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5<sup>th</sup> February 2001

Following the 15<sup>th</sup> December 1997 elections, one Ester Perreira filed a petition on the 25<sup>th</sup> February 1998 under Articles 60, 162 and 163 of the Constitution, the Representation of the People Act Cap. 1:03 and the National Assembly (Validity of Elections) Act Cap. 1:04 claiming the following in simple terms:

- (i) the elections were not free, fair and valid and
- (ii) the results were affected.

Twelve respondents were named, the Chief Election Officer, Doodnauth Singh, Chairman of the Elections Commission and the representatives of the ten parties that took part in the elections. The Attorney General, who was not cited as a respondent, had the power to intervene, but chose not to do so.

The petition was heard by the Honourable Madam Justice Claudette Singh. Although the law prescribes that an election petition should be heard day to day, there were many requests for adjournments which were granted. The hearing of evidence took more than two years and concluded on the 22<sup>nd</sup> May 2000. Addresses to the Court by the lawyers lasted three months. Thereafter the learned trial judge gave her 77 page judgment on the 15<sup>th</sup> January 2001 and made further oral orders on the 26<sup>th</sup> January 2001.

In the course of the judgment the judge found that on the whole of the evidence there was no fraudulent intention by any person and although the Chief Election Officer Mr. Stanley Singh admitted to deliberately flouting the

law his action did not amount to fraud. Although the judge found “flaws (irregularities and illegalities) as massive”, she was “unable to hold that illegal voting by persons who were not registered and were without voter ID cards would have per se affected the results of the elections.” Later on page 75 she stated “I am unable to make a positive finding whether those unlawful acts or omissions per se might have affected the results.” Again as if for emphasis, the judge repeated on the same page “I am unable to find that that it is more likely than not that the proved unlawful acts or omissions did affect the final results of the elections.” The apparent contradictory use of language and findings are already the subject of a cross appeal.

It was reported that when the judge delivered her judgment in open court she said that the elections were “vitiating”. However, on page 77 of the written judgment the learned judge only made **two** declarations as follows:

- (i) “that Act 22/97 is *ultra vires*, null and void Articles 59 and 159 of the Constitution.
- (ii) That the 1997 elections were not conducted in accordance with the provisions of the Representation of the People Act Chapter 1:03 and articles 59 and 159 of the Constitution of Guyana.”

An election court has the power to declare an election invalid. The law is clearly set out in Cap. 1:04. As indicated above, the judge not only did not make such an order but could not have impliedly or expressly done so having regard to her finding that the results would not have been affected.

In addition, the law clearly states that it shall not be a ground for rectification of the result of an election if any illegality or irregularity was committed unless the Court finds that such illegality and irregularity was committed otherwise than in good faith.

In making the first declaration, the judge found that the introduction of the Voter ID card introduced an additional condition to voting and therefore struck down the entire Act as being unconstitutional.

A similar situation arose in the Jamaican case of *Thompson v. Forrest (1967) 11WIR296* where Justice Smith observed that the word "entitled" does not appear in s.37. The word used was "qualified". The judge then went on to say that an individual who is qualified to be a senator is not entitled to be a senator. He then held that "s.37 of the Constitution was not intended to be a complete statement of the law governing the registration of electors." (NB. S.37 of the Jamaican constitution is similar to Article 159 of the Guyana Constitution where the word "qualified" is also used.) Indeed, this principle of law as enunciated by Justice Smith was in total contrast to the submission by Keith Messiah SC that "Articles 59 and 159 completely and exhaustively state that all that is required of the elector when he desires to vote at an election."

Furthermore, the judge went on to say that "There are no provisions in that section [s.37] or elsewhere in the Constitution prescribing the means whereby a person who is qualified becomes registered. Obviously this was left to be dealt with in the electoral law referred to in s.38." In fact this is precisely what Act 22 of 1997 which amended the electoral law, intended to do. The policy of introducing voter ID cards was not intended to disenfranchise voters but to address the mischief of rigged elections and multiple voting. The Act was passed in Parliament with the unanimous agreement of the political parties.

