

2015 – HC – DEM – CIV – CM – 55
IN THE HIGH COURT OF THE SUPREME COURT OF
JUDICATURE
CONSTITUTIONAL AND ADMINISTRATIVE
JURISDICTION

In the matter of Article 60, 103,
105, 160 and 232 of the
Constitution of the Co-operative
Republic of Guyana, Chapter
1:01.

DESMOND MORIAN
(Applicant)

-and-

1. THE ATTORNEY-GENERAL
OF GUYANA
2. SPEAKER OF THE
NATIONAL ASSEMBLY
(Respondents)

BEFORE:

HON. MR. JUSTICE IAN CHANG – CHIEF JUSTICE (ag.)

Mr. Mohabir Anil Nandlall for the Applicant.

Mr. Basil Williams with Ms. P. Kissoon and Ms. E. Sam
for the Respondents.

DECISION

On the 1st July 2015, the applicant, Desmond Morian,
by way of Notice of Motion, applied to the court for the
following Orders:

- I. a declaration that WINSTON GORDON
FELIX and KEITH WINSTON HAROLD
SCOTT are not lawful members of and
cannot sit in the National Assembly of
the 11th Parliament of Guyana.***

- II. an Order directing the second-named Respondent to prevent WINSTON GORDON FELIX and KEITH WINSTON HAROLD SCOTT from sitting in the National Assembly of the 11th Parliament of Guyana, unless and until their names are extracted from A Partnership for National Unity + Alliance for Change national top-up List of Candidates for the May 11, 2015 General Elections.*
- III. Such further or other Orders that may be just and appropriate in the circumstances.*

The grounds for the application were stated to be:

- I. that Articles 60, 103, 105, 160 and 232 of the Constitution of the Cooperative Republic of Guyana, Chapter 1:01, conjointly set out the qualifications of persons who are:*
- (a) elected and non-elected members of the National Assembly;*
- (b) the voting and non-voting members of the National Assembly.*
- II. that, having regard to the clear language and the intendment of Articles 60, 103, 105, 160 and 232 of the Constitution of Guyana, the said WINSTON GORDON FELIX and KEITH WINSTON HAROLD SCOTT are not lawful members of and cannot sit in the National Assembly of the 11th Parliament of Guyana unless and until their names are extracted from A*

***Partnership for National Unity +
Alliance for Change national top-up list
of candidates for the May 11, 2015
General Elections.***

In his Affidavit in support of Motion, the applicant Desmond Morian of 167 Diamond Housing Scheme, East Bank Demerara, deposed that he is a citizen of the Co-operative Republic of Guyana by birth and was a candidate on the People's Progressive Party List of Candidates for the General and Regional Election held on the 11th May 2015. He deposed that, as a political leader, his interest and mandate are to ensure that the welfare and interest of every Guyanese receive paramount consideration by the State and all its agencies, more particularly, the National Assembly. He has a vested interest in ensuring that the letter and spirit of the Constitution are observed by every person, body and authority to whom or to which it applies and also in ensuring that the Constitution, the supreme law of the land by Article 8, is not violated.

He pointed out that Article 1 of the Constitution declares Guyana to be a democratic, sovereign State and that Article 9 vests sovereignty in the people who shall exercise it through their representatives and the democratic organs established by or under the Constitution. He deposed that he considers it to be his national duty to ensure that those representatives who, and the democratic organs which, exercise the sovereign powers of Guyana on the people's behalf, act in compliance with the Constitution and the law in the discharge of their public functions and constitutional duties.

He averred that the names, Winston Gordon Felix and Keith Winston Harold Scott, appeared on A Partnership for

National Unity + Alliance for Change (APNU + AFC) national top-up List of Candidates for the 11th May 2015 General Elections and were published in the Official Gazette (Legal Supplement) B dated 16th April 2015. The APNU + AFC List of Candidates was allocated 33 seats in the National Assembly by the Guyana Elections Commission in the publicly declared of the 11th May 2015 General and Regional Elections. In the Official Gazette (Legal Supplement) dated 5th June 2015, the Guyana Elections Commission, in accordance with section 99 of the Representation of the People's Act, Chapter 1:03, *inter alia*, declared the results of the General Elections (National Top-up List) held on the 11th May 2015 pursuant to articles 60 (2) and 61 of the Constitution and also declared the names of the persons who, following the said results, were extracted to become members of the National Assembly from the APNU + AFC list of candidates (Exhibit GP1 – Copy of Official Gazette).

