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## **IN THE CARIBBEAN COURT OF JUSTICE**

### **Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No \_\_\_\_

Between

**MOHAMMED IRFAAN ALI**

**BHARRAT JAGDEO**

*APPLICANTS/INTENDED APPELLANTS*

And

**1. ESLYN DAVID**

2. CHIEF ELECTIONS OFFICER
3. CHAIRMAN OF THE GUYANA ELECTIONS COMMISSION
4. THE GUYANA ELECTIONS COMMISSION
5. THE ATTORNEY GENERAL OF GUYANA
6. MARK FRANCE
7. DANIEL JOSH KANHAI
8. LENNOX SHUMAN
9. SHAZAAM ALLY
10. ABEDIN KINDY ALI

*RESPONDENTS/INTENDED RESPONDENTS*

### **NOTICE OF APPLICATION**

The Applicants/Intended Appellants apply to the Caribbean Court of Justice for the following Orders-

- a) The Applicants/Intended Appellants be granted special leave to appeal to the Caribbean Court of Justice against the majority decision of the Court of Appeal given by the Honourable Madam Justice of Appeal Dawn Gregory-Barnes and the Honourable Mr. Justice Brassington Reynolds, the Honourable Mr. Justice of Appeal Rishi Persaud dissenting, dated the 22nd day of June, 2020 in Civil Appeal No. 41 of 2020 (the "Decision"), on the grounds set out in the Draft Notice of Appeal exhibited to the Affidavit in support of this Notice of Application;
- b) An order directing that this application be treated as the hearing of the appeal itself and a corresponding order for directions, including an order dispensing with any

other requirements, and taking all such steps as may be necessary to hear the appeal for which special leave is sought on an expedited basis;

- c) An order directing that this application be urgently heard and that the time for service of the Notice of Application pursuant to Rule 10.14 (2) be abridged by Order of the Court from seven days to service forthwith upon the Intended Respondents and consequential directions abridging the time for compliance with Rules 10.14 (3), (4) and (5) such that this Notice of Application may be heard and determined on an urgent and expedited basis;
  
- d) Interim Orders:
  - (i) Restraining the Chief Election Officer from issuing his Report pursuant to s. 96 of the Representation of the People Act or any report in reliance on the Decision, inclusive of the modified interpretation of Article 177 (2) (b) of the Constitution of Guyana given by the Court of Appeal, pending the determination of this application and the Appeal for which special leave is sought herein;
  
  - (ii) Restraining GECOM and/or the Chief Election Officer and/or any servant and/or agent of GECOM from taking any further steps to determine whether the recounted votes as tabulated by the Chief Election Officer constitutes “a final credible count” or otherwise enquiring into the validity or credibility of the tabulated votes pending the determination of this application and the Appeal for which special leave is sought herein;
  
  - (iii) Such further and/or other interim order as will restrain GECOM and/or the Chief Election Officer and/or any servant and/or agent of GECOM from embarking on any course of conduct which would usurp the exclusive jurisdiction exercised by the High Court under Article 163 of the Constitution of Guyana.
  
- e) On the hearing of the appeal, for which special leave is sought, the following Orders be made:

- (i) The Decision, inclusive of all declaratory orders made therein, be set aside in its entirety on the basis that the Court of Appeal lacked jurisdiction to hear and determine Civil Appeal Proceedings No. 41 of 2020 and that all orders made as part of the aforementioned Decision be discharged;
- (ii) Costs in the Caribbean Court of Justice and in the Court below; and
- (iii) Such further and/or other orders as this Honourable Court may deem just and appropriate.

A draft of the order that the Applicants/Intended Appellants seeks are attached.

**The grounds of the application are below and are contained in the accompany affidavit in support of this application as follows-**

1. On June 18, 2020, Respondent Eslyn David (the "Respondent") filed a Notice of Motion dated the 18 day of June 2020 with action number Civil Appeal No. 41 of 2020 ("the Motion"), purporting to invoke the jurisdiction of the Court of Appeal under Article 177(4) of the Constitution of Guyana, seeking certain orders and declarations against the Guyana Elections Commissions ("GECOM") and the Chief Elections Officer, namely:
  - a. A Declaration that the **GUYANA ELECTIONS COMMISSION** has failed to act in accordance with the terms of the Order No. 60 of 2020 and the amended Order dated the 29th day of May, 2020, in that the **GUYANA ELECTIONS COMMISSION** has failed to determine a final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required to do by Order No. 60 of 2020 and the amended Order dated the 29th day of May, 2020.
  - b. An Order that there be an interpretation of the words "more votes are cast" in Article 177 (2) (b) of the Constitution of Guyana

