IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

ORIGINAL CONSTITUTIONAL JURISDICTION

Civil Appeal No. 41 of 2020

BETWEEN:

In the matter of the Constitution of Guyana

ESLYN DAVID

Applicant

-and-

1. **CHIEF ELECTIONS OFFICER**
2. **CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION**
3. **THE GUYANA ELECTIONS COMMISSION**
4. **THE ATTORNEY GENERAL OF GUYANA**
5. **MOHAMED IRFAAN ALI**
6. **BHARRAT JAGDEO**
7. **MARK FRANCE**
8. **DANIEL JOSH KANHAI**
9. **LENNOX SHUMAN**
10. **SHAZAM ALLY**
11. **ABEDIN KINDY ALI**

Respondents

BEFORE THEIR HONOURS:

Hon. Mde Dawn Gregory – Justice of Appeal
Hon. Mr. Justice Rishi Persaud - Justice of Appeal
Hon. Mr. Justice Brassington Reynolds - Additional Judge

APPEARANCES:

Mr. Jeremy, SC with Mr. Scotland, Mr. Robertson, Mr. Keller and Mr. Forde for the Applicant.
Ms. K. Kyte-Thomas for the No. 2 Respondent.
Mr. B. Williams SC, in person, with Mr. M. Edwards for the No. 4 Respondent.
Mr. D. Mendes SC with Mr. D. Kissoon, Mr. A. Nandlall, Mr. S. Datadin and Ms. M. Sharma for the Nos. 5 and 6 Respondents (added)
Mr. R. Ramkarran SC with Mr. T. Jonas for the Nos. 7, 8 and 9 Respondents (added).
Mr. K. Khan with Mr. Khan and Ms. M. Puran for the Nos. 10 and 11 Respondents (added).

DECISION – Gregory JA

INTRODUCTION

[1] National and regional elections were held in Guyana on the 2nd of March 2020. The results of the elections have not yet been declared. Several proceedings were filed in the High Court challenging aspects of the conduct of the elections.

[2] A national recount of ballots was conducted under Order 60 of 2020 as amended and by letter dated 16th June 2020 the Chairperson of the Guyana Elections Commission (GECOM) wrote to the Chief Elections Officer (CEO) in the following terms:

> Pursuant to Article 177 (2) (b) of the Constitution and section 96 of the Representation of the People Act Chapter 1:03, you are hereby requested to prepare and submit your report by 13:00 hours on 18 June 2020 using the results of the recount for consideration by the Commission.

[3] The report of the Chief Elections Officer (CEO) would lead to the declaration of the results of the National and Regional Elections by the Chairperson and the end of the election process.

[4] The instant proceedings filed by Eslyn David are unique in that the Applicant has come directly to the Court of Appeal for relief.

[5] The applicant claims the following orders:

a. A Declaration that the GUYANA ELECTIONS COMMISSION has failed to act in accordance with the terms of the Order No. 60 of 2020 and the amended Order dated the 29th day of May, 2020, in that the GUYANA ELECTIONS COMMISSION has failed to determine a final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required to do by Order No. 60 of 2020 and the amended Order dated the 29th day of March, 2020.

b. An Order that there be an interpretation of the words "more votes are cast" in Article 177 (2) (b) of the Constitution of Guyana.

c. An Order restraining the Chief Elections Officer from complying with the Direction of the Chairman of the Guyana Elections Commission as set out in a Letter dated the 16th day of June, 2020,to submit to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution of Guyana without the Guyana Elections Commission determining the final credible count and or the credibility of the General and Regional Elections held on the 2nd day of May, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

d. An Order restraining the Chief Elections Officer from complying with the Direction of the Chairman of the Guyana Election Commission as set out in a Letter dated the 16th day of June, 2020, to submit an Elections Report under Section 96 of the Representation of the People Act without the Guyana Elections Commission determining the final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

e. An Order restraining the Chief Elections Officer from submitting to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution containing votes which are not credible within the meaning of Order No. 60 of 2020.

f. An Order restraining the Chief Elections Officer from submitting to the Elections Commission an Elections Report under Section 96 of the Representation of the People Act, Chapter 1:03 containing votes which are not valid and credible.

[6] This case raises two important issues, first, whether the Court of Appeal has the requisite jurisdiction under Article 177 (4) of the Constitution to entertain this application and second, the scope and

status of Order 60 and its addendum in the machinery contained in Article 177 (2) (b).

[7] Eslyn David has come to this Court under Article 177 (4) of the Constitution of Guyana which provides:

> The Court of Appeal shall have exclusive jurisdiction to hear and determine any question as to the validity of an election of a President in so far as that question depends upon the qualification of any person for election or the interpretation of this Constitution, and any decision of that court under this paragraph shall be final.

[8] From the outset it is clear that the Court of Appeal in its original jurisdiction under Article 177(4) does not have the power to grant the declarations and injunctions sought at paragraphs a, c, d, e, and f of the motion. Such reliefs can only be granted by the High Court in its original jurisdiction and are entirely outside the remit of this Court in its original jurisdiction.

[9] The applicant is calling upon this Court to interpret Article 177 (2) (b) of the Constitution by exercising its jurisdiction under Article 177 (4). Article 177 (2) (b) provides in short that if there are two or more Presidential Candidates and more votes are cast in favour of any list of candidates the Presidential Candidate designated in the list for which more votes are cast shall be deemed by the Chairperson to be elected President.

[10] The paragraph further states that the President shall be so declared by the Chairperson acting only in accordance with the advice of the Chief Elections Officer after such advice has been tendered to the Commission at a duly summoned meeting.

[11] The Applicant contends that the words "more votes cast" in Article 177 (2) (b) should be interpreted to mean "more valid votes cast" in keeping with the terms of Order 60 of 2020 and its addendum dated 29th May 2020 under which the national recount was conducted.

[12] Section 96 of the Representation of the People Act Chapter 1:03 provides for the ascertainment of valid votes and the allocation of seats in the National Assembly under Sections 97 and 98.

SUBMISSIONS

[13] Mr. Jeremy SC, for the Applicant, argued that once there is an issue regarding the election of a President in so far as it relates to qualification of any person for election to that post or matters relating to the interpretation of the Constitution, Article 177 (4) can be invoked. In this regard, Article 177 (5) provides that Parliament may make provision for giving effect to the provisions of Article 177 (4) and may make provision:

> (a) for the conduct of elections to the office of President and
> (b) with respect to the persons by whom the manner in which and the conditions upon which proceedings for the determination of any question, such as is mentioned in Paragraph 4, may be instituted in the Court of Appeal.

And it goes on to state that provision may be made for those matters by Rules of Court.

[14] Counsel cited a passage from **Olive Casey Jaundoo v. Attorney-General of Guyana (1971) 16 WIR 141** and asked the Court to apply that reasoning in this case to the operation of Article 177 (4) and to find that, to the extent that no rules have been enacted, the access of the Applicant remains unqualified and therefore the Applicant is not barred from seeking to obtain relief.

[15] In her application, the Applicant has asked the Court of Appeal to interpret Article 177 (2) (b) with emphasis on the term "if more votes are cast". She argues that generally Article 177 (2) (b) empowers the Chief Elections Officer to advise the Chairman of the Elections Commission on the Presidential Candidate who would be deemed elected after obtaining more votes cast in favour of his or her list. The Applicant's Attorney contends that prior to the Recount Order No. 60 of 2020, Section 96 of the Representation of the People Act was the basis for the determination of the results of the election and, according to

him, the Recount Order brought with it a new and different legal regime. It introduced a new standard and required the President's election to be based on a declaration of the credibility of elections and for this reason the Applicant urged this Court that the words "if more votes are cast" must be read against the backdrop of the recount order and should be interpreted accordingly. Thus, an interpretation of those terms found in the Constitution is being sought.

[16] The First and third -Named Respondents did not appear and were not represented in these proceedings.

[17] Ms. Kyte-Thomas for the Second-Named Respondent made reference to the principle *noscitur a sociis* which means words derive colour from those which surround them and to the cases that support that principle. So this rule is commonly referred to as the context rule. Applying this rule, a general word must take its meaning from the surrounding words and must be interpreted in light of the context.

[18] Ms. Kyte-Thomas argued further that Article 177 (4) gave the Court of Appeal a narrow, special exclusive jurisdiction to hear and determine any of the issues set out in Article 177 (4). She drew the Court's attention to the fact that the marginal note refers to the election of a President. Thus it can be gleaned, according to her, that the Article in question is dealing with interpretation of words that touch and concern the President's qualifications and anything outside of that parameter falls within the ambit of the High Court.