He deposed that it is common knowledge that both Winston Gordon Felix and Keith Winston Harold Scott were appointed Ministers of the Government by President Granger. Indeed, in the Official Gazette dated 5th June 2015, a Notice was published of the names of appointed Ministers and of their respective responsibilities. In that publication, Winston Gordon Felix was listed as “Minister of Citizenship within the Ministry of the Presidency” and a Member of the Cabinet with assigned responsibilities and Keith Winston Harold Scott was listed as “Minister within the Ministry of Communities” with no assigned responsibilities.

He deposed that the 11th Parliament of Guyana was convened on the 11th June 2015 and that members of the National Assembly for APNU + AFC subscribed to and took

the Oath of Office as Members of the National Assembly for the 11th Parliament of Guyana. Winston Gordon Felix and Keith Winston Harold Scott were among the persons who did so and they each occupy a seat in the National Assembly as non-voting members thereof.

He further deposed that his Attorney-at-Law, Mr. Nandlall, has advised him that:

(I) Article 232 of the Constitution defined “an elected member of the National Assembly as a member of the National Assembly pursuant to the provisions of paragraph (2) of article 60 or article 160 (2).”

(II) Winston Gordon Felix and Keith Winston Harold Scott are elected members of the National Assembly.

(III) Articles 103 (3) and 105 of the Constitution provides as follows:

Article 103 (3)

“Not more than four Minister’s and two Parliamentary Secretaries shall be appointed by the President from among persons who are qualified to be elected as members of the National Assembly.”

Article 105

“A Minister who was not an elected member of the Assembly at the time of his or her appointment shall (unless he or she becomes such a member) be a member of the Assembly by virtue of holding

the office of Minister but shall not vote in the Assembly.”

(IV) It is obvious that Winston Gordon Felix and Keith Winston Harold Scott purport to hold seats in the Assembly pursuant to Article 103 (3) and 105 of the Constitution.

(V) It is equally obvious that elected members of the National Assembly are not captured by the language, spirit or intendment of Articles 103 (3) and 105 of the Constitution.

(VI) Having regard to the clear language and the intendment of Articles 60, 103, 105, 160 and 232 of the Constitution of Guyana, the said Winston Gordon Felix and Keith Winston Harold Scott are not lawful members of and cannot sit in the National Assembly of the 11th Parliament of Guyana.

Counsel for the named respondents elected not to file an Affidavit in Answer to the Affidavit in support of Motion. Counsel informed the court that the statements of fact made in the Affidavit are not in dispute. What is in contention are issues of pure law in respect of which no Affidavit in Answer is consequentially necessary.

Article 232 of the Constitution defines “elected member of the National Assembly as meaning:

“any person elected as a member of the National Assembly pursuant to the provisions of paragraph 2 of Article 60 and article 160 (2).

Paragraph (2) of Article 60 of the Constitution provides:

“Subject to the provisions of article 160 (2), such number of members of the National Assembly shall be elected in accordance with the system of proportional representation prescribed in Article 160 (1).”

Thus, members of the National Assembly are elected in accordance with the system of proportional representation prescribed in Article 160 (1). Article 160 (2) enables Parliament to make provision for the division of Guyana into a number of geographical constituencies. Neither Winston Gordon Felix nor Keith Winston Harold Scott was a candidate for election in any of the geographical constituencies. Therefore Article 160 (2) is not of relevance to the issues in this application.

Article 103 (2) of the Constitution provides:

“Not more than four Ministers and two Parliamentary Secretaries shall be appointed by the President from among persons who are qualified to be elected as members of the National Assembly.”

The qualifications for election as a member of the National Assembly are specified in Article 53 of the Constitution which provides:

“Subject to Article 155 (which relates to allegiance, insanity and other matters), a person shall be qualified for election as a member of the National Assembly if and shall not be so qualified unless, he –

(a) is a citizen of Guyana of the age of eighteen years or upwards; and

(b) is able to speak and, unless incapacitated by blindness or other physical cause, to read the English language with a degree of proficiency

*to enable him to take an active part
in the proceedings of the Assembly.”*

Article 160 (1) provides:

*“Subject to the provisions of the next
following paragraph, the system of
proportional representation referred to in
article 60 (2) for the election of such
members of the National Assembly as shall
be determined by the Assembly, shall be as
follows:*

- (a).....*
- (b).....*
- (c) the seats of the elected members of
the Assembly, as determined under
this paragraph, shall be allocated
between the lists in such manner...”*

It is clear from Article 160 (1) (c) that the seats of the National Assembly are not **allocated** to specific persons but to the successful lists of candidates cumulatively. It is further clear that members of such successful lists are constitutionally recognised as “elected members” even before the stage of allocation between those successful lists is reached – let alone before extraction (or selection) is made by the representatives of such lists after such allocation of seats between or among the successful lists.

