

2020-HC-DEM-CIV-FDA-360

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

BETWEEN:

REEAZ HOLLADAR

Applicant

-and-



- 1. RETURNING OFFICER, CLAIRMONT MINGO**
- 2. CHIEF ELECTIONS OFFICER**
- 3. GUYANA ELECTIONS COMMISSION**

Respondents

March 7, 8, 10, 11, 2020

**Mr. Douglas Mendes SC, Mr. M. Anil Nandlall, Mr. S. Datadin, Mr. K. Ramkarran, Ms. P. Manickchand. Mr. M. Narayan Mr. C. Hackett and Mr. R. Jaigobin for the applicant.
Mr. N. Boston SC, and Mr. Robin Hunte the respondents.**

CORAM: ROXANE GEORGE, CHIEF JUSTICE (ag)

Introduction

1. National and regional elections were held on March 2, 2020 in Guyana. Guyana is divided into 10 electoral districts which correspond to the 10 geographical regions. From all reports the voting process in all ten regions went relatively smoothly. Unfortunately, this proved to be the calm before the storm.
2. This is a storm that needs to be calmed as pursuant to s 99 of the Representation of the People Act, Chapter 1:03 the third respondent, the Guyana Elections Commission (GECOM) has fifteen days from the date of the elections to declare the results.
3. According to the application, after the close of poll, the returning officers of nine of the districts, in keeping with the provisions of the Representation of the People Act, Chapter 1:03 (Chapter 1:03), announced the total number of votes cast and the allocation of votes to the various political parties that contested the elections both nationally and regionally.

4. However, the announcement of the results for District 4, the largest district for the elections, by the first respondent returning officer (RO), was delayed and seemingly mired in confusion.
5. This application contends that s 84 (1) of Chapter 1:03 was not complied with by the first respondent RO and seeks his compliance and by extension the compliance of the second respondent, Chief Elections Officer (CEO), and GECOM with this provision. I will refer to the contentions in more detail shortly. Suffice it to say at this point, this is the narrow issue that has to be determined in this case.
6. The applicant, Reeaz Holladar, is a citizen of Guyana who was a registered elector and who deposed that he voted at the March 2, 2020 elections. Ms. Sonia Parag, attorney-at-law is a candidate for the Peoples Progressive Party/Civic (PPP/C) in these said elections. They both swore to the initial affidavits in support of the application. Supplementary affidavits by Ms. Parag and additional affidavits sworn by others were filed in support of this application. I will refer to their contents later.
7. The applicant outlined the statutory procedures for ascertaining the results of the elections in a district after the close of poll. These are provided for firstly in s 83 of Chapter 1:03. In brief, the ballots are counted and the results are recorded on statements of poll (SOPs) each for the national and regional elections. Ballots for the respective lists of candidates as well as spoilt, tendered, rejected and unused ballots are placed in respective envelopes and packets which are sealed and where required marked. Thereafter, copies of the SOPs are prepared by the presiding officers for the polling places for distribution to the returning officer for the district (RO), assistant presiding officer, such of the duly appointed candidates or polling agents as are present and the CEO. Importantly, s 83 (9A) provides that a copy of the SOP is posted up in a conspicuous place outside each polling place as “conclusive evidence of the result of the elections for that polling place unless there is a recount of the votes.”
8. Section 83 (10) provides that the presiding officer shall place the envelopes with the counted and rejected ballots in the ballot boxes which shall be sealed. The ballot boxes, packets containing balloting documentation and the SOPs are conveyed to the RO of the district in the company of polling agents or duly appointed candidates of the political parties who are desirous of accompanying them where they can be accommodated in the transportation provided.
9. On the completion of the process pursuant to s 83, s 84 of Chapter 1:03 provides for what happens after the ballot boxes and the envelopes, packets and SOPs are received by the RO.
10. Section 84(1) outlines what occurs when the ballot boxes, envelopes and packets, and SOPs arrive at the offices of each RO. It states:

“84. (1) As soon as practicable after the receipt of all the ballot boxes and the envelopes and packets delivered to him in pursuance of section 83(10), the Returning Officer shall, in the presence of such of the persons entitled under section 86(1) to be present as attend, ascertain the total votes cast in favour of each list in the district by adding up the votes recorded in favour of the list in

accordance with the Statements of Poll, and thereupon publicly declare the votes recorded for each list of candidates.” (Emphasis and double emphasis mine.)

11. Section 86(1) states that the persons who are entitled to be present are the RO, election officers appointed by the RO to assist him in the counting, members of GECOM, duly appointed candidates, counting agents and others with good reason to be present. In the context of these elections, the latter group would include local, diplomatic and foreign or international observers. Election officer, as defined in s 2 of Chapter 1:03, means the CEO, Deputy CEO, a returning officer, a deputy returning officer, an election clerk, a presiding officer, an assistant presiding officer and a poll clerk.
12. By s 84 (1A)(a) where an election officer for a polling district discovers a material error on a SOP, the presiding officer is to be informed and, if the SOP has not been sent to the RO, then it is to be corrected with the necessary persons signing it. The corrected SOP is then to be sent to the RO.
13. Then by s 84 (1A) (b), if the mistake is found after an SOP has been sent to the RO, the presiding officer and the person(s) who signed the SOP are to be called for the correction to be made and signed off by the necessary persons. The presiding officer is then required to post the corrected SOP next to the original incorrect SOP at the polling place. For the avoidance of doubt, the subsection goes on to state that the RO is to use the corrected SOP to make the declaration of the votes in favour of the lists of contesting parties pursuant to s 84(1).
14. At the completion of this exercise, if there is no request for a recount pursuant to s 84 (2), the RO is to communicate the final count for the district to the CEO.

