THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CIVIL JURISDICTION

PROCEEDING FOR JUDICIAL REVIEW

2020-HC-DEM-CIV-FDA-568

BETWEEN:

MISENGA JONES

Applicant

- and -

1. **THE GUYANA ELECTIONS COMMISSION**
2. **CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION**
3. **THE CHIEF ELECTION OFFICER**
4. **ATTORNEY GENERAL OF GUYANA**

Respondents

5. **Shazaam Ally representing The Citizenship Initiative**
6. **Abedin Kindy Ali representing Change Guyana**
7. **Bharrat Jagdeo representing People's Progressive Party/Civic**
8. **Irfaan Ali representing People's Progressive Party/Civic**
9. **Mark France representing A New and United Guyana**
10. **Lennox Shuman representing Liberty & Justice Party**
11. **Daniel Josh Kanhai representing The New Movement**
12. **Vishnu Bandhu representing United Republican Party**

Added Respondents

July 15, 17, 20, 2020.

Mr. John Jeremie SC, Mr. Roysdale Forde SC, Mr. Keith Scotland, Mr. Rondelle Keller, Mr. Mayo Robertson for the applicant.

No appearance by or for the first-named respondent.
Ms. Kim Kyte-Thomas for the second-named respondent.
Mr. Neil Boston SC for the third-named respondent.
Mr. Basil Williams SC Attorney-General, and Mr. Maxwell Edwards for the fourth-named respondent.
Mr. Kashir Khan, Mr. Mohamed SGF Khan and Mr. Kalesh Loakman for the fifth and sixth named and added respondents.
Mr. Douglas Mendes SC, Mr. Mohabir Anil Nandlall and Mr. Devindra Kissoon for the seventh and eighth named and added respondents.
Mr. Kamal Ramkarran for the ninth-named and added respondent.
Mr. Hari N. Ramkarran SC the tenth-named and added respondent.
Mr Timothy Jonas for the eleventh-named and added respondent.
Ms. Jamela Ali SC, Mr. Sanjeev Datadin and Mr. Stephen Singh for the twelfth-named and added respondent.

JUSTICE ROXANE GEORGE, CHIEF JUSTICE (ag)

Introduction

[1] The applicant, Misenga Jones, deposed that she is a citizen of Guyana who was a registered voter and who voted at the March 2, 2020 National and Regional Elections. She is supported in her application by Ganesh Mahipaul who deposed that he was an accredited counting agent for the APNU/AFC at the elections and participated in the recount process, the declaration of the results of which are the subject of challenge in this application.

[2] As is well known, the National and Regional Elections (the elections) took place on March 2, 2020. The post election day storm to which I referred in my judgment of March 11, 2020 in **Holladar v RO Mingo & Others FDA 360 of 2020** (**Holladar**) has not as yet calmed. Over the past four months there have been continuous contentions and contestations as regards the results that should be relied on by the first respondent, the Guyana Elections Commission (GECOM), in order to declare a winner and by extension the President of the Cooperative Republic of Guyana.

[3] After the **Holladar** case, the Returning Officer for District Four, about whose declaration it is common knowledge there is the most contention, made a declaration of the results of this District on March 13, 2020. This completed the declarations for the ten electoral districts.

[4] Subsequent to the **Holladar** judgment, and during the pendency of contempt proceedings against the Returning Officer for District Four, a decision was communicated by the Chairperson

of GECOM (Chairperson) in court on the said March 13, 2020, that a recount of the votes cast at the elections would be conducted, no doubt to assuage the contestations. It was soon thereafter revealed that President Granger and the Leader of the Opposition, Mr. Bharrat Jagdeo, agreed to a recount of the votes cast, then stated to be under the supervision of CARICOM. This recount agreement was challenged in **Moore v GECOM & Ors, FDA 394 of 2020** (**Moore**) which ultimately engaged the attention of the Court of Appeal which rendered a decision on April 5, 2020.

[5] Following the **Moore** decision, GECOM issued Order 60 of 2020, gazetted on May 4, 2020 which was amended on May 29, 2020 by Order 69 of 2020. For ease of reference these orders will be referred to as O 60. O 60, which was made pursuant to art 162 of the Constitution of Guyana (art 162) and s 22 of the Elections Laws (Amendment) Act, No. 15 of 2000, (ELA) permitted the recount of the votes cast in all ten electoral districts, and a declaration to be made of the final credible count. According to the Order, the recount was to be undertaken, executed and supervised by GECOM, and scrutinized by CARICOM.

[6] The third respondent, CEO of GECOM (CEO) presented a report on the recount results of the elections to GECOM on June 13, 2020. As a consequence, on June 16, 2020, the Chairperson wrote the CEO requesting him to prepare and submit a report by June 18, 2020, based on the recount results pursuant to art 177 (2) (b) of the Constitution (art 177(2)(b)) and s 96 of the Representation of People Act, Chapter 1:03 (s 96) (RPA). Before the CEO could submit this report, another application was filed. This application, **Eslyn David v Chief Elections Officer & Ors. Civil Appeal No. 41 of 2020** (**David**), was made to the Court of Appeal (CA) pursuant to art 177 (4) of the Constitution of Guyana (art 177(4). In a majority decision, the Court of Appeal held that in ascertaining the votes cast for the purposes of an art 177 (2)(b) declaration of the President, GECOM had to rely on valid votes cast. Justice Reynolds, who agreed with the decision of Gregory JA, further held that O 60 created a new electoral regime which established separate elections – one for the Presidency and the other for the National Assembly. Justice Rishi Persaud dissented, in sum holding that the application was misconceived.

[7] The seventh and eighth respondents herein, who had been joined in that application, were dissatisfied with the decision of the CA and appealed to the Caribbean Court of Justice (CCJ). The CCJ rendered a decision in **Ali & Jagdeo v David & Ors.** (**Ali**) on July 8, 2020 overturning

the majority decision of the CA, and nullifying a report with elections results that the CEO had submitted on June 23, 2020 to GECOM, during a three day stay of the CA decision.

[8] Subsequent to the decision of the CCJ, on July 9, 2020, the Chairperson again wrote the CEO requesting that he submit an art 177 (2)(b) and s 96 report on the election results based on the O 60 recount. The CEO did not comply with this request. After further correspondence between the Chairperson and the CEO, he finally submitted a report on July 11, 2020 that was not based on the recount results but apparently based on the ten declarations submitted to him by the returning officers pursuant to s 84 of the RPA.

[9] On July 13, 2020, the Chairperson issued a ruling in which she stated *inter alia* that:

> "The CCJ did not determine that a final credible count could not be established neither did it set aside Order 60.
>
> The intent of Order 60 was to determine the final credible count by recounting the all [sic] ballots cast on 2nd March from the boxes.
>
> Clause 14 of the recount Order provides that the Commission can make the declaration from the final credible count of the results.
>
> It is my decision that the results of March 13 declaration [sic] cannot be used at this time since these were replaced by the tabulation of the votes at the recount process which was hailed by all to be a transparent and credible process."