[19] Counsel further submitted that Article 133 (1), instead, vested the Court of Appeal with jurisdiction to hear appeals from the High Court on questions of constitutional interpretation. As such, the first two orders seeking a declaration that GECOM act in accordance with Order 60 of 2020, and an interpretation of the words fall outside the jurisdiction of the Court of Appeal and the application should be dismissed.

[20] The Attorney General's submissions were aligned with the Applicant's to some extent. They were much more extreme in what they asked the Court to find but, essentially, the Attorney General asked the Court to find that it has the jurisdiction under Article 177 (4) to grant the reliefs that are sought. The AG contended, just as the Applicant did that, relief ought to be granted as the Court had jurisdiction in relation to interpretation of the Constitution and he asked that an interpretation be placed which enabled the Court to interpret the words in 177 (2) (b) in the manner sought by the Applicant.

[21] Mr. Mendes, Senior Counsel, made wide-ranging submissions. He contended that the Court of Appeal does not have jurisdiction to hear this matter and he submitted that Article 177 (4) is not yet ripe to be invoked. He said that since the declaration has not yet been made the Applicant must await the declaration of a president before invoking Article 177 (4).

[22] Mr. Mendes submitted further that the issues that the Applicant wished to ventilate are matters for the exclusive jurisdiction of the High Court in an election petition which is provided for under Article 163 of the Constitution. Counsel argued that although the Applicant's case calls for an interpretation of the Constitution, what was in fact sought was an interpretation of the duties and responsibilities of GECOM under the recount order and a determination that GECOM had breached the order, and he urged the Court not to venture into such a determination.

[22] It was also argued that where the Court of Appeal has been given an original jurisdiction, that original jurisdiction should not contradict or cause confusion in the Administration of Justice and that the Court should stay instead within the limits of Article 177 (4). Another reason to dismiss the application was the fact that no rules have been made under Article 177 (5) to give effect to access to the Court provided for under Article 177 (4). Thus, Counsel said, there was no basis on which the jurisdiction of this court could be activated.

[23] Mr. Ramkarran SC and Mr. Kashir Khan argued along lines similar to Mr Mendes. Mr Khan suggested that, even if the Court had the jurisdiction there was nothing to justify the exercise of that jurisdiction in terms of the reliefs which are being sought.

ANALYSIS

[24] Eslyn David's application and her assertions in the supporting affidavit raise the question whether this is an appropriate case for the exercise of jurisdiction under Article 177(4) and further to the scope and effect of the Order 60 and its addendum in relation to Article 177 (2) (b). The question is whether the second limb of Article 177 (4), that is the jurisdiction to interpret the Constitution in relation to the validity of election of a President in this election indeed arises as contended by the Applicant.

[25] While the application refers to matters in controversy, such as the decision of the Commission and its instructions to the CEO, it is not disputed what are the stipulations contained in Order 60 of 2020. It is also not disputed by any of the parties that the national recount was conducted according to the stipulations contained in the gazetted Order. The Order declares in its title that it is made under the Constitution of Guyana and the Election Laws Amendment Act (No 15 of 2000).

[26] If this Court has jurisdiction in this case the question would be whether Order 60/2000 can impact the interpretation of the words in Article 177(2)(b).

[27] There are three elements in Article 177 (4) upon which the jurisdiction of the Court is based:

I. Any question as to the validity of an election of a President in so far as that question depends on
II. The qualification of any person for election or
III. Interpretation of the Constitution

[28] In **Re Eusi Kwayana's Application (1980) 29 WIR 130**, this Court described its jurisdiction under Article 177(4) at p 140:

> "The jurisdiction of the Court of Appeal is statutory, and, except for any provision which has invested it with an original jurisdiction....it is appellate. Constitution has, in addition, invested the Court of Appeal with exclusive jurisdiction under the provisions of article 177 (4) to hear and determine certain questions... Paragraph 4 is concerned solely with the court's jurisdiction on a question as to the validity of election of a president under that machinery. Further the court's jurisdiction is circumscribed. It is limited to questions as to the validity of an election of a president insofar as such questions depend (a) upon the qualification of any person for election or (b) upon the interpretation of the Constitution."

[29] The issue before the Court in **Eusi Kwayana** was whether the transitional president (so deemed by section 10(1) of the Constitution of Guyana Act which brought the 1980 Constitution into being) was validly holding such office on account of the oath that the transitional president had taken. The Court had to determine whether it had jurisdiction under Article 177(4) where the President had transitioned by operation of law and had not been elected under the machinery contained in Article 177 itself. The majority of the Court held that the Court had no jurisdiction under Article 177(4) to grant relief.

[30] **Eusi Kwayana's case** did not address whether reference to 'validity of an election of a president' in Article 177(4) applied also to the process of electing a president under the machinery contained in Article 177(2) (b) as it arises in the instant case, or applied only where a president had already been elected.

Does a question as to the validity of an election of a president arise in this case?

[31] Since "more votes cast" is part of the machinery set out in Article 177(2) (b) for the election of a presidential candidate it is, in my opinion, part of the question of the validity of the election of a president. Article 177(2)(b) requires that a president be elected in accordance with this prescription and this requirement is therefore a prerequisite to the validity of the election of the president. I am of the view that the

question can and does arise at this stage of the election process even though a president has not yet been declared in this election.

Does any question arise as to the qualification of any person for election?

[32] Nothing in this case involves qualification to hold office as President as set out in Article 90 of the Constitution.

Does interpretation of the constitution arise?

[33] Interpretation is sought in paragraph (b) of the application. A question now arises as to whether 'or' in Article 177(4) is conjunctive and therefore limits the jurisdiction to interpret only to matters pertaining to qualification to hold office as president, or is 'or' disjunctive so as to enable a separate interpretation from the issue of qualification?

[34] I agree that the Court's jurisdiction under Article 177 (4) is narrow and very limited. I however find that the word 'or' in that paragraph is disjunctive and I see no bar to the court's jurisdiction extending to an interpretation of Article 177 (2) (b) as sought in this application. It seems to me that Order 60 of 2020 as amended, did have sufficient force to impact the interpretation of the words "if more votes are cast" as it pertains to the elections of the 2nd of March, 2020. The Court is well within the jurisdiction accorded to it and is within the confines of Article 177 (4). I hold that the words "if more votes are cast" are subject to the terms of Order 60 of 2020.

[35] Further, the fact that no rules have been enacted in relation to access to the Court under Article 177 (4) does not prevent the exercise of the Court's jurisdiction to grant relief at this stage of the election process. The reasoning in **Jaundoo v. Attorney-General** is applicable. It was held, in relation to access to the High Court for the enforcement of fundamental rights under the Constitution, that:

> (i) in the absence of any provisions made by Parliament under para 6. of art. 19 of the Constitution, the right to apply to the High Court under para. (1) thereof remains unqualified; that the clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of

Parliament or the rule-making authority to make specific provision as to how that access is to be gained; and that the notice of motion was the appropriate procedure for making the original jurisdiction of the High Court under art. 19 (2) of the Constitution.

[36] I make the point that this Court has no jurisdiction to determine whether the contents of the Chief Elections Officer's report were valid or not. In the first place, the Chief Elections Officer was not present. This Court has no jurisdiction to make such a determination.

CONCLUSION:

[37] For the reasons that are outlined it is ordered that the words "more votes are cast" in article 177 (2) (b) be read as meaning "more valid votes are cast" in relation to the election held on the 2nd March, 2020.

Stay of Execution

[38] The application by Mr. Kashir Khan on behalf the respondents for a stay of 3 days was granted although it was resisted by counsel for the Applicant. The stay was granted to allow the respondents to explore their "next steps".

COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

.....
Dawn Gregory
Justice of Appeal

Dated this 22nd day of June, 2020

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
ORIGINAL CONSTITUTIONAL JURISDICTION

CIVIL No. 41 of 2020

BETWEEN: -

IN THE MATTER OF THE CONSTITUTION OF GUYANA

ESLYN DAVID

Applicant

- and -

1. CHIEF ELECTIONS OFFICER
2. CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION
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5. MOHAMED IRFAAN ALI
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8. DANIEL JOSH KHAN
9. LENNOX SHUMAN
10. SHAZAAM ALLY
11. ABEDIN KINDY ALI

Respondents

BEFORE THEIR HONOURS:

Hon. Madame Justice Dawn Gregory Barnes – Justice of Appeal
Hon. Mr. Justice Rishi Persaud – Justice of Appeal
Hon. Mr. Justice Brassington Reynolds - Additional Judge

APPEARANCES:

Mr. J Jeremy, SC with Mr. R Forde, SC, Mr. Scotland, Mr. M. Robertson and Mr. Keller for the Applicant
Ms. K Kyte-Thomas for the No 2 Respondent
Mr. Basil Williams SC with Mr. M Edwards for the No 4 Respondent
Mr. D Mendes SC, with Mr. M Nandlall, Mr. D Kissoon for the Nos 5 and 6 Respondents
Mr. R Ramkarran SC and Mr. T Jonas for the No 7, 8, and 9 Respondents
Mr. K Khan, Mr. M Khan and Ms. M Puran for Nos 10 and 11 respondents

DATES:

2020 June 19
June 20
June 22

DECISION OF MR. JUSTICE BRASSINGTON REYNOLDS

BACKGROUND AND INTRODUCTION

[1] The facts which give rise to this Notice of Motion may briefly be stated as follows. Regional and General Elections were held in Guyana on the 2nd March, 2020. Subsequent thereto, objections were raised pertaining to the declarations made on March 5th and March 13th, 2020 respectively by the Returning Officer for District four (4). In an attempt to quell the discord amongst the Political parties and ensure transparency in the election process, the third Respondent agreed to conduct a recount of the ballot boxes in all ten (10) of the electoral districts. Such a procedure was hitherto not provided for in Guyana's statutory electoral framework. To facilitate the recount process Order No. 60 of 2020 dated 4th May, 2020 (the "Order") was issued by the third Respondent and published in the Official Gazette (Extraordinary) to regulate the recount which was to take place from May 6, 2020. An amendment to this Order was issued and published in the Official Gazette on 29th May 2020.

[2] During the recount process, objections were made in respect of ballot boxes by Election Agents whereby discrepancies and anomalies were pointed out which were recorded in an Observation Report. On 13th June, 2020 the first Respondent submitted his report in accordance with paragraph 12 of the Order and stated that

> ***"the summation of anomalies and instances of voter impersonation identified in Districts one to ten [1 to 10] clearly does not appear to satisfy the criteria of impartiality, fairness and compliance with provisions of the Constitution and the Representation of the People Act, Chapter 1:03. Consequently, on the basis of the votes counted and the information furnished from the recount, it cannot be ascertained that the results for the ten districts meet the standard of fair and credible Elections."***

[3] On the 16th June 2020, the third Respondent stated it did not have the legal authority to determine the credibility of the March 2, 2020, General and Regional Elections and by extension to arrive at a final credible count as was required by the aforesaid Order on the basis that such questions must be determined exclusively by the High Court under Article 163 (1)(b) of the Constitution. Thereafter, the second Respondent directed the first Respondent in writing to submit his report pursuant to section 96 of the **Representation of**

People Act (the "**RPA**") and Article 177 (2) (b) of the Constitution using the results of the recount for consideration by the Commission.

[4] Dissatisfied with the foregoing events, the Applicant filed the instant Notice of Motion seeking the following reliefs:

a. A Declaration that the **GUYANA ELECTIONS COMMISSION** has failed to act in accordance with the terms of the Order No. 60 of 2020 and the amended Order dated the 29th day of May, 2020, in that the **GUYANA ELECTIONS COMMISSION** has failed to determine a final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required to do by Order No. 60 of 2020 and the amended Order dated the 29th day of May, 2020.

b. An Order that there be an interpretation of the words "more votes are cast" in Article 177 (2) (b) of the Constitution of Guyana.

c. An Order restraining the **Chief Elections Officer** from complying with the Direction of the Chairman of the Guyana Elections Commission as set out in a Letter dated the 16th day of June, 2020,to submit to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution of Guyana without the Guyana Elections Commission determining the final credible count and or the credibility of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

d. An Order restraining the Chief Elections Officer from complying with the Direction of the Chairman of the Guyana Election Commission as set out in a Letter dated the 16th day of June, 2020, to submit an Elections Report under Section 96 of the Representation of the People Act without the Guyana Elections Commission determining the final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

e. An Order restraining the Chief Elections Officer from submitting to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution containing votes which are not credible within the meaning of Order No. 60 of 2020.

f. An Order restraining the Chief Elections Officer from submitting to the Elections Commission an Elections Report under Section 96 of the Representation of the People Act, Chapter 1:03 containing votes which are not valid and credible.

[5] The Applicant contends that the main objective of the recount process was to determine a final credible count before a declaration of the election results can be made. The Applicant further contends that the Order established the criteria for determining the final credible count and that the first Respondent is required to determine the total number of valid votes before a report under section 96 of the Representation of the People's Act can be prepared. That GECOM failed to determine a final credible count and/or credibility of the result of the Elections as provided by the Order. It is further claimed that despite these failures the second Respondent directed the first respondent to submit his report using the results of the general recount.

[6] In the interest of time the Court and owing to the public interest the court acceded to the request to join seven (7) additional respondents being representative of political parties likely to be affected by the outcome of these proceedings.

ISSUES TO BE DECIDED

[7] Having regard to the affidavit in support of the Motion, the affidavit in answer, and the submissions related thereto, the following issues are to be determined:

a) Does this Court have jurisdiction to entertain this Notice of Motion;
b) Does **Order 60 of 2020** require GECOM to determine the final credible count of the elections.

ANALYSIS AND FINDING

[8] In GECOM's effort to resolve the difficulty which it considered had arisen in the aftermath of the March 2nd elections, it had recourse to Article 162(1) (b) of the Constitution and section 22 of the Elections Laws (Amendment) Act.

[9] Article 162(1)(b) provides –

> ***162 (1) The elections commission shall have such functions connected with or relating to the registration of electors or the conduct of elections as are conferred upon it by or under this constitution or,***

subject thereto, any Act of Parliament and, subject to the provisions of this Constitution the Commission

(b) shall issue such instructions on the take such action as appear to it necessary or expedient to ensure impartiality, fairness and compliance with the provisions of this Constitution or of any Act of parliament on the part of persons exercising powers or performing duties connected with or relating to the matters aforesaid

[10] Section 22 of the Elections Laws (Amendment) Act, 2000, provides -

22. (1) If any difficulty arises in connection with the application of this act, the Representation of the People Act or the National Registration Act or any relevant subsidiary legislation, the Commission shall, by order, make any provision, including the amendment of the said legislation, that appears to the Commission to be necessary or expedient for removing the difficulty and any such order may modify any of the said legislation in respect of any particular matter or occasion so far as may appear to the Commission to be necessary or expedient for removing the difficulty.
(2) Any order under subsection (1) shall be subject to negative resolution of the National Assembly, only if Parliament is not dissolved and not otherwise, and shall not be made after the expiry of three months from the date of the election.

[11] Noteworthily, the long title of this Act describes it as -

An Act to make certain amendments in the laws relating to registration of persons and to elections to choose the president, members of the National Assembly and members of the regional democratic councils and for matters connected therewith.

[12] A snapshot of the difficulty that the commission considered itself to be faced with at the time is best gleaned from the first two recitals of the Gazetted Order, which brought the recount into being. These recitals provide as follows: -

Whereas the Declarations of the results pursuant to section 84 one of the representation of the people act chapter 103 have been made, but request for recounts in a number of electoral districts have been rejected, aborted, or held in abeyance and the report pursuant to section 96 (2) of the Representation of the People Act had been delivered to the chairman of the commission and held in abeyance, and aspects of the election process have been subjected to legal proceedings;

And whereas the President and Leader of the Opposition and all contesting parties agreed to a CARICOM proposal for a total Recount of all electoral Districts as a means of assuaging the contesting parties and determining a final credible count.

[13] And so, it is out of this *difficulty* that a *modified* election regime was effectively birthed. It turns out however that the special regime created by

this legal detour boasts features which are hybrid in nature incorporating as it does measures which bear resemblances to measures deployed by the High Court in its ordinary jurisdiction and as well others deployed by that Court in its special election petition jurisdiction.(emphasis mine)

[14] So that Order 60 of 2020 vests GECOM with powers and responsibilities akin to those vested in the commission under the RPA, and others akin to the High Court both in its ordinary supervisory jurisdiction and under the **National Assembly (Validity of Elections) Act**.

[15] As a necessary consequence thereof, GECOM's actions and omissions pursuant to Order 60 of 2020 are impacted by the Constitutional and statutory provisions that are related to both their original and modified electoral regimes. It is therefore in the context of this newly created or modified electoral propinquity that the Applicant has approached the court for an interpretation of words used in Article 177(2), the constitutional provision directly referred to by the Chairman in her letter to the CEO dated June 16, 2020.

[16] Through her Notice of Motion, the Applicant Eslyn David seeks to invoke this court's jurisdiction to interpret words in one such impacted provision Art 177 (2) in so far as they now affect the validity of the election of the president under the **Order 60 of 2020** modified electoral regime. The question of this Court's Jurisdiction is therefore in my respectful opinion the foremost and substantive issue of this application.