- c. An Order restraining the Chief Elections Officer from complying with the Direction of the Chairman of the Guyana Elections Commission as set out in a Letter dated the 16th day of June, 2020, to submit to the Guyana Elections Commission an Elections Report under Article 177 (2) ( b) of the Constitution of Guyana without the Guyana Elections **Commission determining the final credible count and or the credibility of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020**
- d. An Order restraining the Chief Elections Officer from complying with the Direction of the Chairman of the Guyana Election Commission as set out in a Letter dated the 16th day of June, 2020, to submit an Elections Report under Section 96 of the Representation of the People Act without the Guyana Elections Commission determining the final credible count and or the credibility of the result of the General and Regional Elections held on the 2nd day of March, 2020, as required by the Order No. 60 of 2020 and the amended Order of the 29th day of March, 2020.
- e. An Order restraining the Chief Elections Officer from submitting to the Guyana Elections Commission an Elections Report under Article 177 (2) (b) of the Constitution containing votes **which are not credible within the meaning of Order No. 60 of 2020**
- f. An Order restraining the Chief Elections Officer from submitting to the Elections Commission an Elections Report **under Section 96 of the Representation of the People Act, Chapter 1:03** containing votes **which are not valid and credible.**
2. By virtue of the Motion Eslyn David essentially sought to prevent the Chief Elections Officer from complying with the direction given to him by the Chairperson

of GECOM on June 16<sup>th</sup> 2020, to submit his Election Report to the Commission by 13:00 hours on June 18<sup>th</sup> 2020. This direction was issued to the Chief Elections Officer consequent on the completion of a recount of the votes cast at the general elections held on 2<sup>nd</sup> March 2020 which had been ordered by the GECOM.

3. The Motion was framed as an application pursuant to Article 177(4) of the Constitution of Guyana but the relief sought therein, the Intended Appellants contend, fall outside the scope and intent of Article 177(4). Rather than being a genuine attempt to invoke the special, original jurisdiction of the Court of Appeal under Article 177(4), the said Motion is a contrived and thinly veiled attack on the exercise of the powers of the GECOM and its decision to hold a recount, which said decision and its implementation and the conduct of the actual recount have arisen in circumstances which have been widely publicized nationally and internationally.
4. General and Regional Elections were held in the Co-operative Republic of Guyana on the 2nd March, 2020, during which registered voters within the ten (10) Election Districts exercised their constitutionally enshrined right to vote for a list of their choice. Ten (10) political parties contested the said Elections including the PPP/C, the only Opposition Party represented in the eleventh Parliament in Guyana.
5. After the initial count of votes cast at the election, the PPP/C was leading in 9 of the 10 Districts by over 55,000 votes. The last District to be counted was District 4 which is traditionally a stronghold of the governing APNU/AFC coalition. In order to win the election therefore, the APNU/AFC would have needed to have won District 4 by over 55,000 votes.
6. In each District, including District 4, Presiding Officers are required to independently count and tabulate the votes cast in the presence of Polling Agents of the contesting political parties. The results of the count are then recorded on a document called a Statement of Poll for General Elections and a Statement of Poll for Regional Elections in respect of each polling station. These Statements of Poll are then signed by the Presiding Officer and the Polling Agents of the contesting political parties once the count is not disputed. A carbon copy of each Statement

of Poll is then given to the respective Polling Agents present and copies are posted on conspicuous places at the polling stations to allow members of the public to view and inspect same.

