

IN THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2020

BETWEEN:

MISENGA JONES

Appellant

- and -



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

Respondents

CORAM:

Hon. Mm'e Justice Dawn Gregory - (Justice of Appeal)
Hon. Mr. Justice Rishi Persaud - (Justice of Appeal)
Hon. Mm'e Justice Priya Sewnarine-Beharry - (Additional Judge)

APPEARANCES:

Mr. R. Forde S.C with Mr. Jeremie S.C and Mr. R. Keller instructed by Mr. Mr. M. Robertson for the Appellant

No appearance by or for the First Named Respondent

Ms. K. Kyte-Thomas for the Second Named Respondent

Mr. N. Boston S.C for the Third Named Respondent [Not actively participating in this Appeal]

Mr. M. Edwards led by Mr. B. Williams SC in person for the Fourth Named Respondent
Mr. K. Khan with Mr. M. Khan and Mr. K. Loakman for the Fifth and Sixth Named Respondents
Mr. D. Mendes SC with Mr. M. Nandlall
Mr. D. Kissoon and Mr. Hachett for the Seventh and Eighth Named Respondent
Mr. K. Ramkarran for the Ninth Named Respondent
Mr. H. Ramkarran SC for the Tenth Named Respondent
Mr. T. Jonas for the Eleventh Named Respondent
Ms. J. Ali SC with Mr. S. Datadin
Mr. S. Singh and Mr. D. Ramgaya for the Twelfth Named Respondent

Dates:

22nd July 2020
25th July, 2020
30th July, 2020

DECISION - Gregory JA

INTRODUCTION

- [1] This case stems from an impasse at the Guyana Elections Commission (GECOM). GECOM through its Chairperson, has requested the Chief Elections Officer (CEO) to submit his report upon which basis the declaration of the results of the national and regional elections is to be made in accordance with Art 177 (2) (b) of the Constitution and sec 99 of the Representation of the People Act Cap 1:03 (RPA). The CEO has submitted a report other than the report which he was instructed to prepare by the Chairperson.
- [2] So far as is material, Article 177 (2)(b) provides that the declaration of the results of the election is made by the Chairperson of GECOM acting only in accordance with the advice of the CEO after such advice has been tendered to GECOM at a duly summoned meeting. Section 99 of the RPA provides for publication of the results of the election and, among other things, the allocation of seats in the National Assembly.

- [3] In June, at the conclusion of the national recount of votes, GECOM decided to use the results as shown in the Statements of Recount to declare the results of the elections held on 2nd March 2020. Following that decision, the Chairperson wrote to the CEO requesting him to prepare his report. There followed an application to this Court by Eslyn David (Eslyn David v Chief Elections Officer and others Cvl Apl No 41/2020) in which the applicant complained that GECOM had failed to act in accordance with Order 60 of 2020 under which the recount had been held. After this Court's decision the CEO submitted a report on 23rd June which was deemed null and void by the Caribbean Court of Justice (CCJ) in the appeal Ali and Jagdeo v Eslyn David and Others [2020] CCJ 10 (AJ) GY, (Ali and Jagdeo).
- [4] On 10th July, after an exchange of letters between the Chairperson and the CEO, the CEO submitted a report based on original reports of the ten District Returning Officers submitted in March 2020. To date, the CEO has not submitted the report requested by the Chairperson. No declaration of the results of the election has been made by GECOM under Article 177(2)(b) of the Constitution or sec 99 of the RPA.
- [5] The national and regional elections of 2nd March 2020 have spawned four Court actions. Apart from the two cases, Eslyn David and the current proceedings, which were brought after GECOM's decision to use the results of recount to declare the winner of the election, two earlier proceedings engaged the attention of the Courts.
- [6] In March, Reaz Holladar obtained orders against the Returning Officer for Region 4 for non-compliance with the statutory procedures for the declaration of results in that District (Reaz Holladar v Returning Officer Clairmont Mingo and Others 2020 HC-DEM-CIV- FDA- 360) (Holladar). The controversies which arose at that time were not resolved and as was undertaken by the Chairperson to the High Court, in contempt proceedings then extant, those controversies led to the decision by GECOM to hold a national recount.

- [7] Uilita Moore then approached the High Court to challenge the proposed recount (Uilita Grace Moore v Guyana Elections Commission and Others Cvl Apl No 38 of 2020) (Moore). That matter was appealed to the Court of Appeal. In that case and in the course of all four proceedings, several issues were adjudicated on and the parties in the current case have all drawn on these cases.
- [8] It is contended by the respondents, with the exception of the Attorney General, that the current proceedings attempt to re-litigate issues which have already been settled in the earlier proceedings, more particularly, by the CCJ in Ali and Jagdeo and by this Court in Moore. On the other hand, the appellant and the Attorney General rely on the decision of the CCJ in Ali and Jagdeo as the basis of a new challenge to Order 60 of 2020 and the recount process which it regulated.

THE CLAIMS MADE IN THE FIXED DATE APPLICATION TO THE HIGH COURT

- [9] The claims made in the Fixed Date Application (FDA) in the instant case are set out in full:
- 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 tendered 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 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

THE DECISION OF THE CHIEF JUSTICE

[10] The Chief Justice found that the High Court had a narrow supervisory jurisdiction which could be invoked in the circumstances of this case where there is an impasse regarding the decision-making of GECOM to complete the election process, and where it was necessary to advance the process.

[11] The Court was of the view that the applicant was really seeking the interpretation of the Constitution for a determination of whether the Chairperson and the CEO were acting lawfully in the context of the relevant provisions.

[12] Applying decisions of Holladar and Moore the High Court was held to have jurisdiction to ensure the correct and smooth operation of the progress of the election process.

[13] As to the following claims in the Fixed Date Application it was found that:

1. Challenges to the constitutionality of section 22 of the Election Laws (Amendment) Act had been definitively resolved by the Court of Appeal in Moore to be a matter for determination by the High Court under Art 163 of the Constitution. As such, this issue was *res judicata*.
2. As to the challenge to Order 60, in Ali and Jagdeo the CCJ had not nullified the Order and the recount process which had been carried out under it. Instead, the Chief Justice found that in that case the CCJ had explicitly endorsed Order 60 and the recount process. Additionally, the Chief Justice found that the Court of Appeal in Moore had held that the lawfulness of the recount was an issue to be determined in an election petition under Article 163 of the Constitution. Hence, it could not be concluded at this time that Order 60 and the recount held under it were invalid. These issues of the constitutionality of Order 60 and the recount were also *res judicata*.
3. Sec 18 of the Elections Laws Amendment (Act) (ELA) provides:

“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.”
4. The Chief Justice found that it was GECOM and the Chairperson who had a constitutional mandate and not the CEO who is a functionary of GECOM pursuant to Article 161A of the Constitution and sections 2 and 7 of the RPA. The Court agreed 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. Section 18 of the ELA was held not to be unconstitutional nor in conflict with Art 177.
5. The Court noted that the reports of the ten Returning Officers could not be resurrected to form the basis of the CEO’s report

to the Chairperson for the declaration of the results of the election.

- [14] In dismissing the application, the High Court in effect endorsed the position of GECOM and the Chairperson that it was within GECOM's powers to decide that the recount and the results therefrom should stand as the basis for the final declaration of the results of the election.

THE APPEAL AND CROSS APPEALS

- [15] The appellant has appealed against the decision of the High Court. Cross appeals have also been filed by the seventh and eighth respondents jointly and the fourth respondent, the Attorney General. The combined issues raised in the main appeal and two cross appeals complain about all of the main findings made by the High Court.
- [16] The grounds of appeal of the appellant and of the Attorney General focus primarily on the findings on the justiciability of section 22 of the ELA which gave birth to the recount Order 60 of 2020. They also challenge the findings on the authority of the CEO in the performance of his functions under section 18 and the presentation of his advice under Article 177 (2)(b). They contend that the High Court ought to have found the CEO's report of 10th July, 2020 which is based on the report of the ten District Returning Officers, to be the report required under Article 96 (1) of the RPA.
- [17] As such these parties say that the Court ought to have found that the declaration of the results of the election must be based on this report and that GECOM ought not to request the results from the recount. Sec 96 (1) of the RPA provides for ascertainment of the results by the CEO based on the votes counted and the information furnished by Returning Officers. Section 96(2) provides for the presentation by the CEO of his report for the benefit of the Commission and for that report to be the basis for GECOM to declare and publish the results of the election.

- [18] The respondents other than the Attorney General focus on the issues of *res judicata* and judicial precedent since they argue that the issues raised in this case have been addressed and settled in previous cases, which decisions were binding on the High Court.
- [19] The seventh and eighth respondents moreso complain that the Chief Justice erred in finding that the High Court had jurisdiction to determine any question beyond the issue as to whether the Chief Election Officer was lawfully bound to comply with the directions of the Guyana Elections Commission and/or its Chairperson, pursuant to section 18 of the ELA.
- [20] Alternatively, they contend that if the High Court had jurisdiction to entertain the matters raised in the FDA without the limitation contended, that the Court erred in its treatment of evidence before it.

ANALYSIS OF THE ISSUES IN THE APPEAL

Res Judicata

- [21] It is contended that many of the claims in the FDA raise issues which have been already adjudicated on in Moore as touching upon the authority of GECOM in exercising its functions under Articles 62 and 162 of the Constitution and its authority to decide when the time has come to proceed to make a declaration under Article 177 (2)(b) and section 99 of the RPA. It was also discussed in Moore that section 140(1) operated to shield these functions from inquiry by any Court during the election period.
- [22] In Ali and Jagdeo the CCJ stated at para 46 of its judgment:

“...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.”

- [23] I agree that the findings of the Courts in Ali and Jagdeo and Moore on the issues which are outside of the jurisdiction of the Court at this time, that is during the election process, are *res judicata*.
- [24] The doctrine of *res judicata* is a fundamental doctrine of all courts that there must be an end to litigation. It is often treated as a branch of estoppel (Halsbury's Laws of England Vol 16 4th edition para 974).
- [25] Mr. Kamal Ramkarran for the ninth respondent submitted that regardless of the species of *res judicata* or estoppel that applies, it is intended to prevent and bring an end to re-litigation of identical claims. He referenced Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 at 185 where it was stated that the common purpose behind these concepts, whether of substantive or procedural law, was of limiting abusive and duplicative litigation.
- [26] The doctrine of *res judicata* also applies to public interest litigation.
- [27] In State of Karnataka and another v All India Organizations and Ors, AIR 2006 SC 1846 the Court noted that in public interest litigation the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bona fide the judgment in previous public interest litigation would be a "judgment in rem". Consequently such a judgment would bind the public at large and would act as a bar to any member of the public from coming to Court and raising any connected issue which has been raised in previous litigation.
- [28] The Chief Justice pointed out the reliefs which have been mirrored in the three cases, the current case, Ali and Jagdeo and Moore. Indeed, there is duplication in the issues brought in Moore, Ali and Jagdeo and this application.
- [29] Section 140 of the RPA states:
- (1) Except to the extent that jurisdiction...has been conferred, and the exercise thereof is required, by the Constitution or any law made under Article 163 thereof (which provides for the determination by the Supreme

Court of Judicature of questions as to membership of the National Assembly and elections thereto)... 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.

- (2) No evidence of any deliberations of the Elections Commission or communications between members of the Commission regarding its business shall be admissible in any Court.