The following statement cited in that case is very instructive to draw attention to the nature of the problem which the Court was called upon to adjudicate: "Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the

wisdom or expediency of legislation. Such questions are for Parliaments and the people.”

Having regard to this case, which was not cited to the Court, the Court of Appeal should review this finding urgently. So as to prevent any delay to the case being heard, judges whose appointments could not be challenged and who could not possibly be accused of bias ought to be selected to adjudicate on this matter.

Before dealing with the second declaration it must be stated that Act No. 22 of 1997 contained eleven provisions and some of them did not deal with the voter ID card at all. It was therefore unusual that the entire Act was declared *ultra vires*, null and void.

The second declaration has to be read in conjunction with the first one. It declared that the elections were not conducted in accordance with the law because of the introduction of the voter ID card.

There are many unanswered questions and legal issues in this case which would generate much interest.

1. Why was the Chief Election Officer represented by Doodnauth Singh SC who was cited as the second respondent and was also a potential witness?
2. Why was the second respondent Doodnauth Singh, Chairman of the Elections Commission unrepresented?
3. Was the objection taken that the Chief Election Officer could not be sued in his official capacity?
4. Why was vital evidence not presented to the Court?
5. Was the *erratum* properly excluded as to the truth of its contents?

On the 26<sup>th</sup> January the learned judge made further oral orders. She held that the government should remain in power, then proceeded to impose limitations. Acts of Parliament made since December 1997 were temporarily validated, and the government could only now table legislation on constitutional reform and on elections. Elections must be held by 31<sup>st</sup> March 2001 and the State media must only accept paid political advertisements.

It is interesting to note that the learned judge quite rightly recognised that she had no jurisdiction to order the President or the Government to demit office and in any event no authority was shown to her. The government was not even a party to this matter. The orders made were never claimed in the petition. But more importantly, having found that the results would not have been affected, that the irregularities and illegalities were not committed in bad faith and having not declared the elections invalid, was there any power to order elections, to validate Acts of Parliament and to impose sanctions on the Government and the State media? Surely not! The doctrine of separation of powers has been seriously violated in this case. The doctrine of necessity which was invoked was wholly irrelevant.

The folly of these orders is that having expressly validated the acts of the Legislature and the Executive and remaining silent on the Judiciary one can argue that the acts done as well as the orders made by the Judiciary since 15<sup>th</sup> December 1997 are null and void. Indeed, the orders are a haven for controversy, litigation and disorder and should be addressed urgently.

The reference to Lord Denning MR in the *Morgan v. Simpson*(1974) case is inapposite as the Law Lord faced a different situation, a different provision and arrived at a different conclusion. In that case it was held that although the local government election had been conducted substantially in accordance

with the law as to local elections, the omission to stamp 44 ballot papers had affected the result of the election which was therefore declared invalid.

Finally, what this case clearly brought out was the inability of the Elections Commission to properly conduct elections. Were any sanctions taken against those persons who failed to sign the statements of polls, whether deliberate or not? Has any penalty or effective sanctions been introduced to cure that and other mischief? Did the Elections Commission address the many deficiencies highlighted in the case? Is the Elections Commission equipped to conduct a proper election on March 19<sup>th</sup>?

26<sup>th</sup> January 2001.

#### Update

On the 31<sup>st</sup> January the judge issued a written draft of the order of court. Yet again there were variations from what was said and written previously. The lawyers were allowed to state their objections in writing.

Firstly, the two declarations as written on page 77 of the judgment were not precisely recorded in the order of court as is usually done. The most significant change was the insertion in the second declaration of the words which referred to the elections "and are therefore unlawful."

