

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

SKBHCV2020/0109

Election for the Constituency of Saint Christopher 1 held on the 5th
day of June, 2020

BETWEEN:

IAN PATCHES LIBURD

Petitioner

AND

JERMAINE LAKE
(Returning Officer for the
Constituency of Saint Christopher 1)

First Respondent

GEOFFREY HANLEY

Second Respondent

Appearances:-

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau and Ms. Leah Abdulah for the petitioner.

Mr. Dane Hamilton QC leading Mr. Dane Victor Elliott Hamilton for the first respondent.

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the second respondent.

2020: November, 09

JUDGMENT ON COSTS

- [1] **WARD, J.:** Federal Elections in Saint Christopher and Nevis were held on 5th June, 2020. The petitioner was the unsuccessful candidate for the Peoples' Action Movement in the Constituency of Saint Christopher No.1. The first respondent was the Returning Officer for that Constituency while the second respondent was the successful candidate. He won the seat by 24 votes. A total of 98 ballots were rejected by the first respondent.
- [2] The petitioner filed a petition challenging the return of the second respondent on two grounds. First, that in breach of section 91(2)(b) of the National Assembly Elections Act, ("the Act") the returning officer wrongly rejected a number of ballot papers. The second ground alleged that on nomination day, the second respondent was not qualified to be elected to the National Assembly as, by virtue of his own act, he was under allegiance, obedience and adherence to a foreign power or State, namely the United States of America, having become a naturalized citizen on 20th December, 2007.
- [3] As it relates to the first ground, the petition averred that of the 98 rejected ballot papers, 22 were rejected either on the ground that they were not marked for any candidate or on the ground that they had been given for more candidates than there were seats. Of the remaining 76 ballot papers, 8 were rejected on the basis that a tick instead of an X was used to signify the voter's choice; 3 were rejected on the basis that they had double crosses in the box next to the petitioner's name; 15 had an X over the petitioner's party symbol, the hat; 21 had an X with an appendage of either a "long arm" or a "long leg" which extended outside of the box next to the candidate's name; 10 had circles drawn around the petitioner's party symbol; and 3 had markings in a single box.
- [4] Were it not for the rejection of these 60 votes over the objection of the petitioner's counting agents, the petition avers that the petitioner had a majority of the good and valid votes cast in the constituency and, had they been counted, he would have been declared the winner and returned as duly elected for the constituency.
- [5] Accordingly, the petitioner made an application for the production and inspection of the rejected ballots. The application was supported by affidavits of the petitioner and by Mr. Craig Tuckett, one of the petitioner's counting agents at the vote count.

- [6] The application was vigorously opposed by the second respondent on the basis that the petitioner had failed to establish that the ballots in issue were in fact lawful ballots and that the petitioner had failed to provide sufficient particulars to justify an inspection. Additionally, the factual assertions made by Mr. Tuckett were strongly denied by the second respondent through affidavits sworn by his counting agents, Ms. Warner-Paul and Mr. Johnson. They deposed that most of these ballots marked with a tick were cast for the second respondent, contrary to Mr. Tuckett's assertion that all such ballots were cast for the petitioner. They further deposed that ballots marked with any variations of an X that were within one box were all accepted, including ballots marked with a double staff, an X with three crosses and an X with a long tail. The only instance where an X was not accepted was where it went outside of the box in a southern direction into the box below or from the box below to the outside. Ms. Warner-Paul also maintained that there were no ballots with circles drawn around the symbol. A ballot with an H was, however, accepted according to her and Mr. Johnson.
- [7] On 28th September, 2020, the court granted leave for the ballots to be produced and inspected and this exercise was undertaken at 9:00 a.m. on 2nd October, 2020 and was not concluded until almost 7:00 p.m.
- [8] On 9th October the petitioner filed an application for leave to withdraw the petition. The reasons for that course of action are set out at paragraphs' 10 and 11 of his affidavit in support of that application. The petitioner explained that immediately after the count on election night, his agent, Mr. Tuckett, telephoned him and complained that the first respondent had rejected what he strongly felt were good ballots in the petitioner's favour and which would have changed the outcome of the election. After the return of the second respondent was declared, Mr. Tuckett again telephoned the petitioner and insisted that he should challenge the result as he was sure that the petitioner would have won the election had the first respondent properly counted the ballots. The petitioner deposed that in a conversation with the first respondent subsequently, the first respondent opined that it was possible that there were more rejected ballots that could be construed in the petitioner's favour than for the second respondent. Having now had the opportunity to inspect the rejected ballots, the petitioner concedes that the allegations made by his counting agent, Mr. Tuckett, "cannot be proved".

