

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 of 1989

BETWEEN:

HUBERT HENRY - Appellant

and

DONALD HALSTEAD - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: C. Lloyd Luckhoo, O.C. and J. Osborne for the Appellant
Dr. Ramsahoye, S.C., S. Christian and C. Derrick for
the Respondent

1991: Feb. 28,
June 17.

JUDGMENT

MOE, J.A.

The respondent in this appeal has taken objection to the hearing of the appeal which is against the decision of the Judge of the Election Court declaring null and void the parliamentary election for the Constituency of St. John City West held on 9th March, 1989. At that election Henderson St. Clair Simon was returned as duly elected as the member of Parliament for that Constituency on the certificate of the appellant, who was the Returning Officer.

The respondent Donald Halstead, who was the unsuccessful candidate at the election, petitioned the Election Court questioning the return of Simon as duly elected and seeking a determination that the election was void. The appellant, the Returning Officer at the election concerned was served with the petition and made a respondent in the proceedings.

The Election Court Judge made various findings as regards the conduct of the election by the appellant.

He found that in the holding of the election breaches of the statutory rules governing the conduct of elections were committed by the Returning Officer and/or his servants or agents as follows:-

- 1) Polling was not allowed or conducted continuously on election day in accordance with the Election Rules at two Polling Divisions.

/Polling was.....

- 2) Polling was carried out during hours beyond those specified or allowed by the Election Rules.
- 3) Ballots cast during a period when voting was not allowed in accordance with the Election Rules were counted by the Returning Officer, his servants and/or agents in declaring or making the return of the successful candidate.
- 4) The Returning Officer, his servants and/or agents wrongly and unlawfully relied upon an order of the High Court made on election day purporting to exercise a jurisdiction to extend by three hours the time for voting on election day.

He also found that there was substantial non-compliance with the rules relating to voting particularly the breaches stated at (2) and (4) and it was impossible to say definitely that the result would not have been affected by the irregularity committed. On declaring the election invalid he also made an order against the Returning Officer for costs.

Neither the respondent Halstead nor Simon appealed the decision of the Election Court. Following upon the Judge's declaration and report to the Speaker of the House, on 17th August, 1989 another election was held and Simon was again returned as the duly elected member of Parliament for the Constituency of St. John City West and he still sits as such today.

The respondent asks for dismissal of the appeal on three grounds:-

- (1) The notice of appeal is incompetent;
- (2) The appellant is not a competent appellant in a matter of this nature; and
- (3) There is no lis to be adjudicated upon.

NOTICE OF APPEAL

It was submitted that the appeal is incompetent because the notice of appeal motion was not signed by the appellant or by his legal representative having regard to the provision of Order 64 and Order 52 of the Rules of the Supreme Court.

Order 64 provides:-

/"Rule 2(1)....

"Rule 3(1) An appeal to the Court shall be by way of rehearing and shall be brought by notice of motion (hereinafter called "Notice of Appeal") to be filed together with two copies thereof.

(2) Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice must specify the grounds of appeal the nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and must be signed by the appellant or his legal representative."

Order 52 provides:-

"1 - (1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, until and unless notice of the change is filed and copies of the notice are lodged and served in accordance with this rule, the former solicitor shall subject to rules 5 and 6, be considered the solicitor of the party until the final conclusion of the cause or matter, whether in the High Court or Court of Appeal.

(2) Notice of a change of solicitor must be filed and a copy thereof lodged, in the Registry."

There was no solicitor on record in the proceedings before the Election Court but Counsel appeared for the Returning Officer un-instructed. No solicitor was put on record prior to the signing of the notice of appeal by one Arlene Gomez. The contention is that Arlene Gomez, the signatory of the notice of appeal was not at any material time a solicitor on record for the appellant and could not validly or properly sign a notice of appeal on his behalf as his legal representative. Counsel for the appellant contended that Gomez was perfectly entitled under Order 64 r.3 to sign the notice even although she was not on record.

I see no ambiguity in the language of Order 64, r.3(2). It provides quite simply and clearly that a notice of appeal may be signed by an appellant's legal representative. Order 64 does not speak of solicitors on record. The legal representative may or may not be the solicitor on record. Order 52 sets out rules concerning change of a solicitor on record.

The provisions of that Order give effect to the general rule that when a solicitor has been retained to conduct and defend an action, he has contracted to do so to the conclusion of the action subject to his right to withdraw for good cause and upon reasonable notice or

/to the....

to the client's right to terminate at any time. But a change of solicitor is not the situation being considered in relation to Arlene Gomez. Gomez is an Attorney-at-Law employed in the Chambers of the Attorney-General and it may be taken that she was signing as a legal representative.