7. In accordance with section 83(9) of the Representation of the People Act, the PPP/C was provided with copies of the Statements of Polls for District 4. The APNU Coalition was similarly provided with copies of these Statements of Poll. The PPP/C's tally of the votes in their copies of the Statements of Poll showed that the APNU/AFC got more votes than the PPP/C in District 4 - the APNU got 116,950 while the PPP/C got 80,887. But the margin of victory in District 4 was not enough to overhaul the PPP/C's lead in the other 9 Districts and accordingly the PPP/C had won the election.
8. It is a matter of record and judicial determination that great controversy erupted in respect of the adding up and ascertaining of the results for Electoral District 4 by Returning Officer, Clairmont Mingo. At one point in the process, the election officials produced a spreadsheet which purported to record the votes contained in the Statements of the Poll. There was a dramatic variance between the results recorded in the spreadsheet and the results recorded in the Statements of Poll in the possession of persons present. The relevant original Statements of Poll were produced which, unsurprisingly, were in accordance with the copies in the possession of the PPP/C and therefore contradicted the numbers recorded on the spreadsheet. The obvious and only inference was that the votes recorded for those polling stations on the spreadsheet were obtained from some source other than the Statements of Poll provided to and in the possession of the Returning Officer.
9. After the votes on only 421 of the 879 Statements of Poll were ascertained, the Returning Officer suspended the ascertainment process at around 3 am on the 5<sup>th</sup> March 2020, asking those present to return at 9 am. He eventually turned up after midday on March 5<sup>th</sup> and announced that he would be proceeding forthwith to make a declaration of the votes for each list and shortly thereafter purported so to do.

10. The document in the public domain which purported to be his March 5<sup>th</sup> declaration recorded the number of votes cast for the APNU in District 4 in the amount of 136,458, and those for the PPP/C as 77,329. This represented an increase in the number of the votes recorded for the APNU from 116,950 (as per the Statements of Poll handed to the PPP/C by the Presiding Officer) to 136,458, as per the Returning Officer's purported declaration, an increase of 19,508 votes. It also represents a decrease in the number of votes recorded for the PPP/C from 80,887 (as per the Statements of Poll handed to the PPP/C by the Presiding Officer) to 77,329 as per the Returning Officer's purported declaration, a decrease of 3,558 votes. The Returning Officer's purported declaration therefore recorded a net gain of 23,066 votes for the APNU coalition over and above the votes recorded in the Statements of Poll provided to the PPP/C by the Presiding Officers.
11. The votes purported to have been added up and ascertained for the parties as per the Returning Officer's declaration could only have come from a source other than the Statements of Poll. In other words, the additional 23,066 votes were manufactured by Mr Mingo to give the APNU/AFC victory and there was a fraud on the electorate.
12. It is significant that at no time during the course of the proceedings which ensued after Mr. Mingo's fraudulent count was the tally of the statements of poll presented by the PPP/C challenged by anyone. Indeed, the recount which was eventually ordered by GECOM and which was recently concluded confirmed the PPP/C's tally in relation to District 4 and that the PPP/C had won the election by over 15,000 votes, as it had always contended. There is accordingly now no factual dispute that the majority of the votes cast at the general election were in favour of the PPP/C.
13. Several international, diplomatic and local observers were present to observe and monitor the election process and the tabulation and verification of votes cast in favour of the respective contesting political parties. Those bodies included the Commonwealth Secretariat, the European Union, the Carter Centre, the Organisation of American States, the Caribbean Community ("CARICOM"), the

American Chamber of Commerce and the Guyana Bar Association. These observers all condemned the conduct of Clairmont Mingo.

14. Mr Mingo's fraudulent conduct resulted in the initiation of litigation in Fixed Date Application (FDA) 2020-HC-DEM-CIV-FDA-360 by *Reeaz Holladar v (1) The Returning Officer, Mr. Clairmont Mingo; (2) Chief Elections Officer, Mr. Keith Lowenfield, (3) The Guyana Elections Commission* in which various Orders were ultimately made by the Honourable Chief Justice relating to the invalidity of the purported declaration made on March 5<sup>th</sup> 2020 by Mr Mingo for District 4 and of the consequent invalidity of all actions done further thereto. The Honourable Chief Justice gave further remedial Orders to ensure that Mr Mingo would carry out a count of the votes recorded on the Statements of Poll in compliance with s. 84 (1) of the Representation of the People Act, Chapter 1:03.
15. The Chief Elections Officer took no issue with the conduct of Clairmont Mingo in Region 4 or the conduct of any Returning Officer in any Region and actually defended the conduct of Clairmont Mingo.
16. Despite the said Orders of the Honourable Chief Justice in, Mr. Mingo failed to comply with s. 84 (1) of the Representation of the People Act, Chapter 1:03. On March 13, 2020, he purported to make a declaration of the total votes cast ("the second purported declaration") which recorded the number of votes cast for the APNU in District 4 in the amount of 136,057, and those for the PPP/C as 77,231. This represented an increase in the number of the votes recorded for the APNU from 116,950 (as per the Statements of Poll handed to the PPP/C by the Presiding Officer) to 136,057, as per Mr. Mingo's second purported declaration, an increase of 19,107 votes. It also represented a decrease in the number of votes recorded for the PPP/C from 80,887 (as per the Statements of Poll handed to the PPP/C by the Presiding Officer) to 77,231 as per Mr Mingo's second purported declaration, a decrease of 3,656 votes. Mr. Mingo's second purported declaration therefore recorded a net gain of 22,763 votes for the APNU coalition over and above the votes recorded in the Statements of Poll provided. The votes recorded for the

