LEBBE
v.
COMMISSIONER OF ELECTIONS AND OTHERS

COURT OF APPEAL
RANARAJA, J.,
C.A. APPLICATION NO. 250/97
JUNE 17, 1997.

Local Authorities Elections – Local Authorities Election Ordinance ss. 60, 61, 63, 63A, 64, 65 (b), 66, 67 (2) and 69 – Writs of Certiorari and Mandamus – Application for recount – Grounds for declaring election invalid – Local Authorities Elections Amendment Act, No. 24 of 1977 – Candidates – Public Officials – Counting Agents – Counting Officer – Returning Officer – Commissioner of Elections – Elections Office – Inspection of Returning Officer's Journal and ballot papers by Court – Onus of proof – Recount – Journal.

1. For an election to be declared invalid three conditions have to be satisfied:

    i. There must be a failure to comply with any provision of the Ordinance.

    ii. It is essential for the Court to have sufficient evidence before it that the election was not conducted in accordance with some principle laid down in the provisions of the Ordinance. The vote of every elector who has effectively exercised his right has to be duly taken into account for the purpose of ascertaining which candidate has received the majority of the votes. It is the will of the majority which must be declared at the end of the election. The "conducting" of the count has to be done by public officials. The political parties or groups that fielded candidates at the election have only a right to attend at the count to ensure that the underlying principles are followed by the public officials but they play no part in "conducting" the election and are not public officials.

    iii. The Court must be satisfied that the failure to comply with the provisions of the Ordinance and the failure to conduct the election in accordance with the principles laid down in such provisions affected the result of the election. The "result" contemplated is the return of the candidate and not the majority.

2. After the amendment of the Local Authorities Elections Ordinance by Act, No. 24 of 1977 each political party or independent group has the right to appoint two agents to attend at the counting of votes at any counting centre.

Notice in writing of the appointment of counting agents with their names and addresses has to be given by the Secretary of the recognized party or its authorized agent or the group leader to the Counting officer before the counting. Any person whose name does not appear in the notice may be refused entry to the Counting center by the Counting officer (section 60). The votes have to be counted after making arrangements for the presence of Counting Agents with notice in writing of the time and place (section 61). The provisions of section 63 (6) require two statements to be prepared by the Counting officer, one giving the number of votes cast for each party or group and the other stating the number of preference votes received by each candidate. These statements have to be certified by the Counting officer and witnessed by one of his assistants and clerks. The counting agents of a party or group may sign them if they so desire. Any power, duty or function of a Counting officer under section 63, may be exercised, performed or discharged on his behalf by any of assistants or clerks under his supervision and direction. Though this is not provided for in the statute, the Counting officer must maintain a journal wherein is kept a record of the proceedings before him.

3. From the statements delivered to him by the Counting officers, the Returning officer will determine the number of votes given for each political party or independent group and number of preferences for each candidate of such party or group (section 65 (*b*)). Two agents, each of the political parties or groups have the right, if appointed in terms of section 60, to be present at the proceedings before the Returning officer.

4. Before the Returning officer declares the result of the election, notice in writing has to be given by him to the secretary or the authorized agent of a political party or group leader of an independent group contesting the election, of the time and place at which the result will be declared.

5. The Returning Officer is also required to publish a notice specifying the names of the candidates elected as Mayor and Deputy Mayor of the relevant local authority and the names of the candidates elected as members. The Returning Officer is also obliged to report the result to the Commissioner of Elections through the Elections officer of the district in which the area is situated.

6. The Commissioner in turn has to cause the result so reported to be published in the *Gazette*.

7. The Returning Officer to whom the Counting officer delivers the ballot papers and documents referred to in section 64 (2) has to deliver to the Elections officer of the district in which the electoral area is situated, the ballot papers and documents referred to in section 67 (2) which have to be retained by the latter for six months from date of receipt after which they are destroyed.

8. No person is entitled to inspect the ballot papers or documents while they are in the custody of the Elections Officer. A competent Court may order

the production, inspect or authorise the inspection of such packets of ballot papers or documents within the specified period of six months (section 67 (2)).

9. The maxim, *omnia presumuntur rite et solemniter esse acta.* That all official acts have been regularly performed may be presumed. The onus of proving that the Election officers acted contrary to the provisions of the Ordinance is on the petitioner.

