CHANDANANDA DE SILVA
COMMISSIONER OF ELECTIONS AND ANOTHER
v.
GEORGE IVAN APPUHAMY AND OTHERS

SUPREME COURT.
FERNANDO, J.
AMERASINGHE, J AND
KULATUNGA, J.
SC APPEAL NO. 15/92
CA APPLICATION NO.530/91
MAY 04 AND 05, 1992.

Mandamus – Municipal Council Elections – Proportional representation (PR) system – Counting of Votes and preferences – Counting Agents – recounts – Right to be present at count – Local Authorities Elections Ordinance as amended by Act No. 24 of 1972 and 24 of 1978 ss. 60, 62, 63, 65.

The Negombo Municipal Council Elections were held on 11.5.91 under the proportional Representation (PR) system as modified by Act No. 24 of 1987 apart from casting his vote for the Party or Group of his choice each voter was permitted to indicate preferences for three of the candidates of the party or group for which he voted. After voting ended, the election officials counted the votes in six rooms from 8.00 p.m. or 8.30 p.m. on 11.5.91. The same officials then proceeded to count the preferences from some time in the morning of 12.5.91 till 4.00 p.m. that evening with short breaks and intervals for meals etc. Since each ballot could have preferences for three different candidates ballot papers could not be sorted into bundles according to preferences and then counted. Instead the preferences indicated in each ballot paper had to be separately recorded on sheets of paper. One group of officials read out the preferences while another recorded them. There was no suggestion of deliberate falsification of results. According to a circular (2R1) dated 2.5.91 only two counting agents could be present at each counting centre and no candidate had a right to enter a counting centre by virtue only of his candidature. Some or all the Independent Group candidates requested their leader (3rd respondent) that they and/or their counting agents be permitted to be present at the count. The 3rd responded told them this could not be permitted. But the 2nd petitioner (who was a candidate) was one of the group's counting agents and thereafter there was no absolute prohibition on candidates being present at the count.

A recount was not demanded. The result had been declared in terms of section 65 of the Local Authorities Elections Ordinance at 8.00 p.m. on 12.5.91. No agents of the Independent Group were present at those proceedings. When the Ordinance was amended in 1977, section 63(6) provided for the preparation of one written statement as to the votes cast, and section 63 (7) enabled a recount to be applied for before the statement was prepared. However, when in 1987

section 63(6) was amended to provide for two written statements, section 63(7) was not amended and continued to refer to a written statement referred to in subsection (6).

The circular 2R1 dated 2.5.91 issued to all parties and groups does not contain an absolute prohibition on the admission of candidates to the count. It merely restated that which is implicit in section 62(1) that a candidate, qua candidate was not entitled to admission to the count. It is not ultra vires nor an improper restriction of the counting officers discretion. Further no request had been made to the counting agent to permit candidates and their counting agents to be present at any stage. There was therefore no refusal.

In the scheme of the Ordinance, the declaration of the result by the returning officer takes place in the proceedings under section 65 (sec. 65(d) and (c)) on the basis of the statements as to votes and preferences prepared under s. 63(6). The returning officer is thereupon required under section 66 to publish a notice specifying the names of the candidates elected, and to report the result to the Commissioner of Elections, who will cause those names to be published in the Gazette. There is no provision for informal communication of the results.

The law requires that a written statement of preferences should have been prepared under section 63(6) and by implication at least, that a written record be made of the declaration of the result under section 65. Both these acts should have been done on 12.5.91 before any dispute arose. It is not suggested that there were no such documents. It must be assumed that the official records did exist. The notice under section 66(1) and the Gazette notification under section 66(1) were before court . It was not necessary to decide whether these notices differed from one or more non-statutory oral statements made by the 2nd appellant (Asst. Commissioner of Elections) after he was functus insofar as the declaration of the result was concerned.

The circular 2R1 did not absolutely prohibited the presence of candidates at the count or improperty restrict the discretion of the counting officer. The petitioners had failed to prove any probability of error in regard to the count of the preferences or any irregularily in regard to the declaration of the result.