Applicant’s claims

15. In simple terms, the major complaint of the applicant is that the first respondent, who is the RO for District 4, has not complied with s 84 (1) in that he has not completed the addition of all the SOPs in the presence of persons entitled to be there. It is further claimed that despite these circumstances he made an attempt at a declaration or made a purported declaration of the total votes cast in favour of each list in the district, that is, he attempted to declare or declared the results of the elections for District 4.
16. From the evidence deposed to by the first respondent RO, it is now accepted by all parties that the declaration was made. I would add that from the evidence the declaration was made despite what clearly was a protest that was unfolding in the GECOM building. So it can be concluded that there was a public declaration of the results such as to satisfy the requirements of s 84 (1) in this regard. Therefore, it is the circumstances which led to the declaration being made that are to be determined and whether such circumstances affect the validity of the declaration.
17. As a result, the applicant applied for the following orders:

- “(i) A Declaration that the purported declaration of the Elections returns/votes made by the Returning Officer for Election District Number 4 of the Co-

operative Republic of Guyana dated the 5th March, 2020, by Form Number 24, of the Representation of the People Act General Elections, is in breach of the provisions of the Representation of the People Act, Chapter 1:03 and is unconstitutional, unlawful, illegal, improper, null, void and of no effect;

- (ii) A Declaration that the Guyana Elections Commission is the only body to constitutionally and statutorily authorized to declare the results of the General Elections held on the 2nd March, 2020 in the Co-operative Republic of Guyana, pursuant to section 96 of the Representation of the People Act, Chapter 1:03;
- (iii) A Declaration that the Guyana Elections Commission cannot legally, lawfully or constitutionally declare the results of the General and Regional Elections of Guyana unless and until the Returning Officer and/or Deputy Returning Officer for Elections District Number 4 and/or the Chief Elections Officer complies with and ensures the compliance with the process set out by the provisions contained in and the letter and spirit of section 84 of the Representation of the People Act;
- (iv) An Order vacating, revoking, setting aside and/or declaring invalid the purported declaration of the Elections Returns/votes made by the Returning Officer for Election District Number 4 of the Co-operative Republic of Guyana, dated the March 5th, 2020, by Form 24, of the Representation of the People Act General Elections in respect of the votes cast in Election District Number 4 for the General and Regional Elections held on the 2nd March, 2020 of the votes for District 4;
- (v) and injunctions.

18. The injunctions were originally sought and granted pursuant to an oral application made before Navindra Singh J on March 5, 2020. These injunctions restrained the RO, the CEO and GECOM from declaring the votes for District 4 without complying with s 84, and restrained GECOM from declaring the total number of valid votes cast for each political party until the RO and/or the CEO complies with and ensures compliance with the provision, letter and spirit of s 84 of Chapter 1:03. A mandatory injunction was also granted compelling the RO, the CEO and GECOM to comply with the letter and spirit of s 84 of Chapter 1:03 and forthwith declare the votes for the political parties for the district.
19. The language of the injunctions was such that they could be interpreted to be final in nature. Mr. Mendes, recognizing that they had been granted *ex parte* on an oral application, suggested that the court order that they continue until the hearing and determination of this application. Mr. Boston objected and his submissions in the substantive application revealed why.
20. Mr. Boston contended that these injunctions, being final or permanent in nature could not be revisited by this court. He contended that as regards these orders, the case was *res judicata*. He eventually abandoned this submission as to maintain it would have made the hearing of this application an exercise in futility and the respondents would have simply

had to abide by the injunctions. Therefore, for the purposes of this application, the injunctions granted on March 5th 2020 are deemed to be interim pending the determination of this application.

21. At the hearing of the injunctions application, the applicant gave an undertaking to file the substantive fixed date application (FDA) in support of the application for the said injunctions.
22. The FDA was filed on March 6, 2020 and fixed for hearing on March 7, 2020 due to the urgency of the circumstances. Mr. Boston SC appearing for the respondents acknowledged service of the FDA on behalf of all three respondents. He raised a point *in limine* contending that this court has no jurisdiction to grant the application and orders sought, and that the injunctions were improperly granted as the issues raised by the applicant belong to a class of questions covered by art 163(1) of Constitution of Guyana. Article 163 provides for “Determination of questions as to membership and elections” and by virtue of art 163 (4) and the National Assembly (Validity of Elections) Act, Chapter 1:04 for the filing of elections petitions. It was submitted that only this special jurisdiction of the court could be invoked so that any challenge to the elections must be presented by an elections petition. It was further submitted that the court has no jurisdiction to grant injunctions by way of equitable relief so as to restrain the conduct of elections or the conduct of elections in a particular way.
23. Mr. Mendes SC countered that the issues raised in this application are amenable to judicial review since they do not fall with the class of questions contemplated by art 163(1)(b)(i) or the National Assembly (Validity of Elections) Act, Chapter 1:04. This is so because the applicant is not challenging the results of the elections as they are not known, nor does he challenge the elections themselves. The application seeks to have the RO comply with s 84 and facilitate the elections process in accordance with the law irrespective of what the result might be.
24. In a decision given on March 8, 2020, I ruled that the court has jurisdiction to hear this application and that the issues raised need not be left for a challenge by way of elections petition. I directed that the respondents serve and file their affidavits in defence by 10.30 am on March 10, 2020 and that the applicant file a reply, if necessary, by 1.30 pm on the said March 10, 2020. The parties complied.

Evidence and submissions in support of Application

25. I turn now to the evidence in support of the application. The applicant, supported by Ms Parag, states that there was a tabulation and verification process for nine of the ten election districts. It was deposed that in these districts the “tabulation and verification process were (sic) concluded in the presence of representatives of all the contesting political parties and the international, diplomatic and local observers and the results were declared and announced without objection, protest or challenge from any of these stakeholders”. However, as regards District 4, there has not been a completed verification of the votes cast.