The Chairperson again requested the CEO to prepare a report by July 14, 2020 based on the recount results. Then this application was filed by Ms. Jones.

Applicant's contentions

[10] The applicant in brief, contends that s 22 of the ELA, pursuant to which O 60 was issued, is unconstitutional. She also contends that as a consequence O 60 is invalid, and as a further consequence that the recount results flowing therefrom are invalid. As such, she is stating that O 60 is unconstitutional. She relies on the CCJ decision in **Ali** stating that the CCJ nullified O 60, and relied on the RPA, in arriving at its decision that the CA had erred in concluding that it had jurisdiction to hear the **David** case. It is contended that there has been a violation of the s 84 (1) of the RPA by GECOM by its refusal to accept the declarations of the returning officers, made pursuant to this section. She deposed that these declarations, which were all submitted to the

CEO by March 13, 2020 when District Four was declared, are still extant and valid. She urges that these declarations should and must be the basis for any declaration of the winner of the elections, and by extension the declaration of the Presidency. It is her assertion that the Chairperson and GECOM cannot refuse to act on the CEO's report in this regard, nor can he be directed to utilize the recount results for the purposes of a final declaration of the elections results. Her application is supported by the third and fourth respondents – the CEO and AG respectively.

[11] The Applicant therefore applies for the following orders:

(i) A Declaration that this Court has jurisdiction to hear this Application on the basis of prima facie evidence that there has been noncompliance by the Guyana Elections Commission and the Chairman of the Guyana Elections Commission in that they have not complied with the constitutionally stated process as outlined in Article 177(2)(b) of the Constitution with regard to the March 2, 2020 General and Regional Elections.

(ii) A Declaration that the Chair of the Guyana Elections Commission (GECOM) has failed to act in accordance with the advice of the Chief Election Officer as mandated by Article 177(2)(b) of the Constitution of Guyana in that she has failed to declare the Presidential candidate deemed to be elected as President in accordance with the advice tended in the report by the Chief Elections Officer dated the 11th day of July 2020.

(iii) A Declaration that the Respondents and in particular the Guyana Elections Commission (GECOM) have no authority to declare any person as President except in accordance with the advice of the Chief Election Officer tended in his report pursuant to Section 96(1) of the Representation Act.

(iv) A Declaration that the Respondents and in particular the Guyana Elections Commission (GECOM) have no authority to declare any person as President except in accordance with the advice of the Chief Election Officer tended in his report pursuant to Article 177(2)(b) of the Constitution of Guyana.

(v) A Declaration that the report required by the Chief Election Officer under Section 96 of the Representation of the People Act must be based on the votes counted and information furnished by the ten (10) Returning Officers from their respective ten (10) Electoral Districts which were submitted to the Chief Election Officer on the 13th day of March, 2020.

(vi) A Declaration that the Chief Election Officer is not entitled to base his report required by Section 96 of the Representation of the People Act on data generated from the recount purported to be carried out under Order No. 60 of 2020.

(vii) A Declaration that the votes counted at the National Recount pursuant to Order No. 60 of 2020 as amended, are invalid for failure to conform with the concept of valid votes described by the CCJ in its Judgement [sic] in the Appeal of Ali and Jagdeo v David, et al [2020] 10 (AJ) GY.

(viii) A Declaration that data generated from the recount purportedly conducted under Order No. 60 of 2020 is generated by an unconstitutional process in that the Order requires decisions on validity of ballots that by Article 163(1)(b) are the exclusive province of the High Court.

(ix) A Declaration that the votes counted and information furnished by the Returning Officers of the ten (10) Electoral Districts on March 13, 2020 contain the votes that are ex facie valid in that they were tabulated in the presence of, inter alia, the duly appointed candidates and counting agents of contesting parties and, as such, are properly the valid votes contemplated by Section 96(1) of the Representation of the People Act.

(x) A Declaration that the Chief Election Officer is not subject to the direction of either the Chairman or GECOM in the content of the advice he is required to furnish under Article 177(2)(b) of the Constitution of Guyana.

(xi) A Declaration that any instruction from the Chairman of GECOM purporting to direct the Chief Election Officer as to the content of the report he furnishes under Section 96(1) of the Representation of the People Act, is unlawful, void, and of no effect.

(xii) A Declaration that letters from the Chairman of GECOM on June 13th, July 9th, and July 10th 2020 purporting to direct the Chief Election Officer as to the content of his advice and report under Article 177(2)(b) and Section 96(1) of the Representation of the People Act respectively, are unlawful, constitutional, void, and of no effect.

(xiii) A Declaration that in particular the letter of July 9th 2020 citing Section 18 of the Election Laws (Amendment) Act No 15 of 2000 as authority that the Chief Election Officer was subject to the supervision and control of GECOM is misguided, invalid, and has no application to the Chief Election Officer in the performance of his duties under Article 177(2)(b) of the Constitution and Section 96(1) of the Representation of the People Act.

(xiv) A Declaration that any challenge to the advice of the Chief Election Officer furnished in his report to GECOM on July 11th, 2020 can be challenged only in accordance with the provisions of Article 163 of the Constitution of Guyana, in an Election Petition Court.

(xv) A Declaration that the Commission does not have the constitutional authority to alter the advice contained in the report submitted by the Chief Election Officer in accordance with Article 177(2)(b) of the Constitution of Guyana and Section 96(1) of the Representation of the People Act.

(xvi) A Declaration that GECOM is obligated to accept the advice of the Chief Election Officer tendered in his report submitted on June 11th 2020.

(xvii) A Declaration that neither the Chairman nor the Commission is entitled to alter the votes counted and information forwarded by the ten (10) Returning Officers to the Chief Election Officer in accordance with Section 84 of the Representation of the People Act.

(xviii) A Declaration that Section 22 of the Election Laws (Amendment) Act No. 15 of 2000 is unconstitutional in that it violates the separation of powers and impermissibly usurps the legislative powers of Parliament

(xix) A Declaration that the Declarations made by the Returning Officers of the ten Electoral Districts of the votes cast by the Electors in the Electoral Districts and or Electoral Returns are final and cannot be set aside, varied and or altered by the Respondents.

(xx) A Declaration that the Declarations of the respective Returning Officers for each Polling District after compliance with section 84 of the Representation of the People Act, of the votes cast by Electors in favour of the Lists of Candidates in Electoral Districts 1 to 10 are the Final Declarations of the votes cast by the Electors in favour of a List of Candidates in Electoral Districts 1 to 10.