parties as per Clairmont Mingo's second purported *declaration could again only have come from a source other than the Statements of Poll and/or were manufactured or invented to cause the APNU coalition* to win the election.

17. Prior to the second purported declaration, contempt proceedings were initiated against the Returning Officer Mr. Clairmont Mingo for his breaches of the said Orders of the Honourable Chief Justice dated the 11th March, 2020. On the 13<sup>th</sup> March 2020, the Chairperson of GECOM, Retired Justice Claudette Singh, appeared before the Honourable Chief Justice in the contempt proceedings and gave an undertaking to facilitate a recount of votes.
18. Controversy once again erupted around the second purported declaration resulting in local and international condemnation of the electoral process and public statements by international partners and CARICOM colleagues that the elections results were unlikely to be accepted.
19. Any future international recognition of an APNU Government by erstwhile international partners was accordingly in jeopardy.
20. Mr. Mingo also denied requests for a recount under section 84(2) of the Act by the parties' counting agents, including that of Dr Jagdeo's counting agent Mr Charles Ramson. Mr Mingo's reason for denying such requests was either that their appointment as counting agents was made too late or that more than one counting agent was appointed when there ought only to have been one.
21. The legality of the second purported declaration as well as the denial of the request for a final count on the part of Mr Ramson were the subject of a second set of proceedings brought by Mr. Holladar in the High Court *Reaz Holladar -v- Returning Officer, Clairmont Mingo, Chief Elections Officer, Keith Lowenfield, and the Guyana Elections Commission*.
22. In the meantime, negotiations had ensued between President David Granger, Dr Jagdeo and CARICOM Representatives. On the 14<sup>th</sup> day of March, 2020, a Public Statement was issued by the Honourable Mia Mottley, Prime Minister of Barbados,

in her capacity as the Chairperson of CARICOM, which announced an agreement between Dr Jagdeo, in his capacity as the Leader of the Opposition, and President David Granger, that a recount of the ballots cast at the 2<sup>nd</sup> March 2020 General and Regional Elections to be conducted by GECOM would be supervised by an independent High Level Team appointed by CARICOM.

23. On the 14<sup>th</sup> day of March, 2020 this Public Statement was read in Court in the second set of proceedings brought by Mr Holladar. In the course of the said proceedings, the Chairperson of GECOM confirmed to the Honourable Chief Justice that on Friday March 13<sup>th</sup> she had given an undertaking in the High Court to facilitate the recounting of the ballots for Region 4. She further informed the Court that a meeting of the full Commission was scheduled to take place later that day to discuss how this recount would be facilitated. On this basis and in reliance on this stated undertaking and the Statement of Caricom issued on the 14th March, 2020, the proceedings were adjourned to the 16th March 2020.
24. Thereafter, on the 14th March, 2020 the Chairperson of GECOM issued a public statement in the following terms<sup>1</sup>:

*"Statement from Justice Claudette Singh*

*As Chairperson of the Guyana Elections Commission (GECOM) I, on Friday March 13th, gave an undertaking to Chief Justice Madame Roxanne George Wiltshire, during the contempt hearing, that I would facilitate the recounting of the ballots for Region 4.*

*In this regard I requested a meeting of the full Commission, today, Saturday.*

*My commitment has now been bolstered, by a request made by His Excellency President David Granger, and to which the Leader of the Opposition Mr. Bharrat Jagdeo has approved, to have the Chairperson of*

*CARICOM field an independent high level team to supervise the recount of the ballots for District One to District Ten.*

*I welcome this initiative and would assure everyone, that GECOM will cooperate fully with the process."*

25. This Statement was then followed by an Aide Memoire signed on the 16<sup>th</sup> day of March 2020 by Dr Jagdeo, in his capacity as the Leader of the Opposition, and President David Granger and witnessed by the Secretary General of CARICOM.