Article 160 (3) (a) prescribes:

**“Subject to the provisions of this
Constitution, Parliament may make
provision –**

- (a)(i)*
- (ii).....*
- (iii)*
- (iv)*

*(v) for the extraction from the lists
and declaration of the names of
candidates who have been elected,*

.....

Article 160 (3) (a) (v) makes it pellucidly clear that extraction is made from the lists of candidates who have been elected. Therefore, the status of a candidate as an elected member of the Assembly necessarily precedes any act of extraction made by the representative of that list to be holders of seats in the Assembly on behalf of the other persons named thereon.

If, as contended by counsel for the respondents, a person becomes an elected member of the Assembly only when his name has been extracted from the list of candidates to hold one of the number of seats allocated to that list, it leads to the absurd result that persons on that successful list, whose names have not be so extracted, would be “non-elected” members of the Assembly despite the fact that the collective list has been successful in winning seat or seats. It is precisely because they all remain elected members that they are eligible for extraction later if a vacancy arises and there is a need for substitution in the Assembly itself:

Article 103 (2) provides:

*“Subject to the provisions of article 101(1),
Vice-President and other Ministers shall be
appointed by the President from among
persons who are elected members of the
National Assembly or subject to paragraph
(vi) of subparagraph 3 (a) of article 160 are
qualified to be elected as such members”*

while Article 103 (3) provides:

“No more than four Ministers and two Parliamentary Secretaries shall be appointed by the President from among persons who are qualified to be elected as members of the National Assembly.”

Clearly, there is a distinction between “elected members” and “persons qualified to be elected as members” of the Assembly for the purpose Ministerial appointment by the President. The significance of such a distinction becomes apparent when regard is had to Article 105 which provides:

“A Minister who is not an elected member at the time of his appointment shall (unless he becomes such a member) be a member of the Assembly by virtue of holding the office of Minister but shall not vote in the Assembly.”

Clearly, Article 105 speaks only to those Ministers who are “qualified to be elected as members of the Assembly” but who are not “elected members” of the Assembly at the time of their Ministerial appointments (technocrat Ministers). If the Minister’s name has formed part of the list of candidates which successfully contested the election, then he is an elected member and Article 105 would have no application to him. If his name never appeared on a successful list of candidates, then Article 105 would have application to him and he would be a non-elected member of the Assembly without a right to vote in the Assembly. After all, the electorate would not have voted for him as part of any list to represent them in the Assembly.

It does appear to the court that it is legally possible for the President to appoint persons as Ministers from his party’s successful list of candidates whose names the representative of the list has not seen it fit to extract to hold seats in the Assembly. After all, the President’s power to appoint Ministers is executive in purpose while the

representative of the list's power to extract is representative in purpose – the President himself being no part of the National Assembly (in contradistinction to Parliament). In such a case, like the President himself, those Ministers would not be holders of seats in the Assembly. On the other hand, if he appoints as Minister a person who is not a member of a successful list of candidates but is a qualified elector, that person holds a seat in the National Assembly as a non-elected member thereof but has no right to vote therein (Articles 103 (2) and 105).

But there appears no provision in the Constitution which allows a Minister who is an elected member of the Assembly but whose name has not been extracted from a successful list of candidates to hold a seat in the Assembly even as a non-voting member. As a matter of practice, such Ministers are usually junior Ministers – Ministers within Ministries as Mr. Felix and Mr. Scott appear to be.

The words “unless he becomes such a member” in Article 105 speaks to the possibility that a non-elected member later becoming an elected member. In the court's view, such is a possibility if the court later finds that in the case of a regional candidate, he did win his regional seat or wins a regional seat in a regional election which is ordered to be re-run by an Order of Court.

It is undisputed that the names, Winston Gordon Felix and Keith Winston Harold Scott, were on the successful top-up list of candidates for the APNU + AFC coalition. That list of candidates was successful in the general election. Therefore, Winston Gordon Felix and Keith Winston Harold Scott are elected members of the Assembly.