[30] Article 62 of the Constitution states that:

“Elections shall be independently supervised by the Elections Commission in accordance with the provisions of Article 162.”

[31] Article 162 (1) is to the effect that:

“The Elections Commission shall have such functions connected with or relating to... the conduct of elections as are conferred upon it by this Constitution or subject thereto, any Act of Parliament; and subject to the provisions of this Constitution, the Commission -

- (a) shall exercise general direction and supervision over the administrative conduct of all elections of members of the National Assembly; and**
(b) shall issue such instructions and take such action as appear to it necessary or expedient to ensure impartiality, fairness and compliance with the provisions of this Constitution or any Act of Parliament on the part of persons exercising powers or performing duties connected with or relating to the matters aforesaid.

[32] In Moore, the primary issue was if a recount should be held or instead, whether the time had come to proceed to a declaration of the results under Article 177 (2) (b) and section 99 of the RPA. The further question was whether GECOM should be compelled to declare the results at that time.

[33] It was held that the decision whether to hold a recount or not was a matter that was central to the elections which fell within the domain of GECOM to determine as part of its management of the elections. The Court found that the functions performed or not performed in

relation to those responsibilities would be shielded from enquiry at that time by section 140(1) of the RPA.

- [34] The submission is therefore correct that this Court has determined that the High Court at that time had no jurisdiction to enquire into the lawfulness of the recount by virtue of section 140 (1) of the RPA.
- [35] Likewise, in the same case, the constitutionality of section 22 of the ELA came up for consideration as it was indicated that GECOM intended to use its powers under section 22 to enable the recount. At paragraphs 106 and 107 of Moore, the Court referenced Petrie and Other v Attorney General and Others (1968) 14 WIR 292 and Seecomar Singh and Another v Butler (1973) 21 WIR 34 in which the High Court had declined to examine the constitutionality of election related legislation during the election period, allocating such questions to an election petition. Moreover, this Court recognised 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. All these questions are therefore *res judicata*.
- [36] It was also considered in Moore that if, alternatively, GECOM unlawfully utilised its powers under section 22 or was about so to do, then this would be a question for determination at the hearing of an election petition.
- [37] It is contended by the appellant that there now exists “*a sufficient evidential basis ... for such a determination on this point*”. That evidential basis, she contends, is Order 60 of 2020 which was brought into being after the decision in Moore.
- [38] I do not accept this submission. Order 60 was created from the powers exercised under section 22 of the ELA and is an election related law. Further, the Order has already been implemented to conduct the recount. As an election law any question as to its constitutionality in form or content must be determined in an election petition in the same way as the constitutionality of section 22 itself. In

its judgment in Ali and Jagdeo the CCJ affirmed that Order 60 forms part of the electoral law in relation to elections held on 2nd March 2020.

[39] I conclude that most of the claims made in the FDA cannot now be raised as they have already been determined in previous litigation to be matters for determination under Art 163 of the Constitution. Those claims are as follows:

- i. Claims as to whether there was non-compliance with Article 177 (2) (b) of the Constitution by GECOM and the Chairperson whereby it was alleged that the Chairperson and GECOM had failed to act on the advice of the CEO and failed to declare the presidential candidate in accordance with the advice of the CEO.
- ii. Claims challenging the authority of GECOM and the Chairperson to decide whether the time had come to declare results pursuant to section 96 (1) of the Representation of the People Act and Art 177 (2) (b) of the Constitution.
- iii. Claims that the votes counted in the National Recount did not conform to the concept of valid votes and were generated by an unconstitutional process.
- iv. Claims challenging the constitutionality of section 22 of the Elections Law (Amendment) Act.
- v. Claims contending for the finality of the declarations made by the ten District Returning Officers and for these declarations to be the sole legal basis for the CEO's report pursuant to section 99 of the RPA and Art 177 of the Constitution.

Discussion of Remaining Issues

[40] Claims touching on the authority of the CEO to determine the basis of the CEO's report under section 96 of the RPA and claims challenging the lawfulness of the decision of GECOM and the Chairperson not to act on the advice of the CEO as contained in the

CEO's letter of 10 July, 2020 could be considered as falling within the supervisory jurisdiction of the High Court.

[41] The questions at the heart of the impasse in the unique circumstances of this case were (i) whether the CEO was lawfully bound to comply with the directions of GECOM and its Chairperson and (ii) whether GECOM was acting within its powers when the Chairperson directed the CEO as to the content of his report. The second question was a corollary of the first. Both fell within the jurisdiction of the Court to determine in resolving the impasse.

[42] At paras 24 and 25 of the Chief Justice's decision it is stated:

[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.

[43] I agree with the Chief Justice's finding that the High Court's supervisory jurisdiction could be exercised where there is evidence, as there is in this case, that the election process must be "smoothed" or in some way assisted.

[44] Local instances exist where the High Court intervened during the election period, outside of the jurisdiction exercised under Article 163 of the Constitution, to ensure that some aspect of the election process operated lawfully. For example, in Application by Aubrey Norton [1996-1998] GLR 373 there was affidavit evidence before the Court that the Chairperson of GECOM at that time was about to act without consulting or meeting with other members of the Commission prior to making a declaration of the final results of the election under Art 177. The High Court granted orders nisi of *certiorari* to quash the decision. It turned out that the orders were discharged under the provisions in Article 177 (6) which precluded any further enquiry after it was confirmed that the President had already been declared and sworn. Bernard CJ, as she then was, discussed the discretionary remedy of *certiorari* as follows:

“It was a form of judicial review whereby the acts of these courts, tribunal or public authorities could be quashed if it was found that they had acted outside of their mandate or unfairly even within their mandate or jurisdiction.” (p 378)

[45] Also in Joseph Hamilton v Guyana Elections Commission and Others No. 40-M of 2001 (unreported) and Holladar it was deposed in affidavits that there had been non-compliance with the procedures set out in section 84 (1) of the RPA. The High Court granted remedies in both cases. In Moore this Court held that the High Court had the jurisdiction to grant appropriate orders if it was satisfied that supervision of the recount might be at risk of compromise and if satisfied that GECOM was acting outside of its powers (See paras 97 and 98 of the majority decision of this Court in Moore).

[46] In these cases the jurisdiction invoked was separate from the jurisdiction conferred under Article 163 of the Constitution and was exercised when it was deemed necessary to protect the ongoing process.

- [47] In the instant case, the High Court examined section 18 of the ELA and Article 177 (2) (b) and made findings as to the roles to be performed and in particular as to the lines of authority between GECOM, the Chairperson and the CEO. In my view the Court was entitled to intervene in order to advance the process.
- [48] What was undertaken by the Chief Justice was, as I see it, more an analysis of roles than an interpretation of the Constitution in the strict sense as would be undertaken under Articles 163 (1) or 133 (1) (a) of the Constitution. Such an analysis was a proper exercise of the supervisory jurisdiction in the impasse which has occurred and I agree with the findings of the Court as to those roles and the exercise of authority between GECOM, the Chairperson and the CEO.
- [49] The seventh and eight respondents submitted that the High Court had no jurisdiction to enquire into any of the issues raised in the application except those concerning the role of the CEO under section 18 of the ELA.
- [50] Given the powers of GECOM in its management and supervision of the election to decide issues which are central to the election process without enquiry by any Court (section 140 of the RPA), the High Court's jurisdiction is indeed narrow at this time. While I accept that the supervisory jurisdiction is a narrow one during the election process, as I have discussed, I do not agree that in this case it was as limited as submitted by the seventh and eighth respondents.
- [51] However, I agree that interpretation of the Constitution, as is involved under Article 163, did not fall within the narrow jurisdiction of the High Court during the election period.
- [52] Under sections 83, 84 and 89 of the RPA, the processes are set out for the Returning Officers of all ten districts to receive information and data and to furnish their reports to the CEO. The CEO is the functionary who is allocated the responsibility of receiving those

reports, from those reports calculating the number of votes cast for each list of candidates and preparing his report under Sec 96.

[53] This would explain the provision in Art 177 (2) (b) that the Chairperson is to act only in accordance with advice of the CEO. Indeed, no other functionary receives the documents and data on which the calculation of the votes and the declaration of the final results are to be made. There is what appears to be a pyramid type of relationship in the collection from Presiding Officers around the country to the Returning Officers then to the CEO. This function would appear to include the CEO in person or his Office.

[54] Under the recount, where all the data was handled in one location under the supervision of the CEO, there should be no difficulty for the report of the tabulation to be prepared by the CEO as requested by the Chairperson.

[55] I have outlined the issues which have already been litigated and which are outside of the jurisdiction of this Court to determine in this application. On the remaining issue whether the Court has jurisdiction to smooth the impasse existing at GECOM, I believe that this jurisdiction existed and was correctly exercised. I am also of the view that the CEO as a functionary of GECOM is subject to its direction. He is required to prepare the report as requested by the Chairperson who under section 16 of the ELA is the voice of GECOM. Section 16 (1) states:

“All directions or instructions of the Commission, in exercise of the functions conferred on it by article 162 of the Constitution, this Act, the Representation of the People Act or the National Registration Act, shall, be issued orally or in writing through the Chairman of that Commission or any person authorized by him in writing in that behalf.”

CONCLUSION

[56] For the reasons discussed earlier, I would dismiss the main appeal and cross appeal of the fourth respondent.

[57] I would allow the appeal of the seventh and eight respondents in part, to the extent that it was not part of the High Court's jurisdiction in this case to interpret the Constitution.

[58] I hold that the supervisory jurisdiction was correctly exercised to advance the election process.

[59] The decision of the High Court is affirmed subject the finding on the limits of the Court's jurisdiction.

[60] The parties are to make submissions on the issue of costs within three (3) days. At the request of the Appellant and on the submissions put forward by Mr. Maxwell Edwards on behalf of the fourth respondent a stay of one day of the effect of the Court's order is granted.

Megony
.....
Dawn Gregory

Dated this 30th day of July, 2020



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

CIVIL APPEAL NO. 52 OF 2020

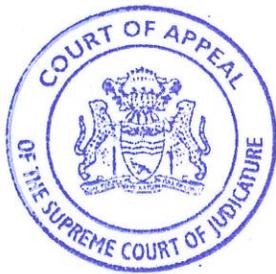
BETWEEN

MISENGA JONES

Appellant

-and-

1. THE GUYANA ELECTIONS COMMISSION
2. CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION
3. THE CHIEF ELECTION OFFICER
4. ATTORNEY GENERAL OF GUYANA
5. SHAZAM 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 and Justice Party
11. DANIEL JOSH KANHAI representing The New Movement
12. VISHNU BANDHU representing United Republican Party.