26. The applicant contends that the verification process commenced in the presence of representatives and candidates of the contesting political parties, international and local observers and officers of GECOM. He and Ms Parag referred to the “verification and reconciliation process being disrupted and delayed on several occasions” because GECOM and its officers, servants and agents have refused to conduct the process in an open, transparent, fair and efficient manner and in compliance with the provisions of the Representation of the People Act.” In this regard, it was stated that these persons have continued to be willing to conduct the verification and reconciliation process but that this has been refused by GECOM and its officers, servants and agents.
27. It was also stated that officers of GECOM had sought to verify information from a spreadsheet but major discrepancies were disclosed as against the SOPs in the possession of the contesting political parties. This resulted in objections and protests and the process was halted so that SOPs could be utilized for the verification and reconciliation process to be conducted.
28. So, the factual matrix relied on in the main, is that there were 879 polling stations for District 4 with corresponding SOPs. 421 SOPs have been dealt with by adding the votes cast for the various party lists, with there being minor discrepancies which were resolved pursuant s 84 (1A). The problem arose in relation to 458 polling stations as the process for tabulating the SOPs was suspended, so that no addition of these remaining SOPs was conducted in the presence of persons who are entitled to be there pursuant to s 84 (1). Despite this, on March 5, 2020 a declaration of the results for District 4 was made by the first respondent pursuant s 84(1).
29. It is contended that to date there has been no lawful or proper declaration of the votes for District 4 in compliance with the provisions of Chapter 1:03. It was vaguely posited that subsequent to the service of the injunctive orders there was a purported declaration of the results for District 4 by the RO. It was conceded by Mr. Mendes that the injunctions order was not served on the RO onto the time he had made the declaration.
30. A further supplementary affidavit was filed by Ms. Parag alleging that she has records of the tally sheets and votes cast in favour of the PPP/C. Indeed she and the applicant had stated in their initial affidavits that they could produce SOPs for the perusal of this court.
31. Additional affidavits in support of the application were filed by Mr. Zulificar Mustapha, election agent for the PPP/C and Mr. Charles Ramson, attorney-at-law, candidate for the PPP/C detailing that the latter had been appointed counting agent. It was also deposed that when he applied for a general final count on March 6, 2020, this was refused on the ground that there were no records at GECOM that he had been appointed as the said counting agent.
32. I concluded in the ruling on the preliminary point that these additional issues as outlined in para [30] and [31] above are not for an application such as this. I reconfirm my initial view that these matters would better be canvassed in an elections petition. I am not concerned with the votes cast for any of the parties. As I said above, the issue to be determined in this application is a narrow one – whether there has been compliance with s 84 (1) of Chapter 1:03. Thus, out of an abundance of caution, I again do not rely on any of this evidence in coming to my decision in this application.

33. Mr. Mendes placed emphasis on the factual circumstances, going through in particular the affidavits by and for the respondents which I will detail shortly. He referred to the affidavit of the RO for District 4 being based on hearsay evidence. He noted that the affidavits for the respondents are contradictory as regards what occurred in relation to the completion of the addition of the votes recorded on the SOPs after midday of March 4th, 2020. He contended that the issue to be determined is whether the failure to comply with s 84 can properly lead to a declaration by the RO.
34. It was submitted that s 84 is mandatory and that in the circumstances Parliament would have intended that if the provision was not followed then any act in this regard would be invalid. It was further advanced that there would be no prejudice to anyone for the RO to conduct the process in the presence of persons entitled to be there. Therefore, there would be no prejudice if an order invalidating the declaration is granted for this would ensure that the process is carried out pursuant to the law to ensure public confidence. He posited that a failure to require compliance with s 84 (1) would lead to distrust, and a lack of trust in the results that have been declared. He concluded by emphasizing that the process must be transparent.
35. In answer to my enquiry, Mr. Mendes stated that the fact that Mr. Ramson made a request for a general count pursuant to s 84(2) was not evidence that there was an acceptance of the validity of the declaration made by the RO. It was merely done out of an abundance of caution in case it was that the declaration was deemed valid. As regards the reference to what was meant by verification and reconciliation of the SOPs, Mr. Mendes said that this meant the addition of the SOPs and that as the RO produces the original SOPs, the representatives of the political parties would seek to reconcile the information presented with their SOPs. In this regard there can be reconciliation. Hence, the reason for the public conduct of the process in the presence of such representatives and other persons. However, he concluded that it would be for the RO to resolve any dispute and decide whether to accept what is being put forward.

Evidence and submissions in support of the Respondents

36. Affidavits in defence were deposed to and filed on behalf of Mr. Clairmont Mingo, the first respondent RO for District 4; Ms. Roxanne Myers, Deputy CEO; Mr. Aubrey Norton, Counting Agent for A Partnership for National Unity/Alliance For Change (APNU/AFC); Mr. John Adams, Deputy Campaign Manager and Assistant Election Agent for APNU/AFC for District 3; Ms. Nicola Trotman, Co-Manager for APNU/AFC and Mr. James Bond, attorney-at-law.
37. The evidence produced by Ms. Myers, Ms. Trotman and Mr. Bond confirms the confusion that ensued as regards the tabulation and declaration of the votes for District 4. In fact, the evidence in these affidavits, which was not denied by Ms. Parag in her affidavit in reply, suggests there was mayhem at the GECOM building in which the RO's office was located. Given the evidence of Ms. Myers who produced a report on the tabulation methods for all districts, and Mr. Norton and Mr. Adams who spoke to the

process in District 3, it appears that there is no standard methodology for all districts as regards the addition of the votes disclosed on the SOPs. Hence, the contentions as regards how the votes were to be added for District 4 and the input of the agents of political parties.