(xxi) A Declaration that the Declarations of the respective Returning Officers of Electoral Districts 1 to 10 of votes cast by Electors in favour of the Lists of Candidates in the respective Districts at the General and Regional Elections held on March 2, 2020 made on or before the 14th day of March, 2020, are the sole legal basis for the Chief Elections Officer's Report to the Chairman of the Guyana Elections Commission and the Guyana Elections Commission pursuant to section 99 of the Representation of the People Act and the Chief Elections Officer's advice tendered under Article 177 of the Constitution of Guyana

(xxii) An Order restraining the Guyana Elections Commission from acting in any manner not consistent with the mandate set out in Article 177(2)(b) and Section 96 of the Representation of the People Act with respect to the advice and report of the Chief Election Officer tendered on July 11th 2020.

(xxiii) An Order restraining the Chief Election Officer from acting in any manner inconsistent with the mandate contained in Article 177(2)(b) of the Constitution of Guyana and Section 96 of the Representation of the People Act in the performance of his duty to submit a report containing his advice to the Guyana Elections Commission.

(xxiv) An Order restraining the Second Respondent whether by herself, her servants or agents, from acting in any manner inconsistent with the provisions of Article 177(2)(b) of the Constitution of Guyana as it relates to declaring a person deemed to be President.

(xxv) An Order restraining from taking the oath of office as President of Guyana any person identified as the Presidential candidate in the list of parties contesting the elections, other than the Presidential candidate in the list which the Chief Election Officer advised in his report to GECOM on July 11, 2020 to be the list in favor of which more votes were cast.

(xxvi) An Order setting aside the decision of the Commission not to accept the advice of the Chief Elections Officer as contained in his report dated July 10th 2020, furnished in accordance with Article 177(2)(b) of the Constitution of Guyana and Section 96(1) of the Representation of the People Act.

(xxvii) An Order setting aside the decision of the Commission purporting to invalidate the votes counted and information furnished by the ten (10) Returning Officers to the Chief Election Officer in accordance with Section 84 of the Representation of the People Act.

(xxviii)Such further or other Orders as this Honorable Court may deem just.

(xxix) Costs

[12] The industry of all counsel is acknowledged. I mean no disrespect in not detailing the submissions made. As I did in **Holladar**, I note that there is much by way of evidence, whether substantiated or not, that has been placed before me in the affidavits as regards how votes were or were not counted, whether or not policy decisions and criteria were consistently applied to ascertain the results each is contending for, and referring to statements made by persons or entities, both local and overseas, with or without supporting exhibits, as regards their views on the elections results. Apart from the factual matrix necessary to provide a background to this application which I have outlined above, none of this information or material is relevant to a determination of this case. Further, affidavits that were filed or exchanged without the permission of the court are struck from or are not part of the record, and have therefore, also not been considered.

Issues to be decided

[13] Having reviewed the orders sought, this application is really a challenge to the constitutionality of the recount process that was undertaken by GECOM pursuant to O 60. As such, at the case management conference on July 15, 2020, the parties were directed to make written submissions to be heard on the following issues:

(1) Whether this court has jurisdiction to hear this application;
(2) Whether s 22 of the ELA pursuant to which GECOM issued O 60 is constitutional;
(3) Whether O 60, and by extension the recount results obtained therefrom, are valid such as to permit a declaration of the March 2, 2020 election results based on the said recount results;
(4) Whether the declarations of the Returning Officers for the Ten Electoral Districts made pursuant to s 84 of the RPA should be acted on or be set aside;
(5) Whether these issues are *res judicata* given the decisions of the CA in **Moore**, and of the CCJ in **Ali**.

(1) Whether this court has jurisdiction to hear this application

[14] I understand the gravamen of the complaints by the applicant, supported by the CEO and the AG, to be that the Chairperson and GECOM have not complied with their public duty as outlined in art 177 (2) (b) in relation to the declaration of the elections and consequentially the declaration of the President; and that in so doing, they have sought to nullify s 84 of the RPA. In this regard, they are acting outside the Constitution and the RPA in an election process that is still ongoing, and that therefore their actions are subject to judicial review.

[15] The applicant seeks to have art 177 (2)(b) interpreted because, as submitted on her behalf, an impasse now exists between the Chairperson and the CEO as to which results are to be used in order to declare the election. In this regard, it is contended that the Chairperson is obliged to accept the report and advice of the CEO in relation to the declaration of the results. It is submitted that this impasse must be resolved now, and cannot await an election petition. In this regard, the issue is whether the Chairperson and GECOM must accept whatever the CEO produces for their consideration as regards the results of the elections.

[16] On behalf of the CEO, it is submitted that GECOM, and more particularly the Chairperson, are "acting in breach of their constitutional and statutory powers in refusing to act on the basis of the report prepared by the [CEO], pursuant to section 96 of the [RPA] as [the Chairperson] is constitutionally bound to do pursuant to article 177 (2)(b) of the Constitution. Judicial review can go to ensure that the Chairperson complies with article 177 (2) (b) of the Constitution."

[17] Citing para 42 of the preliminary point judgment in **Holladar**, dated March 8, 2020, counsel for the AG submitted that this is a case where "the Court's supervisory jurisdiction can

be invoked to ensure the correct and smooth operation or progress of the elections proceedings or process." It is submitted that the proviso to art 226 (7) of the Constitution excludes GECOM from the provisions of art 226 (6) which ousts the court's jurisdiction to enquire whether constitutional commissions have validly performed their functions. As a consequence, the proviso permits the Court to enquire whether the Chairperson and GECOM are acting lawfully in the context of this case.

[18] I, however, prefer the counter argument that the proviso to art 226 (7) states that even though GECOM is exempted from the operation of the ouster clause in art 226 (6), this is without prejudice to the power of Parliament to make provision in relation to the functions of GECOM. Parliament has done so by s 140 of the RPA which provides that apart from an election petition as provided for in art 163, "no question whether any function of the Elections Commission or of any of its members has been performed validly, or at all, shall be enquired into in any court."

[19] The applicant, supported by the AG, and to some extent by the CEO, also contends that s 22 of the ELA is unconstitutional, and therefore O 60 made pursuant thereto is unconstitutional and therefore invalid. This, they contend must be addressed by this court. This is a substantive issue to be determined in this decision. I will return to this.

[20] I note the submissions on behalf of most of the other respondents, that this court has no jurisdiction to entertain this application. They argue that the issues raised speak to an election dispute, and are best dealt with pursuant to art 163 by an election court pursuant to an election petition. Section 140 of the RPA, noted above at para [18], is also relied on. However, it is submitted on behalf of the fifth and sixth respondents that "this court does have jurisdiction, albeit limited to where GECOM has acted or is about to act in excess of its constitutional and/or statutory powers."

[21] In **Holladar**, as noted by the applicant in her submissions, I held, in para [33] of the preliminary point judgment as to jurisdiction, that this court has jurisdiction to hear an application regarding whether a person exercising authority has complied with her/his statutory duties. I relied on the cases of **In the Matter of an Application by Aubrey Norton for Writs of Certiorari and Prohibition [1996-1998] GLR 373** and **Joseph Hamilton v Guyana Elections Commission, Bharat Jagdeo & AG 40M/2001** in so concluding.