Respondents

BEFORE THEIR HONOURS:

Mme. D. Gregory	- Justice of Appeal
Mr. R. Persaud	- Justice of Appeal
Mme. P. Sewnarine-Beharry	- Additional Judge

APPEARANCES:

Mr. R. Forde S.C with Mr. Jeremy S.C and Mr. R. Keller instructed by Mr. M. Robertson for the Appellant
No appearance by or for the First Named Respondent
Ms. K. Kyte-Thomas for the Second Named Respondent
Mr. N. Boston S.C for the Third Named Respondent [Not actively participating in this Appeal]
Mr. M. Edwards led by Mr. B. Williams SC in person for the Fourth Named Respondent

Mr. K. Khan with Mr. M. Khan and Mr. K. Loakman for the Fifth and Sixth Named Respondents
Mr. D. Mendes SC with Mr. M. Nandlall
Mr. D. Kissoon and Mr. Hackett for the Seventh and Eighth Named Respondent
Mr. K. Ramkarran for the Ninth Named Respondent
Mr. H. Ramkarran SC for the Tenth Named Respondent
Mr. T. Jonas for the Eleventh Named Respondent
Ms. J. Ali SC with Mr. S. Datadin
Mr. S. Singh and Mr. D. Ramgaya for the Twelfth Named Respondent

Dates:

22nd July 2020

25th July, 2020

30th July, 2020

DECISION

[1] By way of a Fixed Date Application (2020 HC-DEM-CIV-FDA-568) the Applicant Misenga Jones approached the High Court 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

[2] Her application was supported by one Ganesh Mahipaul an accredited counting agent for APNU+AFC Coalition at the March 2nd National and Regional Elections. Those supporting affidavits are a matter of record and will not be recited. The Respondents countered. Their various affidavits form a part of the record and likewise will not be recited.

BACKGROUND

[3] A brief background to these proceedings is warranted if only for the purpose of context. As a result of the National and Regional Elections various bitter disputes and contentions have arisen essentially as it relates to the results that should be relied upon by GECOM for the purposes of a declaration of a winner.

[4] Several court actions ensued challenging first of all the declarations by the Returning Officer for District 4 [Holladar v R.O Mingo and Others FDA 360 of 2020] and secondly an agreed to Caricom supervised recount [Moore v GECOM et al F.D.A 394 of 2020].

[5] Subsequent to Moore's decision GECOM issued orders 60 of 2020 and 69 of 2020 which facilitated a recount process to be scrutinized by Caricom. That process was completed.

[6] As a consequence and upon a report being submitted by the CEO of GECOM, the Chair wrote to the CEO requesting him to prepare and submit a report based on the recount results pursuant to Article 177 (2) (b) of the Constitution and Section 96 of the Representation of the People Act Chapter 1:03. This spawned a third action, Eslyn David v. GECOM and Others Civil Appeal No. 41 of 2020. The Court of Appeal whose exclusive jurisdiction was purportedly invoked held by a majority that for the purposes of Article 177 (2) (b) GECOM must rely on VALID VOTES CAST. Upon an Appeal from David's ruling, our Apex Court the Caribbean Court of Justice overturned the majority decision of the Appeal Court and nullified the report presented by the CEO.

[7] As a result the Chair again wrote to the CEO requesting his submission of a report based on Article 177 (2) (b) and Section 96 Representation of the People Act. There was noncompliance with this request which prompted further correspondence to the CEO from the Chair. The CEO responded by submitting a report which did not accord with the Chair's request but one which apparently reflected the 10 declarations submitted to him by the various returning officers pursuant to Section 84 of the Representation of the People Act. This prompted the Chair to issue a ruling essentially setting aside those 10 declarations and replacing them with the certified tabulation of votes pursuant to the recount process. Upon another request by the Chair for the preparation of a report this 4th Application was filed and engaged the attention of Her Honour the Chief Justice.

JONES .V. GECOM ET AL

[8] In essence the Applicants contended that Section 22 of the Elections Laws (Amendment) Act No. 15 of 2000 is unconstitutional and as such inter alia O 60 issued by GECOM which facilitated the recount process is invalid. She called in aid the decision of the Caribbean Court of Justice in Ali & Jagdeo v. David et al (referred to earlier). Further it was contended that there has been a violation of Section 84 (1) of the Representation of the People Act by GECOM's refusal to accept and Act on the 10 declarations of the returning officers which are still extent and valid. Additionally, the Chair of and GECOM is bound to accept the CEO's report in this regard and the latter cannot be directed to utilize the recount results for the purposes of a final declaration.

[9] Upon a review of the Orders sought Her Honour at a case management conference identified 5 issues to be decided by the court:

- 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.**

[10] Her Honour, as a matter of law and based on a comprehensive decision found in essence as follows:

- 1) On the basis of Holladar and the Appeal Court's decision in Moore, the Court was clothed with jurisdiction albeit limited to hear the Application before her.
- 2) On the basis of Moore's case the principles of *res judicata* would apply and as a result the issue of the constitutionality of Section 22 of the ELA would be for an Elections Petition.
- 3) The Appeal Court in Moore's case and the Caribbean Court of Justice in Ali and Jagdeo's case have already ruled on the validity of GECOM's Order 60 and as a result the issue is *res judicata*.
- 4) The 10 declarations by the various returning officers cannot be resurrected. Additionally, the CEO is subjected to the direction and control of GECOM pursuant to Section 18 of the ELA as noted by the Caribbean Court of Justice in Ali and Jagdeo's case.
- 5) Based on the principles of *res judicata and stare decisis* the reliefs sought, which are based on issues previously litigated and determined, cannot be granted.

[11] Her Honours ruling attracts an Appeal by the Appellant and 2 "Cross Appeals" by the Fourth and Seventh and Eighth Respondents.

[12] The Appellant complains:

- i) That the Honourable Chief Justice (ag) erred in law when she held that the issue of the constitutionality of section 22 of the Election Laws Amendment Act was *res judicata*.
- ii) That the Honourable Chief Justice (ag) erred in law when she held that the issues raised the case were *res judicata*.
- iii) That the Honourable Chief Justice (ag) erred in law when she misconstrued paragraphs 106 and 107 of the Judgment of the majority of the Court of Appeal in the *Ulita Grace Moore V Guyana Elections Commission*.
- iv) That the Honourable Chief Justice (ag) erred in law when she failed to find that the Chairman of the Guyana Elections Commission and or Guyana Elections Commission had acted outside their constitutional and or statutory powers.
- v) That the Honourable Chief Justice (ag) erred in law when she failed to properly construe the terms and provisions of Order 60 of 2020.
- vi) That the Honourable Chief Justice(ag) erred in law when she ruled that the validity of Order 60 of 2020 was *res judicata*.
- vii) The Honourable Chief Justice (ag) erred in law when she failed to consider that the Guyana Elections Commission had exceeded its constitutional and statutory power when it issued and established the elements, mechanism and parameters of Order 60 of 2020 and executed Order 60 of 2020 in such terms.
- viii) That the Honourable Chief Justice (ag) erred in law when she failed to consider and rely on the undisputed affidavit evidence adduced by the Applicant and admitted by the Third Named Respondent that the Returning Officers did not participate in the recount process.
- ix) The Honourable Chief Justice (ag) erred in law when she held that the Declarations of the Returning Officers made pursuant to section 84 of the Representation of the People Act had been

overtaken by events, were no longer useful and could not be resurrected.

- x) The Honourable Chief Justice (ag) erred in law when she failed to consider and rely on the undisputed affidavit evidence adduced by the Applicant and admitted by the Third Named Respondent which established that the Chairman of the Guyana Elections Commission and or Commissioners, officers and or agents of the Guyana Elections Commission had changed the validity of ballots or votes during the purported recount.
- xi) The Honourable Chief Justice (ag) erred in law when she failed to consider affidavit evidence of the 7th named Respondent, Bharrat Jagdeo which would have allowed her to see that the Order for recount had its genesis in an unconstitutional attempt to challenge the lawfulness in the conduct of an election.
- xii) The Honourable Chief Justice (ag) erred in law in the interpretation of section 18 of the Election Laws Amendment Act.
- xiii) The Honourable Chief Justice (ag) erred in law in the interpretation of section 96 of the Representation of the People Act.
- xiv) The Honourable Chief Justice (ag) erred in law in the interpretation of Article 177 of the Constitution.
- xv) The Honourable Chief Justice (ag) erred in law when she failed to determine that Order 60 of 2020 was materially and substantially inconsistent with the Representation of the People Act and could not constitute a new legal regime.
- xvi) The Honourable Chief Justice (ag) erred in law when she failed to determine that the process and or mechanism for determination of a final credible count under Order 60 of 2020 was predicated on and was inconsistent with the constitutional powers of the Guyana Elections Commission and in excess of the provisions of the Representation of the People Act as it required the application of the reconciliation process set out in Order 60 of 2020.
- xvii) The Honourable Chief Justice (ag) erred in law when she did not consider that at the time of the Court of Appeal's determination of Uilita Grace Moore V Guyana Elections Commission that there was no Order 60 of 2020 in being and as such no issue of res judicata could properly arise.
- xviii) That the Honourable Chief Justice (ag) erred in law when she failed to consider the distinction between the unconstitutionality of Section 22 of the Election Laws Act and acting in excess of the constitutional and or statutory powers of the Chairman of the Guyana Elections Commission and or of the Guyana Elections Commission in establishing and executing the said recount in accordance with elements, mechanism and parameters which are unconstitutional and set out in Order 60 of 2020.
- xix) That the Honourable Chief Justice (ag) erred in law when she failed to consider that the recount process as conceived and executed by the Guyana Elections Commission under Order 60 of 2020 was at substantial variance with the Representation of the People Act in that the validity of the votes was altered during the purported recount.

- xx) That the Honourable Chief Justice (ag) erred in law when she failed to consider that the purpose of and intent of Order 60 was in effect to give to GECOM the unlawful power to resolve an election dispute which Article 163 had conferred exclusively on the High Court.
- xxi) That the Honourable Chief Justice (ag) erred in law when she failed to consider that the purpose of and intent of Order 60 was to unconstitutionally alter the statutory scheme provided by Parliament in the Representation of the People Act and by the Constitution.
- xxii) That the Honourable Chief Justice (ag) erred in law when she Struck out the Affidavit of the Third Named Respondent.
- xxiii) That the Honourable Chief Justice (ag) erred in law in her decision on the whole save and except her decision that the court had jurisdiction to hear the Application.

[13] The Fourth Named Respondent seeks to vary Her Honours Orders to the following extent:

- a. That the issue of the validity of Order 60 of 2020 is res judicata by the decisions of the Court of Appeal and Caribbean Court of Justice and accordingly the High Court which is bound by the decisions of the higher Courts cannot rule that Order 60 is invalidated, be set aside.
- b. That section 18 of Election Laws (Amendment) Act No. 15 of 2000 is not in conflict, or tension, with article 177 of the Constitution, nor does it breach the separation of powers doctrine and is accordingly not unconstitutional, be set aside.
- c. That it is presently incompetent for the Chief Election Officer (CEO) to use the ten (10) declarations of the Returning Officers to base his advice as Order 60, unless it is declared invalid by a Court, requires him to use the figures generated at the National Recount, be set aside.
- d. That the principles of res judicata and stare decisis apply to the circumstances of the Application and requires the High Court to dismiss it, given binding rulings adverse to the Applicant in the Court of Appeal and Caribbean Court of Justice, be set aside.