JURISDICTION

[17] **Article 177 (4) of the Constitution** of Guyana reads:

> ***"The Court of Appeal shall have exclusive jurisdiction to hear and determine any question as to the validity of an election of a President in so far as that question depends upon the qualification of any person for election or the interpretation of this Constitution; and any decision of that Court under this paragraph shall be final."(emphasis mine)*** It is to be noted that his provision is peculiar to the Guyana constitution; and is not to be found in any Constitution anywhere else in the region. (underlining mine)

[18] On the respondents' submissions (save for the fourth-named respondent), this Court's jurisdiction is effectively challenged under four (4) headings, viz -

- **(i) Article 177(4) to be read conjunctively/disjunctively**
- **(ii) Application premature**

(iii) **Rules a pre-condition to effectuate jurisdiction**
(iv) **Jurisdiction under 177(4) creates absurdity owing to concurrent or coordinate jurisdictions.**

[19] The respondents, save for the first, third (unrepresented) and fourth-named (Attorney General), contend for divers reasons that the narrow exclusive jurisdiction created by article 177 could not be invoked in the circumstances of David's case.

[20] The first consideration is whether the action falls within the ambit of the aforementioned provision?

IS ARTICLE 177 (4) TO BE READ DISJUNCTIVELY OR CONJUNCTIVELY?

[21] What is meant by the words used in Article 177 (4)? The case **Re Eusi Kwayana's Application (1980) 29 WIR 130** cited by Counsel on both on both sides of this question tends to shed some light on its intendment. A thorough examination of the case however reveals that it is not as helpful as it is first considered to be, since the surrounding circumstances are entirely different to those of this instant matter. That case dealt with the assumption of office during transition from one form of government to another whereas this instant matter deals with the election of the president

[22] The Guyana Court of Appeal called upon to examine article 177(4) along with several other articles of the Constitution and several sections of the Constitution of the Cooperative Republic of Guyana Act at the time the 1980 Constitution came into being, held that that paragraph (Art 177(4)) conferred a very limited jurisdiction. At page 11, R.H. Luckhoo JA examined the wording of paragraph (4) in order to ascertain the extent of the court's jurisdiction stated that:

> ***"The provisions deal with the machinery for election of a President under the Constitution. Paragraph (4) is concerned solely with the court's jurisdiction on a question as to the validity of election of a President under that machinery. Further, the court's jurisdiction is circumscribed. It is limited to questions as to the validity of an election of a President in so far as such questions depend (a) upon the qualification of any person for election, or (b) upon the interpretation of the Constitution. ...",***

suggesting without more in my respectful opinion that the limbs for testing the validity of the election of a President were to be read disjunctively.

[23] The second-named respondent, directed the court for assistance to the venerated canon of construction ***noscitur a sociis***, but in developing the argument that the words '**or the interpretation of the Constitution**' in 177 (4) relate to interpretation of the Constitutional Provisions in relation to the **qualification of any person for election** to the Office of the President, omitted to recognise the disjunctive use of the word **'or'** in that formulation of words. (emphasis mine)

PREMATURE

[24] Mr. Ramkarran, SC in a slight variation of the same argument submitted that this Court has no jurisdiction over this matter under Article 177(4) in absence of an elected President. He said Article 177(4) requires a President to be elected before the jurisdiction which it confers can be invoked as the words "as to the validity of an election of a President" in Article 177(4), could only mean that in order to invoke the Article the President must already have been elected.

[25] He further submitted that Article 177(4) confers jurisdiction to question the qualification of the person elected as President and since none of these issues relating to the qualification of the President, assuming that he has already been appointed, has been raised in the Motion, this Court would therefore have no jurisdiction over this matter. The contention being that the Affidavit discloses no facts or evidence that brings this matter within the ambit of Article 177(4), that is to say, that an election of a President has taken place to finality and that the qualification of the President is challenged. The words "or the interpretation of this Constitution" must be construed as limited to the issue of the qualification of a person elected as President, reliance being placed on the very **Re Eusi Kwayana's Application** referred to before, where the interpretation of Article 177(4) was considered and where the submissions of the Attorney General that "the interpretation of the Constitution" relate to the "validity of an election of a President" were upheld when R. H. Luckhoo J. A. stated that he found nothing in Article 177(4) to warrant jurisdictional extension to section 10(1) of the Constitution Act.

[26] The question at issue in this instant matter is however not quite the same as that in the Kwayana application, where quite significantly, there had not been an election but rather a transition from one type of Government to another.

[27] This court believes that the Mr. Ramkarran's contention is further not borne out by sub-paragraph 6 of that very article 177 which demonstrates from the documents referred to therein that the draughtsmen contemplated equally a situation, as in the instant case, where the election process has not yet been concluded. Assuming Mr Ramkarran to be correct, his arguments taken to their logical conclusion would lead to the absurdity of requiring the electorate having become seized of information rendering a candidate unqualified or disqualified, to have to await that person's installation before mounting a challenge to his/her election. The value of his submission is even further diminished when article 177 (4) is analysed for its harmony with related provisions, in the context of the statutory framework in which it is situate, later on in my judgment.

[28] It was further submitted that it is the High Court that has jurisdiction over constitutional matters as part of its wider, original jurisdiction under section 18 of the High Court Act and Article 133 of the Constitution and that the history of constitutional law in Guyana confirms that it is the High Court that has jurisdiction over questions relating to the interpretation of the Constitution while the Court of Appeal has an appellate jurisdiction. Therefore, where the Court of Appeal has been given an original jurisdiction, that original jurisdiction could not be at large so as to clash with or cause confusion with the administration of justice. This question of harmonisation is dealt with fully in my examination of the statutory framework of article 177.

[29] Ms. Kyte-Thomas further submits in another limb of the same argument that Article 177(4) grants this Court a narrow, special exclusive jurisdiction to hear and determine any question as to the validity of an election of a president in so far as that question turns upon the qualification of any person for election or the interpretation of this constitution. That the words or the interpretation of the constitution in Article 177(4) speaks to the interpretation of the constitutional provisions in relation to the qualification of any person for election to the office of the President. Since the Order sought at paragraph (a) of the Notice of Motion amounts effectively to the interpretation of Order 60 of 2020 and not the Constitution this Court has no jurisdiction. I respectfully disagree for reasons to be outlined later on in the decision where the statutory framework of the within which article 177 must be considered is examined.

[30] Similarly, Mr. Ramkarran submits that this Court is not vested with original jurisdiction to hear questions on the interpretation of the constitution outside of this narrow special jurisdiction, it is the High Court which is so vested. It is Article 133(1) he contends that vests the Court of Appeal with jurisdiction to hear appeals from the High Court on questions on constitutional interpretation. He further submits that since the first two orders sought in the Motion do not touch and concern the qualification of a person elected President, the application is misconceived and ought to be struck out forth-with. Furthermore, on plain reading of Article 177, the article contemplates a person already declared by GECOM as President and since none as been so declared, the narrow jurisdiction under Article 177(4) cannot yet be invoked. These submissions coincide with and are subsumed by those made by Senior Counsel Mendes for the Nos 4 and 5 Respondents and will be dealt with in my analysis later.

[31] It was further submitted that the relief sought in paragraph (a) of the Notice of Motion cannot be determined by this court but instead must be pursued by an Election Petition pursuant to Article 163 (1) (b) of the Constitution which confers on the High Court the exclusive jurisdiction to determine questions relating to the validity of an election. Since Article 163(1)(b) stipulates that the High Court shall have exclusive jurisdiction, GECOM cannot cloth itself with jurisdiction to establish itself as a Court of Law to determine credibility of an election. Further that, the Commission cannot arrogate onto itself a jurisdiction to determine the credibility of an election or any unlawful act since no specific power was conferred on it under Article 162 (1) (b) to so do. This submission was dealt with extensively by Ms Kyte-Thomas for the 2nd named Respondent and will be analysed separately.

[32] It was further posited that since Parliament gave the exclusive jurisdiction to the High Court to determine lawfulness and validity of an election, the Recount Order cannot be interpreted to have taken away the exclusive jurisdiction granted to the High Court and placed it into the arms of GECOM: Reference being made here to Article 8 of the Constitution and to provision being void to the extent of their inconsistency with the supreme Law.

[33] It was further submitted that once the Commission issues a decision it cannot be impugned except by an Election Petition. And further Resolution of

Election Disputes must be by the judicial process only: See **Indira Gandhi v Raj Narain AIR 1975 SC 2299.**

[34] Thus, irregularities during the progress of the election process even if they vitiated the election should be brought before the High Court by an election petition and not be subject of dispute before any court while the election process is underway culminating in declaration of results: (See **NP Ponnuswami v the returning officer AIR 1952SC 64)**.