10. Every non-compliance with the provisions of the Ordinance is not sufficient but it must be established that the election had not been conducted in accordance with the principles underlying the provisions of the Ordinance.

11. Failure to provide adequate staff to conduct the count, failing to give adequate notice to the counting agents of the time and place of the count, refusal without reason to permit counting agents duly appointed by the party secretary of a political party, recognized agent or group leader to be present at the count, not providing adequate facilities to the counting agents to observe the count and make their own notes, refusal to record the objections of the counting agents to the manner in which the counting was done, failure to allow a recount when demanded by the counting agents are the principles underlying the provisions of the Ordinance regarding the counting of votes. The non-compliance must be of such a degree and magniture that it could reasonably said that the electorate was not given a fair opportunity of electing the candidate of its choice. If there is sufficient proof that the Election officers did not act in accordance with the principles underlying the provisions relating to the count, Court should call for the packets forwarded to the Election Officer under Section 67 (2) and ascertain the truth of the allegations made by the petitioner by perusing the journal maintained by the Counting officer. If the allegations of tampering with the votes/preferences are established, Court must then proceed to ascertain whether the degree of the non-compliance was such as to affect the wish of the electorate. Once the Court reaches that stage, then it has to proceed to inquire whether the failure to observe the underlying principles affected the result of the election.

12. Where requests are made, the Court makes available to the petitioners, copies of the statements of the Counting officers prepared in terms of section 63 (*a*), on which the Returning officers declared the result under section 65 and published the notice of the result under section 66 in the *Gazette.* The petitioners were thus in a position before the date of the argument to ascertain whether the statements were prepared in conformity with section 63 (6) and whether the declaration under section 65 and notice under section 66 tallied with the statements. Where the Court after inquiry is satisfied that the result in all probability has been affected and where this is sought by way of relief, allow a recount of the votes/preferences. However mandamus directing a recount will not lie in all cases where such relief is sought.

13. The right to seek a recount being conferred on Counting agents and not on the candidates the petitioner qua candidate is not entitled to a recount.

Cases referred to:

1. *Martin Perera v. Medadombe* 73 NLR 25, 29.
2. *Eastern Division of the Country of Clare* (1886) 4 OM & H 162.
3. *Woodward v. Sarsons* (1875) LR 10 CP 733.
4. *De Silva v. Ivan Appuhamy* (1993) 2 Sri LR 401, 412, 413, 415, 416.
5. *Munasinghe v. Corea* 55 NLR 265, 272, 273.

APPLICATION for writs of certiorari and mandamus.

S. J. Mohideen for petitioner.

S. Sri Skandarajah, S.S.C for respondent.

Cur. adv. vult.

June 17, 1997.

DR. RANARAJA, J.

Introduction:

This is one of many applications filed by unsuccessful candidates, who contested the Local Authorities Elections held on 21.3.97. The main reliefs prayed for in almost all the applications were:

(*a*) writs of Certiorari quashing the determination of the number of preferences for each candidate and,

(*b*) writs of Mandamus directing the relevant officials to scrutinise the tally sheets and/or recount the ballot papers pertaining to the preference votes received by each candidate of a particular political party or independent group.

In view of the large number of such applications, this order will deal in some detail the relevant law and the decisions of the Superior Courts on the subject. This judgment will be the basis on which all other applications will be decided.

Section 69 of the Local Authorities Elections Ordinance :

Section 69 of the Local Authorities Elections Ordinance (as amended) provides: "**No elections shall be invalid** by reason of any failure to comply with the provisions of this Ordinance relating to elections if it appears that the election was conducted in accordance with the

principles laid down in such provisions, and that such failure did not affect the result of the election".