AND TAKE NOTICE that the grounds upon which the Fourth Respondent intends to rely are as follows:

- i. That the Honourable Chief Justice (ag) erred in law and misdirected herself when she misinterpreted and misconstrued the provisions of article 177 (2) (b) when she held that the Chief Elections Officer cannot act on his own; when she found that the Chief Elections Officer does not have a constitutional mandate under article 177; when she held that article 177 (2) (b) means that GECOM is not to act on the advice of any person or body external to the Commission.
- ii. That the Honourable Chief Justice (ag) erred in law and misdirected herself when she held that section 18 is not unconstitutional as being in conflict or in tension with article 177.
- iii. That the Honourable Chief Justice (ag) erred in law when she failed to find that the Chairman of the

- Guyana Elections Commission (GECOM) had abdicated her duty to have declared the Presidential Candidate on the APNU+AFC list as the elected President, she being obliged to act only on the advice of the CEO, tendered to the Commission pursuant to article 177 (2) (b).
- iv. The Honourable Chief Justice (ag) erred in law in the interpretation of Article 162 and 177 of the Constitution, more particularly article 177 (2) (b) when she reasoned that article 162 permitted the Guyana Elections Commission to make Order 60 in its present form, when had she applied (as she ought to have done) the rule of constitutional interpretation i.e. generalia specialibus non derogant she ought to have concluded that the specificity of article 177 (2) (b) does not permit Order 60 in its present form as it derogates from article 177 (2) (b).
 - v. The Honourable Chief Justice (ag) erred in law when she failed to consider that by the words of limitation "subject to...." in article 162 (1) (b) article 162 became subordinate to article 177 and accordingly article 162 cannot be interpreted as impairing, subverting, diluting, watering down or undermining the effects of article 177 (2) (b).
 - vi. The Honourable Chief Justice (ag) erred in law when she failed to apply any principle or rule of interpretation in arriving at her decision that Order 60 was not inconsistent with section 96 of the Representation of the People Act (ROPA) or article 177 (2) (b) of the Constitution.
 - vii. The Honourable Chief Justice (ag) erred in law and misdirected herself when she ruled that the issue of the validity of Order 60 is res judicata given the decisions of both the Court of Appeal in David and the CCJ in Ali&Jagdeo because she failed to apply the principle that only the ratio decidendi and not the obiter dicta of a decision is binding.
 - viii. The Honourable Chief Justice (ag) erred in law when she failed to consider that whereas the constitution imposes a duty on GECOM to act on the CEO's advice, the new regime created by Order 60 confers a discretion in GECOM to act or not to act on his advice.
 - ix. That the Honourable Chief Justice (ag) erred in law and misdirected herself when she found that the ten declarations of the Returning Officers which formed the basis of the advice to the Elections Commission were overtaken by events to wit the national recount results or data which amounted to an invalidation of the ten declarations which only an election court has jurisdiction to do under Article 163.
 - x. That the Honourable Chief Justice (ag) erred in law and misdirected herself when she failed to consider that the CCJ in its statement of principle in paragraph 52 of its judgment must be taken to be seen as having indicated a disposition that Order 60 of 2020 is unconstitutional, null, void and of no legal effect.

[14] The Seventh and Eighth Respondent contends that Her Honours decision should be varied to uphold her order made on grounds different from those relied upon by her.

[15] The grounds upon which the variation is sought though not limited to, are as follows:

“The Honourable Chief Justice erred in holding that she had jurisdiction to determine any question beyond the issue as to whether the Chief Election Officer was lawfully bound to comply with the directions of the Guyana Elections Commission and/or its Chairperson, pursuant to section 18 of the Elections Laws (Amendment) Act, 2000 or otherwise.

2. Alternatively, on the premise that the Honourable Court was properly seised with jurisdiction to entertain the matters raised in the Fixed Date Application without the limitation contended in the foregoing ground, that the Honourable Chief Justice erred:

- a. in failing to have proper or any regard to the contents of the Principal Affidavit of Bharrat Jagdeo sworn and filed on the 15th July, 2020 and the Supplemental Affidavit of Bharrat Jagdeo sworn on the 15th July, 2020 and filed on the 16th July, 2020 on behalf of the Seventh and Eighth Respondents herein, which comprise evidence that was directly relevant to the resolution of the issues relating to the validity of the recount results and the Declarations for Electoral Districts 1 to 10 made between the 2nd and the 13th March, 2020.**
- b. in failing to make relevant findings of fact and law despite the existence of unchallenged probative and relevant evidence before the Court;**
- c. in failing to address and accept the arguments made by the Respondents in their entirety; and**
- d. in striking out the Second Supplemental Affidavit of Bharrat Jagdeo sworn to on the 16th July, 2020 and filed on the 17th July, 2020 on behalf of the Seventh and Eighth Respondents.**

[16] Various written submissions were duly laid over by the parties actively engaged in this Appeal and oral submissions, supplementary expanding and clarifying the issues that fall for determination, heard.

[17] The industry and at times ingenuity of Counsel is noted and fully appreciated. I do not purpose however to refer in detail to any of those submissions but rest assured that they were fully considered and greatly assisted me in arriving at my conclusions on the issues in this Appeal.

[18] As referred to earlier, Her Honour identified 5 core and peripheral interlinked and overlapping issues that fell for consideration before her. The parties to this Appeal seemingly agree that Her Honour properly identified those issues and as a result her conclusions thereupon forms the basis of this Appeal.

JURISDICTION

[19] This issue has been the main bone of contention between the parties as a result of the difficulties which have arisen in the aftermath of the March 2nd 2020 elections in Guyana. This issue once again attracts this Courts' attention.

[20] Her Honour in applying Articles 226 (7), 163 Section 140 of the Representation of the People Act and the jurisprudence emanating therefrom; Application by Aubrey Norton [1996-1998] GLR 373; Hamilton v GECOM 40M of 2001; Ulita Moore's case and Holladar's case found at para 24 of her decision,

"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".

[21] Her Honour at paras 25 and 26 her decision went on;

"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.

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

[22] This Court by majority held in Moore's case that section 140 of the Representation of the People Act was incapable of protecting GECOM from a judicial review challenge if it has acted or was about to act in excess of its' constitutional or legislative mandate. However, section 140 did shield GECOM from review in relation to functions which fall squarely within its responsibilities in its management of the elections process. Acts or omissions in the latter regard was for the determination by an elections court.

[23] Additionally, the majority went on to consider and referred specifically to Article 177, section 99 of the Representation of the People Act and Section 22 of the Elections Laws (Amendment) Act in paras 85, 86, 88, 106 and 107 of its decision as follows;

[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 the 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.

[88] On our view of the affidavit evidence the issues raised in the FDA in relation to whether Article 177 and section 99 were triggered and whether the proposed recount is lawful are matters which would fall for determination under Article 163 of the Constitution.

[106] We agree with the submission that the legality of section 22 is matter to be frontally examined by the Court at a full hearing. In Petrie and Seecomar Singh, the High Court declined to examine the constitutionality of election related legislation during the election period, allocating such questions to an election petition. The Court said that such a determination would be disruptive of the election process. Moreover, it is well established that constitutional questions can be determined at the hearing of a petition as discussed in Peters and Chaitan v Attorney General Another (2001) 63 WIR 244.

[107] Alternatively, if GECOM has utilised or utilises its powers under section 22 unlawfully, then this would be a question for determination at such time. No sufficient evidential basis exists for such a determination at this point.

[24] I agree fully with Her Honours pronouncement at para 24 of her decision. In the peculiar context of this case Judicial Review was necessary to address the impasse in order to complete the elections process. However, this limited jurisdiction cannot be involved to resolve any questions as to the validity of an election itself. It is in this limited context Her Honour was plainly correct in concluding that the CEO must act upon GECOM's direction, to produce his report in accordance with the recount. This effectively resolved the impasse thereby smoothing the elections process. This aspect will be considered a little more expansively later in this decision.

[25] Paragraph 25 of Her Honours decision (referred to earlier) is of concern and does not sit well with me. Her Honour's pronouncement that there was basis for her to interpret the constitutionality of Section 22, Order 60 as well as Article 177 in order to ascertain if the Chair and GECOM were acting lawfully runs contrary to well settled jurisprudence. (See Seecomar Singh v. Butler [1973] 21 WIR 34; Petrie v. AG [1968] 14 WIR 292; Christopher Ram v. AG et al CCJ; Chaitan v. AG [2000] 63 WIR 244). Her Honour's view was in no doubt prompted by the pronouncement of the majority in Moore's case. At paragraph 108 it is stated;

"On the main issue in this appeal we have found that the jurisdiction of the High Court can be exercised to grant relief during the election process in spite of section 140 (1) of the RPA. That jurisdiction can be exercised where the Court is satisfied that GECOM has acted or is about to act in excess of its constitutional and/or statutory powers."

[26] My lone wolf-like dissenting opinion in the Ulita Moore case is well known and I continue to harbour reservations as to the correctness of the majority's analysis leading to the ambit of their opinion as reflected above. (See paras 24-27 of my dissenting opinion) I continue to hold the view that those are matters that fall squarely within the jurisdiction of an elections court pursuant to Article 163 (B) (I) "unlawful acts or omissions" of course after the election process is completed. My position in this regard has been consistent throughout the elections related litigation that has engaged the attention of this court. This is in keeping with settled jurisprudence reflected in the Petrie, Seecomar Singh and Chaitan cases. [See my dissenting decisions in Ram v. AG et al (No Confidence Motion); Moore v. GECOM et al; David v. GECOM et al]

- [27] This to my mind accorded with the general scheme of elections legislation in Guyana which only permits a challenge after the process is completed (See Ali & Jagdeo v. David 2020 CCJ 10 AJ GY). The inviolability of section 140 and Article 163 of the Constitution must be preserved. The need for certainty as it relates to our election laws and processes is paramount. To whittle away the sanctity of those laws and the well settled jurisprudence attendant thereto would only serve the purpose of disruptive opportunism, which must be eschewed. This to my mind is the primary mischief that our elections laws sought to repel.
- [28] Sitting in a Court of co-ordinate jurisdiction, I do not consider myself bound by the majority in Moore. I am fully cognizant of the need for caution in this regard. See Ying v. Song [2009] NSWC. My position is reflective of the law as I comprehended it. The issues raised by the Appellant/Applicant is simply unsustainable in judicial review proceedings. However, the limited jurisdiction specified by me earlier allows for intervention.
- [29] However and in any event, the majority in Moore clearly stated as highlighted earlier, that issues relating to Article 177, Section 99 of the Representation of the People Act and the constitutionality of Section 22 effectively falls within section 140 of the Representation of the People Act as they are within the responsibilities of GECOM in the management of the elections process.
- [30] Additionally the reference to Petrie, Seecomar Singh and Chaitan as it relates to challenges to the constitutionality of elections related legislation and its disruptive effect if not pursued by elections petition is of significance. The majority decision must be read as a whole. This to my mind has binding effect on a lower court as it relates to that article and those sections.
- [31] In concluding on this aspect, I reiterate that in the peculiar circumstances of this case, judicial review was necessary to address the impasse in order to complete the elections process. This limited jurisdiction could not be properly involved in order to resolve any question as to the validity of an election itself. That falls squarely within the jurisdiction of an elections court pursuant to Section 140 of the Representation of the People Act, Article 163 of the constitution and its attendant rules, after an election is declared.

[32] I am not minded to extend the Court's jurisdiction in judicial review proceedings beyond that limited scope. Notwithstanding and having regard to the circumstances of this case it would be prudent of me to consider albeit briefly, the remaining issues, that based the Applicants claim for relief which fell for Her Honour's determination having assumed an extended jurisdiction as she understandably did.