38. However, it is noted that while there appears to have been an issue regarding the accuracy and therefore use of a spreadsheet in District 4, the report exhibited by Ms. Myers indicates that spreadsheets were utilized in the process of the tabulation in eight of the other districts. While Ms. Myers' report indicates that a spreadsheet was not used in District 3, Mr. Norton and Mr. Adams deposed otherwise. The report discloses that a spreadsheet, either alone or in conjunction with other methods of tabulation, was used. In the main, the SOPs were read and a spreadsheet was created.
39. More importantly, the evidence discloses a major inconsistency as between the affidavits of Ms. Myers and Ms. Trotman on the one hand, and the RO on the other. Ms. Myers and Ms. Trotman support the applicant's contention that apart from delays, which included one as a result of the RO falling ill, there was a suspension of the tabulation of the votes somewhere between 9.00 pm and 10.30 pm on March 4th. Mr. Bond also referred to the suspension of the declaration process though he is not specific as to when this occurred.
40. In any event, a decision was taken to resume on March 5th, 2020 at 9.00 am. Ms. Myers said she had left GECOM for home when the decision to suspend the process was made at about 9.00 pm. At about 9.00 am on March 5th she was at the GECOM building when there was a bomb scare. Subsequently, at about 12.00 noon a decision was made to resume the process with persons entitled to be present to attend including two observers from each of the local and international observer groups. Ms. Trotman stated that on March 5th she checked GECOM regarding the resumption of tabulation, and on receiving a call returned to GECOM at about 11.20 am. Neither of them, nor Mr. Bond, specifically depose to whether, or how, the tabulation process continued or actually unfolded but went on to say that the RO attempted to declare and then declared the votes for District 4.
41. The RO, on the other hand, said that process commenced in the presence of persons entitled to be present from about 10.30 pm on March 2nd 2020. The process continued in his presence until about 12.00 noon on March 4th when he fell ill and left for hospital. He left a Ms. Michelle Miller, Senior Clerk, to supervise the process. Thereafter, it is evident that the RO was personally unaware of what occurred as he deposed continuously about what Ms. Miller told him.
42. The RO further stated that Ms. Miller advised him, that in his absence clerks, supervised by her, inputted data and completed the input of all data in the computer for District 4 at around 7.30 pm on March 4th. Subsequently, he said that the count had already been completed at 9.10 pm on the said March 4th. Ms. Myers, as Deputy CEO, who said she was at the GECOM building when the decision was taken to suspend the process to the following morning, was clearly unaware of this as she has said nothing about the count being completed at any time on the night of March 4th.
43. The RO also said that Ms. Miller told him that the data had been inputted data from the SOPs and had thereafter been produced as a spreadsheet.

44. Ms. Parag deposed and Ms. Myers confirms that there was objection to the use of the spreadsheet, though as noted above the evidence from Ms. Myers shows that spreadsheets were used in other districts. The CEO directed the discontinuance of the use of the spreadsheet after there was protest in this regard.
45. It appears that sometime on the night of March 4th the RO returned to the GECOM building for he stated that (1) he was in a position to make a declaration but did not do so due to queries which were addressed and (2) the process was adjourned to March 5th. At 9.45 am on March 5th Ms. Miller was making preparations for him to make the declaration when a large contingent of persons entered the building and caused a disruption. He nevertheless subsequently made the declaration in the presence of a number of persons, many of whom were shouting loudly.
46. The RO said nothing about the resumption of the tabulation of SOPs on MARCH 5th to which Ms. Myers and Ms. Trotman referred.
47. Significantly, no affidavit has been filed by of Ms. Miller who it appears played a crucial role in finalizing the tabulation process. Mr. Mendes submitted that Ms. Miller, whose designation has been given by the RO as Senior Clerk, would not have been a proper person to have been supervising the s 84 (1) process as she was not an election officer as stipulated by s 86 (1) who the RO could have designated to assist him in counting. He cited the Tanzanian case of **AG v Monko [1989] LRC (Const) 211**. In this case, there was a challenge to an election result by way of petition. The trial judge found that the ballot boxes were opened and the ballots counted by enumerators instead of returning officers or assistant returning officers and as such declared the election void. There was no provision in the elections law that authorised the enumerators to assist in counting the votes. On appeal it was held, upholding the judge's decision, that the legislation provided that the returning officer and assistant returning officer conduct the opening of the ballot boxes and counting of ballots.
48. Indeed, it does appear that Ms. Miller would not have been a proper official to undertake the important task of conducting or supervising the conduct of the tabulation of the SOPs. However, while this is an important issue, there is no need to rely on it in coming to a determination in this case.
49. Mr. Boston submitted that the RO can adopt whatever methodology he decides to pursue to arrive at the results. He can sit with the persons entitled to be there and go through the SOPs or prepare a spread sheet from SOPs and thereafter declare the votes received by list of each candidate. In this regard, the RO is duty bound to rely on the SOPs he has received and not on what Ms Parag and other members of political parties say they have. He said that s 84 (1) does not provide for RO to listen and resolve disputes, so that if there is dissatisfaction then the aggrieved party or persons can apply for a recount under s 84 (2).
50. It was contended that although the RO has not produced evidence of when the tabulation was finally completed, there is a presumption of regularity that he did so. Mr. Boston submitted that even if he has not complied with s 84 (1) by doing a count in the presence of persons entitle to be there, it does not invalidate what was done and the declaration made thereafter as the provisions of s 84 (1) are directory and not mandatory. He relied

on the dicta of Bernard CJ in **Joseph Hamilton v Guyana Elections Commission, Bharat Jagdeo & AG 40M/2001** and other authorities on how the court is to assess mandatory and directory provisions. As such, any non-compliance in this case would not mean that his declaration would be nullified.