Parliament deliberately refrained from making references to candidates in s. 60. A candidate or his agent, not present at the count, could not be given the right to demand a recount and accordingly in section 63(7) too, no reference was made to candidates. There was no lacuna in section 60. The counting officers discretion has to be exercised reasonably having regard to the exigencies of the count and not to admit all candidates to the count as a matter of course.

Section 63(7) confers a right to a recount in regard to both votes and preferences but that right is conferred on *counting agents* and not on *candidates.* After the counting officers made the written statement of preferences he was functus officio and could not make a recount either later on the same day or on 14.5.91 and correctly advised the petitioners that their remedy lay in the courts. The 2nd

appellant had no power to order a recount and his refusal to do so was not unlawful. Mandamus did not lie.

Cases referred to :

1. *R. V. Hanley* Revising Barrister (1912) 3 KB 518, 529.

APPEAL from Judgment of Court of Appeal.

Shibly Aziz, P.C., Additional Solicitor General for 1st and 2nd appellants.

Asoka Gunasekera for petitioner – respondent.

Cur. adv. vult.

July 23, 1992.

FERNANDO, J.

The Petitioners–Respondents (" the Petitioners ") were two candidates of the Independent Group which contested the Negombo Municipal Council elections held on 11.5.91. There is no dispute as to the counting of votes or the number of seats (six) to which that Group became entitled. The questions in issue relate entirely to the counting of the preferences indicated by the voters, and the declaration of the result in regard to the selection of the candidates to fill the six seats won by the Group. The petitioners applied to the Court of Appeal for a writ of Certiorari to quash the determination of the number of preferences indicated for each candidate of the Group made by the 2nd Respondent–Appellant, the Returning Officer (" the 2nd Appellant "), and the declaration made by him in respect of the candidates of the Group entitled to the said six seats, and for a writ of Mandamus directing the 1st Respondent-Appellant, the Commissioner of Elections (" the 1st Appellant "), to hold a recount of the said preferences in the presence of the 28 candidates and their counting agents, to communicate to the Court the results of such recount, and in terms thereof to make a declaration as to the candidates elected.

It is convenient to reproduce the relevant provisions of the Local Authorities Elections Ordinance before the Proportional Representation (" P.R. ") system was introduced. The Ordinance Provided :" 60(1) Each candidate at any election for any ward may appoint one agent (hereinafter referred to as a " counting agent ") to attend at the counting of the votes at such election. Notice in writing of such

appointment, stating the name and address of such person appointed, shall be given by such candidate to the returning officer two clear days at least before the opening of the poll at such election. The returning officer may refuse to admit to the place where the votes are counted any counting agent whose name and address have not been so given, notwithstanding that his appointment may be otherwise valid, and any notice required to be given to a counting agent by the returning officer may be sent by post to, or delivered at, the address stated in the notice."

" 62(1) Except with the consent of the returning officer, no person other than the returning officer, the persons appointed to assist him, and the candidates and their counting agents may be present at the counting of the votes."

" 65 When the result of the poll has been ascertained, the returning officer of the ward in which the poll was taken shall forthwith declare to be elected the candidate to whom the greatest number of votes has been given :

Provided that, upon the application of any candidate or his agent, a recount shall be made before the returning officer makes the declaration."

When the P.R. system was first introduced, each recognized political party and independent group was required to submit a list of candidates arranged in order of priority as determined by the party or group (cf. sections 65(2) (d) and 65A (3) as amended by Law No. 24 of 1977), and the question of the voters preferences did not arise. The Ordinance, as amended then provided :

" 60 Each recognized political party or an independent group which has nominated candidates at any election for any electoral area may appoint not more than two agents (hereinafter referred to as the " counting agents ') to attend at the counting of the votes at each place before the votes are counted at such election and not more than two agents to attend at the proceedings under section 65. Notice in writing of such appointments, stating the names and addresses of the persons appointed, shall be given by the secretary of such recognized party or its authorized agent, or the group leader, to the counting officer or returning officer, as the case may be, before the counting or declaration of the result commences. The counting officer or returning officer, as the

case may be, may refuse to admit to the place where the votes are counted or the place where the proceedings under section 65 takes place any counting agent or other agent whose name and address has not been so given. "