ISSUE ESTOPPEL, STARE DECISIS, RES JUDICATA ETC

[33] In Halsbury's Laws of England 5th Edition Volume 12 at para 1591 it is generally noted that:

"it's a fundamental doctrine of all Courts that there must be an end of litigation and that a party may plea the doctrine of Res Judicata by way of estoppel. Where a judgement has been given where it's a matter of record (as in the instant case) an estoppel by record arises and may take the form of cause of action estoppel or of issue estoppel. It may also be said that the cause of action has merged into the judgement."

[34] (See too Garraway v. Williams 2011 CCJ 12 AJ GY for the traditional formula). Again, in the State of Karnataka v. All India Manufacturers AIR 2006 1846. Sri Krishna J stated;

"Res judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *nemo debet bis vexari pro una et eadem causa* ("No one ought to be twice vexed for one and the same cause") and second, public policy that there ought to be an end to the same litigation The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to reagitate the matter again and again.... As a matter of fact, in a Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is *bona fide*, a judgment in a previous Public Interest Litigation would be a judgment in *rem*. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had to be raised/should have been raised on an earlier occasion by way of a Public Interest Litigation."

[35] The reference here to public interest litigation is of importance; as all are seemingly in agreement that such litigation engages our attention. (See too Trinidad & Tobago Civil Rights Association v. The Attorney General of Trinidad & Tobago HCA No 1070 of 2005.)

[36] The expansive scope of these concepts was highlighted in Henderson v. Henderson in which it is said:

“The plea of *res judicata* applies, except in special case (sic), no only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

- [37] Additionally and of significant importance in cases where *res* is not strictly established, where estoppel per *rem judicatam* has not been sufficiently pleaded or made out but nevertheless the circumstances are such to render any re-agitation of the question formally adjudicated upon a scandal and an abuse the Court in its inherent jurisdiction will not hesitate to dismiss the action. (See *Doctrine of Res Judicata* by Bower & Turner 2nd Edition para 503-505 “Inherent Jurisdiction of the Court”).
- [38] See too Ying v. Song 2009 NSWC 1344 per Ward J as he discusses the issue of obiter dicta and the great weight to be attached thereto.
- [39] Fundamental to these concepts and inextricably interwoven is the general concept of *stare decisis*. The scope and ambit ought to be well known to all but as a reminder it is a principle that, courts’ in common law will follow, previously decided cases as much as possible and avoid upsetting precedents. Stand by things decided as it were.
- [40] It is substantially against this backdrop and in this context that the substantive issues particularly Order 60 and Section 22 fall for consideration. To my mind, public interest litigation as is the case here is incapable of attracting the strict traditional private law *res judicata* formula as highlighted in Garraway v. Williams, referred to earlier.
- [41] Those principles highlighted must be strictly adhered to lest we beckon chaos in the hierarchical structure of our judicial system and perpetrate never ending litigation on the same issues.
- [42] Her Honour’s comparative analysis of the reliefs sought in Moore vis-à-vis those in the instant matter and her finding that though couched in different terms they were in effect similar and in some instances exactly the same is apt and telling in this context. (See para 79 of Her Honours decision.)

SECTION 22 OF THE ELA (ACT) NO. 15 OF 2000.

- [43] Section 22, provides as follows;

"22. (1) If any difficulty arises in connection with the application of this Act, the Cap. 1:03 Cap. 19:08 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."

[44] The issue of the constitutionality of Section 22 was previously addressed by this court in the Ulita Moore case (referred to earlier). This section must be read in light of the prorogation of Parliament as a result of the President's proclamation ushering in the elections process. This context is paramount. The Non existence of Parliament is obvious hence the limited and specified powers of the commission to act for a specified period and purposes. This section was carefully crafted by the legislature in recognition of this vacuum and its potential for disruptive chaos.

[45] At paragraphs 67 and 68 the majority identified the main arguments for and against the constitutionality of S.22.

[46] At paragraphs 106 and 107, (recited in full earlier) the majority held that the legality of Section 22 is a matter to be frontally examined by the court at a full hearing. Significantly reference was made to Petrie, Seecomar Singh and Chaitan in eschewing disruption to the elections process and allocating to an election petition, matters relating to the constitutionality of elections legislation.

[47] Additionally in my dissenting opinion, with reference to the constitutionality of section 22 I stated at paragraph 31;

"Against at this stage of the elections process the constitutionality of the relevant legislative provisions could only be examined by way of election petition as is of course permissible and was done in Esther Periera v. Chief Elections Officer et al 36p of 1998 (see too Peters and Chaitan v. The A.G et anor 2001 63 WIR 244). In the circumstances of our legislative prohibition any other approach to the Court during this elections process may amount to an abuse of the Courts process. See (AG v. Dumas 2017 UK PC 12)."

[48] The Court was *ad idem* on this issue which formed a part of its ratio decidendi albeit for differing reasons. It is clear that the Appeal Court definitively concluded that it lacked jurisdiction to determine the

constitutionality of section 22 and avoided trampling on the elections court, Article 163 jurisdiction. As a pronouncement in *rem* it is binding on all. In any event it is to my mind a stretch to describe these proceedings as a full frontal hearing of the issue as contemplated by the Appeal Court especially where substantial evidence may be required. In the circumstances Her Honour was correct as a matter of law when she stated at paragraph 36 of her decision;

“But the decision of the CA on s 22 cannot be considered to *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*.”

[49] I see no merit in the Appellants contentions in this regard.

ORDER 60 AND THE RECOUNT

[50] A determination of this issue requires a consideration of the impact of the decision of our Apex Court in Ali & Jagdeo v. David and Others GY Civil Appeal 41 of 2020; on Order 60 and the consequent recount results.

[51] At para. 35 of its decision the Caribbean Court of Justice posited that “a determination of the merits of their Appeal requires us to (A) consider the legal and constitutional scheme for elections in Guyana and (B) to interrogate more closely the provisions of Article 177. Clear and ultimately decisive context is achieved here. Unconstitutionally to my mind is an inherent consideration of the legal and constitutional scheme for elections in Guyana. The reliance on the validity of O. 60 in David’s case and its rejection as unconstitutional here seemingly as an afterthought is a classic case of an abuse of the court’s processes which must be rejected.

[52] The Caribbean Court of Justice throughout its decision anatomised Order 60 excruciatingly explaining its’ purport, intent and transparent processes and as emphatically endorsed it as a part of the existing legislative scheme governing the March 2nd 2020 elections in Guyana.

[53] For example at paragraph 38 the Caribbean Court of Justice stated categorically;

“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."

[54] In addition and of significance the Caribbean Court of Justice held that order 60 did not create a new electoral regime in Guyana, but stressed that it only related to the March 2nd 2020 elections.

[55] Further in its analysis there was a clear consideration of the allegations of irregularities voter impersonation and fraud. In this, context, the Caribbean Court of Justice re-affirmed that those challenges could only be brought pursuant to the Article 163 jurisdiction, after the elections process was completed. The Caribbean Court of Justice stressed that;

"Unless and until an elections court decides otherwise the votes already counted by the recount process as valid votes are incapable of being declared invalid by any person or authority."
(see paras 36-46)

[56] The decision must be read as a whole in order to fully appreciate its impact on those issues. On this aspect the majority decision in Moore must also be noted. It is clearly stated that issues and contentions in relation to the then proposed recount would fall squarely within the jurisdiction of an elections court. (See paras 85-89).

[57] This issue has been definitively and conclusively pronounced upon. Suffice it to say that I agree fully with Her Honours comprehensive analysis and conclusion on this issue.

DECLARATIONS BY THE RETURNING OFFICERS AND THE POWERS OF THE CEO

[58] The peculiar aftermath of the March 2nd 2020 elections resulting in the lawful advent of Order 60 in an effort to provide an open transparent and accountable recount of votes validly cast thus enabling the delivery of elections results and its endorsement by our apex court to my mind necessarily meant that the declarations of the Returning Officers made pursuant to Section 84 of the Representation of the People Act were "overtaken by events". Simply put the section 84 declarations can no longer be the basis of ascertaining the results of the March 2020 elections. This to my mind is what the Chair was alluding to in her pronouncement and guidance to the CEO as it related to those declarations. A contextual understanding of the purpose of Order 60 is crucial. Paragraph 38 of the

Caribbean Court of Justice's decision in Ali & Jagdeo v. David, referred to earlier is pellucid. The contentions that it has retrospective effect and that the Chair of GECOM trampled upon the jurisdiction of the Elections Court in setting aside those declarations is misconceived to say the least and thus rejected. I fully endorse the conclusions of Her Honour in this regard.

[59] The Chief Election Officer holds a statutory office and is subjected to the disciplinary control, guidance and direction of the Commission.

[60] The legislative scheme so provides pursuant to Article 161 (A) of the constitution sections 2, 7, 9, 13, 14 and 16 of the Representation of the People Act and Sections 18 and 19 of the Elections Laws (Amendment) Act. Section 18 of the Elections Laws (Amendment) Act recited in O.60 specifically provides that the CEO shall notwithstanding anything in any written law, be subject to the direction and control of the commission and if I may add, "only the commission". Clear and unambiguous language.

[61] Section 19 of the Elections Laws (Amendment) Act provides:

"for removal of any doubt it is hereby declared that the power of the Commission to supervise the functioning of any election officer..... shall include the power to issue directions to any such officer"

[62] The CEO falls within the definition of an elections officer.

[63] Simply put the CEO is an employee of the Commission. The history and evolution of reforms to the Representation of the People Act effectively whittling down the powers of the CEO and enhancing those of the commission as highlighted by SC Ramkarran in his submissions is illuminating and most worthy of note.

[64] Sections 96 (1) and (2) of the Representation of the People Act mandates that the CEO after calculating the total number of valid votes of electors cast for each list of candidates, shall prepare a report in manual and in electronic form in terms of Section 99 for the benefit of the commission and allocate seats in the National Assembly to members on those lists in accordance with the formula set out in Sections 97 and 98. This represents in essence, his mandate.

[65] As referred to earlier in the CCJ's decision in Ali's case;

"Unless and until an election court decided otherwise, the votes already counted in the recount process are incapable of being declared invalid, by any person or authority."

[66] Again in a stinging rebuke at paragraph 47 of Ali's case the CCJ said,

“The idea that the CEO or GECOM could, in an unaccountable, non-transparent and seemingly arbitrary manner, without the due processes and the legal standards established in Article 163 and in the Validation Act, disenfranchise scores of thousands of electors is entirely inconsistent with the constitutional framework. Whatever allegations of irregularity attended those votes (and we neither agree nor disagree as to the existence of such irregularities) must be adjudged by the High Court under Article 163 as was correctly stated by the Chairperson of GECOM.”

[67] The CEO’s powers are derived from the Representation of the People Act. The contention that he is clothed with constitutional authority under Article 177 is simply not the case. The commission is clothed with such authority by virtue of Article 161 and 162 of the Constitution. The clear distinction between the commission and its employees must be appreciated as a basis of conceptualizing the CEO’s role and functions. This distinction will also impact the court’s jurisdiction which will be dependant on the nature of claims brought, involving the commission or its employees. It is also important to note that by virtue of Article 226 (1), GECOM shall not be subject to the direction or control of any person or authority.