[35] It was further submitted that this challenge cannot be entertained at this time on the basis that it is premature. It is contended that any challenge to the validity of an election and any dispute or claim of any irregularities or illegalities in relation to an election can only lawfully form the basis of an election petition after the result of the election has been made known: **Mohinder Singh Gill case (AIR 1978 SC 851), ECI v Ashok Kumar AIR 2000 SC 2979, Manda Jaganath v ks Ratnam AIR 2004 SC 3600.**

[36] And further, that in accordance with the statutory framework and in order not to cause the election proceedings to be unduly retarded or protracted any challenge to the validity of an election and any dispute or claim of any irregularities or illegalities in relation to an election must be brought by way of an election petition after the result of the election has been made known. This argument being the common thread between the contention of all of the added respondents and the 2nd respondent. These contentions and those at paragraphs 26 through 29 (supra) are variations/extensions of the same genus of arguments dealt with under the heading '**absurdity owing to concurrent, coordinate jurisdiction**' later on in this judgment.

[37] Attorney General, Mr. Basil Williams, agreeing with the Applicant, submitted that Article 177 (4) should be read disjunctively as on the one hand, it deals with qualifications of the president and on the other, it pertains to the interpretation of the Constitution, in so far as they relate to questions involving the validity of the elections of the President. He was therefore of the view that this Court has jurisdiction to deal with the issues of interpretation raised by the Fourth Named Respondent.

[38] Mr. Williams went further citing several Indian cases, contending that the commission had the authority to annul the election. I have however declined

to address this submission altogether recognising that the question it raises is entirely beyond the remit of this court having regard to the scope of the David's application viz article 177(4).

[39] Mr. Mendes submitted that the Court does not possesses jurisdiction over this matter for several reasons. Firstly, that Parliament's failure to make provision for the exercise of the court's jurisdiction pursuant to Article 177(5)(b) deprives the court's jurisdiction under Article 177(4). He relied on **Chaitan & Peters v Attorney General of Trinidad and Tobago [2002] 3 LRC 32**, in which it was held that, as a general rule, the failure to prescribe what is to be prescribed deprives a court of jurisdiction.

[40] Secondly, echoing sentiments earlier expressed by Mr. Ramkarran and Ms. Kyte-Thomas, he submitted that on a proper construction of article 177(2), (4) and (6), the jurisdiction of this Court under Article 177 (4) can only be invoked after a President has been elected. Article 177(4) relates to "any question as to the validity of an election of a President". Since there has been no declaration of the election of a President, the Court's jurisdiction cannot be invoked because there is simply no basis for any determination under Article 177(4).

[41] Thirdly, that the reliefs sought in the Notice of Motion falls outside the ambit of Article 177(4) which is restricted to questions as to the validity of an election of a President which depends upon the qualification of any person for election or the interpretation of the Constitution. In **Re Eusi Kwayana's** where Luckhoo JA noted that the "Constitution has, in addition, invested the Court of Appeal with exclusive jurisdiction under the provisions of art 177(4) to hear and determine certain questions. That exclusive jurisdiction is defined within the ambit of para (4) of the article" which must be examined "in order to ascertain the extent of the court's jurisdiction." In the consequences where the Notice of Motion does not raise any of these issues, the Court has no jurisdiction to grant the reliefs sought.

[42] He further submitted that Article 177 (4) does not permit interpretation at large; it only permits constitutional interpretation within a specific context, that is to the validity of an election of a President. He contended that the reliefs sought does not ask for any interpretation of the Constitution at all, but really require the court to Interpret the GECOM's Order No. 60 of 2020 and

the amended Order dated the 29th day of May, 2020, and for this reason, this Court has no jurisdiction under Article 177(4) to do so.

[43] Mr. Mendes contended further that the reliefs sought are more properly reserved for an election petition pursuant to Article 163(1)(b) and section 3 of Chapter 1:04 and a determination of these issues would amount to an encroachment of the High Court's jurisdiction under said Article 163.

[44] Conversely, Mr Jeremy, Counsel for the Applicant held the view that Parliament's failure to make rules for the determination of questions as to the validity of an election of a President pursuant to Article 177(5) of the Constitution does not strip this Court of its exclusive jurisdiction under Article 177(4). Reliance was placed on **Jaundoo v Attorney General of Guyana [1971] AC 972** where the Privy Council stated that:

> ***"So long as nothing has been done by Parliament, or by the rule-making authority under the Supreme Court of Judicature Ordinance, to regulate the practice or procedure upon such applications, the right to apply to the High Court under paragraph (1) remains, in their Lordships' view, unqualified."***

[45] That in the absence of a procedure provided by Parliament the ordinary procedures can be invoked to approach the Court under Article 177(4). Reliance was placed on Privy Council in **Jaundoo** which stated that:

> ***"use by an applicant of any form of procedure by which the High Court [the Court of Appeal in this instance] can be approached to invoke the exercise of any of its powers. They are not confined to the procedure appropriate to an ordinary civil action, although they would include that procedure until other provision was made [...]"***

[46] Further that the use of the word 'may' in Article 177(5) where it states that "Parliament may make provision for giving effect to" indicates that Parliament's provision was not a precondition to the exercise of the Court's jurisdiction under Article 177(4). If it was, the use of the word 'shall' would have been expressed. Reliance was placed on the case of **Weithers v Weithers (1976) 28 WIR 170,** where the words under the Matrimonial Causes Ordinance No. 34 of 1916 expressed that the jurisdiction of the Court was "subject to any rules which may be made". Crane CJ stated, provided that where no rules were "made," it was the intent of Parliament that ordinary rules in place at the time were to be used to approach the Court.

[47] It was further submitted by the Applicant that the jurisdiction granted to this Court under Article 177(4) to interpret the Constitution in relation to an

election of a President is separate and distinct from the jurisdiction granted to the High Court under Article 163 to determine any question regarding the qualification and election of a person to the National Assembly. That consequently, the election petition process as provided for under Article 163 and the National Assembly Validity of Elections Act relates to the election of persons to the National Assembly. It however does not replace the Court of Appeal's exclusive jurisdiction as it relates to the election of a person to the Office of President.

[48] Furthermore, the completion of the electoral process by a declaration of the results is not a necessary precondition to invoke the jurisdiction of the Court of Appeal under Article 177(4). That any person may at any stage during the electoral process, approach the Court of Appeal pursuant to Article 177(4) seeking the interpretation of any provision of the Constitution so far as such an interpretation touches and concerns an election of a President.

RULES A PRE-CONDITION TO EFFECTUATE JURISDICTION UNDER 177(4)

[49] This issue is largely predicated upon the interpretation of the word '**may**' used in article 177(5). The applicant's view on this issue is opposed to that of all respondents (save the fourth named respondent). The applicant relies principally on the principle in the **Jaundoo** case and the line of Guyanese authorities which similarly held that, without more, provisions are not a precondition to effectuating article 177 (4).

[50] The respondents for their part rely on the Trinidadian authority **Peters & Chaitan**, contending that there are no provisions governing the conduct of the application before the court, but that those provisions are a precondition to effectuating jurisdiction in the court.

[51] Mr. Mendes sought to distinguish **Jaundoo** from **Peters & Chaitan** arguing that the latter case was the appropriate authority in the circumstances.

[52] But Learned Senior's observations about the non-applicability of the principle in Jaundoo to this matter are not entirely accurate.

[53] In his effort to distinguish **Jaundoo** from **Peters & Chaitan** and the other cases which followed it and to highlight **Chaitan** as the case which established that the provision enabling the making of rules was to be

interpreted as a precondition to the exercise of jurisdiction, he referred to Article 155(5) of the Guyana constitution.

[54] But article 155 (5) to which he referred to and relied upon to make this distinction within the statutory framework has long since been repealed by the Constitution Amendment Act number 14 of 2000.

[55] Whereas, article 177, with which this matter is directly concerned, is in fact the first article under Title 4, an entirely different title of the Constitution; titled 'The Presidency' and the only one which specifically addresses issues related to the election of the president.

[56] Writing in **"Principles of Statutory Interpretation", 14th Edition** - Justice G P Singh while discussing enabling words such as 'may' used in statutory instruments explained the following principles of interpretation: -

> ***"Ordinarily, the words 'May' and 'It shall be lawful' are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply discretion. They've are both used in a statute to indicate that something may be done which prior to it could not be done". The use of words 'Shall have power' also connotes the same idea."***

[57] In **Julius v Lord Bishop of Oxford, (1874-80) All ER Rep. 43** Lord Cairns enunciated the Principles of Statutory Interpretation in the following words: -

> ***"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise the power when called upon to do so".***

[58] So that while in ordinary use the word 'may' implies discretion, when the word 'may' is coupled with a duty on an authority or Court, it has been given meaning of 'shall' that is an obligation on an authority or Court.