Questions may be raised whether a legal representative having signed a notice, other steps were taken as required to give validity to the notice of appeal. It seems to me that a legal representative having signed a notice, filed it in the Registry and served it on parties concerned goes on record as from then representing the litigant concerned. But the only question raised here is the propriety of the signing of the notice by Arlene Gomez.

In my view the signing of the Notice of appeal fell within the provisions of Order 64 Rule 3(2).

But even if the matter complained of was not in compliance with the rules I would not regard the non-compliance as being fatal to the appeal. The non-compliance would be covered by Order 9 which provides:-

"1 - (1) Where.....at any stage in the course of or in connection with any proceedings, there has, by reason of anything done, or left undone, been a failure to comply with the requirements of these rules....., the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."

COMPETENT APPELLANT

The submission is that for a determination of the question whether any person has been validly elected as a member of the House, as raised in the petition, the Constitution provides for only four categories of litigants and only those four categories may be appellants. The relevant sections of the Constitution are as follows:-

"44 - (1) The High Court shall have jurisdiction to hear and determine any question whether -

(a) any person has been validly elected as a member of the House;

.....

(2) Any application to the High Court for the determination of any question under subsection (1)(a) of this section may be made by an person entitled to vote in the election to which the /application.....

application relates or by any person who was a candidate at that election or by the Attorney-general.

.....

- (6) An appeal shall be as of right to the Court of Appeal from any final decision of the High Court determining such a question as is referred to in subsection (1) of this section."

The submission continues that the provisions of the Constitution and of the Representation of the People Act No. 19 of 1975, (hereafter called the Act), contemplates a petition against the person declared as elected as member. That person is the respondent to the petition but by section 44(2) of the Act, the Returning Officer in certain circumstances is deemed to be a respondent. However the Returning Officer may not properly claim a right of appeal on a determination of the question whether a member of the House has been validly elected.

Section 44(2) of the Act states:-

"(2) The member whose election or return is complained of is hereafter referred to as the respondent, but if the petition complains of the conduct of a returning officer, the returning officer shall for the purposes of this part be deemed to be a respondent."

The submission of Counsel for the appellant is that although the Returning Officer is not mentioned in section 44 of the Constitution, in view of the adverse declarations made against him with respect to the conduct of the election as well as the order against him for costs, he is not precluded from protecting himself by appeal so long as he can establish that there is a lisit. He has his own right of appeal from a final decision of an Election Court whether or not the candidate lodged an appeal.

It seems to me that it must first be determined whether a returning officer becomes a party to the proceedings by virtue of section 44(2) of the Act. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences,.....per Cave J., R v Norfolk County Court 60 L.J.Q.B. 390. Therefore, when the conduct of a returning officer is impugned in an election petition he is to be treated as the consequences of being a respondent demand. He is entitled to the same notices as to presentation of the petition, proposal as to security for costs etc. like an ordinary respondent. Moreover as Lord Selborne L.C. pointed out in Hammon v Park (1980) 6 O.B.D. 323 at 328 it is not a matter of an option of the petitioner; the

/Returning.....

returning officer shall be treated ipso facto as a respondent by reason of the complaint. In *Sabga v Solomon* 5 W.I.R. 66, Corbin J. said that "the intention of the legislature in deeming the respondent officer a respondent must have been to give him an opportunity of objecting to the security for costs and to answer any complaints made in the petition". Smith J.A. in *Williams v Manley* 20 W.I.R. 333 expressed the view that the intention was to enable the Judge hearing the petition to be in a position to call upon the Returning Officer to answer or account for his acts or omissions in the conduct of the election. It is essential that the Judge should be able to question the person who had charge of the conduct of the election where that conduct is impeached. There ought to be no doubt therefore that by section 44(2) of the Act the Returning Officer becomes a party to the proceedings.

The question then arises whether as a party to the proceedings, he is entitled to appeal against a decision given in the proceedings. Would he not be entitled like any other party to do so? It seems to me it would be a grave injustice to allow a person to call in question another's conduct and also be able to appeal a decision obtained on the question but not to provide that other person with a right to challenge the decision that his conduct was such as to merit the decision reached. Happily in my view the Constitution does not so provide. The language of section 44(6) of the Constitution to my mind is clear and unambiguous. I do not see why the words in the section should not be given their plain ordinary meaning and respect given to the traditional construction put on the language used in the section. By the language of that section, there is a right of appeal from any final decision of an Election Court. Where a right of appeal from a decision is provided, it is well established that any of the parties to the action or matter concerned enjoys that right of appeal. See *In Re Securities Insurance Co.* (1994) 2 Ch. 410, Vol. 37 Halsbury's 4th Ed. para. 679. I see nothing in the language of section 44 which limits the right of appeal given only to those who may petition.

live issue

Henderson Simon, at the election held on 17th August, 1989 was again returned as the duly elected member of Parliament for the Constituency of St. John City West and today sits as such. There is now no question as to whether he has been validly elected as a member of the House. The respondent says that this appeal is therefore flawed for the reasons that the sections of the Constitution which

/provide for.....

provide for the determination of the question whether a member of the House has been validly elected refer to a question which needs determination and Courts of appeal do not adjudicate where there is no live lis to be adjudicated upon.