[68] In the peculiar context of the present legislative scheme governing the elections, the “advice” referred to in Article 177 (2) (B) is to be construed to mean that GECOM is not to act on the advice of any person or authority external to the commission. In addition, and considered in context I cannot conceive of any issue as to the constitutionality of S. 18 of ELA. I am in agreement with Her Honour in this regard. The “advice” contemplated must be lawful and in accordance with the prevailing law which includes Order 60 as endorsed by the CCJ. The Commission cannot be expected to accept advice known to be unlawful or lacking in legitimacy and act upon it. Such a proposition is absurd and is squarely rejected.

[69] (See Ulufa Alu (Prime Minister) v. Governor General (2001) 1 LRC 425 at 432)

[70] The CEO is duty bound, in the peculiar context of these elections, to prepare and present his report based on the results of the recount as instructed by the Chair. There is simply neither power nor authority reposed in him to act otherwise.

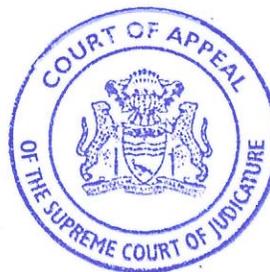
- [71] He certainly cannot act outside of the scope of the guidance and directions of the commission as he purports to do; as he is not endorsed with any semblance of discretionary authority or power.
- [72] In this regard I agree with the analysis and conclusion of Her Honour as it properly and effectively resolved the impasse which affected the elections process and stalled its completion, however untenable that impasse may have been.
- [73] In the circumstances and having regard to all that I have said this appeal dated the 21st day of July 2020 is dismissed.
- [74] The cross appeal by the Fourth Named Respondent dated the 22nd July, 2020 which in essence supports the Appellants appeal is also dismissed.
- [75] The cross appeal by the Seventh and Eighth respondents dated the 22nd July 2020 is allowed to the extent of the Court's limited jurisdiction in judicial review proceedings in an ongoing election process, as specified by me in this decision.

A cost order is to be issued upon receipt of submissions by the parties in that regard.

A 24 hour stay of this decision is granted


.....
RISHI PERSAUD

Dated this 30th day of July, 2020.



IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL NO. 52 OF 2020

BETWEEN:

MISENGA JONES

Appellant

- and -



1. THE GUYANA ELECTIONS COMMISSION
2. CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION
3. THE CHIEF ELECTION OFFICER
4. ATTORNEY GENERAL OF GUYANA
5. SHAZAAM ALLY representing THE CITIZENSHIP INITIATIVE
6. ABEDIN KINDLY 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

Respondents

July 25, 2020.

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

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, Mr. Mayo Robertson 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 respondents.

Mr. Douglas Mendes SC, Mr. Mohabir Anil Nandlall and Mr. Devindra Kissoon for the seventh and eighth named respondents.

Mr. Kamal Ramkarran for the ninth-named respondent.

Mr. Hari N.Ramkarran SC the tenth-named respondent.

Mr. Timothy Jonas for the eleventh-named respondent.

Ms. Jamela Ali SC, Mr. Sanjeev Datadin and Mr. Stephen Singh for the twelfth-named respondent.

Coram:

Gregory, Persaud JJA, Sewnarine-Beharry J (Additional Judge)

Judgement delivered by the Honourable Madame Justice Priya Sewnarine-Beharry on 28th July 2020

[1] The Appellant and Fourth Respondent have cited numerous grounds of appeal in their respective Notice of Appeal and Notice of Intention to Contend that the Decision of the Court below be varied (the Fourth Respondent's Cross Appeal). These grounds can be condensed into the issues set out below which fall for determination of this Court:

- **Whether Section 22 of the Elections Laws (Amendment) Act, No. 15 of 2000(ELAA) pursuant to which the first named respondent, Guyana Elections Commission (GECOM), issued Order 60 of 2020 (Order 60) is Constitutional;**
- **Whether Order 60 and the recount results obtained therefrom are valid such as to form the basis of a declaration of the March 2, 2020 General and Regional election;**
- **Whether the Declarations of the Returning Officers for the Ten Electoral Districts made pursuant to Section 84 of the Representation of the People Act, Chapter 1:03(ROPA) can form the basis of a Declaration of the March 2, 2020 General and Regional election;**
- **Whether GECOM and/ or its Chairperson can direct the CEO to produce his report under section 96 of the ROPA in accordance with the recount.**

[2] The Seventh and Eight Respondents have also filed a Notice of Intention to Contend that the Decision of the Court below be varied. They have brought to the fore other issues for the determination of this court, that is to say:

- **Whether learned the Chief Justice was seized with jurisdiction to determine any of the issues raised in the Fixed Date Application(FDA) other than the issue as to whether the Chief Election Officer was lawfully bound to comply with the directions of GECOM and/or its Chairperson pursuant to section 18 of the ELAA;**

- Alternatively, assuming the learned Chief Justice was seized with jurisdiction, whether she failed to make relevant findings of fact and law from the affidavits and arguments of the Seventh and Eighth Respondents;

Jurisdiction

- [3] In *Dhajoo vs. Thom* (1939) LRBG 262 it was held that “it is the first duty of every court before adjudicating to satisfy itself on its jurisdiction.” It is appropriate therefore to commence by examining the issue of the lower court’s jurisdiction before addressing the other issues.
- [4] The Appellant submitted that the lower court was seized with Jurisdiction to hear and determine all the issues raised in the FDA. The Appellant argued that the First, Second and Third Respondents carry out public functions created by the Constitution connected with elections and are subject to the Court’s supervisory jurisdiction under **Art. 133** of the **Constitution**. Citing *Holladar vs. Mingo* [2020-HC-DEM-CIV-FDA-360] as authority for this view, the Appellant quoted paragraphs [34] and [42] of that decision which states [34] “where an election official has not followed the process as outlined in relevant statutory provisions [...] such failure is open to judicial review” and [42] “there can clearly be cases where the court’s supervisory jurisdiction can be invoked to ensure the correct and smooth operation or progress of the elections proceedings or process.”
- [5] The Appellant also submitted that the learned Chief Justice correctly applied the decision of the majority of the Court of Appeal in *Ulita Moore vs. GECOM et. al.* Civ. App. No 38 of 2020. In that case, the Court by a majority ruling endorsed the view that s. 140 of the ROPA did not oust the Court’s jurisdiction to hear the FDA and the Court’s supervisory jurisdiction “can be exercised where the Court is satisfied that GECOM has acted or is about to act in excess of its constitutional and/or statutory powers.” The Appellant contended that the issues raised in this FDA concerned the validity of Order 60 and the first, second and third Respondents’ failure to

act within the confines of and in accordance with their constitutional and statutory duties under the ROPA and were therefore reviewable.

- [6] On the other hand, the Seventh and Eight Respondents have submitted that the learned Chief Justice erred in holding that she had jurisdiction to determine any question beyond the issue of whether the Chief Election Officer (CEO) was lawfully bound to comply with the directions of the Guyana Elections Commission and/or its Chairperson pursuant to section 18 of the ELAA.
- [7] They argued that the Appellant is challenging the way GECOM has performed or is performing its functions and this is prohibited by section 140 of the ROPA except by way of an election petition. They submitted that the findings of the majority of the Court of Appeal in *Ulita Moore*, that section 140 did not protect GECOM from judicial review if it had acted or was about to act in excess of its constitutional or statutory powers; that GECOM was protected from judicial review in relation to functions which fall within the responsibilities of GECOM in its management of the elections process; and; that the validity of its acts and omissions in carrying out those responsibilities were to be determined on an election petition, had to be read in light of the decision of the CCJ in the *Ali and Jagdeo vs. Eslyn David et al* [2020] CCJ 10 (AJ) GY. In *Ali and Jagdeo*, the CCJ determined that the Court of Appeal in hearing David's motion usurped the exclusive jurisdiction of the High Court under Article 163 of the Constitution because Article 177(4) can only be invoked after a President had been elected.
- [8] The Seventh and Eight Respondents submitted that the CCJ in finding David's motion was premature, endorsed the hallowed principle that any challenge to the validity of an election ought to be brought after the election has been declared, and not before, as stated in numerous cases including *Nareyan Khare vs. Election Commission of India*, AIR 1957 SC 694 ; *Ponnuswami vs. Returning Officer*(1952) SCR 218; *Reeaz Holladar vs. The Returning Officer et al* (2020-HC-DEM-CIV-FDA-360); the Full Court

in *Bharrat Jagdeo vs. Uilita Moore and Others*(No. 2020-HC-DEM-CIV-FCA-26); the dissenting judgement of Persaud JA in *Uilita Moore; Gladys Petrie vs. AG* (1968) 14 WIR 292 and *Seecomar Singh et anor vs. R C Butler* (1973) 21 WIR 34. The Seventh and Eight Respondents also submitted that the CCJ reiterated and emphasised the exclusive jurisdiction of the High Court under Article 163 to determine any question whether an election has been lawfully conducted or the result has been affected by any unlawful action or omission. They referred to paragraphs [45] and [47] where, their Honours emphasised at paragraph [45] that "If the integrity of a ballot, or the manner in which a vote was procured, is questioned beyond the validation exercise, say because of some fundamental irregularity such as those alleged by Mr. Harmon, then that would be a matter that *must* be pursued through Article 163 after the election has been concluded" and [47] "Whatever allegations of irregularity attended those votes (and we neither agree nor disagree as to the existence of such irregularities) must be adjudged by the High Court under Article 163 as was correctly stated by the Chairperson of GECOM."The Seventh and Eight Respondents submit that it is significant in this regard that the CCJ in this paragraph referenced section 140 in a footnote with the comment that that section provides that "questions as to performance by GECOM of its functions are to be enquired into only pursuant to the jurisdiction conferred by the Constitution under Article 163."

- [9] Consequently, they argued that the decision of the majority in *Uilita Moore* was inconsistent with decisions such as *Smith vs. East Elloe Rural District Council* [1956] AC 736, *R (A) vs. Director of Establishments of the Security Service* [2010] 2 AC 1 and *Farley vs. Secretary of State for Work and Pensions(No 2)* [2006] 1 WLR 1817, the application of which would mean that section 140 is not an ouster provision to which the traditional *Anisminic* analysis was applicable, but rather was part of a statutory scheme which allocates jurisdiction to determine the validity of GECOM's actions to a court other than the High Court exercising its

common law supervisory jurisdiction. They submitted that in light of this the decision of the majority in *Ulita Moore* cannot be considered good law.

[10] The relevant provisions of Section 140 (1) of the ROPA and Article 163 of the Constitution provide:

Section 140(1) Except to the extent that jurisdiction in that behalf has been conferred, and the exercise thereof is required, by the Constitution or any law made under article 163 thereof(which provides for the determination by the Supreme Court of Judicature of questions as to the membership of the National Assembly and elections thereto) and save as hereinbefore provided to the contrary, *no question whether any function of the Elections Commission or any of its members has been performed validly or at all shall be enquired into in any court.*

Article 163 (1) Subject to the provisions of this article, *the High Court shall have exclusive jurisdiction to determine any question –*

(b) *whether –*

(i) 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; [Emphasis mine]

[11] In summary these provisions seem to be saying that court's ordinary supervisory jurisdiction is ousted from inquiry into whether GECOM and/or its members have validly performed its functions or not, except under the exclusive jurisdiction conferred by Article 163(1) of the Constitution. It does not completely oust the court's jurisdiction but provides jurisdiction by special procedure in the form of an election petition after the election has been declared. Section 140(1) of ROPA is a partial ouster clause as enquiry by judicial review into the validity of an administration action is precluded but inquiry by a particular statutory route is permitted. The Full Court in *Ulita Moore* recognised this distinction when it treated with this issue. In paragraphs [84] to [88] the court put it thus:

80. We appreciate and are fully cognizant of the seminal decision of *Anisminic* as discussed above. However, we consider that the principles established in the cases such as *R (A) v Director of Establishments of the Security Service* [cited at paragraph 38 above] are equally relevant to the statutory framework

that is applicable in this case, more particularly **s 140 of Chapter 1:03**. Like **Director of Establishments, s 140** provides for a mechanism to challenge any decision of GECOM however made – this would be *via* an election petition.