- [9] As it relates to the disqualification ground, the petitioner deposed that prior to filing the petition, he consulted a leading United States “immigration and nationality law expert,” Mr. Larry Rifkin, who has won recognition as “Best Immigration Lawyer of the Year” by Lawyer International, among other accolades. According to the petitioner, “Mr. Rifkin advised me that a Certificate of Loss of Nationality is the only conclusive evidence of the Second Respondent’s loss of American Nationality. Further, Mr. Rifkin advised me that the fact that the second respondent was not included in any of the publications of the Internal Revenue Service’s Reports on citizens who have expatriated (“the database”) is persuasive, though not conclusive, evidence that he was still a United States citizen.”
- [10] The petitioner deposed that the second respondent has now furnished him with a Certificate of Loss of Nationality issued to him by the United States State Department. The petitioner is thus forced to concede that his allegation that the second respondent held United States citizenship was also groundless.
- [11] On 29th October, 2020, the court granted the petitioner leave to withdraw the petition. Learned Senior Counsel for the petitioner, Mr. Douglas Mendes, asked to be heard on the question of costs. He submitted that the proper order should be “no order as to costs” because the petitioner was partly successful, in that, he succeeded on the application for production and inspection of the rejected ballots. This application was said to constitute a substantial part of the proceedings and in relation to which the brunt of legal costs were incurred on both sides. He noted that the 2nd respondent resisted the application and submitted that he seemed to be seeking to recover the costs of resisting that application which he lost. To permit this, submitted, Mr. Mendes, would be unjust and disproportionate as the only costs the second respondent would properly have been entitled to was the cost of preparing the Notice of Recrimination.
- [12] Learned counsel for the second respondent, Ms. Angelina Gracey Sookoo-Bobb, submitted that while the petitioner succeeded on the application for production and inspection, the outcome of the inspection demonstrated that the evidence relied on in support of it was inaccurate and proved to be false, thus, justifying the second respondent’s objections to it. Had the petitioner been forthright in his evidence there would have been no need to file the petition in the first place, or, alternatively, to make an application for scrutiny. This factor should tell against the petitioner in costs. Further, as it relates to the disqualification ground, Ms. Sookoo-Bobb submitted that although there is no

obligation on the second respondent to assist the petitioner, there is no evidence that the petitioner made any request of the second respondent for the production of the Certificate of Loss of Nationality prior to filing the petition nor any reason to think that he would not have produced it if asked. Accordingly, Ms. Sookoo-Bobb urged the court to find that the petitioner acted recklessly in pursuing this ground and should be liable in costs.

Issue

- [13] The issue that arises is whether the petitioner should be made to pay the costs of the second respondent.
- [14] In 2014, Election Petition Rules were made by the Chief Justice pursuant to the National Assembly Elections Act, section 98 (2) which provides:

“(2) Rules, not inconsistent with the provisions of this Act, as to the deposit of security and the practice and procedure for the service and hearing of election petitions and matters incidental thereto may be made by the Chief Justice.”

- [15] Statutory Rules and Orders No. 4 of 2014 was gazetted on 27th February 2014.¹ Among the matters provided for in those Rules was the general costs of an election petition. Rule 27 provides:

“27. General costs of petition

(1) Except where specifically provided for in these Rules, all costs, charges and expenses of and incidental to the preparation of a petition, or of any consequent proceedings shall be in the discretion of the court and shall be defrayed by the parties to the petition in a manner and in proportions as the court may determine.

(2) The court may disallow any costs, charges or expenses which may, in its opinion, have been caused by -

- (a) vexatious conduct,
- (b) unfounded allegations; or
- (c) unfounded objections

on the part of either the petitioner or the respondent and shall have regard to the discouragement of any needless expense by throwing the burden of defraying the same on

¹ Gazette No. 10 of 2014

the parties by whom it has been caused, whether or not the parties are on the whole successful.