" 62(1) Except with the consent of the counting officer, no person other than the counting officer, the persons appointed to assist him, and the counting agents may be present at the counting of the votes. "

" 63(6) 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 such statement shall be certified by the counting officer and witnessed by one of his assistants or clerks and the agents of any party or group as are present and desire to sign.

(7) Before the counting officer makes a written statement referred to in subsection (6), such number of recounts may be made as the counting officer deems necessary ; and a recount or recounts shall be made upon the application of a counting agent so however that the maximum number of recounts that shall be so made, on the application of any counting agent or all the counting agents, shall not exceed two. "

" 65(1)(a) After the receipt of the documents referred to in section 64, the returning officer shall determine in the manner hereinafter provided in this section the candidates to be declared elected as Mayor, Deputy Mayor and members.

(b) The returning officer shall from the statements of the number of votes given at each polling station, add up and determine the number of votes given for each recognized political party and independent group. "

Thereafter the P.R. system was modified by Act No. 24 of 1987 to permit the voter to indicate preferences for three of the candidates of the party or group for which he voted. Sections 60, 62(1), 63(7) and 65(1) (a) were not amended. Section 63 was amended by the addition of sub-sections (6A) to (6C) in regard to preferences ; section 63 (6B) was repealed by Act No.25 of 1990. Amendments which were consequential upon the preference system were also made to sections 63(6) and 65(1) (b) :

" 63(6) 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 party or group, and 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."

" 65(1)(b) The returning officer shall from the statements of the number of votes and preferences given, determine the number of votes given for each recognized political party or independent group and the number of preferences indicated for each candidate nominated by each such party or group. "

Other relevant provisions are :

" 61(2) The returning officer shall, before he proceeds to declare the result of an election under section 65, give notice in writing to the secretary or the authorized agent of a recognized political party or the group leader of an independent group contesting that election of the time and place at which the result will be declared.

" 66(1) Upon the declaration of the result of any election of the Mayor and Deputy Mayor and members of the local authority of an electoral area, the returning officer of that electoral area shall –

(a) publish a notice specifying –

(i) the names of the two candidates elected as Mayor and Deputy Mayor ; and

(ii) the names of the candidates elected as members ; and

(b) report the result through the elections officer of the district in which the area is situated to the Commissioner."

" 66(2) The Commissioner shall forthwith upon the receipt of the report of the result cause the names of the two candidates elected as Mayor and Deputy Mayor, and the names of the candidates elected as members to be published in the Gazette."

" 67(2) The returning officer shall forward to the elections officer of the district in which the electoral area is situated all the packets of ballot papers in his possession, together with the statements under subsection (6) of section 63, the ballot paper account, tendered votes list, packets of counterfoils and the marked copies of electoral lists sent by the counting officers endorsing on each packet a description of its contents and the date of the election to which they relate, and the names of the electoral area in which the election was held."

" 67 (4) No person shall be entitled or be permitted by the elections officer to inspect any packet of ballot papers or documents referred to in subsection (3) while it is in the custody of such officer :

Provided, however, that nothing in the preceding provisions of this subsection shall be construed or deemed to debar any competent court from ordering the production of, or from inspecting, or from authorizing the inspection of, any such packet or document at any time within the period of six months specified in that subsection."