[22] The Chairperson is a person with constitutional authority as granted in art 177 (2)(b) of the Constitution of Guyana. Similarly, GECOM has powers under arts 161A and 162 of the Constitution and the RPA. As regards, the Chairperson, I again note the *dicta* of Bernard CJ, as she then was, in the **Norton** case, where her honour acknowledged that, but for the specific ouster of the court's jurisdiction to question the decision of the Chairperson of the Elections Commission to declare the presidency pursuant to art 177(6) of the Constitution, the court had jurisdiction to order certiorari against the decisions of the Commission and its Chairperson. Justice Bernard clearly emphasized that the court can exercise a supervisory jurisdiction in elections cases outside a challenge to the validity of the elections by way of election petition.

[23] More importantly, in **Moore**, the CA by majority, overturned the Full Court decision that the ouster clause in s 140 of the RPA precluded any enquiry into the decisions of the Chairperson and GECOM. The CA held in paras [84] and [108] that where GECOM has acted or is about to act outside of its powers, that it would be subject to the supervisory jurisdiction of the Court.

[24] I am cognizant of the restrictions imposed on the court by s 140 of the RPA, and by art 163 that would require an approach to the court by way of election petition. However, in the peculiar context of this case, where there is an impasse regarding the decision-making of GECOM to complete the elections process, and it is necessary to advance this process which is still in progress, judicial review is necessary to address this impasse. I am of the view that the applicant is really seeking the interpretation of the Constitution for a determination whether the Chairperson, GECOM and the CEO are acting lawfully. It is in this context that there can be judicial review of their decisions.

[25] I have further concluded that in this context there is a distinction to be drawn as regards enquiring into the functions of the Chairperson and GECOM, which are restricted by s 140 of the RPA, and interpreting the constitutionality of the s 22 and O 60, as well as art 177, to determine if they are acting lawfully, albeit these provisions speak to the powers and functions of the Chairperson and GECOM. Thus, on this narrow basis, it is an enquiry into the legal framework that guides the carrying out of their functions to complete the elections process. If the legal framework is found to be unconstitutional and therefore void, then their functions and actions would perforce be affected.

[26] Applying my decision in **Holladar** and the CA decision in **Moore**, by which I am bound, I hold that this court has jurisdiction to hear this application.

[27] Having so found, I move to the second issue for consideration.

(2) Whether s 22 of the Elections Laws (Amendment) Act, No. 15 of 2000 pursuant to which GECOM issued O 60 is constitutional

[28] Section 22 provides:

> "22. (1) If any difficulty arises in connection with the applicability 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."

[29] The applicant, the CEO and the AG state that s 22 is unconstitutional because it confers law-making powers on GECOM, a non-legislative body, in contravention of art 170 of the Constitution. Article 170 provides for Parliament to be the law-making body. More specifically it is pointed out that art 160 gives Parliament the power to enact laws with respect to the electoral system. It is argued that Parliament cannot transfer or delegate this power to another entity and that in this case, in conferring on GECOM an arbitrary law-making power, it has abdicated its law-making power. In this regard, the enactment of s 22 offends the separation of powers, more especially as it permits GECOM to amend laws even when Parliament is dissolved.

[30] In addition, the AG submitted that s 22 was utilized to produce O 60 in order to amend art 177 (2)(b) in violation of art 164 which provides for how the Constitution is to be amended. O 60, it is contended, purports to strip the CEO of "his constitutionally indispensable advisory role." This advisory role, as mandated by art 177 (2)(b), means that his advice is to be tendered to the Chairperson based on the information from the returning officers of the ten electoral districts, and that a declaration of the elections results must be made pursuant thereto.

[31] The responses of the other respondents are based on two limbs. Firstly, that s 22 is not unconstitutional as it did not give GECOM an unfettered discretion to act. It is urged that it is

limited in its scope. It is only where difficulties arise in the application of the specified legislation that GECOM is entitled to make provision as necessary and expedient for removing the difficulty. And further, while GECOM is given the power to amend legislation the period within which this can be done is only for three months after the elections, and when Parliament is not dissolved, the power is subject to negative resolution. The power delegated to GECOM being so narrowly prescribed means that the scope of the power was carefully considered by Parliament. In this regard, art 162 permitted the enactment of s 22 as the article gives wide powers to GECOM in relation to the conduct and administration of elections "to ensure impartiality, fairness and compliance with the provisions of [the] 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."

[32] It is submitted that given the circumstances of difficulty which have occurred in these 2020 elections, GECOM was lawfully empowered to issue O 60. It is contended that even the applicant in her affidavit recognizes that difficulties have arisen. These, GECOM must address. It is submitted that in any event, O 60 does not amend any legislation.

[33] Secondly, these respondents highlight that this issue is *res judicata* as the CA has pronounced in **Moore** on the court's ability to enquire into the constitutionality of s 22. It is this second submission that commends itself to me.

[34] Thus, the answer to this question in my view poses little difficulty given the decision of the CA in **Moore**. The CA identifed the constitutionality of s 22 as an issue in the appeal.[1] The CA clearly held at paras [106] and [107] that they agreed that the legality of s 22 was "a matter to be frontally examined by the Court at a full hearing." The Court considered the decisions of **Gladys Petrie & Others v The AG & Ors (1968) 14 WIR 292** and **Seecomar Singh & Anor v Butler (1973) 21 WIR 34** and noted and held at para [106] that "the High Court declined to examine the constitutionality of election related legislation during the election period, allocating such questions to an election petition. The Court said that such a determination would be disruptive of the electoral process. Moreover, it is well established that constitutional questions can be determined at the hearing of a petition as discussed in **Peters and Chaitan v Attorney General and Another** (2001) 63 WIR 244." It was further held at para [107] that if GECOM had utilised or utilises its powers under s 22 unlawfully, "then this would be a question for

[1] See para 28 of the Moore judgment.

determination at such time [and that] [n]o sufficient evidential basis exists for such a determination at this point."

[35] As such the submission on behalf of the applicant that the CA's decision on s 22 is *obiter dicta*, when it is based on similar arguments as advanced before this court, cannot be accepted. And even if *obiter dicta*, as noted by Ward J in his honour's discussion of the effect of such judicial pronouncements in **Ying v Song [2009] NSWSC 1344**, "it has long been the case that the weight accorded to *obiter dicta* will vary depending on the circumstances in which those *dicta* fell and that considered *dicta* of appellate courts, though not strictly binding on courts in a lower or equal position within the judicial hierarchy, must be afforded great weight and should be departed from only with the greatest of caution."

[36] But the decision of the CA on s 22 cannot be considered to be *obiter dicta* or a passing statement or comment. The pronouncement of the CA was a definitive and considered finding based on a point that was clearly argued. I am bound to give it judicial weight as being part of the *ratio decidendi* or reasoning of the court rather than *obiter dicta*.