Thus for an election to be declared invalid, three conditions have to be satisfied, firstly, there must be **a failure to comply** with any provision of the Ordinance. As observed by *H. N. G. Fernando, CJ* in *Martin Perera v. Medadombe*[1] at 29. "This expression is appropriate to a case where a **public officer** does not perform an act or duty which some provision of the Ordinance requires him to perform, because if so, the officer clearly fails to comply with that provision". Secondly, it is essential for Court to have sufficient evidence before it that the election was not **conducted** in accordance with some principle laid down in the provisions of the Ordinance. His Lordship the Chief Justice, in ***Martin Perera* (Supra) at p.** 29, was of the view that the provisions in sections 59 to 65 of the Ordinance as they stood at the time recognized the principle that the vote of every elector who has effectively exercised his right has to be duly taken into account for the purpose of ascertaining which candidate has received the majority of the votes and also the principle that it is the will of the majority which must be declared at the end of the election. The "conducting" of the count has to be done by public officials. The political parties or groups that fielded candidates at the election have only a right to attend at the count to ensure that those underlying principles are followed by the public officials. They play no part in "**conducting**" the election and are not "public officials" who are required to comply with the provisions of the Ordinance in **conducting** the election.

Finally, the Court must also be satisfied that the failure to comply with the provisions of the Ordinance and the failure to conduct the election in accordance with the principles laid down in such provisions **affected the result of the election.** The "result" contemplated is the return of the candidate and not the amount of the majority ***(Eastern Division of the County of Clare)***[2] or the success of the one candidate over the other. – ***(Woodward v. Sarsons)***[3].

Counting Agents:

After the amendment of the Local Authorities Elections Ordinance, by Act No. 24 of 1977, each political party or independent group has the right to appoint two agents to attend at the counting of votes at

any counting center. Notice in writing of the appointment of counting agents, stating their names and addresses, has to be given by the Secretary of the recognized party or its authorised agent or the group leader to the counting officer before the counting. Any person whose name does not appear in the notice may be refused entry to the counting center by the counting officer (section 60). The votes have to be counted after making arrangements for the presence of counting agents upon notice in writing of the place and time (section 61).

Counting Officer

Section 63 (6) provides:

> "The counting officer shall prepare a written statement, in words as well as in figures, of the number of votes given for each recognized political party and independent group, and a separate statement, in words as well as figures, of the number of preferences indicated for every candidate nominated by each such party or group, and each such statement shall be certified by the counting officer and witnessed by one of his assistants and clerks and the agents of any party or group as are present and desire to sign".

The provisions of the section require two statements to be prepared by the counting officer, one giving the number of votes cast for each party or group and another stating the number of preference votes received by each candidate. These statements have to be certified by the counting officer and witnessed by one of his assistants and clerks. The counting agents of a party or group may sign them if they so desire.

It is to be noted that any power, duty or function of a counting officer under section 63, may be exercised, performed or discharged for and on behalf by any of his assistants or clerks acting under the supervision and direction of the counting officer (section 63A).

Returning Officer:

It is from the statements delivered to him by the counting officers that the returning officer will determine the number of votes given for each political party or independent group and the number of preferences indicated for each candidate nominated by such party

or group (section 65 (*b*)). Two agents each of the political parties or groups have the right, if appointed in terms of the provisions of section 60, to be present at the proceedings before the returning officer.

Before the returning officer declares the result of the election, notice in writing has to be given by him, to the secretary or the authorised agent of a political party or group leader of an independent group contesting that election, of the time and place at which the result will be declared (section 61 (2)). The returning officer is also required to publish a notice specifying the names of the candidates elected as Mayor and Deputy Mayor of the relevant local authority and the names of the candidates elected as members (section 66 (1) (*a*)). The returning officer is also obliged to report the result to the Commissioner of Elections through the elections officer of the district in which the area is situated (section 66 (*b*)). The Commissioner in turn has to cause the result so reported to be published in the *Gazette* (section 66 (2)).

Elections Officer:

The returning officer, to whom the counting officer delivers the ballot papers and documents referred to in section 64 (2) has to deliver to the elections officer of the district in which the electoral area is situated, the ballot papers and documents referred to in section 67 (2), which have to be retained by the latter for a period of six months from the date of receipt, after which they are destroyed. No person is entitled to inspect the ballot papers or documents while they are in the custody of the Elections officer. A competent Court may order the production, inspect or authorise the inspection of such packets of ballot papers or documents within the specified period of six months (section 67 (2)).