(3) The rules and regulations of the court with respect to costs to be allowed in action, causes and matters in the court shall, in principle and so far as practicable, apply to the costs of election petitions and connected proceedings and the amount of the costs may be fixed by the judge or may be directed to be assessed.”

[16] Rule 27 therefore means that in an election petition, the question of costs is within the discretion of the court except where specifically provided in the Rules. The manner in which such costs are to be quantified, where awarded, is a matter for the judge who may, in principle and so far as practicable, draw on the rules relating to costs in the CPR.

[17] Rule 14 (5) is also very material to the issue at hand since it specifically speaks to liability for costs where a petition is withdrawn. It provides:

“If a petition is withdrawn, the petitioner is liable to pay the costs of the respondent.”

[18] The use of the word “liable” denotes that the award of costs on the withdrawal of a petition is not mandatory. Nonetheless I consider that this rule embodies the general rule that costs follow the event and is the default position, unless there are good reasons to depart from it.

[19] Mr. Mendes, urges the court to exercise this discretion in the petitioner’s favour, notwithstanding that he is the unsuccessful party. His success on the application to produce and inspect the rejected ballots is posited as the principal factor to be weighed in the scales when determining whether to award costs. This application was said to have incurred the brunt of the costs on both sides. Mr. Mendes made much of the fact that the second respondents objected to the application and about the amount of time consumed by the production and inspection exercise. In oral submissions Mr. Mendes submitted that the position with respect to costs would be otherwise if they hadn’t objected.

- [20] I agree that the petitioner's success on the application to produce and inspect is a relevant factor. But I am persuaded that this "victory", to be properly assessed and weighed, has to be placed in context. I do not accept the argument that this a case where the second respondent is seeking to recover his costs on an application which he lost; he seeks costs because he was the successful party in the case. Secondly, I do not regard the fact that the second respondent objected to the application for production and inspection as having much bearing on the issue. First, the second respondent was under no obligation to acquiesce, especially where the evidence relating to the nature and number of the markings on the ballots was in sharp conflict, with much hard swearing on both sides. It must be relevant to consider that, when all was said and done, the objections of the second respondent were vindicated because, as his agents had averred, an inspection would have no impact on the results.
- [21] While the petitioner, quite understandably, relied on the bold and confident assurances relayed to him by his counting agent, Mr. Tuckett, the inspection laid bare the very inaccurate nature of Mr. Tuckett's recollection which did not align with the true state of affairs. There is much to Ms. Sookoo-Bobb's observation that had Mr. Tuckett been more forthright with the petitioner, it may never have come to this pass. Viewed in context, it may be said that this was a Pyrrhic victory.
- [22] Further, as it relates to the amount of time that the production and inspection exercise consumed, this cannot be related to the fact that the second respondent objected to the application at the outset, for even had the second respondent not objected, the same amount of time would have had to be consumed in the exercise.
- [23] As it relates to the petitioner's pursuit of the disqualification ground, it seems that the petitioner took a gamble in relying on this ground despite clear advice from his expert that the only conclusive evidence that the second respondent had lost his American citizenship would be a Certificate of Loss. The expert further advised him that the absence of the second respondent's name from the database was persuasive but not conclusive evidence of loss of citizenship. Given the serious nature of the allegation that the second respondent owed allegiance to the United States of America, it would have been more prudent for the petitioner to ensure that the evidentiary plinth on which this ground rested would support the inference that the court would have been asked to draw to the requisite standard of proof. While the standard of proof which the petitioner would have been required to meet in this case would have been on a balance of probabilities, the degree of

probability must be high given the gravity of the issue. See **Walcott v Hinds**² and **Ronald Green v Peter Saint Jean et al.**³

[24] At the end of the day, the fact remains that the petitioner was the unsuccessful party. For the reasons discussed above, I am unable to accept that I should depart from the general rule that costs follow the event. Accordingly, the court hereby orders that the petitioner shall pay the second respondent's costs to be assessed if not agreed within 21 days.

Trevor M. Ward, QC
Resident Judge

BY THE COURT

REGISTRAR

² [1967] 10 WIR 521.

³ Dominica High Court Civil Claim No.6 of 2010.