51. Mr. Boston also submitted that in any event there has been substantial compliance with s 84 (1), that is, substantial compliance in advancing the process towards a declaration of the results for District 4 in a timely manner so that the declaration cannot be invalidated. He said that one cannot consider the numbers of SOPs dealt with or still to be dealt with in determining whether there has been substantial compliance. He further stated that the RO utilized the spreadsheet to make the declaration. There is no evidence to this effect, and I am cognizant of the evidence of Ms. Myers and Ms. Trotman that a decision was taken to discontinue the use of the spreadsheet that had been generated unto that time.
52. Finally, it was submitted that the avenue for challenge would have to be by way of a request pursuant to s 84 (2) for a recount.
53. In response, Mr. Mendes submitted that Mr. Boston cannot rely on the presumption of regularity as the affidavits for the respondents do not support this contention. This is so, he said, because the RO detailed what occurred and stated that adding up was done in his absence and advanced what he had been told as proof. So when he says he was absent and that information was inputted by clerks then we have to accept this. He also referred to the fact that the RO also said the process had been completed at 7.30 pm on March 4th and that he had decided that he was going to make the declaration.

Analysis

54. The position of RO is a statutory one that requires that he or she perform his or her duties in accordance with the law that governs their powers and duties. In this regard, they are bound to ensure that the process and procedures outlined in Chapter 1:03 are carried out. If there is default, then it is open to the court to exercise its supervisory powers to direct that there is compliance with the law.
55. As held in **R v Panel on Take-Overs and Mergers ex parte Datafin plc & Anor [1987] 1 All ER 564**, where a public duty is imposed on an official or body, whether expressly or by implication, the person or body in exercising those public functions, would be subject to the court's jurisdiction of review utilizing its supervisory powers. These sentiments are applicable in this case to the RO who, as I have recounted above, has statutory duties pursuant to s 84 of Chapter 1:03.
56. Importantly, in today's context, where persons are to exercise statutory duties moreso in a public manner, unless there is good reason to conclude otherwise, they are enjoined to do so transparently. The process outlined in s 84 is meant to engender transparency and accountability to thereby ensure impartiality and fairness.
57. I note that in **Joseph Hamilton v Guyana Elections Commission, Bharat Jagdeo & AG 40M/2001**, Bernard CJ (as she then was) considered that s 84 was not mandatory as regards the timeframe in which the additions of the SOPS are to take place, or as to who

should be present at such additions. This is what Her Honour had to say as regards s 84 (1) (p 14 -15):

“Overall one has to conclude that the intention of the Legislature at all times was to provide for the counting of votes, and when one reads the original marginal note and the body of the new section it is clear that it is the duty of the Returning Officer to ascertain the total votes cast in favour of each list in the district. The original section provided for the counting of votes at a place appointed by the Chief Elections Officer, but the amendment provides for the Returning Officer to ascertain the total votes case for each list by adding up the votes recorded in the statements of poll in the presence of persons entitled to be present as set out in Section 86 (1) which includes members of the Commission, duly appointed candidates, counting agents and such other persons as, in the opinion of the Returning Officer, have with good reason to be present. It seems from a perusal of Section 86 (1) that a discretion reposes in the Returning Officer to permit persons who in his opinion have good reason to be present, and to carry this discretion further maybe to have representatives of duly appointed candidates instead of the candidates themselves, and similarly not to insist on the presence of members of the Commission having regard to the limited composition of the Commission and the number of electoral districts. In this regard, Section 86 (1) is not mandatory, but directory. In relation to Section 84 (1) the opening words are significant – “As soon as practicable”. There is no strict time limit imposed, but it imposes a duty to act with dispatch. The ascertaining of the total votes cast for a list by adding up the statements of poll must be done and publicly declared. Overall, I think though not mandatory, the provisions impose a duty on the Returning Officer, and although in my view non-performance of this statutory public duty may not render acts done in the performance of the duty null and void, as was stated in *Normandin* (supra) [*Montreal Street Rail Co. v Normandin* [1917] AC 170 at 174], it is a duty which is binding and should be carried out. This must have been the intention of the Legislature and it cannot be ignored.”

58. I agree with Bernard CJ that the time frame for the commencement of the adding of the votes as recorded in the SOPs is directory as this is to be done “as soon as practicable”. Whether utilising the mandatory – directory dichotomy as contended for by Mr. Boston, or the newer language as contended for by Mr. Mendes which requires a focus on the consequences of non-compliance and whether Parliament intended that there be invalidity, the result is the same as no specific timeline is fixed.
59. Therefore, what would amount to a breach as regards commencing the tabulation after the receipt of the SOPs would depend on the facts of the case. However, as Bernard CJ noted the provision still requires the RO to act with dispatch. In this regard, if there is evidence of inordinate or undue delay, then even though directory, in my view, such may amount to a breach of the provision. But I only mention this *en passant*, for this is not the complaint in this case.

60. I hold that there are primarily two explicitly mandatory requirements in s 84 (1): (i) that the total votes cast in favour of a list in the district must be done by adding up the votes recorded in favour of the list in accordance with the SOPs, and (ii) that thereafter there must be a public declaration of the said votes recorded for each list of candidates.
61. I agree with the *dicta* of Bernard CJ that the presence of all the persons listed in s 86 (1) is not required at the addition of the votes recorded on the SOPs, and that the RO has a discretion to determine who are persons who would have good reason to be present. It is also within his discretion as to which elections officers will assist him. I also agree with Her Honour's conclusion that this aspect of the section is directory. But I would add, especially in this era that calls for greater transparency in the actions of public officials, once any of the persons entitled to be present attends, then the addition must be done in their presence. This would especially be the case where duly appointed candidates and or counting agents of political parties attend. In this latter limited sense, I would say this aspect of s 84 (1) is mandatory, that is, non-compliance would warrant scrutiny and can result in the invalidity of the process.
62. This may appear to be a fine distinction but I feel it has to be made in the interests of the credibility of the process and in order to obviate the continued contentions regarding the tabulation and declaration of elections results. Posting of SOPs at the place of poll is one of the safeguards. The public tabulation of the SOPs is another.
63. Mr. Boston submitted that non-compliance with s 84 (1) cannot result in the invalidity of the declaration because the provision should be considered to be directory. He further contended that in any event in this case there has been substantial compliance with this provision. He stated that he subscribed to the traditional view as recounted by Lord Steyn in *Regina v Soneji & anor* [2006] AC 340 at p 349 para 14 as follows:

“VI. The core problem

14. A recurrent theme in the drafting of statutes is that Parliament casts its command in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the alst 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements purely regulatory in character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply could not invalidate the act provided that there was substantial compliance. A brief review of the earlier case law is to be found in *Wang v Comr of Inland Revenue* [1994] 1 WLR 1286, 1294D – 1295H.”