Reliefs claimed by the Petitioner:

One of the reliefs claimed by the petitioner in this application, like in the other applications, is to call for and examine the journal maintained by the returning officer and all other documents maintained including the ballots cast in favour of the party or group from which the petitioner contested the election as a candidate. The petitioner, who contested the election as a candidate of the United National Party,

for the purpose of electing the Chairman, Vice Chairman and Members of the Lankapura Pradeshiya Sabha, secured 1,297 preference votes. He was unable to secure a seat in the Sabha. He believes he received a large number of preference votes. The 1st respondent, Commissioner of Elections has filed with his affidavit, document 1R2, which is a certified copy of the statement of the total of preferences cast for candidates of the U.N.P seeking election to the Lankapura Pradeshiya Sabha, counted at all the counting centers. The petitioner has received 1,258 preference votes at the counting center No. 12, 26 at center 13 and 13 postal votes counted at center No. 28. The two counting agents of the People's Alliance and the U.N.P whose affidavits have been filed in support of the petitioner's contention, state that he received a large number of preference votes. However they were both present at the counting of the votes at center No. 12 only. The petitioner for reasons best known to him has failed to file affidavits of the counting agents at centers Nos. 13 and 28. The petitioner alleges that the returning officer and his staff failed to exercise due diligence and care in the counting of preferences and the preferences he polled were dishonestly counted in favour of the winning candidates, namely, the 4th to 8th respondents, who were present at the counting halls, presumably as counting agents.

There is no doubt that the petitioner received a large number of preference votes from those counted at center No. 12. This is borne out both by the affidavits of the two counting agents as well as the documents 1R1 (a) to (c) and 1R3 filed by the 1st respondent. However, there is no document filed by the petitioner to support his averment that he received as high a number of preference votes counted at center No. 12 at the other two centers. There is also no evidence at all produced by the petitioner, which in any way even suggests that the officials conducting the count acted dishonestly. The petitioner also complains that a maximum of six counting agents were permitted to be present in the three counting centers and he was not one of them. It is averred that he was therefore unable to ask for a recount.

Are Counting Agents Amenable to Writ Jurisdiction:

The unfair conduct of the counting agents and inefficiency/incompetence/dishonesty of elections officers are two themes that run through all the applications for recounts. *Thus* it is necessary to consider the

role played by counting agents and whether they are amenable to writ jurisdiction of this Court.

As seen, section 60 provides every political party or independent group the right to appoint **not more than two** agents to attend at the counting of votes at each place where votes are counted. There is no prohibition against a candidate at the election being appointed a counting agent. The counting agents are appointed by the secretary of the political party or his recognized agent or the group leader. The need to restrict the number of counting agents to two is due to obvious logistical reasons. For example, where there are five parties or groups contesting an election with each having twenty-five candidates on the nomination list and if each candidate was permitted to have two counting agents, the center will be filled with two hundred and fifty counting agents leaving no space in a center of average size for the elections officers to conduct the counting satisfactorily. It is to avert such disorganisation and *chaos* that is bound to take place that the number of counting agents has been restricted to two for each party or group by statute.

Besides, as observed by *Fernando, J.* in *De Silva v. Ivan Appuhamy*[4] at 416 "the basic assumption that candidates of the same party or group cannot agree on agents who would act impartially as between one candidate and another is questionable, it assumes a degree of distrust and suspicion among candidates which cannot reasonably be assumed to exist among members of what is essentially a team with common political objectives. Parliament must rather be presumed to have contemplated that candidates would agree on agents who would not be dishonest or partial as between one candidate and another". Political parties or groups are voluntary organisations which should have overall control of the candidates and exercise discipline over them. A candidate who is dissatisfied with the conduct of counting agents must seek his remedy within the party or group itself.

The counting agents are appointed to **attend** at the counting of the votes. Even though the counting officer is required to make arrangements for the counting of the votes in the presence of the counting agents, the non-attendance of such agents will not, if the counting is otherwise duly done, invalidate the count (section 74). The statutory requirement is for the counting officer to give adequate notice to the counting agents to be present, if they so wish, at the counting.

The responsibility of attending the count is solely at the discretion of the counting agents. Their absence at the count will in no way affect the "conduct" of the election so long as the counting officer has duly carried out the count.