After the votes had been counted, at the commencement of the count of the preferences, some or all the Independent Group candidates requested their leader, the 3rd Respondent, that they and/or their counting agents be permitted to be present at that count. He told them that according to the instructions issued to him by the Appellants an individual candidate and/or his agent could not be permitted to be present at the count of the preferences. According to a circular (2R1) dated 2.5.91 issued to all parties and groups, only two counting agents could be present at each counting centre, and no candidate had a right to enter a counting centre by virtue only of his candidature. The petitioners state that their leader did not show them 2R1. The Petitioners refrained from stating how many counting agents had been permitted for each party or group ; it was averred that their agents had no opportunity to ensure that preferences were correctly recorded, and that the count took place in five different rooms. However the 2nd Appellant stated in his affidavit that the count took place in six rooms, and that each party or group had been allowed two counting agents for each room, making a total of twelve. The 2nd Petitioner was one of the Group's counting agents and it is therefore clear that there was no absolute prohibition on candidates being present at the count.

Having counted the votes from 8.00 or 8.30 p.m. on 11.5.91, the same officials proceeded to count the preferences from some time in the morning of 12.5.91 till 4.00 p.m. that evening, with short breaks and intervals for meals etc. Since each ballot paper could have preferences for three different candidates, ballot papers could not be sorted into bundles according to preferences and then counted. Instead, the preferences indicated in each ballot paper had to be separately recorded on sheets of paper. The Petitioners stated that one group of officials had read out the preferences while another recorded them ; the 2nd Appellant stated that the same official who examined a ballot paper recorded the preferences. There was no suggestion of deliberate falsification of the results. It was submitted, however, and the Court of Appeal held, that either method " would leave room for human error ", and that " the likelihood of such error is made greater by the fact that the officials were involved in the process of counting nonstop for long hours ". (However the Petitioners do not claim that any protest or complaint had been about these matters, then or later.) The Court of Appeal went on to hold that the need for vigilance by the candidates was, for that reason, enhanced, that if candidates or agents were permitted to be present, any error on the part of the relevant officials may have been detected and corrected ; and that, in the absence of such a safeguard, the Petitioners had just cause to complain with regard to the declaration based on the count of preferences.

A recount was not demanded. However, the Court of Appeal did not consider this to be a serious lapse. When the Ordinance was amended in 1977, section 63(6) provided for the preparation of *one* written statement as to the votes cast, and section 63(7) enabled a recount to be applied for before that statement was prepared.

However, when in 1987 section 63(6) was amended to provide for *two* written statements, section 63(7) was not amended and continued to refer to " a written statement referred to in subsection (6) "; the Court of Appeal took the view that this expression referred only to the first statement, and rejected the submission that the singular includes the plural, and therefore section 63 (7) now referred to both statements. It held further, that even if that construction were to be adopted, the question would arise as to who may seek such a recount ; counting agents represent the interests of the party or group, and not of the individual candidates, who are rivals in regard to preferences, and they are not the appropriate persons to demand a recount ; had the candidates or their agents been permitted to be

present, the power of the counting officer to recount preferences could have been exercised on the application of a candidate or his agent. In these circumstances, the failure to demand such a recount under section 63(7) would not justify denying relief to the Petitioners.

According to the 2nd Appellant (supported by the two Assistant Returning Officers), the result had been declared under and in terms of section 65 at 8.00 p.m. on 12.5.91 ; it is common ground that no agents of the Independent Group were present at those proceedings, and the Petitioners had failed to give any explanation for this omission. The Petitioners allege, however, that there was a delay in officially declaring the result of the count of the preferences of all the contesting parties and groups, and accordingly they met the 2nd Appellant on 14.5.91. They claim that the 2nd Appellant read out the name of the candidates of the Group and the number of preferences received ; they pointed out certain errors and inconsistencies, whereupon the 2nd Appellant summoned some officials, called for " the Negombo File ", perused it, made certain amendments, and read out the list again. The Petitioners then observed that in place of three candidates previously said to have been elected three others had been substituted. They made a request for a recount, which was immediately refused, with the observation that their remedy was to apply to court. Subsequently, all 28 candidates (including those declared elected) wrote to the 1st Appellant, with copy to the 2nd Appellant, on 25.5.91 seeking a recount ; to this they received no reply. On 21.6.91 they filed this application in the Court of Appeal. In the " Lankadeepa " of 15.5.91, the results were published in the same manner as allegedly first read out by the 2nd Appellant on 14.5.91, and the " Dinamina " of 16.5.91 published the results as finally announced. The Court of Appeal accepted the Petitioners version of the events of 14.5.91 and held that there had been " a serious irregularity in the declaration of the results of the preference votes "; it rejected the version of the 2nd Appellant, corroborated by the affidavits of the two Assistant Returning Officers, that all he did was to give the Petitioners a copy of the results declared on 12.5.91 (which was prepared for the purpose of section 66), that no correction had been made, and that the result had not been read out at any time.