26. The Chief Election Officer issued a letter to the Election Agent of the PPP/C on 17<sup>th</sup> March 2020 advising that:

“the National Recount of all votes cast as 2<sup>nd</sup> March 2002 General and Regional Elections will commence from 17:00 hrs today, 17<sup>th</sup> March 2020, at the Arthur Chung Conference Centre (ACCC).

There will be four (4) work stations established to facilitate a fast and smooth process.

Please be advised that you are allowed to have one (1) agent per work station to overlook the process.”

27. As part of its continued undertaking, GECOM on 17<sup>th</sup> March 2020, disseminated various documents for discussion which included,

- a. The Aide Memoire dated 16<sup>th</sup> March 2020;
- b. A draft Order on the part of GECOM giving effect to its undertaking to have a recount aforesaid; and
- c. A proposal for the recount of votes cast for list of Candidates setting out, inter alia, the persons entitled to be present as well as the methodology to be employed.

28. On the 17th March, 2020 another person asserting herself to be a citizen of Guyana and qualified voter, Ulita Moore, filed a Fixed Date Application dated the 17<sup>th</sup> day of March 2020 action number 2020-HC-DEM-CIV-FDA-394 seeking leave to apply for judicial review of GECOM's decision to hold a recount and certain orders and declarations against GECOM to prevent a recount of the ballots cast at the General and Regional Elections and to have current President David Granger declared to be the President of Guyana. Interim injunctive relief was granted by Holder J. on the 17th March, 2020 and the recount was delayed. The main ground of challenge as it turned out was that GECOM had acted unconstitutionally in giving the CARICOM representatives a supervisory role in the recount.
29. The Leader of the Opposition, Dr. Bharrat Jagdeo was joined to the Ulita Moore proceedings and objected to the jurisdiction of the Court. On the 27th March, 2020 Holder J. dismissed the preliminary objection as to jurisdiction and his decision was the subject of an appeal to the Full Court by Appeal No. 2020-HC-DEM-CIV-FCA-26. The Appeal heard by the Full Court was allowed on the 31st March, 2020, the injunction was discharged and Ulita Moore's Fixed Date Application was dismissed. The Full Court held that the High Court had no jurisdiction to hear Ms Moore's application. Thereafter, Ulita Moore sought, inter alia, leave to appeal to the Court of Appeal.
30. On the 2nd and 3rd April, 2020 the Court of Appeal heard the Application for leave to appeal and the Appeal together and by majority decision delivered orally on the 5th April, 2020 set aside the Full Court's decision and proceeded to determine the proceedings before the Honourable Mr. Justice Holder in the following terms:
- a. Leave was granted to Appeal;
  - b. The order of the Full Court that the High Court did not have jurisdiction was set aside;

c. It was ordered that the Appeal be allowed to the extent that it would be unconstitutional for the Guyana Elections Commission to abdicate or delegate its supervisory function over the election process to CARICOM representatives, more particularly the recount of ballots cast at the March 2nd Elections

d. All other orders of the Full Court were affirmed.

The Court of Appeal then issued their Order dated the 5th April, 2020 and entered on the 7th April, 2020

31. Ultimately, Ulita Moore was not successful in preventing the recount decided upon by GECOM from proceeding and GECOM met shortly thereafter and the Chief Elections Officer was directed to prepare a draft plan for the recount of the ballots cast in the General and Regional Elections 2020. The Chief Elections Officer first presented to GECOM a plan spanning 156 days in which counting was proposed to be carried out at only three working stations. This plan was rejected by GECOM. The details of this plan were widely circulated in the national press and were publicly denounced as being ridiculous and unacceptable. Thereafter, GECOM formulated a plan for the recount which was reduced into the terms of an Order No. 60 of 2020 dated the 4th May, 2020 which was duly published in the Gazette. This Order was subsequently amended by Addendum No. 69 of 2020 which was similarly published in the Gazette. The recount actually commenced on the 6th May, 2020 and was completed on the 9th June, 2020.
32. Following the holding of the recount, on June 13<sup>th</sup> 2020, the Chief Election Officer submitted his Report providing a tabulation of the results for the ten (10) Electoral Districts, which showed that the PPP/C had won the Regional and General Elections.
33. During the course of the recount, APNU/AFC representatives raised a number of alleged irregularities which they said had occurred during the course of the election and which they said rendered a number of votes invalid and the election not a credible one. They made these allegations with a straight face even though they

previously defended the results of the election based upon Mr Mingo's fraudulent count.