[59] But whether use of the word 'may' is coupled with duty is a question, which needs to be answered from the statutory scheme of a particular statute. In the absence of the creation of such a duty, the word 'may' remains discretionary.

[60] I could find no duty imposed upon the Parliament to make provisions, either by the words used in article 177 (5) itself or elsewhere in its wider statutory framework to render mandatory the enabling power created by use of the

word 'may' therein and to render it by extension a precondition for effectuating article 177 (4).

[61] Accordingly, the submission by the respondents that the jurisdiction created in this court by Article 177 (4) has not yet been effectuated fails.

ABSURDITY OWING TO CONCURRENT OR COORDINATE JURISDICTION

[62] In my respectful assessment of the submissions, the Constitution of Guyana established separate elections for members of the National Assembly and for the President even though they are taken together. This conclusion can best be appreciated from a closer look at the statutory framework in which these two distinct components of the Guyana 'Parliament' are situated.

[63] Guidance is provided by the CCJ in this regard in its dicta in the 2018 Belizean appeal **International Environment Limited and the Commissioner of Income Tax**, where our apex Court urges at paragraph 20 that -

> ***"When we interpret the words of a statute, you must examine the object and scheme of the enactment and the entire context in which the legislation is situated. The surrounding context must be fully considered. That's surrounding context must, in particular, include statutes or general laws that were enacted at different times, but which pertain to the same subject or object. They can assist us by shedding light on the meaning that must be given to the words of the statute we're interpreting..."***

[64] This exhortation in my respectful opinion holds equally true for interpretation of the Constitution. So that the 'history' and 'geography' so to speak of article 177 (4) become relevant to any analysis of the jurisdiction which it creates.

[65] We are reminded further by Lord Diplock's opinion in **Attorney General of The Gambia v Momoduo Jobe 1984 A.C. 689 at 700**, that -

> ***"A Constitution... is to be given a generous and purposive construction"***

[66] And, in **Societe United Docks et at v Government of Mauritius 1985 A.C. 585 at 685** where dockworkers and the Ports Authority had submitted their wage dispute to binding arbitration and an award of substantial wage increase granted to the workers was met with the introduction by government of legislation allowing the Attorney General to object to the awards enforcement, Lord Templeman stated that it must be given a broad interpretation. The board holding that section 3 of "The Constitution of

Mauritius is an enacting section and not a mere Preamble or introduction...", opined that-

> ***"A Constitution concerned...should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies".***

STATUTORY FRAMEWORK

[67] Article 51 of the Constitution states that Parliament shall consist of the President and the National Assembly and Article 52 states that the National Assembly shall consist of such members elected in accordance with the provisions on the Constitution and in accordance with any laws made by Parliament in that behalf.

[68] Article 60 (2) states that subject to Article 160 (2) the members of the National Assembly are to be elected in accordance with the system of proportional representation pursuant to Article 160 (1).

[69] Article 64 says that all questions as to membership of the National Assembly shall be determined by the High Court in accordance with the provisions of article 163; making it clear enough that the National Assembly is to be treated with separately and distinctly from the Presidency.

[70] Article 91 provides that the President shall be elected by the people in the manner prescribed in Article 177.

[71] Article 177 states that any List of Candidates for an election held pursuant to Article 60 (2) shall designate not more than one of those candidates as a Presidential Candidate. An elector voting at such an election is deemed to be voting in favour of the Presidential Candidate named in the List.

[72] Article 163 (as its marginal note states), confers on the High Court an exclusive jurisdiction to determine "questions as to membership and elections".

[73] A review of Article 163 reveals however that it relates to:

i) Qualification of any person to be elected as a member of the **National Assembly.**
ii) Whether an election has been lawfully conducted or the result thereof has been affected by any unlawful act or omission.
iii) The allocation of seats in the **National Assembly**.
iv) Whether a **member of the Assembly** is required to cease to exercise any of his or her functions as a member thereof.

v) Filling a seat
vi) Whether a speaker was lawfully elected.
vii) An Appeal from the decision of the High Court lies in these matters to the Court of Appeal by Article 163(3). (emphasis mine)

[74] To give effect to the exclusive jurisdiction of the High Court the National Assembly (Validity of Elections) Law was passed. The Long Title for this Act states that it is an Act to provide for the determination of questions relating to **the validity of elections and other matters affecting elections to the National Assembly and the allocation of seats in the National Assembly**.(emphasis mine)

[75] By Section 98 of the RPA, the Representative of the List extracts from the List as many names belonging to candidates selected by him... and the Chief Election Officer shall declare such names **to be elected to the National Assembly.**

[76] It is clear from this review that there is no provision in Article 163 of the National Assembly Validity of Elections Act which is applicable to the President.

[77] Further, Article 232 defines election to mean:

> *"election of members to serve in the National Assembly or the elected body established by or under the Constitution."*

[78] 'Election' is not defined in the National Assembly Validity of Elections Act and it must therefore have the meaning given by the Constitution.

[79] On the question of appeals, Article 133 provides for appeals on constitutional questions and fundamental rights to the Court of Appeal. It is important to note that Article 133(2) states that the conferral of jurisdiction in respect of appeals on constitutional and fundamental rights does not apply to matters provided for in Article 163. Article 163 (3) conferred appellate jurisdiction on the Court of Appeal in respect of specified electoral matters set out in Article 163(1).

[80] As I pointed out before, in my respectful view, nothing in Article 163 (1) is applicable to the election of a President. And so I have formed the opinion respectfully so that Article 177(4) establishes a separate, exclusive jurisdiction in the Court of Appeal, that is to say in respect of appeals to hear and determine questions as to the validity of an election of a President in so far as

that question depends upon (i) qualification of any person or (ii) the interpretation of the Constitution.

[81] Respectfully, it is my view that the High Court in neither vested with this jurisdiction pursuant to Article 163 nor the National Assembly (Validity of Elections) Law. This is an original jurisdiction vested in the Court of Appeal by the Constitution.

[82] It is my very respectful view that while for expedience and necessary symbiosis they are staged simultaneously, the election of the president and that of the National Assembly are constitutionally two separate and distinct elections, and that both the Constitution and related legislation bear this out by their structure and provisions. The President and the National Assembly are treated with separately and distinctly in every material respect in the Constitution and in the statutes related to their respective institutions.

[83] For this reason, together with my aforesaid observations as to the statutory framework in which it is situate, it is my respectful view that the jurisdiction conferred upon the Court of Appeal pursuant to article 177 (4) in respect of the validity of the election of the president is neither the same as, nor is it concurrent, nor coordinate with any original or appellate jurisdiction created anywhere else in the Constitution or related Act of Parliament.

[84] It is my respectful view further that Article 177 (4) thus confers jurisdiction on the Court of Appeal in respect of the validity of an election where such election depends on the qualification of any person for election **or** the interpretation of this Constitution. And it is therefore not possible to institute any proceeding in this regard in the High Court in its original ordinary jurisdiction nor in its Constitutional Jurisdiction as conferred by Article 153 or Article 163, as the jurisdiction of the Court of Appeal in matters set out in Article 163(1) emanates from Article 163(3) and not Article 177(4).

[85] I have formed the respectful view therefore that Article 177(4) is a separate jurisdiction specially carved out and distinct from the High Court Jurisdiction and from other appellate jurisdictions of the Court of Appeal under the Constitution. The provisions outlined in this framework and the jurisdictions they confer are separate and distinct, but they remain in harmony and do not overlap, conflict or collide with each other as earlier suggested by Counsel.

[86] In my respectful view having regard *firstly* to directions given by the chairman to the chief elections officer in her letter dated 16th June 2020

(exhibit G to Applicant's affidavit), and *secondly* to Counsel for the Chairman's stated inability of the Commission to determine the final credible count in accordance with that stated objective in Order 60 of 2020, it becomes necessary to be interpret the words 'more votes cast' pursuant to Article 177 (2) so as to inform compliance with section 96 of the RPA in order that the difficulty recited in the Order might still be resolved. There is no provision in law pursuant to which this matter can be addressed in any Court other than the Court of Appeal.

[87] I have found and rule accordingly that this issue therefore falls squarely within the jurisdiction conferred on this Court by Article 177(4) of the Constitution.