[37] The CA having pronounced that a challenge to the constitutionality of s 22 would be for an election petition, the principles of *res judicata* apply. So the issue having been raised and importantly dealt with by the Court, it cannot be canvassed again. And even more importantly, since it is a decision of an appellate court, sitting as I am in the High Court, I am bound to follow this decision. I can discern no distinguishing feature that would permit me to depart from this judgment; nor has any evidence been disclosed on the affidavits by and/or on behalf of the applicant such as to permit me to do so.

(3) Whether O 60, and by extension the recount results obtained therefrom, are valid such as to permit a declaration of the March 2, 2020 election results based on the said recount results

[38] This issue requires more in depth consideration and really is the heart of the applicant's application. A determination of this issue in her favour would mean that most, if not all, of the reliefs sought could be granted. The submissions of the parties invite an interpretation of the CCJ decision in **Ali**.

[39] The applicant hinges her objection to O 60 primarily on the unconstitutionality of s 22 which has just been addressed. The applicant also submits that the CCJ decision, more

particularly at paras 37, 45 and 52 lend to the view that the apex court nullified O 60. The affidavit of and submissions on behalf of the applicant, the CEO and the AG in relation to this issue are rather nuanced. This is what the applicant stated in her affidavit:

> "48. That I have been further advised by my Attorney-at-Law and truly believe that Recital 8 is **in tension with** Articles 177 and 163 of the Constitution as construed by the CCJ and as such is rendered invalid in accordance with the opinion expressed by the Court in paragraph 52 of its Judgement [sic]. Further, The Order as a whole conflicts with the Representation of the People Act.
>
> 49. That I have been advised by my Attorney-at-Law and truly believe that the validation process described by the Court in paragraphs 37 and 45, inter alia, of its Judgement [sic] is reflected in the process conducted during the counting of the ballots by Returning Officers immediately after the March 2, 2020 Election. On that occasion the validation exercise was conducted **in the presence of, inter alia, the duly appointed candidates and counting agents of contesting parties**. My belief is fortified by the reference in Paragraph 37 of the Judgement [sic] to Returning Officers as the sole basis for votes to be counted under the Representation of the People Act. Returning Officers were engaged in the March count only and not in the National Recount. (Emphasis the applicant's.)

[40] The paragraphs of the CCJ judgment referenced state as follows:

> "[37] The Presidential candidate on the list for which more votes have been cast than any other list is deemed to be elected as President, and the Chairman of GECOM must so declare. Both the allocation of seats in the National Assembly and the identification of the successful Presidential candidate are determined on the sole basis of votes counted and information furnished by returning officers under the Representation of the People Act.
>
> ...
>
> [45] Validity in this context means, and could only mean, those votes that, *ex facie*, are valid. The determination of such validity is a transparent exercise that weeds out of the process, for example, spoilt or rejected ballots. This is an exercise conducted in the presence of, *inter alia*, the duly appointed candidates and counting agents of contesting parties. It is after such invalid votes are weeded out that the remaining "valid votes" count towards a determination of not only the members of the National Assembly but, incidentally as well, the various listed Presidential candidates. If the integrity of a ballot, or the manner in which a vote

was procured, is questioned beyond this validation exercise, say because of some fundamental irregularity such as those alleged by Mr Harmon, then that would be a matter that ***must*** be pursued through Article 163 after the elections have been concluded.

...

[52] The Court also notes that an Order issued by GECOM in any particular context can never determine how the Constitution is to be interpreted. It is a matter of elementary constitutional law that if ordinary legislation is in tension with the Constitution, then the courts must give precedence to the words of the Constitution and not the other way around. With respect, the notion that Order 60 could either impact interpretation of the Constitution or create a new election regime at variance with the plain words of the Constitution is constitutionally unacceptable."

[41] Recital 8 of O 60 states:

"AND WHEREAS the Guyana Elections Commission, in exercise of the authority vested in it under Article 162 of the Constitution and pursuant to Section 22 of the Elections Laws (Amendment) Act, No. 15 of 2000, seeks to remove difficulties connected with the application of the Representation of the People Act, Chapter 1:03, in implementing its decisions related to the conduct of the aforementioned recount of all ballots cast at the said elections, including the reconciliation of the ballots issued with the ballots cast at the said elections, including the reconciliation of the ballots issued with the ballots cast, destroyed, spoiled, stamped, and as deemed necessary, their counterfoils/stubs; authenticity of the ballots and the number of voters listed and crossed out as having voted; the number of votes cast without ID cards; the number of proxies issued and the number utilized; statistical anomalies; occurrences recorded in the Poll Book".

[42] It is submitted on behalf of the CEO, that even if s 22 is constitutional, O 60, as subsidiary legislation overreaches as it gives GECOM power to recount votes that have already been declared final pursuant to s 84 of the RPA. It is urged that GECOM cannot, by subsidiary legislation such as O 60, give itself the power to resolve elections disputes which are for an election petition. In this regard, GECOM arrogated to itself the authority of an election court by invalidating the declarations. Therefore, O 60 is unlawful.

[43] Reliance was placed on para [52] quoted above, as well as para [46] of the CCJ decision in **Ali** which states:

> "[46] At the point in the electoral process where Article 177(2)(b) is reached, there is no further need to reference "valid votes" because, subject to Article 163 (which is triggered by election petition after the election), the relevant validation process has already been completed. It was therefore unnecessary for the Court of Appeal majority to qualify "votes" in Article 177(2)(b) by inserting before it the adjective "valid" and, in any event, they were wrong to do so. Article 177(2)(b) rightly only needed to reference "more votes" and there was no basis for the Court of Appeal to assume jurisdiction to interpret that provision. It is clear that, under the legal infrastructure governing the electoral process, unless and until an election court decides otherwise, the votes already counted as valid votes are incapable of being declared invalid by any person or authority. In this respect, the Guyanese electoral system is not very different from other such systems in other Commonwealth Caribbean countries."

[44] The AG submitted that O 60 created a new regime which is in tension with art 177(2)(b) and s 96 of the RPA which provides for the CEO to ascertain the elections result by calculating the total number of valid votes cast from the declarations of the returning officers.

[45] The Chairperson and the added respondents submitted that the CCJ did not invalidate O 60. It is contended that when read as a whole, the CCJ decision confirmed O 60. Further, it is submitted that the CA permitted the recount by its decision in **Moore**. It is also pointed out that the **David** case was argued both in the CA and on its appeal in **Ali** at the CCJ on the premise that O 60 is valid. It is submitted that the CCJ decision is replete with references to O 60 which are premised on its validity. It is stated that "the CCJ has specifically reviewed and approved not just the recount but the contemplation that the result of the recount will be binding and will be acted upon and therefore, any argument that somehow this recount cannot be used by GECOM, is specifically rejected by a Court which binds us."[2] As a consequence it is urged that this issue is also *res judicata* and cannot be enquired into again by this court.