However, their names were not extracted by the representative of that list to hold any of the number of seats allocated to that list. Therefore, they cannot enter the Assembly as holders of seats on behalf of that list of candidates. Nevertheless, the President did see it fit to appoint them as Minister of Citizenship within the Ministry of the Presidency and a Minister within the Ministry of Communities respectively – apparently as junior Ministers within Ministries. Since they are elected members of the Assembly for reason that their names did appear on the successful APNU + AFC list of candidates, Article 105 of the Constitution, which applies to **non-elected** members of the Assembly, cannot apply to them as elected members of the Assembly. The court can find no legal or constitutional basis on which they can claim that right to **sit** in the Assembly, whether as a voting or non-voting members thereof – despite their appointed status as executive Ministers of the Government.

The court sees it fit to grant to the applicant the following reliefs:

- 1. A Declaration that Winston Gordon Felix and Keith Winston Harold Scott are elected members of the National Assembly.*
- 2. A Declaration that, despite their status of elected members of the National Assembly, Winston Gordon Felix and Keith Winston Harold Scott do not hold seats and cannot sit in the National Assembly since their names were not among those extracted from the APNU + AFC list of candidates to hold seats on behalf of the persons named in that successful list.*
- 3. A Declaration that Article 105 of the Constitution has no application to elected*

members of the National Assembly i.e. persons whose names were on a successful list of candidates i.e. Winston Gordon Felix and Keith Winston Harold Scott.

4. A Declaration that, despite their appointment by the President to be executive Ministers of the Government, such an executive appointment does not entitle Winston Gordon Felix or Keith Winston Harold Scott to hold seats or sit as members of the National Assembly.

While, consistently with the doctrine of separation of powers, the jurisdiction of the High Court does not extend to interference with the internal operations of the Assembly, the High Court as guardian of the Constitution does possess a supervisory jurisdiction over the Assembly to ensure constitutionality or to prevent unconstitutionality in the conduct of the affairs of the Assembly.

In V.G Ramchandran's Law of Writs, the learned authors stated at 1129:

“while in England, Parliament is supreme and no mandamus can be issued against it, in India, the Constitution is supreme over all three organs, the Judiciary, the Executive and the Legislature and so the writ of mandamus could issue to the Legislature in appropriate cases.”

In Thankamma V Speaker, T.N. Legislative Assembly A.I.R (1952) 166, mandamus was issued against the Speaker of the State Assembly to issue the oath to a person who had satisfied the court that she was having the constitutional right to sit in the legislature. In Gunnupati

Kesharam V. Nafaisual Hassan A.I.R (1954) 636, a person was kept in custody pursuant to an order of arrest issued by the Speaker of Uttar Pradesh Assembly without producing him before a Magistrate under section 22(2) of the Constitution. The Supreme Court of India held the order to be *ultra vires* and issued the writ of mandamus.

As in India, the Constitution of Guyana is supreme and above the legislature and the High Court as guardian of the Constitution has the power and, indeed, the duty to ensure that the legislature does not act in contravention of the Constitution.

The question of the legal entitlement to sit in the National Assembly is a matter of constitutional legality or illegality – which falls outwith the internal operations of the Assembly. Therefore, the court has the jurisdiction to issue a writ of Prohibition or Mandamus to the Speaker to prevent or to put an end to unconstitutionality. However, in the instant case, the court does not foresee that the Honourable Speaker will not act in accordance with the dictates of the law and the Constitution as declared by the Court. The court therefore does not see the necessity of giving any direction to the Honourable Speaker at this juncture. In deference to the doctrine of judicial restraint, the court refrains from issuing a coercive order against the Speaker.

It is obvious that the issues which have been considered and determined by this court do not relate to any challenge to the legal validity or the conduct of the election or with the allocation of seats to the successful lists of candidates of the respective political parties. Rather, on the *a priori* assumption that the election had been validly conducted and the allocation of seats validly

made, the issues relate to matters *ex post facto* the completion of the election processes. The determination of such issues could not therefore be matters which attract a challenge by way of an election petition as contended by counsel for the respondents. The submission of counsel for the respondents that the applicants ought to have approached the court by way of an election petition is therefore misconceived and accordingly overruled.

No order as to costs.

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Mr. Ian N. Chang, C.C.H, S.C
Hon. Chief Justice (ag.)

Dated this 19th day of February, 2016