34. The irregularities identified by the APNU/AFC included the following:

Alleged numerous instances of unparticularised voter fraud, measures to protect agents and staff from exposure to Covid-19; the absence of records of observations; unstamped ballots which it was said constituted voter suppression; the presence of “extra ballots”; the presence of wrongly marked or ticked off lists in the wrong boxes; discrepancies between ballots assigned to Polling Stations and the Ballots found in those boxes; the presence of unused ballots; missing counterfoils; persons voting without submitting certificates of employment; missing polling books; missing oaths of identity; missing of oaths of identity and certificates of employment; missing marked lists of Electors; missing ballots; disparity between ballots assigned to ballot boxes and the cast and unused ballot boxes; more ballots cast than the number of electors; missing poll books, marked list of Electors, tendered ballots, unused ballots, folios; incorrect entries in the Poll Books; votes being recorded and counted for persons who are deceased; votes being recorded and counted for persons who are outside of the jurisdiction; persons voting without identification cards or oaths of identity.

35. In his Report on the recount, the Chief Elections Officer made the unsolicited comment in relation to each of the 10 Districts that because of anomalies and instances of voter impersonation, the criteria of impartiality, fairness and compliance with the provisions of the Constitution and the RPA were not satisfied. It therefore could not be ascertained that the results of the election for all ten districts met the standard of fair and credible elections.

36. GECOM determined that it did not have the power to determine the veracity of the allegations of irregularity which had been made or the credibility of the election and that those questions fell within the exclusive jurisdiction of the High Court.

37. The Chief Election Officer was then instructed by GECOM on June 16<sup>th</sup> 2020, to prepare and submit a report on June 18<sup>th</sup> 2020 based upon the tallies produced by the recount to ascertain the results of the elections under section 96 of the

Representation of the People Act, so that the Commission could proceed to issue an official declaration of the Election Results. Before the Chief Elections Officer had complied with this direction, Ms. Eslyn David filed the proceedings in the Court of Appeal which form the subject matter of this appeal, seeking the relief set out in paragraph 1 hereof.

38. At the hearing of the Motion on June 20th 2020, the intended appellants, GECOM and other Respondents, excluding the Attorney General, argued that the Court of Appeal did not have jurisdiction to entertain the application.
  
39. By majority decision delivered orally on June 22<sup>nd</sup> 2020, the Court of Appeal comprised of the Honourable Madam Justice of Appeal Dawn Gregory-Barnes and the Honourable Mr. Justice Brassington Reynolds, the Honourable Mr. Justice of Appeal Rishi Persaud dissenting, held that it had jurisdiction to entertain the Notice of Motion and proceeded to grant the following relief:

A declaration that the words "more votes cast" in Article 177(2)(b) of the Constitution is to be interpreted to mean "more valid votes cast" within the meaning of Order 60 of 2020 as amended by Order 69 of 2020 issued by GECOM and that GECOM was obliged under the said Order to determine whether the final count was credible.

The Court of Appeal stayed its decision for three days commencing on the 22nd June, 2020

***This summary is premised on the oral decisions delivered by the Honourable Madam Justice of Appeal Dawn Gregory-Barnes and the Honourable Mr. Justice Brassington Reynolds. Neither the written decisions nor the settled Order nor the Transcript of the said oral decisions are available as at the date of drafting this Application. The Applicants/Intended Appellants shall seek leave to amend this Notice of Application and/or the Notice of Appeal on receipt of the written decisions, settled Order and the Transcript.***