The duty cast on the counting officer is to open the count to the scrutiny of the counting agents, who can make their own objections and observations as the count proceeds. The task of the counting agents is to ensure that the counting officer and his staff perform their duties according to law. The counting officer in turn is required to provide reasonable facilities to the counting agents to watch with diligence the proceedings. Though there is no specific provision in the Ordinance to do so, in practice, the counting officer must maintain a journal to record any objections raised by the counting agents and his rulings thereon. The counting agents themselves have to be vigilant in ensuring that votes cast for each contesting party or group and the preference votes are accurately counted according to the provisions of sections 61A to 64. They also should exercise their right, when necessary, to seek a recount of votes counted at both stages, if they are not satisfied with the manner in which the count was conducted. If they fail to exercise that right, proceed further and accept the statements prepared by the counting officer as being accurate by signing the same, there is no way that Court will interfere with the count by directing a recount to be held.

On the other hand, if the counting agents have taken any objections at the count and insisted that they be properly journalised by the counting officer, Court can at the appropriate stage have recourse to the journals to arrive at a decision on whether the election was conducted in compliance with the provisions of the Ordinance and the principles underlying in those provisions.

The provisions of the Ordinance therefore permit counting agents to **attend** at the counting. The law does not cast on them any statutory functions or duties in **conducting** the election. They are not public officers responsible for the conduct of the election. They are agents of the respective political parties or groups which are voluntary organisations. Any lapses on their part at the counting of votes will not be considered acts or omissions of public officers, whose conduct alone is amenable to the writ jurisdiction of this Court. Any application seeking writs of certiorari to **quash** the election of candidates of a

particular political party or group on the ground that the counting agents of such party or group did not carry out their functions and duties for the party or group properly, is misconceived.

Failure to comply with the provisions of the Ordinance by Elections Officers:

In many applications the honesty and integrity of public officials who conducted the elections are challenged. It is alleged that the counting officers and their staff have worked in collusion with the authorised agents, group leaders or counting agents, who in certain instances were candidates themselves, to count preference votes cast in favour of the petitioners with preferences cast in favour of the winning candidates or have done so due to carelessness or human error, thus depriving the petitioners and the electors the benefit of the choice of the voters. Such allegations are of a serious nature. Section 114 of the Evidence Ordinance provides "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. The Court may **presume** (*d*) **that judicial and official acts have been regularly performed".**

This presumption is based on the maxim, **omnia presumuntur rite et solemniter esse acta.** The words "regularly performed" mean done with due regard to form and procedure. Where there is general evidence of acts having been legally and regularly done, courts tend to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most cases, although in others the assumption rests solely on grounds of public policy. – *Coomaraswamy* – ***The Law of Evidence*** – Vol. 2, bk 1, p 407.

The ***onus*** of proving that the elections officers acted in any manner contrary to the provisions of the Ordinance therefore lies on those who challenge their conduct. A ***fancied*** possibility of dishonesty or error is not sufficient to ***vitiate*** a count; there must be material pointing to probability of error based upon grounds from which such an inference could reasonably be drawn. – **See: *Fernando, J. in De Silva (supra)*** at p. 412. Unless objections are raised by counting agents to actual or suspected errors in the counting or recording of prefer-

ences and insisting on those objections being contemporaneously recorded by the counting officer in the journal, Court will be slow to hold that the presumption has been rebutted. It is only where the petitioner proves to the satisfaction of Court that the counting officer has failed to comply with any provisions of the Ordinance in respect of the count that it has failed to comply with any provisions of the Ordinance in respect of the count that it will proceed to inquire whether such non-compliance was contrary to the principles laid down by the provisions. As ***Nagalingam, A.C.J*** observed in a similar context in ***Munasinghe v. Corea***[5] at 272–73:

"Every non compliance with the provisions of the Order in Council does not afford a ground for declaring an election void, but it must further be **established** (apart from any other requirement) that the non-compliance with the provisions was of such a kind or character that it could be said that the election had not been conducted in accordance with the principles underlying those provisions. Are the principles laid down in the provisions of the Order in Council different from the provisions themselves? Unless they were, no adequate reason can be assigned for the draftsman using the language he has used. **The difference I think, consists not so much in the nature of the non-compliance as in the degree of that non-compliance;** it consists not in a bare non-compliance but in the **magnitude or extent of the non-compliance**"... I would not put down the omission to perforate these ballot papers to carelessness, and much less to negligence, but rather to human fallibility, to the imperfection of the human machine, to what is sometimes termed the human element ... To hold otherwise would not merely set at naught elections in general, but render entirely unworkable the democratic machinery".