64. In support of his submission, Mr. Boston then referred to the judgment of Lord Carswell at p 363 paras 63 and 65 of *Sonjei* where His Lordship stated as follows -

“63. There is however, some value still in the principles enshrined in the dichotomy, particularly that which relates to substantial performance.

...

65. The traditional consequence of finding that a provision was merely directory was that substantial performance would constitute a sufficient compliance with the statutory requirement. This concept can be more readily applied where a statute prescribes an exact method or sequence of carrying out specified acts or a time within which they are to be performed. A minor or insubstantial deviation from the requirements will not make the resulting proceedings invalid.”

65. Despite this dicta, the House of Lords in **Soneji** ultimately held as follows:

“that the correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid.”

66. Indeed, Luckhoo C adumbrated this principle since 1975 in our local case of **Reece v Abdulla (1975) 23 WIR 34 at 36 C** albeit the dicta is framed in context of the mandatory-directory dichotomy. Chancellor Luckhoo said:

“In order to determine whether a statutory provision is mandatory or directory, a casual or superficial approach is not enough. One would have to get, so to speak, under the ‘skin’ of what was enacted; its scope and its object would have to be surveyed; the justice or injustice that would accrue either way assessed; the extent of hardships and inconveniences examined etc., if the probe is to reveal the true intendment and purpose of the legislature.

67. In De Smith’s *Judicial Review* (7th edn) under the heading ‘Mandatory and Directory Powers’ at p 272 *et seq* the following is stated which highlights the traditional dichotomy and the shift to a more purposive interpretation of legislative provisions (paras 5-052 – 5-63):

“5-052 When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court have therefore formulated their own criteria for determining whether the prescriptions are to be regarded as mandatory, in which case disobedience will normally render invalid what has been done, or as directory, in which case disobedience may be treated as an irregularity not affecting the validity of what has been done.

...

5-053... it is possible to state the main principles that courts have generally followed and to illustrate their application in a few settings. In brief, the principles are as follows:

(a) A decision or action is in general to be treated as valid until struck down by a court of competent jurisdiction. ...

(b) Statutory words requiring things to be done as a condition of making a decision, especially when the form of words requires that something 'shall' be done, raise an inference that the requirement is 'mandatory' or 'imperative' and therefore that failure to do the required act renders the decision unlawful.

(c) The above inference does not arise when the statutory context indicates that the failure to do the required act is of insufficient importance, in the circumstances of the particular decision, to render the decision unlawful.

(d) The courts, in appropriate cases and on accepted grounds may, in their discretion refuse to strike down a decision or action or to award any other remedy.

...

5-062 ... Eschewing a rigid adherence to the language of 'mandatory' and 'directory' (although it was to be regarded as a 'first step'), it was held [in *London & Clydesdale Estates v Aberdeen District Council* [1980] 1 WLR 182] that the matter should be judged upon the overall intent of the legislation, and the interests of justice. In particular, if there had been 'substantial compliance' with the requirement, and if the irregularity was capable of being waived, then whether the non-compliance could be justified depended upon the consequences of non-compliance which, in the circumstances of that case, did not materially prejudice the appellants."

68. I prefer to adopt the more flexible approach as highlighted in **Soneji** and considered in **Reece v Abdulla**. I have therefore concluded that in interpreting s 84 (1) the question to be posed is whether it was the purpose of our Parliament that an act done in breach of the provision should be invalid.
69. While a failure to post the SOPs at the place of poll may be considered directory as Parliament could not have intended that a failure to do so would not affect the results as recorded, **the failure to comply with s 84 (1) has much more serious consequences.**
70. **I have concluded that a failure to tabulate the votes recorded on the SOPs in the presence of persons entitled to attend would be to defeat the intention of Parliament to provide for transparency in the tallying of elections results. To hold otherwise would be to stymie the intention of Parliament and affect the credibility of the elections. It cannot be that Parliament would seek to have the ROs flout the provisions for public tabulation and declaration of results without there being a sanction for non-compliance. In my view, the sanction has to be the invalidity of their actions.**
71. With this background, this decision boils down to an assessment of the facts disclosed on the affidavits.

72. My understanding of the provisions outlined, more especially s 84 of Chapter 1:03, is that the RO, in the presence of the persons listed in para [11] above, is to add up the votes in favour of the political parties according to the SOPs that would have been delivered to him or her. On completion, he or she is to publicly declare the votes for each list of candidates, i.e. for the political parties.
73. As stated earlier, Mr. Boston submitted that there has been substantial compliance with the subsection and that the principle of presumption of regularity should be applied. I disagree. The dicta cited by Mr. Boston from **Soneji (above)** in my view supports my finding in this regard. As quoted by Mr. Boston from p 364 para 67:

“What will constitute substantial performance will depend on the facts of the each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done ... as valid.”

