-material irregularity. For this reason, this court holds the corollary view that Minister has been empowered under section 75 (2) (a) to dismiss a complaint which is based on a non-material irregularity i.e. an irregularity which could not reasonably affect the validity of the election.

It should be noted that before the Minister dismisses a complaint based on an irregularity under section 75(2) (a), she must first consider the nature of the complaint, the number of electors bringing the complainant, the report of any elections observers or any other relevant factors. Where she decides not to dismiss the complaint under section 75(2)(a), this does not mean that she must uphold the complaint. Nor does such a decision made under section 75(2) (a) preclude her from later dismissing it since she can either uphold the complaint or dismiss it under section 76(4).

In the instant case, in response to the Orders or Rule nisi directed to the Minister, the response of the Liason Officer of the Ministry was that the Minister never received a complaint in writing from any voter in the Orealla/Siparuta Village Council Elections held on the 28<sup>th</sup> April 2009. This court has already stated that it is not inclined to believe such a claim since the applicant stated in his Affidavit the complaint accompanied Mr. Ramjattan's letter to the Minister and it was admitted by the respondent that Mr. Ramjattan's letter was received by the Minister. Further, on making inquiries made by the applicant on the 10<sup>th</sup> August 2009 as to what was the decision of the Minister on the complaint, the Minister's Secretary informed him that the Minister had already finally determined the matter and that there is nothing more to be said on the matter. Moreover, the Stabroek News was able to state in their daily newspaper of the 10<sup>th</sup> June 2009 that the Minister stated at a Press conference at her Ministry that she was "privy to a copy of the complaint from a disgruntled group though a representative of the Alliance for Change (AFC) party". (see Exhibit E).

Whether the letter of complaint (Exhibit D) was sent to the Minister through the agency of Mr. Ramjattan on behalf of the complaints and whether the letter of complaint was an original or a photocopy do not at all detract from the claim of the applicant that a complaint was made to the Minister. Once that complaint was received within thirty days of the declaration of the election results, it behoved the Minister to consider it under section 75(2) of the Act. It was not

open to the Minister to abdicate her statutory duty to consider the complaint by making the hollow claim that she did not receive a complaint from any adult resident but rather received a photocopy of letter of complaint from Mr. Ramjattan of the AFC.

The complaint did allege that the Returning Officer had debarred the applicant from contesting for the post of Toshao on the ground of non-satisfaction the residency qualification. Moreover, it was signed not by one complainant but by over two hundred voters as complainants. No reasonable Minister could have taken the view that such an act by the Returning Officer was immaterial to the election of Toshao especially as the disqualification of the applicant resulted in Mc Lean Devair becoming the sole candidate for that post.

The Minister took the erroneous position that exhibit D was not a complaint by voters. She therefore omitted to consider it as a complaint made under section 75(1). Her omission to consider the complaint as a valid complaint necessarily meant that it was dismissed without due consideration. The effect was that the act of the Returning Officer in disqualifying the applicant as a candidate for the post of Toshao was upheld by the dismissal of the complaint by the Minister. In the circumstances, the order or rule nisi of *Cetiorari* made on the 14<sup>th</sup> August 2009 must be made absolute. The court so orders.

In relation to the Order or rule nisi of Mandamus ordered to be issued against the respondent Minister on the 14<sup>th</sup> August 2009, this Court is of the view that it cannot be allowed to stand and orders its discharge.

In considering a complaint made under section 75(1), the Minister has the power of dismissal under section 75(2) (a). However, under **section 75(2)**, she has no power to uphold a complaint. Her power to uphold a complaint lies under **section 76(4)**.

But before the Minister can uphold a complaint under section 76(4), she must first establish an investigating committee under section 75(2) (b) in accordance with section 76 (1). Once established, that investigating committee must investigate and present its report to the Minister within one month under section 76(3). Under section 76(4), the Minister must take into account that report before deciding whether to dismiss or uphold the complaint. Under section 77(1), once she make a decision to uphold the complaint, she must declare the election invalid and set a date for new election.

In the instant case, the Minister could not have upheld the complaint and could not have declared the entire elections invalid without first establishing an investigating committee and considering its investigative report. Since no such committee was established, the Minister had no jurisdiction to uphold the complaint and declare the

elections invalid. The Order or Rule nisi of Mandamus ordered to be issued against the respondent Minister on the 14<sup>th</sup> August 2009 must be discharged.

It must be mentioned at this juncture that the letter of complaint did allege that the names of many persons who were not supporters of Mc Lean Devair and his Councillors were omitted from the Voters' List. The letter of complaint also pointed to specific instances where named persons who were not qualified to vote were allowed to do so. It even pointed to an instance where a named non-Amerindian was allowed to vote. Even if the complaint of such irregularities ought not to have been dismissed by the Minister under section 75(2) and ought to have been the subject matter of investigations by an investigating Committee established by the Minister under section 75 (2), this Court cannot compel the Minister by Mandamus to nullify the Orealla/Siparuta elections and set a date for fresh elections for the simple reason that the Minister has not been conferred with any power to do so unless she would have received and considered the report from an investigative Committee established by her under section 75 (2) (b).

It must be noted that Motion of the Applicant with Affidavit in support thereof did not seek a Writ of Certiorari to quash her dismissal of the complaint in so far as it relates to the election of both Toshao and Councillors. It sought Certiorari only in so far as the Minister made the

decision which, upheld the disqualification and ineligibility of the applicant to stand for election for the post of Toshao.

Mr. Chase, S.C. for the respondent Minister pointed out to the court that the signature of the applicant does not appear in the list of signatures attached to Exhibit D. In effect, Mr. Chase, S.C was inviting this court to hold that the applicant had no *locus standi* to institute these proceedings since he was never a person making a written complaint to the Minister. This court has no difficulty in rejecting that invitation. There is nothing in the Act which restricts the right of the applicant (as a person aggrieved by the act or decision of the Minister to disregard/dismiss the complaint made by the signatory voters) to institute these proceedings. It would be otiose and unnecessary for the applicant himself to have made another complaint when other voters had already complained about the perceived “injustice” meted out to him by the Returning Officer. That they had complained to the Minister as interested voters about the disqualification of the applicant as a candidate for the post of Toshao by the Returning Officer cannot detract from the fact that he would have been a person aggrieved by the action of the Minister which had the effect of maintaining the decision of the Returning Officer against his candidature.

The Order or Rule nisi of Certiorari ordered to be issued against the respondent Minister on the 14<sup>th</sup> August 2009 is made absolute. The

Order or Rule nisi of Mandamus ordered to the issued against the said Minister on the same date is discharged.

Following upon the decision of this Court, by virtue of the provisions of the Amerindian Act 2009 (and not under any Order made by this Court), the Minister must proceed to appoint a committee to investigate the question raised by the letter of complaint (Exhibit D) as to whether the applicant had the residency qualification to stand for election for the post of Toshao and whether the Returning Officer had erroneously or improperly removed his name from the list of nominees for the post of Toshao. After receipt and consideration of the report, the Minister must then decide whether to uphold or dismiss the resident – voters’ complaint. If she were to uphold the complaint, she must declare the election of Mc Lean Devair as Toshao as invalid and set a date for new election to the post of Toshao with the applicant and Mc Lean Devair as the candidates. These procedural steps should be taken all convenient speed in the light of the application of section 39 of the Interpretation and General Clauses Act, Chapter 2:01.

Each party to bear his or her own costs.

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**Ian N. Chang, S.C.**  
**Chief Justice (ag.)**

**Dated this 4<sup>th</sup> day of November, 2009.**