Principles underlying the Provisions of the Ordinance Relating to the Count:

What then are the principles underlying the provisions of the Ordinance regarding the counting of votes, the breach of which would justify the invalidation of an election? In other words, what should be the effect of a failure to provide adequate staff to conduct the count, failing to give adequate notice to the counting agents of the time and place of the count, refusal without reason to permit counting agents duly appointed by the party secretary of a political party, recognized

agent or group leader, to be present at a count, not providing adequate facilities to the counting agents to observe the count and make their own notes, refusal to record the objections of the counting agents to the manner in which the counting is done, failure to allow a recount when demanded by the counting agents?

Apart from what ***H. N. G. Fernando, C.J*** held in ***Martin Perera (supra),*** to be the underlying principle namely, that the vote of every elector who has effectively exercised his right has to be duly taken into account for the purpose of ascertaining which candidate has received the majority which must prevail and be declared at the end of the election, ***Nagalingam A.C.J*** in ***Munasinghe (supra)*** came to a similar conclusion, when he observed, the non-compliance should be of such a degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice. A failure to comply with those provisions would be acting contrary to that principle. If such a breach of the provisions does take place, the counting agents may produce evidence by way of affidavit and other documents maintained by them. Bare statements unsupported by the petitioners, who were not present at the count, will not suffice. If there is sufficient proof that the elections officers did not act in accordance with the principles underlying the provisions relating to the count, Court should call for the packets forwarded to the Election Officer under section 67 (2) and ascertain the truth of the allegations made by the petitioner by perusing the journal maintained by the counting officer. If the allegations of tampering with the votes/preferences are established, Court must then proceed to ascertain whether, the degree of the non-compliance was such as to affect the wish of the electorate to return the candidates of its choice as members of the relevant local authority. Once Court reaches that stage, then it has to proceed to inquire whether the failure to observe the underlying principles affected the result of the election.

Effect of Non-compliance of Provisions Regarding the Count on the Result of the Election:

In the context of breaches of the provisions of the Ordinance relating to the counting of votes, this Court made available, where requests were made by petitioners, copies of the statements of the counting officers prepared in terms of section 63 (6), on which the

returning officers declared the result under section 65 and published the notice of the result under section 66 in the *Gazette.* The petitioners were thus in a position before the date of argument to ascertain whether the said statements were prepared in conformity with the provisions of section 63 (6) and whether the declaration under section 65 and notice under section 66 tallied with the statements. Where they tallied, there could not have been any error or irregularity, see: ***De Silva (Supra)*** p. 413, and the question of any error or irregularity affecting the result did not arise. However, where there are discrepancies in the figures entered in the said statements and declaration/ notice, Court is obliged to proceed further and investigate whether the error or irregularity was of such a degree and magnitude to affect the result. If Court, after such inquiry is satisfied the result in all probability has been affected, where sought by way of relief, allow a recount of the votes/preferences in order to give the electorate a fair opportunity of electing the candidates of its choice. However mandamus directing a recount will not lie in all cases where such relief is sought. ***Fernando, J.*** in ***De Silva (supra)*** **at p. 415** posed the question whether a writ of mandamus lies where a recount was not demanded in respect of the count of votes/preferences under section 63 (7). His Lordship proceeded to answer the question thus: "while the failure to demand a recount at the proper stage may not always be fatal, in the circumstances of this case, Mandamus did not lie". In that case, the counting agents of the Independent Group, of which the petitioner was a candidate, had not made a demand for a recount, after the count and prior to the relevant statements in respect of the votes/preferences were prepared and certified under section 63 (6). The right to seek a recount being conferred on counting agents and not on the candidates the petitioner qua candidate was not entitled to a recount.

Conclusion:

In the instant application the petitioner has failed to make out a case that, (*a*) the election officials did not comply with the provisions of the Ordinance and (*b*) they conducted the election in breach of the principles underlying those provisions and (*c*) that the conduct of the said officials affected the result of the election. Thus neither certiorari nor mandamus is available to the petitioner. His application is dismissed. No costs.

Application dismissed.