[46] I have concluded that an holistic review of the CCJ judgment in **Ali** supports the contention for the Chairperson and the added respondents that this issue is indeed *res judicata*. Thus, the interpretation of the CCJ decision by the applicant, the CEO and the AG is hopelessly

[2] Written submissions on behalf of the eleventh added respondent.

flawed. The CCJ judgment lends to the ineluctable conclusion that the recount votes are *ex facie* valid. Hence the view expressed that any irregularities would have to be addressed via an election petition.

[47] Paragraph [37], which is relied on by the applicant, seeks to further explain what the CCJ described in para [36] as a hybrid presidential system. The Court explained that "an elector's single ballot serves to determine both election of members of the National Assembly and also election of the President." This explanation has to be linked to the consideration of the decision of Reynolds J in the CA as referred to in para [15] of the judgment that O 60 established a new elections regime in separate elections for members of the National Assembly on the one hand and, on the other hand, the election of the person deemed to be President. Paragraph [37] is clearly linked to a finding that this aspect of the decision of Reynolds J was not correct.

[48] Significantly, para [37] cannot be read in isolation. This is so because immediately thereafter in paras [38] and [39] the CCJ explain O 60 in detail, commencing with the opening statement that "Order 60 relates only to the Elections held on 2 March 2020." Importantly, the Court went onto highlight that "It was specifically introduced to cater for the various disputes and contentions that arose after polling day. The intention was to provide an open, transparent, and accountable recount of all the votes cast in those elections. The purpose was to assuage the contestations among the various parties, determine 'a final credible count', and remove certain difficulties or fill certain gaps in connection with the application of the provisions of the Representation of the People Act."[3]

[49] After noting that the "CEO was to supervise the recount process",[4] and that "the aim at transparency included a variety of measures"[5], in outlining the procedures for the recount as provided for in O 60 the CCJ emphasized that "Order 60 carefully set out how the process should unfold."[6] The CCJ further highlighted the following:

> "[39] ... The tabulation of the Statements of Recount was to be done at a central tabulation centre in an openly transparent manner. Once all the Statements of Recount were tabulated, the supervisor for tabulation was to ascertain and verify the entries therein and calculate totals, again in the presence of various personnel. This ascertained and verified matrix was to be signed by the District Coordinator for the District and the

[3] Para 38 of the judgment.
[4] Para [39] of the judgment.
[5] Ibid.
[6] Ibid.

signed matrix was to be transmitted to the CEO whose responsibility it was to tabulate the matrices of the ten electoral districts and submit to the Commission a report together with a summary of observation reports for each District. GECOM would deliberate on this report and then determine whether it would request the CEO to use the data compiled as the basis for the submission of a report under section 96 of the Representation of the People Act."

[50] It is in this context that paras [45] and [46] of the CCJ judgment have to be read.

[51] Therefore, the applicant's view that the letters from the Chairperson to the CEO are invalid because they require him to produce a report based on the valid votes of the recount which conflicts with the CCJ's explanation of valid votes in para 45, has no merit. Indeed, in my view, this claim is another way of putting the claim made by Ms. David which is recounted at para 14 of the CCJ judgment that "the Chairperson's 16 June directive to the CEO (who by Section 18 of the Elections Laws (Amendment) Act, 2000 is mandated to be subject to the direction and control of the Commission) required the CEO to commit an illegality." This is in the context that the June 16, 2020 letter as quoted at para [8] of the judgment also requested the CEO to produce an art 177(2)(b) and s 96 report based on the results of the recount.

[52] In all this, the CCJ clearly considered the allegations made by Mr. Harmon, an election agent for the APNU/AFC as regards irregularities, voter impersonation and fraud and noted the concerns expressed by the CEO, commenting that he "took it upon himself" to present revised totals.[7] I consider that this prompted the Court to conclude at paras [40] and [41] that:

> "[40] The exclusive jurisdiction of the High Court, through Article 163, to determine, among other matters, any question in relation to whether an election has been lawfully conducted or the result affected by any unlawful act or omission was naturally unaffected by Order 60. …
>
> [41] The jurisdiction conferred by Article 163 is capable of addressing the allegations of irregularities complained of by Mr. Harmon and alluded to by the CEO. The Chairperson of GECOM was therefore perfectly entitled and right to take the position that these allegations, if pursued, should be addressed by an election petition filed in the High Court as contemplated by Article 163. … ."

[7] Para [7] of the judgment.

[53] Therefore, far from nullifying O 60 and the recount process, in my view the CCJ explicitly endorsed it. It is clear from the above quoted part of para [39] that the Court was stating how the CEO was to conduct the tabulation, how he was to prepare his report for transmission to GECOM for its deliberation, and importantly that such report would "determine whether it would request the CEO to use the data compiled as the basis for the submission of a report under section 96 of the Representation of the People Act."

[54] As regards para [52], the CCJ in my view was simply saying that as subsidiary legislation, O 60 could not be used to interpret the Constitution as the CA had ruled; and that where there was tension or possible conflict between the subsidiary legislation and the Constitution, the latter would inform an interpretation of the former and not vice versa. The CCJ re-emphasized that O 60 did not and could not create a new election regime. This was a clear reference to its finding as regards the decision of Reynolds J. The Court did not, in explaining how any tension between the Constitution and subsidiary legislation should be treated, negate or nullify O 60 either expressly or impliedly.

[55] And there is another reason why the applicant's contentions in relation to the recount cannot be upheld. In **Moore**, the CA clearly stated that this would be an issue for a petition. The Court concluded thus in paras [85] and [86] in relation to the recount:

> "[85] The evidence before the High Court, as outlined, indicated that there were matters which were being addressed by GECOM which related to the execution of its functions under Article 177 and section 99. Whether the time had come to proceed under article 177 and section 99 and the decision whether to hold a recount or not were matters that were central to the elections and fell squarely within the domain of GECOM to determine as part of its management of the elections. The functions performed in relation to those responsibilities would be shielded by section 140 (1).
> [86] Based on the evidence before the High Court on Affidavits, the High Court was not equipped to determine conflicts on the issues being addressed by GECOM or to find, at that stage, that there was unlawful non-compliance with Article 177 and section 99. This therefore was not a fit case for the exercise of the Court's supervisory jurisdiction and for mandatory orders to issue against the GECOM respondents."

[56] And at para [88] it was stated that "whether the proposed recount is lawful are matters which would fall for determination under article 163 of the Constitution." The fact that the CA referred to the recount as proposed at the time does not negate from their decision as to what was

to happen if one were dissatisfied with the recount. The completion of the recount cannot change this holding of the Court. The CA had before it the issue of the unconstitutionality of s 22 and the recount. The CA in determining that it was "in a position to exercise jurisdiction in its own right and to make orders it considers appropriate to dispose of the appeal"[8] did not grant the injunctions sought to prevent the recount. In effect, the CA permitted the recount to proceed with the caution that it must be a GECOM controlled process.