While there is authority for altering or modifying oral orders made in open court at any time before they are entered, there seems to be no authority for altering written judgments. Hence, will the Court of Appeal rely on what was stated in the written judgment or what was recorded in the order of court?

In addition to the orders stated above, it was ordered that "the President *de facto* and his Cabinet ... shall perform their respective functions of office, not

under and by virtue of the declared unlawful National and Regional Elections,  
**but under and by virtue of this Order of the Court ..."**

It was also ordered that "all National and regional acts performed after December 15<sup>th</sup> 1997 are temporarily validated until such time as newly elected National and Regional representative can validate, amend, modify or revoke them according to law, in order to uphold the Rule of Law, to preserve the rights, obligations and other legal effects as if they had arisen under the provisions of valid enactments for such time until they are permanently validated by the new Legislature."

The first question that arises is whether the Court had the power to temporarily validate acts of the executive and legislature? Secondly, having expressly validated acts of the executive and the legislature, one could argue that the express mention of these two areas meant that the judiciary was excluded. This means that all court decisions made after 15<sup>th</sup> December 1997 could be challenged.

Further, according to her ruling, the judge's own appointment to the Court of Appeal has only been temporarily validated. The appointments of other three judges who were appointed on the same day were only temporarily validated. Additionally, the Chancellor's extension has only been temporarily validated. Such individuals cannot properly adjudicate on this matter because of the temporary validation of their appointments.

Moreover, if another party gains control of the Parliament or the executive, there is no impediment to that other party arbitrarily invalidating selected acts of the previous executive? The worst is yet to be seen!

The award of costs was specified: to be paid by the Elections Commission to Senior Counsel for the petitioner, two Senior Counsel for Hugh Desmond

Hoyte (respondent) and Attorney-at-law for Asgar Ally and Saphier Husain, who were also respondents. It is unusual, perhaps unprecedented, to award costs to the petitioner and respondent, as well as to award costs against entities not a party to the litigation and the Elections Commission was not a party. One might well ask why costs were not awarded to Janet Jagan and to the other lawyers who appeared for the respondents? Or why costs were awarded to the petitioner although the prayers sought were not determined in her favour. A vital omission from the judgment was the determination of whether the petition was upheld or dismissed.

The purpose of the voter ID card was to prevent multiple voting. Was it proper and fair to award costs to a respondent who approved of the card? Indeed, the petitioner did not allege in her pleadings or evidence that she was disenfranchised due to the voter ID card. In fact there was no evidence by anyone that they were disenfranchised due to the voter ID card.

This ruling leaves one to wonder whether a petition can be brought if persons who are 18 years old and citizens of Guyana are denied the right to vote because

1. their names were not on the list,
2. they did not go to a specified polling booth on elections day or
3. they did not have any form of identification or
4. they did not produce any identification to the presiding officer.

These four requirements are not listed out in Articles 59 or 159 of the Constitution. In this regard, it is instructive to return to Justice Smith who recognised that "The Constitution does not say when a person becomes entitled to vote" and wisely concluded that "It is left to the electoral law to say who is entitled to vote and when and where he is so entitled."

In concluding, the learned trial judge having earlier found that she could not say that the results would have been different chose in making the orders to confine herself to the validity of the amendment which she considered to be unlawful. She did not find that the results would have been different. On the contrary, she said "I am unable to find that it is more likely than not that the proved unlawful acts or omissions did affect the final results of the election." In the premises, she did not find the elections were null and void and no consequential orders were necessary.

31<sup>st</sup> January 2001.

#### Update

On the 2<sup>nd</sup> February, almost three weeks after the decision was given the order of court was finally entered. True to form there were variations from the draft, the most significant as follows:

1. The reasons for the decision were omitted.
2. The words "*de facto*" which referred to the President were deleted.
3. The following vague limitation was added "No substantial contracts for the execution of public works shall be awarded **without the permission of this court.**"
4. Costs were awarded to an additional counsel for the petitioner.

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