SECOND ISSUE

[88] I return very briefly to the submissions by the second name respondent insofar as they bear upon my finding. Counsel contends that the applicant's affidavit suggests that the application is really an attempt to interpret the recount order rather than the Constitution itself as article 177 (4) requires.

[89] She contends further that by its very construct Article 177(4) refers to circumstances where the president has already been elected and in that sense the application is premature.

[90] She also sought to distinguish the cases relied upon by the applicant contending principally that the Constitutional and legislative framework in which they are set is distinguishable from ours as the Indian elections are constituency driven based on the first-past-the-post system using constituencies whereas ours is based on proportional representation where electors vote for one list.

[91] Rebutting this observation in his rejoinder Mr. Jeremy observed that that notwithstanding the principles were the same and were equally applicable to the holders to constitutional office holders GECOM including the Chairman and the CEO.

[92] Counsel for the Chairman concluded by contending that the constitution is the supreme law and therefore to ask GECOM through the recount order to take over the Jurisdiction from the high court under 163 and to place it in the

arms of GECOM is impossible, contending effectively that GECOM could not do what it undertook to do in the recount Order in the first place.

[93] It is in the context of this admission and the specific directions for compliance with Article 177(2) issued to the CEO in the Chairman's letter of June 16th 2020 that this court became satisfied about the need for an interpretation of the words 'more votes are cast' used in article 177(2).

[94] Counsel for the second-named respondent admitted that GECOM did set as its objective determining the final credible count of the votes. But by submitting that it would be a usurpation of the high court's function after the fact of its inclusion in the very Order which brought the recount into being, concedes an abdication by the commission of its responsibilities in that regard.

[95] Beyond that, I concluded upon my examination of the Affidavits and the exhibits exhibited thereto that the words "determining a final credible count" inserted into Order 60 of 2020 are not mere surplusage considering that they are twice deployed, firstly in the third recital at the beginning of the original Order and then further included in final paragraph of the amended order after it was considered necessary to adjust the original.

[96] I also considered the fact that Paragraph 16 of the order expressly incorporates the recitals into the order. I concluded that the only reasonable inference to be drawn from their inclusion is that the commission having defined the objectives of the recount, intended that those words be given effect to. Accordingly, I find that GECOM does have a responsibility to determine the final credible count of the results of the March 2nd Elections. So that while it outside of the remit of this court to direct GECOM how or when to perform its functions, it would be reasonable to presume from the procedure detailed in Order No 60 of 2020 that the final credible count creates a dual responsibility in the Commission that requires both a quantitative and qualitative assessment to be made of the Reports (CEO and Caricom) and the Summary of Observations submitted in compliance with that said Order.

[97] Counsel for the second-named respondent however contends that to do so would be impossible, as it would be a usurpation of the election petition Court's jurisdiction for the commission to arrogate such a responsibility to itself. I respectfully disagree with this submission for the reasons I have outlined before.

[98] I have considered that neither in the Chairman's statement nor in the commission's press release earlier in the said day June 16, is there any reference to the use of the results of the recount. Significantly however reference is only made to the use of the 'results of the recount 'in the Chairman's letter to the Chief Elections Officer later that said day 16th June 2020.

[99] The specific references by the chairman to Article 177 (2) (b) and Section 96 of RPA in her letter to the CEO directing that he prepares a report for submission to the commission using the results of the recount brings into sharp focus the words used in Article177(2)(b), having regard to their implications when juxtaposed with the words 'valid votes' used in section 96 of the RPA, and when measured contextually against the backdrop of the stated objective of the recount, that is to say, 'to determine a final credible count'. This circumstance in my respectful view impacts directly the validity of the election of President and for this reason and the reasons I earlier adduced, grounds jurisdiction in this Court under Article 177 (4), and I so find.

[100] It is in my respectful view further, having regard to the applicant's affidavit and the chairman's statement, the Commission's press release and the Chairman's letter of 16th June 2020 exhibited thereto, that it is within the remit of GECOM pursuant to Order 60 of 2020 to determine the final credible count of the results of the March 2nd 2020 Elections utilising the modified elections procedure, detailed at paragraphs 4 through 14 of that said Order.

[101] I agree with the added respondents that owing to nature of these proceedings and the very narrow special jurisdiction created by article 177 (4), that this jurisdiction is not extended to the granting of injunctive relief ordinarily available in private law or judicial review proceedings.

ORDER

[102] It is hereby ordered that the words " more votes are cast " in Article 177 (2) (b) of the Constitution of the Cooperative Republic of Guyana be interpreted to mean "more valid votes are cast" in relation to the March 2nd 2020 Elections.

[103] And it is hereby further ordered that there be a stay of execution for three days. Each party is ordered to bear its own costs.

.....

B. G. Reynolds, MSM
Additional Judge

Dated this 22nd day of June, 2020

IN THE COURT OF APPEAL

ORIGINAL CONSTITUTIONAL JURISDICTION

Civil Appeal No. 41 of 2020

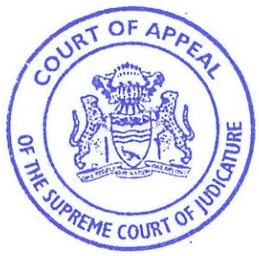
Between:

In the matter of the Constitution of Guyana

ESLYN DAVID

Applicant

-and-



1. **CHIEF ELECTIONS OFFICER**
2. **CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION**
3. **THE GUYANA ELECTIONS COMMISSION**
4. **THE ATTORNEY GENERAL OF GUYANA**
5. **MOHAMED IRFAAN ALI**
6. **BHARRAT JAGDEO**
7. **MARK FRANCE**
8. **DANIEL JOSH KANHAI**
9. **LENNOX SHUMAN**
10. **SHAZAM ALLY**
11. **ABEDIN KINDY ALI**

Respondents

Before their Honours:

Hon. Mde Dawn Gregory – Justice of Appeal
Hon. Mr. Justice Rishi Persaud - Justice of Appeal
Hon. Mr. Justice Brassington Reynolds - Additional Judge

Appearances:

Mr. Jeremy, SC with Mr. Scotland, Mr. Robertson, Mr. Keller and Mr. Forde for the Applicant.
Ms. K. Kyte-Thomas for the No. 2 Respondent.
Mr. B. Williams in person with Mr. M. Edwards for the No. 4 Respondent.
Mr. D. Mendes SC with Mr. D. Kissoon, Mr. A. Nandlall, Mr. S. Datadin and Ms. M. Sharma for the Nos. 5 and 6 Respondents (added)
Mr. R. Ramkarran SC with Mr. T. Jonas for the Nos. 7, 8 and 9 Respondents (added).
Mr. K. Khan with Mr. Khan and Ms. M. Puran for the Nos. 10 and 11 Respondents (added).

Heard on:

19th 20th and 22nd June 2020.

Decision

[1] This Notice of Motion purports to invoke the Court of Appeal's original jurisdiction pursuant to Article 177 (4) of Guyana's Constitution.

[2] On the face of it an order seeking the interpretation of the words "more votes cast" in Article 177 (2) (b) of the Constitution is prayed for. This is as a consequence of the Guyana Elections Commission's failure to determine a final credible count of votes cast at the General and Regional Elections of March 2nd 2020 pursuant to order No. 60 of 2020 as amended by order dated 29th May, 2020. Several other consequential restraining orders are sought as follows:

a) An order restraining the Chief Elections Officer from complying with the direction of the Chairman of the Guyana Elections Commission as set out in a letter dated the 16th Day of June, 2020, to submit to the Guyana Elections Commission an Election Report under Article 177 (2) (b) of the Constitution of Guyana without the Guyana Elections Commission determining the final credible count and or the credibility of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

b) An Order restraining the Chief Elections Officer from complying with the direction of the Chairman of the Guyana Elections Commission as set out in a letter dated the 16th day of June, 2020, to submit an Elections Report under Section 96 of the Representation of the People Act without the Guyana Elections Commission determining the final credible count and or the credibility of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.

c) An Order restraining the Chief Elections Officer from submitting to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution containing votes which are not credible within the meaning of Order 60 of 2020.

d) An Order restraining the Chief Elections Officer from submitting to the Elections Commission an Election report under Section 96 of the Representation of the People Act, Chapter 1:03 containing votes which are not valid and credible.

e) Such further and or other Order as may be just.

[3] A 35 paragraph Application supports this Motion. The background and events leading up to this Motion is well documented in the various submissions laid over and its recital is thought unnecessary. Likewise a recitation of the voluminous written submissions laid over for our consideration is thought to be equally unnecessary. I will delve immediately into a consideration of the uncomplicated issues at hand.

[4] Paragraph 14 of order 69 of 2020 as amended by Order of the 29th day May, 2020 is set out for the purpose of context.