81. As recounted earlier, *Holder J.* found that **s 140(1) of Chapter 1:03**, does not oust the jurisdiction of the Court in its ordinary supervisory jurisdiction for judicial review where GECOM has done or is alleged to have done or intends to do something which it has no jurisdiction to do, or has acted or seeks to act beyond the powers conferred upon it by the Constitution.
82. In so finding, *Holder J.* relied on the *dicta* of *Cummings JA* in **Re Application by Gerriah Sarran** [cited at paragraph 13 above]. He also relied on the strict approach regarding the application of complete ouster clauses laid down in **Anisminic** finding favour with the principle that “a provision ousting the ordinary jurisdiction of the court must be construed strictly” and that a “meaning shall be taken which preserves the ordinary Jurisdiction of the court”.
83. However, in doing so, we are of the view that *Holder J.* would have erred when he failed to fully take into consideration and/or to apply the distinction between **complete ouster clauses**, such as considered in **Anisminic** and similar cases, and **partial ouster clauses**, such as considered in **Smith v East Elloe Rural District Council, R (A) v Director of Establishments of the Security Service** and **Farley v Secretary of State for Work and Pensions (No 2)** [cited at paragraph 38 above].
84. The position is clear from these authorities that complete ouster clauses are to be construed narrowly such that any error of law which goes to jurisdiction renders the ouster clause ineffective and does not preclude the exercise of the Court's power of judicial review.
85. However, clauses which preclude enquiry into the validity of administrative action in judicial review proceedings, but either permit such enquiry if initiated within a specific time period, or by a particular statutory route, will be held to oust the High Court's ordinary supervisory jurisdiction. In **R(A) v Director of Establishment of Security Services**, Lord Brown of Eaton-Under Heywood said at paragraph 23 of the judgment that:

“Nor does **Anisminic** assist **A**. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2) (a) does no such thing. Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny ...to the [Investigating Power Tribunal].”

86. Similarly, in *Farley*, Lord Nicholls of Birkenhead remarked at paragraph 18 of the judgment:

“The need for a strict approach to the interpretation of an ouster provision ... was famously confirmed in the leading case of Anisminic ... This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court.”

87. In *R (A) v Director of Establishment of Security Services*, the jurisdiction was allocated to the specialist Investigating Power Tribunal and in *Farley* to another court. In the matter under consideration, s 140(1) of Chapter 1:03 allocates jurisdiction to the High Court itself by a special procedure. The jurisdiction of the High Court is therefore not ousted at all, but s 140(1) merely requires the particular issue to be dealt with by a particular procedure, that is to say by election petition.

88. Therefore, we hold that there is no reason to construe s 140(1) narrowly, or as was done in the *Anisminic* line of cases, to make it inapplicable to decisions made without jurisdiction.”

[12] It was the failure to appreciate the distinction between a complete and partial ouster clause that caused both Justice Holder and majority Court of Appeal to err in *Ulita Moore*. The majority in the Court of Appeal noted that the evidence before the High Court indicated that there were matters which were being addressed by GECOM which related to the execution of its functions under Article 177 of the Constitution and section 99 of ROPA. In paragraphs [85], [86], [88] and [107] the majority in the Court of Appeal recognised that an examination of issues such as whether the time had come to proceed under Article 177 of the Constitution and section 99 of ROPA; *whether to hold a recount or not*; whether there was unlawful non compliance with Article 177 of the Constitution and section 99 of ROPA; whether Article 177 of the Constitution and section 99 of ROPA were triggered; whether the recount was lawful; whether section 22 of ELAA is unconstitutional and whether GECOM has utilised its powers under section 22 of ELAA unlawfully, fell within the responsibilities of GECOM in its management of the electoral process and was completely ousted by

Section 140 of ROPA and could only be raised under the parameters of Article 163 of the Constitution in an election petition.

[13] Given the Court's finding in this regard it is difficult to see how the court concluded at paragraph [108] that the:

"...jurisdiction of the High Court can be exercised to grant relief during the election process in spite of section 140(1) of the RPA. That jurisdiction can be exercised where the Court is satisfied that GECOM has acted or is about to act in excess of its constitutional and or statutory powers. Section 140(1) is however effective in excluding the Court's intervention in relation to the functions which fall within the responsibilities of GECOM in the management of the election process. The validity of its acts and omissions in carrying out its responsibilities would be by virtue of section 140(1) and Article 163 of the Constitution matters for determination in an election petition.

[14] It has been recognised that the High Court does have jurisdiction to intervene before an election is declared where to do so would accelerate the completion of the election or acts in furtherance of the election or to correct, smoothen or remove obstacles in election proceedings. See *Election Commission of India vs. Ashok Kumar* Civil Appeal Nos. 6843-6844 of 1999 dated 30 August 2000; *Joseph Hamilton vs. Guyana Elections Commission and others* [2001] No 40 M and *Holladar*;

[15] *Hamilton* and *Holladar* were concerned with elections officials who had not complied with the statutory duties imposed on them and were rightly subject to judicial review. In my view those courts could properly review the decisions of the RO's because it was necessary to complete the election process and did not go to the validity of the election itself. Whether or not they complied with their statutory duties was reviewable because they did not enjoy the protection of Section 140(1) of ROPA; In *Ulita Moore* to inquire into the decision of GECOM and/or its Chairperson to sanction a recount of the ballots would involve embarking on an examination of GECOM's management of the election process and its acts and omissions which is expressly prohibited but for Article 163 of the Constitution. How

else would a Court determine whether GECOM acted or was about to act in excess of its constitutional and statutory duties?

[16] In the instant case Section 140(1) of the ROPA deliberately sets out that that there can be no inquiry into whether GECOM or its members validly performed its functions or not unless such inquiry falls within the parameters of Article 163 of the Constitution. It was within this limited scope that that the learned Chief Justice could have intervened to address the impasse between the CEO and GECOM. Had it not been for the majority decision of the Court of Appeal in *Ulita Moore*, by which Her Honour found she was bound, it is doubtful that she would have concluded that she had jurisdiction to examine any issue other than, the impasse between GECOM and or its Chairperson and the CEO. She was likely to follow her own decisions in *Holladar* in the High Court and *Ulita Moore* in the Full Court.

[17] In this regard, I find that the learned Chief Justice had no jurisdiction to "interpret the constitutionality of the s 22 of ELAA, O 60 or Article 177 of the Constitution, to determine whether GECOM was acting lawfully" as this runs contrary to the jurisprudence as demonstrated by the CCJ's ruling in *Ali and Jagdeo* that those issues properly belong in an election petition after the declaration of the final results.

Whether GECOM and/ or its Chairperson can direct the CEO to produce his report under section 96 of the ROPA in accordance with the recount.

[18] It must be stated from the outset that that the learned Chief Justice's jurisdiction to inquire into the impasse between the Chairperson of GECOM and the CEO was not ousted by Section 140(1) of ROPA because the concern here is compliance by the CEO with his statutory functions and not the validity of the election.

- [19] That being said, the Appellant and Fourth Respondent contend *inter alia* that GECOM must declare the election on the basis of the declarations made by the Returning Officers under section 84(1) of ROPA since the recount process is inconsistent with the requirements of the ROPA. They contend the person who is deemed to be elected President must be declared by the Chairman of GECOM “acting only in accordance with the advice of the Chief Elections Officer”. The Respondents, excluding the Third and Fourth named Respondents, contend that the CEO is an officer employed by GECOM and is subject to the direction and control of his employer. Further GECOM is empowered to remove and exercise disciplinary control over him and he is rendered by Section 18 of the ELAA subject to the direction and control of GECOM. Further there is no provision in the constitution or any other law which gives the CEO the power to direct GECOM.
- [20] An examination of our electoral laws regime reveals that the CEO is a statutory officer subject to the disciplinary control of GECOM. Sections 18 and 19 of the ELAA expressly provide, respectively, that “notwithstanding any written law the CEO shall be subject to the control and direction of the Commission” and “for the removal of doubts, it is hereby declared that the power of the Commission to supervise the functioning of any election officer...shall include the power to issue directions to any such officer.” Section 2 of ROPA defines “election officer” to include the CEO.
- [21] Article 161A(1)(a) of the Constitution provides that GECOM “shall be responsible for the efficient functioning of the Secretariat of the Commission, which shall comprise officers and employees of the Commission, and for the appointment of all the staff to the offices... and shall have the power to remove and exercise disciplinary control over such staff.” Article 162(1) of the Constitution provides that GECOM shall have functions connected with the conduct of elections and shall issue such directions and take such action as appear to it necessary to ensure impartiality, fairness and compliance with the provisions of the Constitution

or any Act of Parliament on the part of persons exercising powers or performing duties with the matters aforesaid. Section 22 of the ELAA empowers GECOM, by Order, if any difficulty arises in connection with the application of the ROPA, "to make provision, including the amendment of the said legislation, that appears to the Commission to be necessary or expedient for removing the difficulty..." Article 226(1) of the Constitution provides that GECOM is not to be subject to the direction or control of anyone.

[22] The CEO is therefore subject to the direction, control and supervision of GECOM acting in accordance with the entire electoral regime, that is to say, the Constitution, ROPA, the ELAA and Order 60 made under the ELAA and not the reverse. Therefore, the directions given by GECOM and/or its Chairperson to the CEO to prepare his report in accordance with the recount must be treated as a valid lawful directive which the CEO is required to obey by virtue of section 18 of ELAA.

[23] Section 96(1) of ROPA mandates that the CEO shall, after calculating the total number of valid votes of electors which have been cast for each list of candidates on the basis of votes cast and information furnished by the Returning Officers under Section 84, ascertain the result of the election in accordance with Section 97 and 98. In light of the fact that Order 60 is part of the present electoral law regime by which the CEO is bound it can only mean that the CEO must prepare his Section 96 report based on the recount numbers. It is disingenuous for the CEO to insist on preparing his 96 report on the basis of the March 13 Declarations when GECOM specifically issued Order 60 to cater for the various disputes and contentions that arose after polling day as stated in Recital 8 of Order 60. The CEO cannot take it upon himself to arbitrarily disenfranchise scores of thousands of voters. As noted by the CCJ in *Ali and Jagdeo* at paragraph [47]:

"The idea that the CEO or GECOM could, in an unaccountable, non-transparent and seemingly arbitrary manner, without the due processes and the legal

standards established in Article 163 and in the Validation Act, disenfranchise scores of thousands of electors is entirely inconsistent with the constitutional framework. Whatever allegations of irregularity attended those votes (and we neither agree nor disagree as to the existence of such irregularities) must be adjudged by the High Court under Article 163 as was correctly stated by the Chairperson of GECOM."