The Court of Appeal held that " the Petitioners have made out a formidable case on the basis of a *lacuna* in the legislation, illegal administrative action in the matter of issuing circular 2R1 which worsened the adverse impact of the *lacuna* in the legislation, the

manner of counting, and a serious irregularity in the declaration of the result of the preference votes ". Before coming to this finding, the Court did not exercise its undoubted power, under the proviso to section 67 (4), to call for and inspect the sealed packets which should have contained the statements prepared under section 63(6) and the journals maintained by the counting officer and the returning officer. We were informed that the Appellants had brought these to court and that their Counsel had invited inspection, but that learned Counsel for the Petitioners had ignoed this opportunity. The Court of Appeal found it unnecessary to consider relief by way of Certiorari. It took the view that the Petitioners were not challenging the election of any of the Group's six candidates who were declared elected, but were " merely seeking a verification by way of a recount as to the whether the result that had been declared was correct ". Having cited Wade (Administrative Law 6th ed. page 652) :

" within the field of public law the scope of mandamus is still wide and the court may use it freely to prevent breach of duty and injustice ".

and *R. v. Hanley Revising Barrister* [1], 518 at 529:

" Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable ", the Court observed that the purpose of the Ordinance was to ensure that the result declared was a fair and accurate reflection of the votes cast by the electorate ", and that election officials" have a public duty to make and declare a fair and accurate result of the votes that have been cast by the electorate ", and concluded:

" the Petitioners and the other candidates were not satisfied with the count and the declaration that have been done and made a request for a recount to the 1st and 2nd (Appellants). The Petitioners have in this application substantiated the legal and factual basis on which they made that request. I am of the view that the failure on the part of the 1st and 2nd (Appellants) to reply that request amounts to a refusal to perform a public duty..... In my view the case of the Petitioners for a recount is well founded."

A writ of Mandamus was granted, as prayed for, with a further direction that, if the result of the recount was the same, the Petitioners would not be entitled to any further relief ; if however, the result was different, the Appellants were required to make a declaration on the basis of that result which would supersede the declaration already made. It would seem, therefore, that the Court of Appeal did not consider the aforesaid defects and irregularities in procedure, to be of such a nature as to warrant a finding that " the declaration already made " was vitiated by want or excess of jurisdiction, or error of law, or otherwise, but merely that declaration should be annulled only if the recount disclosed a different result. That hesitation to grant Certiorari is, with respect, significant.

The circular 2R1 does not contain an absolute prohibition on the admission of candidates to the count, although the 3rd Respondent appears to have misled his fellow candidates in that respect ; it merely restated that which is implicit in section 62(1), that a candidate, *qua* candidate, was not entitled to admission. The fact that the 2nd Petitioner who was appointed a counting agent was permitted to be present at the count, although he was a candidate, establishes that the counting officer too, did not regard 2R1 as imposing an absolute prohibition. It was neither *ultra vires* nor an improper restriction of the counting officer's discretion. It is clear beyond doubt that no request had been made to the counting officer to permit candidates and their agents to be present at any stage of the count, either as of right or as a matter of discretion, and consequently that there was no *refusal* of any such request. The allegation that because officials worked long hours, errors in the count were likely, has not been established. Since the count commenced at 8.00 or 8.30 p.m., these officials would have reported for work some hours earlier – and this would probably have been recorded in a (now sealed) official journal or record. It is admitted that they did have short breaks for rest and refreshments ; after the count of the votes there may well have been a break before the count of the preferences commenced to enable other officials to attend to various formalities. The available material does not indicate that the officials worked for such an intolerably long period or in such a way as to impair their efficiency. Here again, had this been a genuine apprehension, and not an afterthought, the counting agents might have requested an interval for rest, and if this was refused, they could have insisted upon their complaint being recorded in an official journal. Similarly no complaint was made in respect of actual errors, or suspected errors, in the recording of preferences. There is no suggestion that the procedures adopted were