[57] Then at para [89] in **Moore** the CA went on to say that "An election petition which has the features of a trial according to the procedures set out in the National Assembly (Validity of Elections) Act and Rules would be the place for controversies central to the elections to be resolved by the High Court by way of evidence and cross examination of witnesses. In that process the Court can also consider constitutional questions as part of its determination of any dispute before it."

[58] The evidence in this case at bar, as does the evidence as it appears from the judgment in **Moore**, reveals that there were and still are matters to be addressed by GECOM which relate to the execution of its functions under art 177 and s 99 of the RPA. The evidence, as in **Moore**, also reveals conflicts on issues that have to be addressed by GECOM. Hence the conclusions of the CA at paras [85] and [86] of their judgment as confirmed in their conclusion at para [109].

[59] The affidavits in the case at bar clearly demonstrate that there are still matters in controversy.

[60] Thus, both courts, by which I am bound, have pronounced on this issue. This court, therefore, cannot rule that O 60 is invalidated.

[61] This issue is therefore *res judicata.*

(4) Whether the declarations of the Returning Officers for the Ten Electoral Districts made pursuant to s 84 of the Representation of the People Act, Chapter 1:03 should be acted on or be set aside

[62] The applicant had this to say in her affidavit in support of her contention that there must be reliance on the declarations of the returning officers:

> 50. That I have been advised by my Attorney-at-Law and truly believe that the count of votes and information transmitted by the ten (10) Returning Officers of

[8] Para 37 of the Moore judgment.

the Electoral Districts are fully compliant with the Law as declared by the CCJ in the Ali/Jagdeo v David Appeal.

51. That further, I have been advised by my Attorney-at-Law and truly believe that the count of votes and information transmitted by the ten (10) Returning Officers of the Electoral Districts are still valid and subsisting, and though held in abeyance in the purported National Recount, were never invalidated or set aside by any Court of competent jurisdiction.

...

54. That I have been advised by my Attorney-at-Law and truly believe when the Chairman seeks to invoke the authority of Section 18 of the Election Laws (Amendment) Act her reliance on such authority is misplaced. While the Chief Election Officer is generally subject to the control and direction of the Commission such control does not extend to his constitutionally mandated duty as described in Article 177(2)(b) and Section 96 of the Representation of the People Act. Any other construction would make nonsense of the constitutional and statutory provisions which are premised on independent advice from the Chief Election Officer. Further, and in any event as the Court noted in paragraph 52 of its judgement [sic] in the Ali/Jagdeo v David case, if Section 18 is **in tension with** Article 177(2)(b) of the Constitution, Section 18 must give way." (Emphasis the applicant's.)

[63] In light of her affidavit, it is submitted that the declarations of the returning officers for the ten Electoral Districts having been submitted pursuant to s 84, they cannot be discarded and replaced. Thus, O 60 could not permit new declarations; if it did, this was unconstitutional as this order encroached on the jurisdiction of an election court under art 163. The Order also breached the RPA because the returning officers, as statutory officers, were excluded from the recount process. The latter assertion is an evidential issue that may be in controversy and I do not rely on it.

[64] It is further advanced that O 60 could not have retrospective effect so as to nullify the s 84 declarations made by the returning officers. The submissions continued that the returning officers were mandated to issue their declarations pursuant to s 84 of the RPA. Then the CEO was to consider them and prepare a report for GECOM pursuant to s 96 of the said Act. These submissions were supported by those made on behalf of the CEO.

[65] It is submitted that O 60 as held by the CCJ in **Ali**, could not institute a new legal regime for the declaration of the votes. Thus, the RPA had to be complied with as O 60 could not

replace the requirements of this Act. O 60 established a new regime for the determination of the validity of the votes by persons not authorized to do so. It was submitted on behalf of the CEO that O 60 amended s 84 by replacing the declarations with the recount as the source of the result.

[66] The AG submitted that the nullification of the ten declarations can only be done by way of election petition. He relied on para [46] (outlined above [43]) of the CCJ decision in **Ali**.

[67] Article 177 (2) (b) states"

> "177. (2) Where -
>
> ...
>
> (b) there are two or more Presidential candidates, if more votes are cast in favour of the list in which a person is designated as Presidential candidate than in favour of any other list,
>
> that Presidential candidate shall be deemed to be elected as President and shall be so declared by the Chairman of the Elections Commission acting only in accordance with the advice of the Chief Election Officer, after such advice has been tendered to the Elections Commission at a duly summoned meeting."

[68] Section 84 and 96 of the RPA as relevant provide:

> " 84. (1) As soon as practicable after the receipt of all the ballot boxes and the envelopes and packets delivered to him in pursuance of section 83(10), the Returning Officer shall, in the presence of such of the persons entitled under section 86(1) to be present, ascertain the total votes cast in favour of each list in the district by adding up the votes recorded in favour of the list in accordance with the Statements of Poll, and thereupon publicly declare the votes recorded for each list of candidates.
>
> ...
>
> 96. (1) The Chief Election Officer shall, after calculating the total number of valid votes of electors which have been cast for each list of candidates, on the basis of the votes counted and the information furnished by returning officers under section 84 (11), ascertain the result of the election in accordance with sections 97 and 98.
>
> (2) The Chief Election Officer shall prepare a report manually and in electronic form in terms of section 99 for the benefit of the Commission, which shall be the

basis for the Commission to declare and publish the election results under section 99."

[69] My conclusions as regards the interpretation of the CCJ decision regarding O 60, necessarily mean that the answer to this issue is that the declarations of the returning officers as made pursuant to s 84 have been overtaken by events whereby GECOM, in its wisdom, considered that there were difficulties that had to be addressed in order to produce what is termed in O 60 as a credible count. In this regard, difficulties having arisen subsequent to the declarations made, O 60 was meant to address them, and in this regard cannot be said to have retrospective effect. As noted by the CA at para [109] of **Moore**, it is "within GECOM's functions to resolve those controversies as part of its responsibilities to deliver results of the elections."

[70] And as noted earlier (para [48]), the CCJ stated at para [38] of **Ali** that the intention of O 60 "was to provide an open, transparent, and accountable recount of all the votes cast in those elections."

[71] It is in this context that s 18 of the ELA has to be read. Section 18 provides:

> "18. ***The Chief Election Officer*** and the Commissioner of Registration ***shall notwithstanding anything in any written law, be subject to the direction and control of the Commission***." (Emphasis mine.)

[72] The fact remains that the circumstances surrounding the declaration of results of the March 2, 2020 elections are contextual. As just concluded, given the decisions of the CA and the CCJ, the recount cannot be considered to be invalidated, at least not at this point in time. In this context, the s 84 (1) declarations can no longer be considered useful. Hence, while the CEO may be expected to act independently, he cannot be a "lone ranger" so to speak. I agree with the submission that art 177(2)(b) can be construed to mean that GECOM is not to act on the advice of any person or body external to the Commission.