40. The Intended Appellants contend that the Court of Appeal erred in law and was plainly wrong by:
- (i) Holding that it had jurisdiction to hear and determine the Notice of Motion filed by Eslyn Davis in Civil Appeal No. 41 of 2020 under Article 177(4) of the Constitution, despite the absence of rules effectuating the Court of Appeal's jurisdiction to determine questions as to the validity of an election of a President, as is required by Article 177(5) of the Constitution;
  - (ii) Finding that it had jurisdiction to hear and consider the Notice of Motion even though a President had not yet been elected and the issue of the validity thereof had accordingly not yet arisen;
  - (iii) Finding that it had jurisdiction under Article 177(4) even though the resolution of the questions raised by Ms David did not depend upon the qualifications of the President or the interpretation of the Constitution but rather upon the interpretation of the Order made by GECOM;
  - (iv) Finding that it had jurisdiction to entertain the application even though the questions raised by Ms David fell within the exclusive jurisdiction of the High Court under Article 163 of the Constitution;
  - (v) Finding that it had jurisdiction to entertain the application even though the application did not raise any question concerning the interpretation of the Constitution but rather only a question concerning the application of provisions of the Constitution to the facts of the case;
  - (vi) Failing to find that any and all relief sought to be raised by the Applicant, Eslyn Davis fell outside of the Court of Appeal's delineated remit and jurisdiction under Article 177(4) of the Constitution;

- (vii) Failing to find that any and all relief sought to be raised by the Applicant, Eslyn Davis, could only be raised on an election petition pursuant to Article 163 of the Constitution;
- (viii) Finding that the Guyana Elections Commission has the jurisdiction to assess, qualitatively and quantitatively, whether the tabulation of the votes as recounted and tabulated by the Chief Elections Officer constitutes “a final credible count” or otherwise enquire into the credibility of the tabulated votes arising out of the recount;
- (ix) Finding in effect, that GECOM was empowered to engage in an exercise of determining the validity of votes and thereby empowering GECOM to exercise a jurisdiction exclusively reserved for the High Court under Article 163 of the Constitution;
- (x) Failing to properly construe and/or consider properly or at all the terms and effect of Article 162 of the Constitution, Article 163 of the Constitution, section 22 of the Election Laws (Amendment) Act and section 140 of the Representation of the People Act;
- (xi) Interpreting Orders of GECOM and ascertaining the intention of GECOM in making said Orders instead of limiting themselves to interpretation of the Constitution in the purported exercise of the Court of Appeal’s jurisdiction under Article 177(4) of the Constitution;
- (xii) Finding that the scope of Article 177(2) of the Constitution could be modified or amended by virtue of any Order of GECOM or at all outside of the manner and form requirements mandated under the Constitution;
- (xiii) In making a determination the effect of which was to contravene the Constitutional doctrine of the separation of powers by authorising GECOM

to usurp the specialised jurisdiction of the High Court under Article 163 of the Constitution;

- (xiv) In failing to recognize that the jurisdiction under Article 163 of the Constitution to determine any question as to whether an election has been lawfully conducted necessarily impacted upon the election of a President;
- (xv) Finding that the High Court had no jurisdiction under Article 163 to consider questions concerning whether the election of the President has been lawfully conducted;
- (xvi) In failing to recognise that any scope of the Court's jurisdiction under Article 177(4) would necessarily be limited to matters outside of Article 163 and that no such matters arose in the Motion which had been filed;
- (xvii) In failing to give effect to the separation of powers doctrine and to the primacy of the Constitution by finding that the meaning of Article 177(2)(b) was in effect amended by the order of GECOM;
- (xviii) In failing to properly construe the Orders of GECOM which did not, in any event, evince any intention on the part of GECOM to undertake an assessment of the credibility of the election as would ordinarily arise in the context of a determination under Article 163;
- (xix) Interpreting Article 177(2)(b) by modifying the provision to include the word "valid" in circumstances where the Court of Appeal had no jurisdiction so to do, the modification was both unwarranted and unnecessary as well as inimical to the complex legislative scheme for the conduct of elections as framed by the Constitution and multiple Acts of Parliament;