in any way different to other elections based on the P.R. system, and the Appellants have stated that the same procedures were adopted at 90 centres in the Gampaha District. If (as the Court of Appeal held) it did " leave room for human error " that possibility exists in regard to every system of counting, as it does in all human activity. A fancied possibility of 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. Had the 2nd Petitioner or the other counting-agents entertained a real apprehension, they would probably have demanded a recount, whether entitled thereto or not. It is inconceivable that the 2nd Petitioner, who says he promptly demanded a recount on 14.5.91 when he perceived some irregularity in the declaration, would have refrained from acting in the same way on 12.5.91. His conduct leads to the inference that he had not noticed any irregularity throughout the proceedings of those two days which he thought was worth speaking about. This is reinforced by his unexplained failure to attend the proceedings held under section 65.

In the scheme of the Ordinance, the declaration of the result by the returning officer takes place in the proceedings under section 65 (see section 65(2)(d) and (e), on the basis of the statements as to votes and preferences (prepared under section 63(6)). The returning officer is thereupon required, under section 66, to publish a notice specifying the names of the candidates elected, and to report the result to the Commissioner of Elections, who will cause those names to be published in the Gazette. There is no provision for any informal communication of the results, to candidates or otherwise, i.e. apart from the declaration under section 65(2), the notice under section 66(1) and the Gazette notification under section 66(2). Even if the 2nd Appellant did make an oral communication to the Petitioner on 14.5.91, that was not in the exercise of his statutory functions ; it was not the time and place of which notice had been given under section 61(2). However, in a matter of that importance, the Court of Appeal was obliged to look at the best evidence, without attempting only to determine which set of affidavits was more credible. The law required that a written statement of preferences should have been prepared under section 63(6), and by implication at least, that a written record be made of the declaration of the result under section 65 ; and both these official acts should have been done on 12.5.91 before any dispute arose. The Petitioners have not suggested that there were no such documents, but refrained from joining in the request to the Court of Appeal to examine the sealed documents. The Appellants

thus made every effort within their power to make the best evidence available to the Court. It must therefore be assumed that these official records did exist, and an inference adverse to the Petitioners, and favourable to the Appellants, must be drawn. The notice under section 66(1) and the Gazette notification under section 66(1) have been produced. The crucial question which the Court of Appeal had to decide was whether these two notices were in conformity with the aforesaid written statement and declaration (and not whether those notices differed from one or more non-statutory oral statements made by the 2nd Appellant after he was *functus* insofar as the declaration of the result was concerned). If they tallied, then there had been no error or irregularity in the declaration of the result – regardless of whatever might have happened on 14.5.91. If there was a material discrepancy between the two sets of documents, then undoubtedly a serious irregularity had occurred – and then it was unnecessary to decide between the conflicting versions of the events of 14.5.91, because even if the Appellants version was true, yet that would not disprove the irregularity. The failure of the Petitioners to support the Appellants invitation to the Court of Appeal to inspect the sealed documents, kept in the ordinary course of official election duty, overwhelmingly points to the conclusion that those documents were in conformity with the aforesaid notices under section 66. No irregularity in declaring the result has been established.