[73] I do not agree with the submission that the CEO has a constitutional mandate under art 177. It is the Chairperson and GECOM that have the constitutional mandate. The CEO is a functionary of GECOM pursuant to art 161A and ss 2 and 7 of the RPA. Section 18, which is repeated in O 60, merely confirms this and the obvious for the avoidance of doubt – that the

CEO cannot act on his own. In this regard, he has certain duties as regards tabulating results as provided for in s 96 of the RPA.

[74] Section 18 is therefore not unconstitutional as being in conflict or in tension with art 177.

[75] And as noted earlier, the CCJ also stated at para [41] that any allegations as alluded to by the CEO can be addressed by way of election petition.

[76] If it is the considered opinion of the CEO that in the face of O 60 he can produce a report based on s 84 declarations, then one would expect that he must be guided accordingly by GECOM. This, the evidence discloses the Chairperson has sought to do via the letters transmitted to the CEO. Thus, as determined by the CCJ, unless overturned by a Court in an election petition, the only data that could be used for the declaration of the results of the elections would have to be the recount results or data.

[77] For the reasons outlined, the ten declarations cannot be resurrected at this point in time. In this regard, there can no longer be an impasse between the Chairperson and the CEO as to the effect of art 177 (2)(b) and s 96. For the avoidance of doubt as stated in s 18, the CEO is subject to the direction and control of the Commission. In this regard, I refer to para [14] of the CCJ judgment where it is noted that by s 18 the CEO is "mandated to be subject to the direction and control of the Commission."

(5) Whether these issues are *res judicata* given the decisions of the Court of Appeal in Moore v GECOM and Others Civil Appeal 38 of 2020, and of the Caribbean Court of Justice in Ali & Jadgeo v David & Ors, GY Civ Appeal 41 of 2020.

[78] In light of the discussion above, the decisions of the CA and the CCJ have guided me in answering the issues that have arisen as a consequence of the 28 claims for relief sought by the applicant. Apart from s 22 which was specifically cited, there are a number of the reliefs claimed in this application which were claimed in or are mirrored in the claims in **Moore**, and which I consider cannot be re-litigated. Some of these were highlighted in the submissions for the tenth respondent.

[79] It can be seen that the reliefs sought at (v) and (vi) in this application replicate those in paras (iv) and (vi) of **Moore**; para (xix) is exactly the same as (vii); para (xx) is mirrored in para (ix); para (xxi) is seen in para (x); and para (xxiii) is similar to para (xi). Indeed, although

couched in different terms, this application for the most part mirrors that in **Moore**[9] and in effect, is similar to that of Ms. David in the **Ali** case.

[80] *Res judicata* is a legal principle that speaks to ensuring finality in litigation. As explained in *Halsbury's Laws (5th Edn), Vol. 12, Civil Procedure*, para 1168 *et seq*, the doctrine of *res judicata* applies where a matter has been adjudicated on by a competent court so that the matter cannot be re-litigated. The principle can take different forms: 'estoppel by record',[10] cause of action estoppel,[11] and issue estoppel.[12]

[81] Importantly, as submitted by the Chairperson and added respondents, one has to consider that this application and that in **Moore**, as well as **Holladar** before them, are public interest litigation. Thus, such cases do not fall into the traditional criteria required to determine whether *res judicata* applies. The traditional formulation was confirmed by the CCJ in **Garraway v Williams [2011] CCJ 12 (AJ)** as follows:

> "[14] As is well known, the principle of *res judicata* is intended to give finality to judicial decisions. Literally, the term means that a matter has already been finally settled by judicial decision and is not subject to further appeal. In order for the doctrine to be applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties. Once satisfied the principle bars the same parties from litigating on the same claim or any other claim arising from the same transaction or subject-matter that was or could have been raised in the first suit. Thus is precluded continued litigation between the same parties in respect of essentially the same cause of action. The concomitant waste of judicial resources is avoided." (Emphasis mine.)

[82] Public interest litigation affects the public at large. While it has to be instituted by a person, the litigation should not be considered to be *in personam* or between or determining the rights of the parties thereto. It should be considered to be *in rem*, that is leading to a determination of "the status of a person or thing or the disposition of a thing, as distinct from a

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[9] See paras [38] – [40] and [43] of the CA judgment in Moore.
[10] *Halsbury's Laws (5th Edn), Vol. 12, Civil Procedure*, para 1168.
[11] Ibid. para 1174.

[12] Ibid. para 1179.

particular interest in it of a party to the litigation."[13] And importantly, as highlighted in the submissions, the CEO was a party in **Moore**, and in **Ali** and is a party in this case. Whether he participated in the proceedings or not, he is bound by the decisions in **Moore** and **Ali**.

[83] Also in *Halsbury's Laws (5th Edn), Vol. 12, Civil Procedure* at para 1182, the extent to which issue *estoppel* can apply to public law proceedings is discussed, though the context of the learning suggests its application may be limited. In my view, and I so hold, where there is public interest litigation such as this application, baring a new issue arising, or one that can be distinguished, or a claim that the judgment was improperly obtained e.g. through a misrepresentation of facts or law, or the perpetration of a fraud on the court, an applicant is bound by any decision on an issue that has been raised and adjudicated on previously. There must be finality to judicial decisions. Myriad persons cannot be permitted to engage the court with multiple applications regarding the same issue which has been decided, and shield behind the claim that they were not a party to the previous proceedings. To so permit would be to waste precious judicial time and resources. In short order – this cannot be allowed.

[84] **Ram v Chief Election Officer et al FDA 1151/2019** was a public interest litigation case which required an interpretation of the CCJ decision in the consolidated appeals of **Ram v AG & Ors** (No. GYCV2019/009), **Jagdeo v AG & Ors** (No. GYCV2019/010) and **Persaud v Reid & Ors** (No. GYCV2019/011). I applied the principle of issue *estoppel* in holding that the CCJ did not make an order that referred to, or included a date or period for the holding of elections following the successful no confidence motion. As such, apart from applying the doctrine of *stare decisis*, I concluded that *res judicata* applied to the claim by Mr. Ram and he was bound by the decision of the CCJ in this regard.

[85] The reliefs sought are all based on issues that have been litigated previously and determined by Courts that take precedence over this High Court. Apart from *res judicata*, under the common law system, applying the principle of *stare decisis*, I am bound to follow the decisions of the CA and ultimately the apex court, the CCJ.

[86] The application is accordingly dismissed.

[87] I have been lenient in the award of costs in what I call the national interest matters since I have considered them important for the development of our jurisprudence, more especially our constitutional jurisprudence. However, on this occasion, having found that the issues that have

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[13] *Halsbury's Laws (5th Edn), Vol. 12, Civil Procedure*, para 1159, See also 1160

led to a determination of this case have been decided by superior courts, the issue of costs has to be addressed differently. Therefore, I will invite submissions on costs to be filed and served by all parties by email on or before July 24, 2020 for issuance of a costs order thereafter.

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Roxane George
Chief Justice (ag)
July 20, 2020