- (xx) Interpreting Article 177(2)(b) by modifying the provision to include the word “valid” and proceeding thereby to construe and interpret the Constitution of Guyana by reference to subsidiary legislation, that is the Order and the Addendum issued by GECOM;
  - (xxi) In effect reviewing the decision of GECOM not to make any determination on the credibility of the election, in breach of s. 140(1) of the Representation of the People Act which prohibits any court from enquiring into whether any function of GECOM has been performed validly or at all.
41. The Applicants/Intended Appellants are likely, upon the basis of the grounds set forth above, to succeed on their Appeal.
  42. The issues which are engaged by this Appeal are of fundamental importance and will, inevitably impact the outcome of the General and Regional Election, the outcome of which is a matter of tremendous domestic and international concern and importance.
  43. The Constitution and relevant legislation governing elections in Guyana have provided for the independence of GECOM which said independence has been directly impugned in the Motion of Eslyn David and the Decision of the Court of Appeal.
  44. The request for the urgent intervention of the Caribbean Court of Justice is justified and necessary to prevent a clear and substantial miscarriage of justice arising out of an act of judicial overreach by the Court of Appeal.
  45. The Applicants/Intended Appellants did not apply for leave to appeal to the Caribbean Court of Justice by first applying to the Court of Appeal in Guyana having regard to the urgency of the matter. The exercise of the original jurisdiction by the Court of Appeal pursuant to Article 177(4) of the Constitution, the issue as to whether Article 177(4) has come into effect at all and the question of whether

any justiciable issue as to the validity of the election of the President involving an interpretation of the Constitution has indeed arisen are all matters of great general or public importance which require the consideration and determination of the Caribbean Court of Justice. The issues raised on this appeal touch and concern the legitimacy and integrity of the electoral process in Guyana as a whole and it is crucial that they be determined on an urgent basis. If the Orders sought by Eshlyn Moore are granted, it will have the effect of unlawfully inflating the discretion of the Chief Elections Officer and preventing the exercise by GECOM of its specialised and independent supervisory role and will also obfuscate the jurisdiction of GECOM. It is in this regard that interim relief is sought to restrain the Chief Election Officer from issuing a Report in reliance on the Decision as such Report is likely to disregard the tabulation of the Statements of Recount in favour of the adjusted calculations posited by the Chief Elections Officer in his Summary of the Observation Reports.

46. The request for the urgent intervention of the Caribbean Court of Justice is justified and necessary in order to prevent a clear and substantial miscarriage of justice and irreparable harm that will otherwise be done to the people of Guyana and the very institution of democracy in Guyana unless special leave to appeal is granted. The General and Regional Elections which were held on the 2nd March, 2020 must be completed and the Government of Guyana duly constituted in accordance with the results thereof. A meeting of GECOM is currently scheduled for June 22, 2020 at 11 AM to determine matters relating to the election.
47. The instant application is for leave to appeal against determination of the Court of Appeal purportedly made in the exercise of its jurisdiction under Article 177(4). Although Article 177(4) speaks of decisions of the Court of Appeal made thereunder being final, that is no restriction to the instant appeal in circumstances where, as here, for the reasons set out in the grounds above:
  - a. The Court of Appeal's decision was not made under Article 177(4) because the decision which it did make does not fall within the ambit of Article 177(4);

- b. The decision which was arrived at was ultra vires the powers of the Court of Appeal under Article 177(4);
- c. In the exercise of its Article 177 (4) jurisdiction, the Court of Appeal acts with limited jurisdiction and it accordingly may not, through a mistaken understanding or application of this jurisdiction, encroach or abrogate other parts of the Constitution and in particular exercise a jurisdiction vested exclusively in the High Court;
- d. The assumption of jurisdiction by the Court of Appeal was irregular and improper;
- e. Where, in any event, the supremacy of the constitution and the rule of law requires this Honourable Court to intervene to give effect to other provisions of the Constitution and the implied separation of powers established thereunder.

48. The balance of convenience favours the grant of the reliefs sought herein.



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Douglas Mendes SC  
Mohabir Anil Nandlall  
Devindra Kissoon  
Attorneys-at-Law for the Applicants/  
Intended Appellants

Dated the 22<sup>nd</sup> day of June 2020

This notice of application was filed in the Registry by Devindra Kissoon, Attorney-at-Law, London House Chambers, Attorneys-at-Law, 153 Charlotte Street, Lacytown, Georgetown, Attorneys-at-law for the Applicant/Intended Appellant whose address for service is at the above address. Service may also be effected by e-mail to [dkissoon@londonhousechambers.com](mailto:dkissoon@londonhousechambers.com).

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TO: THE CHIEF ELECTIONS OFFICER  
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GUYANA

TO: MS. KIM KYTE- THOMAS  
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