However, since the affidavits of the two Assistant Returning Officers have been expressly rejected – and that of the 2nd Appellant by implication – it is necessary to consider the basis of that rejection. The Court of Appeal observed that, since the result had been declared at 8.00 p.m. on 12.5.91, the visit of the Petitioner on 14.5.91 would not have been of any significance to them ; that it was strange that these two public officers " happened to be present " when the Petitioners made an unannounced visit ; and more strange how they recalled this visit at which, according to them, the two Petitioners were merely given a copy of the result ; that it was unbelievable that both officers could recall the events of that day " in the same manner so as to enable them to make two affidavits that are identically worded " down to names and initials, and even punctuation marks and grammatical errors. The Court concluded that " these officers merely signed affidavits that had been prepared somewhere else ". However, the Court did not examine the joint affidavit of the two Petitioners with the same stringency before accepting their version as true. Thus the 1st Petitioner swears to matters of which he obviously had no personal knowledge (including the count of the preferences which he did not attend) ; there are errors (for instance,

that the result was declared by the returning officer, the 3rd Respondent – who was their own Group Leader) : no mention is made of the circular 2R1 ; no explanation is given for the failure to make requests and complaints to the counting officer in respect of the several matters adverted to earlier. Had they sworn separate affidavits, these would have attracted some of the same criticisms as the affidavits of the two Assistant Returning Officers. The presence of the two Assistant Returning Officers on 14.5.91 was by no means strange ; it is not unlikely that various matters had to be attended to, which could not be done on 13.5.91. Election duty not being a routine function, it is not surprising that they remembered the visit of the Petitioners. Affidavits are generally not prepared by the declarants, but by a lawyer, usually the legal adviser for one party, in accordance with instructions given by the declarants ; if on the relevant matters the instructions were identical, the affidavits would necessarily be identical, even in regard to the grammatical errors of the draftsman. There was no justification for the rejection of their affidavits, when truthfulness could have been immediately and conclusively established by reference to the statements made under section 63(6).

I therefore hold that the circular 2R1 did not absolutely prohibit the presence of candidates at the count, or improperly restrict the discretion of the counting officer, and that the Petitioners have failed to prove any probability of error in regard to the count of the preferences, or any irregularity in regard to the declaration of the result. It remains to consider the following questions of law in relation to the interpretation of the Ordinance :

1. Is there a *lacuna* in the Ordinance, in that in 1987 Parliament inadvertently omitted to re-introduce the right of a candidate to appoint a counting agent (section 60), and to demand a recount (section 63(7))

2. In any event should the discretion of a counting officer under section 62(1), as it stands, be execised so as invariably to permit a candidate and his agent to be present at the count of the preferences ?

3(a) Does the right to demand a recount (under section 63(7)) exist both in respect of the count of votes, and the count of preferences ?

(b) If so, does a writ of Mandamus lie where a recount was not duly demanded ?

(c) If not, does a writ of Mandamus lie in respect of the refusal of a demand for a recount made (two days) after the declaration of the result ?

1. It will be seen that originally nomination and election were in respect of a *ward*, and a candidate was entitled to appoint a counting agent, and the returning officer was obliged to permit the candidate and his counting agent to be present at the count; the returning officer was responsible for both the count and the declaration of the result (for which there was no separate proceedings). Upon the introduction of the P.R. system, the nomination and the election were in respect of the entire electoral area (of the Municipal Council), and a candidate was no longer entitled either to appoint counting agents or to be present at the count ; the election became very much a party affair, and the phrase " candidates and their counting agents " was, it seems, deliberately omitted. The determination of the number of seats won involved some degree of computation after the counting of votes (cf. section 65(2)), and a two-stage process became necessary ; a (new) counting officer was responsible for the count (section 62), and the returning officer for the result ; counting agents for the count, and a new and distinct category of agents for the proceedings under section 65, all appointed by the party or group. Once it was determined how many seats a party or group was entitled to, the identification of the candidates to fill those seats was automatic; they were taken from the nomination papers in order of priority. It is common ground that in this system it was both unnecessary, and unworkable, to have given a candidate the right to appoint agents to be present at the count, or the declaration of the result, or to demand a recount. However when in 1987 the system of determining the voters preferences were given effect to, these provisions remained unchanged. The Petitioners submission, which the Court of Appeal upheld, was that previously the sole concern of a candidate was to secure as many votes as possible for his party or group ; that he had no interest adverse to his fellow-candidates ; but now he had a special interest *vis-a-vis* fellow-candidates in regard to the accurate count, and recount, of his preferences. In that context it was urged that the omission to provide for the right of the candidate or his agent to be present, and to demand a recount, was an inadvertent omission. Had such provision been made, in each of the six rooms where counting took place on 11.5.91 there would have been 28 persons