- [24] The Appellant and Fourth Respondent's contention that Section 18 of the ELAA is in tension with Article 177(2) (b) of the Constitution and that GECOM can only act in accordance with the March 13 declarations in light of the fact that Order 60 was specifically created to deal with the controversies surrounding those Declarations is without merit. The validation exercise has been completed and as noted by the CCJ at paragraph [46]" the votes already counted as valid votes are incapable of being declared invalid by any person or authority." The CEO must abide by the instructions of GECOM and/or its Chairperson and prepare his report as required by section 96 of ROPA using the recount numbers.

Res judicata, the Constitutionality of Section 22 of the ELAA, Validity of Order 60, the recount results and the Declarations of the Returning Officers for the Ten Electoral Districts made pursuant to Section 84 of ROPA

- [25] Given the finding of this court that the learned Chief Justice lacked jurisdiction to inquire into the constitutionality of Section 22 of the ELAA, the validity of Order 60 and the recount results, it is unnecessary to treat with these issues. However, for the sake of completeness these issues will be considered, on the assumption that the learned Chief Justice was seized with jurisdiction.
- [26] With the exception of the Third and Fourth named, the Respondents all contend that the issues of the constitutionality of Section 22, the validity of Order 60 and the recount results obtained pursuant to Order 60 are all *res judicata*.

[27] The Appellant and Fourth Respondent have submitted that these issues are not *res judicata*. The Appellant contends that the conditions set out in ***Garraway vs. Williams*** [2011] CCJ 12 (AJ) (GY) to raise a successful plea of *res judicata* were not met. The Appellant argued that Section 22 was addressed as a jurisdictional point and the validity of Order 60 was never raised in any Court before because the ***Ulita Moore*** decision predated Order 60. The Appellant further submitted that the learned Chief Justice erred in interpreting paragraphs [106] and [107] of judgment of the majority Court because that Court was not declaring that Section 22 of the ELAA could only be challenged in an election petition but also in a full frontal hearing as that of Misenga Jones. It was further argued by the Appellant and Fourth Respondent that ***Ali and Jagdeo*** concerned an interpretation of “more votes cast” and whether the Court of Appeal had jurisdiction to hear Eslyn David’s motion and were not decisions on the merits of the constitutionality of section 22 of the ELAA and Order 60. It was therefore submitted that the learned Chief Justice erred in finding that the CCJ’s decision endorsed Order 60.

[28] Section 22 of the ELAA, Order 60 made pursuant to Section 22 of the ELAA and the recount results obtained from Order 60 were examined by the majority Court in ***Ulita Moore*** at paragraphs [105] to [107]. Having set out the material part of Section 22 of the ELAA, the majority Court applied ***Petrie*** and ***Seecoomar***, and, agreed that the examination of the constitutionality of elections related legislation during the election period properly belonged to an elections petition. The Court went even further to say that the determination of the question as to whether GECOM has utilised or utilises its powers under section 22 of the ELAA, unlawfully, properly belonged in an elections petition. At paragraph 106 and 107 the majority Court said:

“[106] We agree with the submission that the legality of section 22 is a matter to be frontally examined by the Court at a full hearing. In *Petrie and Seecomar Singh*, the High Court declined to examine the constitutionality of election related

legislation during the election period, allocating such questions to an election petition. The Court said that such a determination would be disruptive of the election process. Moreover, it is well established that constitutional questions can be determined at the hearing of a petition discussed in *Peters and Chaitan vs. Attorney General and Another* (2001) 63 WIR 244.

[107] Alternatively, if GECOM has utilized or utilizes its powers under section 22 unlawfully, then this would be a question for determination at such time. No sufficient evidential basis exists for such a determination at this point."

[29] A full hearing as contemplated by the majority Court cannot mean anything other than a hearing of an election petition by an election court with the presentation of evidence and cross-examination. The majority in *Ulita Moore* said just this at paragraph [89]:

"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 the 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."

Submissions that the hearing of this matter before the learned Chief Justice amounted to a full hearing contemplated in paragraph [89] by the majority court in *Ulita Moore* cannot be countenanced.

[30] Reference in paragraph [107] to the possibility of GECOM utilizing its powers unlawfully under section 22 of ELAA could have only logically be referring to GECOM's decision to complete the electoral process by a recount of the votes in the ballot boxes, the validity of which properly belongs to an election petition. It is noteworthy that the majority Court in *Ulita Moore* found in paragraphs [85], [86] and [109] that GECOM's decision to recount was within their functions to resolve controversies as part of its responsibilities to deliver results of the elections. The Court endorsed the recount at paragraph [85] and [86] which provides:

"[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."

The majority court even went further in paragraphs [110-111] to say that it would be unlawful for GECOM to surrender supervisory jurisdiction over the election process more particularly the recount of ballots cast at the March 2nd elections.

[31] The recount process was also endorsed by the CCJ in the full judgment of *Ali and Jagdeo*. The CCJ spoke to the intent and purpose of Order 60, at paragraph [38], as being "specifically introduced to cater for the various disputes and contentions that arose after polling day and specifically after the March 13th Declaration. It was this last declaration which led to **Order 60**.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**." The Apex Court expressly determined the validity of the Recount Order and its process to be within the constitutional powers of GECOM as well as the legislative framework of Guyana's electoral system at paragraph [46]:

"It is clear that, under the legal infrastructure governing electoral process, unless and until an election court decides otherwise, the votes already counted by the recount process as valid votes are incapable of being declared invalid by any person or authority."

At no time did the CCJ determine that a final credible count could not be established pursuant to Order 60 neither did it set aside Order 60.

[32] The constitutionality of Section 22 of the ELAA, the validity of Order 60 and the recount results have already been traversed and addressed ad

nauseam in both the Court of Appeal and our Apex Court and found to properly belong in an elections petition after a declaration is made. These issues cannot be re-litigated. Where such issues have already been decided, the courts have held that to allow a challenge to the outcome offends core policy against re-litigation of identical claims. Garraway which binds the parties in personam can be distinguished from the present case which concerns public interest litigation and the decisions of the court which are binding in rem.

- [33] Decisions of the court in public interest litigation have been recognized as creating a judgment in rem rendering the issues raised *res judicata*. In 2006, the Supreme Court of India in ***State of Karnataka vs. All India Manufacturers*** AIR 2006 1846, (per Srikrishna, J. giving the decision of the Court) stated (pp. 9-11):

“Res judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *nemo debet bis vexari pro una et eadem causa* (“No one ought to be twice vexed for one and the same cause”) and second, public policy that there ought to be an end to the same litigation.... The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re-litigate the matter again and again.... As a matter of fact, in a Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bona fide, a judgment in a previous Public Interest Litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a Public Interest Litigation.”

- [34] Attach whatever label you may, whether *res judicata*, *estoppel per rem judicatam*, *issue estoppel* or *cause of action estoppel*, the FDA before the learned Chief Justice obviously raised impermissible abusive and duplicative litigation of issues already canvassed before the courts by both ***Ulita Moore*** and ***Eslyn David*** as noted in paragraph [79] of the judgment of the learned Chief Justice and she was correct not to rehash those issues or allow the Court’s processes to be abused.

[35] It is clear from the foregoing that the recount process undertaken by GECOM is germane to the discharge of its management of the electoral process and functions to resolve controversies to bring the elections to its conclusion under the existing electoral laws regime. Given that Order 60 contemplates the use of the valid votes obtained at the recount and the CCJ's pronouncements, that the valid votes which were recounted must be used, the recount tabulations replaced the March 13 declarations. The question as to whether GECOM properly set aside the March 13 Declarations and ordered the recount under Order 60 is a question for the election court as noted in paragraph [85] of the majority judgment in *Ulita Moore*.

[36] The finding by the learned Chief Justice that the March 13 Declarations were overtaken by a credible count pursuant to Order 60 cannot be faulted. The law is pellucid. The court is estopped from inquiring into any matter which has the effect of vitiating an election or, using the words of Section 140, inquiring into whether GECOM or its members "has validly performed its functions or at all" except under the exclusive jurisdiction of the High Court under Article 163(1) (b) of the Constitution. This Appeal and the Fourth Defendant's Cross Appeal are frivolous and vexatious and amount to a further abuse of the Court's process.

[37] It is a notorious fact that hostile and volatile conditions pervade the election season in Guyana, moreso, when cases surrounding the election are dealt with by the Courts. In this regard the words of Bernard CJ in *Aubrey Norton* [1996-1998] GLR 373 at pages 387-388 of the judgment are apt and are worthy of recitation:

"It is incumbent on me to stress that at all times respect for our courts and orders emanating therefrom must be maintained whether right or wrongly made...Judges strive to dispense justice under severe pressures and less than favourable conditions. Very often they make decisions which are not always popular; it is one of the occupational hazards, and we learn to live with it provided always that we know we have decided fairly and in accordance with the

law. However we hope, and I trust that I speak for all members of the judiciary, that we do not have to carry the additional burden of political pressure from any quarter. We are here to dispense justice fairly and to hold the scales evenly... To put it simplistically if the law is on your side regardless of the identity of the litigant you will win; if the law and judicial precedent is against you, you will lose. Justice must never be tied to political considerations and affiliations if we as a democratic nation believe in the separation of powers, i.e. the legislative, the executive and the judiciary. The independence of the judiciary must be maintained at all times."

Now as the President of the Apex Court said, in *Ali and Jagdeo*, "The law must run its course."

[38] In the circumstances, I order:

- (1) The Appeal dismissed;
- (2) The Cross-Appeal of the Fourth Respondent dismissed;
- (3) The Cross-Appeal of the Seventh and Eight named Respondents is allowed in relation to ground 1 of the Notice by the Seventh and Eight Respondents of Intention to Contend that the decision of the Court below be varied AND The Court's jurisdiction to inquire into the constitutionality of Section 22 of the ELAA, the validity of Order 60 and the recount are prohibited unless within the parameters of Article 163 of the Constitution;
- (4) Assuming the learned Chief Justice's jurisdiction was not ousted the issues raised in the FDA filed by Misenga Jones to wit the constitutionality of Section 22, the Validity of Order 60/ the recount results are res judicata;
- (5) The issue of the validity of Order 60 and the recount which effectively set aside the Declarations of the Returning Officers on March 13 2020 for the ten electoral districts properly belongs to an election petition after a declaration of the results is made in accordance with the recount numbers;
- (6) For avoidance of doubt, I find that the ruling of the majority in *Ulita Moore* was erroneous in so far as it relates to the finding, that outside of an election petition, the jurisdiction of the High Court can be

exercised where the court is satisfied that GECOM has acted or is about to act in excess of its constitutional and/or statutory powers;
(7) The parties to file submissions on costs within three days hereof.

[39] An application for a stay was made by both Mr. Forde for the Appellant & Mr. Edwards for the Fourth Respondent. This application was opposed by Ms. Kyte for the Second Respondent, Mr. Nandlall for Seventh and Eighth Respondents, Mr. Jonas for the Eleventh Respondent and Mr. Datadin for Twelfth Respondent. This application was refused. It is my view that there can be no stay of a dismissal of an Appeal; In any event, even if an application for stay of execution could have been made, such an application is refused on the ground that there is no likelihood of success on appeal.

Sgd. Priya Sewnarine-Beharry

Additional Judge

30th July 2020.