74. There cannot be substantial compliance when the tabulation of 458 SOPs has not been accounted for. The RO said nothing about how many SOPs had been added unto when he fell ill and left. He did not refute the evidence for the applicant in this regard that 421 SOPs had been completed and that therefore 458 remained to be completed. In addition, it was incumbent on the RO to ensure that the addition was done in the presence of persons entitled to be present. Ms. Parag’s uncontroverted evidence is that such persons were available to attend the process. As I noted above, it is unknown how the process unfolded while Ms. Miller was in charge as she has not filed an affidavit. None of the persons who deposed to affidavits for the respondents has accounted for what happened with the tabulation process from the time the RO left for the hospital around midday on March 4th and unto his return sometime in the evening of March 4th.
75. I understand the applicant to be saying that the adding up of the votes based on all the SOPs was not done in the presence of these persons as this process had not been completed when the RO made the declaration. In my view and I hold that the evidence discloses that a significant part of the addition of the votes from the SOPs was done in the absence of the persons who are entitled to be there, that is in the absence of election officers, members of GECOM, duly appointed candidates, counting agents and others with good reason to be present, that is for example, election observers, and that these persons were willing and able to be present. As such the process would have been flawed, and there has been a breach of s 84 (1) in this regard.
76. As I have emphasized, the provisions of s 84 are designed to ensure transparency in the process towards a declaration and the credibility of the elections results. I have concluded that in the absence of credible evidence about what occurred after the RO left for hospital unto the time he made the declaration, then the presumption of regularity cannot apply. It cannot be presumed, based on the RO’s affidavit, that the process was regularly conducted, that is that there was addition of votes on the SOPs and in the presence of persons entitled to be there. Thus, I hold that there has been a breach of s 84 (1) in these regards.

77. And even if one were to conclude as Mr. Boston contends that s 84 (1) is directory as regards the public tabulation, given my conclusion that there has been substantial non-compliance with the requirements of the provision, the result would be the same – the breaches cannot be condoned.
78. But what is the role of persons who are entitled to be present. It is unclear what the applicant and Ms Parag mean by a verification and/or reconciliation process of the SOPs as there is no provision for this in Chapter 1:03. They did not explain what they understood the process to be though Mr. Mendes did say it simply meant the addition process with persons raising their concerns with the information provided as warranted.
79. It does appear to me that there is a misunderstanding as regards operationalising s 84 (1). Section 84 (1A) (a) and (b) clearly provide for the correction of mistakes in the SOPs. The section does not outline how a “material error” or a “mistake” is to be brought to the attention of the elections officer or the RO. No doubt this would be done by one of the persons entitled to be present, though I would think that observers would be excluded in this regard.
80. Nevertheless, I do not consider that if one or many of the persons entitled to be present is or are dissatisfied with the RO in terms of what is recorded, that this entitles these persons to challenge the figure recorded at that point in time such as to disrupt the process. I do not conclude that the Act provides for verification or reconciliation in this sense. This is especially in the context of the well known fact that ten political parties contested the 2020 elections in District 4. If each were to object, moreso in a vociferous and/or hostile manner, the tabulation process would definitely be delayed, and indeed there may be the risk that it is not completed.
81. Aggrieved persons would no doubt make their concerns known and take note for further action whether pursuant to the next provision I will outline or by an elections petition. To permit otherwise would be to invite protest and possibly chaos as outlined in the affidavits in support of this application and for the respondents. Such would not inure to the overall credibility of the process and would exacerbate the already tense and even volatile situation that exists during the elections period and moreso at the conclusion of the voting exercise.
82. I refer to **Singh v Nehru & Ors (1958) XVI ELR 234** by analogy to emphasise why Parliament would have provided for the presence of persons. This was a case regarding the counting of ballots. It was held thus in this case:

“Even though there is no express provision in the Representation of the People Act of India, similar to rule 45, clause (iii), of the Parliamentary Election Rules of the United Kingdom, the returning officers should give the candidate and his counting agents all reasonable facilities for overseeing the proceedings of the counting and all such informations in respect thereof as can be given consistently with the orderly conduct of the proceedings.

A candidate along with counting agents is not only entitled to be physically present in the counting room but is also entitled to watch the proceedings and to

see for himself that the counting was being done strictly according to the rules, in a fair and proper manner.”

83. Therefore, one would expect the respectful indication of a party’s concern or concerns and equally a respectful consideration of the said concern or concerns by the RO, including the making of corrections or adjustments. However, it is not for the persons to so intervene in or stop the tabulation process and ultimately the declaration of the votes, which declaration must be public, because they are of the view that the RO has not addressed their concerns. If it is felt that there should be greater participation in the addition process of the SOPs by persons, who are not election officers invited to assist the RO, but who are entitled to be present, then there would have to be an amendment of the law.
84. At the end of the day, the only official documents that the RO can consider are the SOPs that have been transmitted to him by the presiding officers of the various polling places pursuant to s 83. Any SOPs in the possession of agents of political parties or others would not be such. As Mr. Mendes agreed, it would be for the RO to decide how he would treat with any objections or challenges raised. Such decision-making is not within the remit of the persons who are entitled to be present; otherwise, they would be usurping the powers and responsibilities of the RO pursuant to s 84.
85. But the transparency of the adding process in the presence of the persons entitled to be there, in my view, is to permit them to object firstly within the parameters of Chapter 1:03. This is provided for in s 84 (2). This is to say, if they are not present to take note of the addition of the votes from the SOPs, they would not be in a position to ascertain whether there are discrepancies such as to mount a challenge pursuant to s 84 (2).
86. Therefore, if there is dissatisfaction with the addition and ultimately the declaration, then s 84(2) provides that:

“Where before 12 noon of the day following the declaration under subsection (1) any counting agent for the district does not request the Returning Officer to conduct a final count of the votes counted by the presiding officers in the district under section 83, the declaration of votes obtained by the lists under subsection (1) shall be final; but where any counting agent for the district seeks a final count of the votes already counted by the presiding officers in the district under section 83, the Returning Officer shall count such votes in accordance with the provisions contained in the following subsections and section 87 and on the basis of such recount confirm or vary the declaration of the votes recorded in the district for each list of candidates under subsection (1).”