representing the Independent Group ; if five parties and groups had contested, there would have been 140 agents present in each room. It is not unreasonable to suppose that Parliament did not desire to introduce a system which would require drastic infrastructural and logistical changes. Further, 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 whats essentially a team with common political objectives. To hold that there is a *lacuna* would be to assume such distrust. 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.

I am of the view that Parliament deliberately refrained from making reference to candidates in section 60 ; a candidate or his agent, not present at the count, could not be given the right to demand a recount, and accordingly in section 63(7) too, no reference was made to candidates.

2. There being no *lacuna* in section 60, if the discretion of the counting officer under section 62(1) were to be exercised to permit candidates and their agents to be present, as a matter of course, the very situation which Parliament presumably desired to avoid, would arise. That discretion has to be exercised reasonably, having regard to the exigencies of the count : e.g. to permit catering staff to provide refreshments for officials, or workman to attend to a power failure, or official observers or monitors verifying the fairness of the count, and not to admit all candidates as a matter of course.

3(a). Section 63(6) originally contemplated one written statement. At that time, section 63(7) should, more correctly, have referred to " *the* [and not *a*] written statement referred to in subsection (6)". Had section 63(7) referred to " *the* written statement ", then when section 63(6) was amended in 1987 to provide for a written statement of the preferences as well, if it was the intention of Parliament that the right to a recount conferred by that section should be applicable to both such statements, that expression would necessarily have had to be amended to read either " *a* written statement " or " *any* written statement ". Since section 63(7) already referred to " *a* written statement " amendment was unnecessary. Section 63(7) confers a right to a recount in regard to both votes and preferences, but that right is conferred on *counting agents,* and not on *candidates.*

3(b). A recount was not duly demanded under section 63(7). After the counting officer made the written statement of preferences, he was *functus officio*, and could not make a recount either later the same day or on 14.5.91 ; neither of the Appellants had any power, at any stage, to make or order a recount. Quite properly, the 2nd Appellant refused a recount on 14.5.91, correctly advising the Petitioners that their remedy was to apply to court. The fact that a recount was again demanded by letter dated 25.5.91, to which no reply was sent, is quite irrelevant : not only was the counting officer *functus,* but the 2nd Appellant had already refused a recount, and there was no obligation to go on interminably replying to letters. 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.

3(c). If on the other hand, section 63(7) means – contrary to my view – that there is no right to a recount of preferences before the written statement of preferences is made, then equally there is no statutory right to a recount thereafter. The 2nd Appellant had no power to order a recount and his refusal to do so was not unlawful, and Mandamus did not lie.

Scope of his statutory duties, after he was *functus* in respect of that declaration ; his refusal of a recount on 14.5.91 was amply justified as he had no statutory power to order a recount (and, indeed, no one had that power on 14.5.91). The Appellants failure to reply to a further demand for a recount on 25.5.91 took the matter on further. Further, the conduct of the Petitioners, particularly their failure to make prompt complaints in regard to alleged irregularities and to join in the invitation to the Court of Appeal to examine the relevant documents, were factors relevant to the exercise of the Court's discretion. Mandamus should not have issued.

For these reasons, I set aside the judgement of the Court of Appeal and dismiss the Petitioners application with costs, in both courts, in a sum of Rs. 6,000/- payable by the Petitioners jointly to the Appellants.

AMERASINGHE, J. – I agree.

KULATUNGA, J. – I agree.

Appeal allowed.