The appellant contends that the question remains whether certain adverse declarations should have been made against the Returning Officer and whether the election should have been declared invalid. He submits that the Election Judge erred, firstly in the consideration and application of section 12(3) of the Act when he declared that due to acts or omissions of the Returning Officer in breach of his official duties, the result of the Election was thereby affected and secondly in his award of costs which ordered that the respondents do pay the Petitioner's costs fit for two Counsel. Simon the other respondent to the petition has not questioned that order. The appellant maintains that he is entitled to clear his name in respect to allegations, acts or omissions which were outside the law and should not be precluded from so doing.

Counsel for the appellant did say in answer to this Court that the main benefit of a hearing of this appeal would be the result as to costs. It is clear to me that the decision in this appeal, even one favourable to the appellant cannot affect the question or issue of Henderson Simon's membership of the House. A decision by this Court that the election of Simon on 9th March, 1989 ought not to have been declared invalid will not affect the question of his membership of the House. Therefore to hear this appeal to give a ruling as to whether the conduct of the Returning Officer as shown merited the decision reached could be regarded as being no more than an academic exercise.

In *Elders Pastoral Ltd. v Bank of New Zealand* (1990) 1 W.L.R. 1090 on a respondent's petition to the Judicial Committee of the Privy Council for the appeal to be dismissed without hearing of argument on the merits on the ground that the appeal had become academic, Lord Templeman in delivering the judgment of the Board after a review of the authorities had this to say:-

"It appears from the authorities that even if the only effect of a successful appeal between the parties will be to reverse an order for costs made in the Courts below, there remains a lis or issue between the parties". He went on to point out "an appellant is never entitled as of right to appeal to the Judicial Committee if the only effect of a successful appeal will be to reverse an order for costs. Where there is no appeal as

/of right,.....

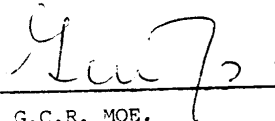
of right, an appellant may seek special leave, notwithstanding that the only effect will be on costs, but the appellant will only obtain such special leave in very exceptional circumstances..... Where leave is unnecessary or has been obtained and subsequently the dispute between the parties is reduced to a dispute over costs the appeal remains competent but the Judicial Committee retains a discretion to decline to entertain the appeal if the only effect of success will be to reverse an order for costs; and as a general rule the Judicial Committee will be minded not to entertain the appeal:

Where supervening events render an appeal unnecessary save with regard to costs there must however be cases in which it would be most unfair for the Board to decline to entertain the appeal."

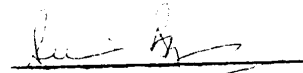
That passage provides guidance for this Court in the instant case. In light of the circumstances and the only effect of success set out above, I think this Court would have a discretion to decline to entertain the appeal unless very exceptional circumstances have been shown or it would be most unfair to decline.

It seems to me that the success or not of the appellant on the order as to costs hinges on a determination of the question whether the Election Court Judge erred in his consideration and application of the law relating to the conduct of elections, which as has already been stated may be seen as academic at this stage. However it would appear that the majority of breaches complained of flowed from the reliance by the Returning Officer on the order of the High Court, extending the voting hours a matter which in itself is a most unusual basis for impugning conduct of a returning officer. It would not be unreasonable for a person to follow or take steps in keeping with an order of the Court. This conduct along with other breaches related to it appear to be the basis for the decision that the election was not substantially conducted in accordance with the relevant rules. It is an important question whether the High Court was correct to order costs as it did. It is also of the utmost importance for returning officers, voters and all involved in this aspect of the democratic process to be clear as to whether Elections may or may not be conducted in the manner concerned. I would decline to entertain the appeal against the Judge's decision that the election was null and void. However in the light of what has been stated above I would entertain argument on the award of costs against the Returning Officer and make no order as to costs in this appeal.

/G.C.R....


G.C.R. MOE,
Justice of appeal


L.L. ROBOTHAM,
Chief Justice


C.M.D. BYRON,
Justice of Appeal.