Subsections (3) and (4) provide for a general final count or a limited final count to be requested by the counting agent in relation to the district results. Where a limited count is requested, the counting agent has to specify the polling places in which the final count is to be conducted. The RO has to comply with the request. There are restrictions on what is to be rechecked in a limited count and this is provided for in subsection (4). Subsections

(5) and (6) provide further details on how the final counts are to be conducted as regards general and limited counts respectively.

87. And ultimately, a challenge can be launched by way of elections petition after the declaration and gazetting of the elections results.

Conclusion and Orders

88. Taking all the above into consideration, I have concluded that there has been substantial non-compliance with s 84(1) as regards the addition of all the SOPs for District 4 and as regards whether such was conducted in the presence of persons entitled to be present as attend. The non-compliance is such as to vitiate the declaration of the results of the addition of the SOPs for this district.
89. It would be for the RO and or Deputy RO to decide whether in the interests of transparency the addition process should be re-started or continued from where it was left off. It would also be for these functionaries to determine the best method of tabulating the SOPs. Again, it cannot be for the persons present to dictate how this should be conducted, though one would expect that the RO would act reasonably in ensuring a process that allows persons to observe what is being tabulated and how. This is especially so given the varying methods of addition of the votes from the SOPs as disclosed in Ms. Myers' affidavit.
90. I do not consider it necessary that the declaration sought that GECOM is the only body constitutionally and statutorily authorized to declare the results of the General and Regional Elections of March 2nd 2020 pursuant to s 96 of Chapter 1:03 be granted. This is a given fact and such an order would be otiose.

IT IS HEREBY ORDERED THAT:

- (1) the declaration made on March 5th 2020 by the Returning Officer for District 4 of the total votes cast for District 4 was unlawful as being in breach of s 84 (1) of the Representation of the People Act, Chapter 1:03 and is null, void and of no effect;
- (2) the declaration made on March 5th 2020 by the Returning Officer for District 4 of the votes for District 4 is hereby vacated and set aside;
- (3) any act done in pursuance of the said declaration is hereby deemed null and void and of no effect;
- (4) subject to my admonition as regards the role of persons entitled to be present as attend, the Returning Officer and/or Deputy Returning Officer must comply with s 84 (1) in ascertaining the total votes cast in favour of each list and the public declaration of the votes so recorded for each list of candidates;
- (5) that the Guyana Elections Commission cannot lawfully declare the results of the elections of March 2nd 2020 unless and until the Returning Officer or Deputy Returning Officer for District 4 complies with and/or ensures compliance with the provisions of s 84 (1) of the Representation of the People Act, Chapter 1:03;

- (6) the injunction restraining the Returning Officer District 4 from in any manner whatsoever, declaring the votes recorded for each List of Candidates for District 4 before complying with or ensuring the compliance with the process set out in section 84 of the Representation of the People Act, Chapter 1:03, Laws of Guyana is hereby made final;
- (7) the injunction granted restraining the Guyana Elections Commission from declaring the total number of valid votes cast for each political party until the Returning Officer or Deputy Returning Officer for District 4 complies with and ensures compliance with s 84 of the Representation of the People Act, Chapter 1:03 is hereby made final.
- (8) the mandatory injunction that refers to compliance with the letter and spirit of s 84 is hereby discharged;
- (9) Because of the urgency of the situation, the following consequential orders are made:
 - (a) the Returning Officer or Deputy Returning Officer for District 4 are to commence compliance with s 84 (1) of the Representation of the People Act, Chapter 1:03 no later than 11.00 hours on Thursday, March 12, 2020.
 - (b) that in the interests of transparency but taking into consideration the need for urgency, the Returning Officer and/or Deputy Returning Officer for District 4 is to decide whether the process of ascertaining the total votes cast in favour of each list in the district by adding up the votes recorded in favour of the list in accordance with the of the Statements of Poll delivered pursuant to section 83 of the Representation of the People Act, Chapter 1:03, should be restarted or continued;
 - (c) that this order is to be served on counsel for the parties and is to be deemed service on the parties.

91. Before I conclude, as Bernard CJ had to do some 22 years ago in **In the Matter of an Application by Aubrey Norton for Writs of Certiorari and Prohibition [1996-1998] GLR 373**, I must stress that this decision does not decide the result of or the validity of the elections for District 4, nor does it decide the region and nation elections. This decision is only concerned with the conduct of the RO in complying with s 84 of Chapter 1:03.

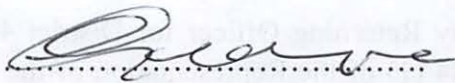
92. Further, I must lament that it is particularly saddening that 19 years after **Joseph Hamilton v Guyana Elections Commission, Bharat Jagdeo & AG 40M/2001**, the words of Bernard CJ as follows still ring true (p 18):

“... the role of the Elections Commission and its staff is to take such action as appears necessary to ensure impartiality, fairness and compliance with the provisions of the Constitution and any other acts of Parliament.

In the present volatile situation which pervades our country no effort must be spared to assure everyone that the process was fair and impartial. Lingering doubts that hang like a sword of Damocles over the head of the Commission must

be removed. Confidence in the electoral process must be restored. This is absolutely essential if we as a nation are to move forward and strive to heal the wounds that divide us. Let fairness pervade all of our actions at all times.”

93. I could not have said it better. I would add that going forward all must strive to encourage respect for the other. While elections are often fraught with anxiety and sadly even a lot of hostility, it must be remembered that the elections staff are human and they must be treated with respect.
94. Leaders of the respective political parties must encourage their supporters to be civil, respectful and responsible. The integrity of our nation demands that we act responsibly. In this regard I am compelled to admonish all to respect the processes and orders of the Court.
95. Costs to the applicant in the sum of \$ 500,000.00.



Roxane George
Chief Justice (ag)
March 11, 2020.