> "The Commission shall, after deliberating on the report at paragraph 12, determine whether it should request the Chief Elections Officer to use the data compiled in accordance with paragraph 12 as the basis for the submission of a report under Section 96 of the Representation of the People Act Chapter 1:03, provided that the Commission shall, no later than three (3) days after receiving the report make the declaration of the results of the final credible count of the Elections held on 2nd day of March, 2020"

[5] Article 177 (4) of the Constitution under the title "the President states"

> "The Court of Appeal shall have exclusive jurisdiction to hear and determine any question as to the validity of an election of a President in so far as that question depends upon the qualifications or the interpretation of this Constitution and any decision of the Court under this paragraph shall be final"

[6] The qualifications for election as president is set out in Article 90 and for what its worth, election to the National Assembly in article 53. Of critical and determinative importance Article 177 (5) provides:

"Subject to the provisions of this Constitution, Parliament may make provision for giving effect to the provisions of this title and, without prejudice to the generality thereof, may make provision –

(a) For the conduct of elections to the office of President; and

(b) With respect to the persons by whom, the manner in which and the conditions upon which proceedings for the determination of any question such as is mentioned in the preceding paragraph may be instituted in the Court of Appeal,

And, subject to any provisions made under subparagraph (b), provision may be made with respect to the matters referred to therein by rules of Court.

[7] **Jurisdiction**

A proper and lawful interpretation of Articles 177 (4) and 177 (5) leads to my mind the inescapable conclusion that this Court is without jurisdiction to entertain this Motion, for several reasons. (See **Bourne –v- Norwich Crematorium, IRC –v- Frere (1965) AC 402, Attorney General of Trinidad and Tobago –v Whiteman [1991] LRC 536, Nawazuddin –v- State of Uttar Pradesh [1960] ALR 484 –** as it relates to the appropriate canons of construction) Technical and convoluted interpretative excursions must be eschewed.

[8] There is no dispute that provisions have not been made by Parliament under Article 177 (5) (b). The words "for giving effect to" is a clear indication that Parliament intended, that provisions be made in order to operationalize the Article 177 (4) Jurisdiction.

[9] Specific reference in Article 177 (5) (b) to critical provisions as it relates to "whom, the manner in which and the conditions upon which proceeding… may be instituted in the Court of Appeal, clearly intends it to be a necessary pre-condition. Provisions here are clearly required to "complete the definition of the power or jurisdiction in question". (See **Chaitan and Peters –v- Attorney General of Trinidad and Tobago 2002 LRC 32**). Crucial issues such as locus standi and time limits are not provided for, which is fundamental to the completion of the Court's jurisdiction. **Jaundoo –v- Attorney General [1971] 3 WLR 13** relied upon

by the Applicant is unhelpful in the context of the clear and specific wording of Article 177 (5) and of course the well-established original and inherent jurisdiction of the High Court. Jaundoo's case does not avail the Applicant.

[10] In the event that it was indeed Parliament's intention that 177 (4) be operational without the necessary provisions required under Article 177 (5). This Motion remains unsustainable. In this regard reference is made to Re: **Eusi Kwayana's Application [1980] 29 WIR 130**.

[11] Though it does not appear that the issue of provision making under Article 177 (5) was raised, I find myself persuaded if not bound by the pronouncement of our apex Court at the time as it relates to the scope and ambit of the jurisdiction conferred by virtue of 177 (4). At page 140 R. H. Luckhoo said:

> "It is not in doubt that words are to be construed in the contexts in which they are found. The subject matter of the jurisdiction is clear. It has to do with the validity of an election of a president. Article 177 follows immediately under Title 4 of part 2 of the Constitution and is headed "the President, the marginal note thereof being 'Election of President.' The provisions deal with the machinery for election of a president under the Constitution. Paragraph (4) is concerned solely with the Court's jurisdiction on a question as to the validity of election of a President under that machinery. Further, the Court's jurisdiction is circumscribed. It is limited to question as to the validity of an election of a President in so far as such questions depend (a) upon the qualification of any person for election, or (b) upon the interpretation of the Constitution. The qualification requirements are to be found in Article 90 and need not be set out as they are not pertinent to the matter in hand. I am unable to find anything in the wording of paragraph (4) construed in the context of the whole scheme of Title 4 Part 2 of the Constitution to warrant jurisdictional extension to a matter falling within the ambit of section 10 (1) of the Act."

[12] It is without a doubt, from a perusal of this Motion that the issue of the validity of the election of a President is not raised. The words "on the

interpretation of this Constitution is clearly circumscribed and applies only to the issue of the qualification of a person elected as President. It does not lend itself to be interpreted as a roving commission. The High Courts' original and inherent jurisdiction as it relates to the interpretation of our constitution is well established (for example see Section 18 of the High Court Act and Article 133 of our Constitution).

[13] There is yet another reason why this Motion must fail. Article 177 (4) speaks to the determination of any question as to the "validity of an election of a President." A President is yet to be elected pursuant to the machinery and process contemplated by Article 177 (2) and (6). This can hardly be the source of any contention.

[14] Whether one is deemed the President or referred to as the President-elect is immaterial. It is clear that Article 177 (4) contemplates an elected President. This is consistent with the general scheme of legislation in Guyana that govern the elections process which only permits challenges after that process is completed. As a result and additionally this Motion is simply premature. This is so even if one were to interpret the "or" in Article 177(4) as vesting in the Court, Jurisdiction to interpret the Constitution beyond the scope and ambit of the qualifications of one who is elected as President.

[15] **Article 163 (1)**

Article 163 (b) (1) vests in the High Court exclusive Jurisdiction to determine any question whether either generally or in any particular place an election has been lawfully conducted or the result thereof has been or may have been affected by any unlawful act or omission. Provision for the determination of the validity of an election is made by way of the National Assembly (validity of elections) Act Chapter 104. See too **Petrie -v- Attorney General [1968] GLR, C. Ram -v- Attorney General et al CCJ 2019. See Comar Singh -v- Butler [1973] 21 WIR.** The sanctity and exclusivity of the election court is well established. (See **Saunders CCJ P Ram -v- Attorney General** (above). The National Assembly (Validity of elections Act provides for an exhaustive procedure for any challenge to the validity of an election.

[16] The Applicant here in essence contends that GECOM's Order (highlighted) required a determination that the elections were credible and ultimately urges the Court to pronounce upon. A consideration of the scope and effect of that Order is to my mind intended here. Various pieces of "evidence" was provided to GECOM and attached to the Affidavit in Support of Motion here. Those allegations and unsolicited opinions according to the Applicant establishes that the election was not credible. Unlawful acts and omissions underscores the Applicant's complaints.

[17] I have perused the various pieces of legislation that governs the election process and the powers of GECOM. I am unable to find any provision which even suggest that GECOM is empowered to embark on what would be an evidential based credibility exercise and by extension annul the elections. That jurisdiction falls exclusively within the realms of an election Court and the Chair of GECOM so properly determined. It is noted from a perusal of the authorities emanating from India cited that there is specific authority in the elections commission to annul and have fresh polls at an affected polling station. A stark difference in context. The issues raised here to my mind is not concerned with the interpretation of the Constitution.

[18] The issues falls squarely within the exclusive jurisdiction of the High Court under and by virtue of Article 163 (b) (1). The unlawfulness or otherwise of and act or omission is clearly a matter for the elections court.

[19] As an aside and for the purpose of guidance, I can conceptualize of no element of ambiguity that burdens the words "more votes cast" which would require the intervention of the Highest Court in the land. Suffice it to say that I see no reference to the words "valid" or "credible" in Article 177 (2) (b) and I am not prepared nor empowered to rewrite or insert those words into a constitutional provision, thus exacting a different or higher standard, than Parliament intended. GECOM's order certainly could not have the effect of amending a Constitutional provision. It is patently obvious to me, that having regard to the tabulation and certification process encompassed by our legislative scheme, the words "more votes cast" refers to "presumptively valid votes." Such a

presumption can only be rebutted by virtue of an evidence based process conducted by an Election's Court under Article 163(1) of our Constitution.

[20] In closing it should be noted that I have deliberately refrained from dealing with, in any particular detail those core and peripheral issues which have arisen here, that may be the subject matter for consideration by an elections court. This is of course in an effort to avoid what may amount to pronouncement or opinions prejudicial to the elections Courts' consideration of those issues properly before it.

[21] In the circumstances for the reasons given I find that this Notice of Motion is wholly misconceived and is accordingly struck out for want of jurisdiction.

Each party to bear their own costs.
Stay of execution for 3 days.

...Sgd.....
Rishi Persaud
Justice of Appeal

Dated this 22nd day of June, 2020