

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COMMONWEALTH OF DOMINICA

DOMHCV 279 OF 2019

BETWEEN:

- [1] LOFTUS DURAND**
- [2] ATHERTON MARTIN**
- [3] DR. IRVING PASCAL**
- [4] NICHOLAS GEORGE**
- [5] DALE LAURENT**
- [6] OSWALD GEORGE**
- [7] ATHERLEY ROBIN**

Applicants

AND

- [1] PRESIDENT OF THE COMMONWEALTH OF
DOMINICA CHARLES A. SAVARIN**
- [2] THE ELECTORAL COMMISSION**
- [3] CHIEF ELECTIONS OFFICER IAN ANTHONY**
- [4] CABINET OF THE COMMONWEALTH OF DOMINICA**
- [5] DOMINICA BROADCASTING CORPORATION**
- [6] THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF DOMINICA**

Respondents

Appearances:

Justin Simon QC, Cara Shillingford, Singoalla Blomqvist Williams, Elue John Charles, Julian Prevost, Ronald Charles, Joshua Francis Counsel for the Applicants

Lennox Lawrence & Jodie Luke Counsel for the 1st named respondent

Heather Felix Evans of Optimum Legal Services for the 2nd and 3rd respondents

Hon. Attorney General Levy Peter, Tameka Hyacinth Burton Solicitor General with Jo-Anne Xavier Cuffy Counsel for the 4th and 6th Respondents

Stephen Isidore of CC Law Practitioners Counsel for the 5th named Respondent

2019: December 2 & 3

ORAL RULING

- [1] **STEPHENSON J.:** On the 6th November 2019, His Excellency the President of the Commonwealth of Dominica the Writs setting the dates for nominations and the general election. Parliament was dissolved on that same day. The Election Writ and the date for nomination day were subsequently published in the Gazette. However, the date published in the gazette for the nomination day contained an error in that the date published Wednesday the 20th November 2019. There is no dispute that that date as then published does not appear on the calendar. The error of the publication was subsequently corrected, and a new notice issued. This error which was remedied was on the notice issued by the Chief Elections Officer.
- [2] Nomination Day was held as scheduled on the Tuesday 19th November 2019 and nominations were duly made by the two major parties who appear to be contesting the said general elections. General Elections are scheduled to take place on Friday 6th December 2019.

Application for leave to file for Judicial Review of intended constitutional and administrative claims, Interim Injunctions and other orders

- [3] On the 26th November 2019 the applicants herein filed an ex parte Notice of Application for leave to apply for Judicial Review and intended constitutional motions and for an injunction and other orders. There was an intervening application for recusal also made heard and ruled on.
- [4] Oral representations were made by counsel representing the respondents in the case at bar that they intended to file applications to strike out the applications for judicial review and other relief on the grounds that the court had no jurisdiction to hear the matter. This court was of the considered view that the proper application is not an application to strike but a notice in opposition to the application for leave to file judicial review and other reliefs on the grounds that the court had no jurisdiction to hear the matter.
- [5] Due to the pressure of time as the time between the application being filed, served and heard and the General Elections which the applicants are seeking to obtain an injunction from this court is only within a window of 10 days which is in fact 7 days after the recusal hearing. In pursuit of the Overriding Objective after some thought and discussion with counsel it was ordered that the applications will be made and the affidavit exchanged by counsel over the weekend with each counsel electronically with each counsel undertaking, as recorded in the court's order to file their documents on Monday Morning. The application was fixed for Monday 2nd December 2019 at 13:00 hours. Full arguments were heard from both sides with Learned Counsel Miss Shillingford being given the full opportunity to the arguments in opposition to her application.
- [6] This approach to the aforementioned case management order was taken by this court in an effort to maximize the use of the intervening weekend and to facilitate the court dealing with the applications in an expedited manner.
- [7] Upon the indication to the court by counsel for the respondents that the primary objection to be taken by them was whether the court had jurisdiction to issue to matter at bar and this court was of the view and it was decided the jurisdictional issue even though it's not the first application in time would be dealt with first as should the court find that there it is in fact not clothed with the jurisdiction to entertain the applications the matter would end there. This court was of the view that it ought not to consider the application for leave and whether or not to grant the injunction first if it did not have jurisdiction to

entertain the matter. If the court did have jurisdiction to hear the matters at bar the court informed all counsel that what would follow is a rolled-up hearing for leave and the applications for judicial review and the injunction.

[8] In the order of court dated Friday 29th November 2019 an order was made abridging time and that the court would hear the *point in limine* challenging jurisdiction and application for leave to file judicial review and the injunction on Monday 2nd December 2019. Thereafter if necessary, the application for leave, the injunction will be held in a rolled up hearing.

[9] Counsel complied with their undertakings and exchange their respective applications, affidavits and skeletal submissions electronically over the weekend and to file the said items on Monday morning.

The application for Injunctions:

The “writ”

[10] The application for the interim injunction made on behalf of the applicants is to restrain the defendants whether by themselves or through their servants from holding general election in Dominica on the 6th December 2019 or on any date prior to the 5th February 2020 unless:

- a. The procedure for holding elections outlined in the House of Assembly Act has been complied with;
- b. The voters list has been verified and the names of ineligible voters be removed;
- c. All objections filed on or before the 19th November 2019 or within the time for so filing (whichever is later) is dealt with in accordance with the law; and
- d. Voter ID cards have been issued to only eligible voters.

[11] The applicants also seek an injunction restraining Dominica Broadcasting Corporation as a state-owned corporation from discriminating against political parties and candidates in the upcoming general election in any way including:

- a. Failing to permit the political parties and candidates contesting the upcoming general elections equal and comparable access to the radio station

- b. Failing to broadcast the events so the political parties contesting the upcoming general elections at similar times duration and with similar frequency.

[12] The applicants contend that the interim injunction against the holding of the general elections on the 6th December 2019 is extremely urgent, important and necessary. They contend that they have an excellent prospect of success in the respective claims and that the defendants have no arguable defence.

[13] The applicants also contend that this is an exceptional case in that there was a procedural breach which operated to render all the nominations made on the 19th November 2019 null and void. That in the circumstances if elections were to be held based on the invalid nominations that would be an exercise in futility and a waste of resources. That in the circumstances of the case the balance of favour lies in favour of granting the injunction.

[14] It was further contended that there has been no proper procedure which has been followed and therefore it is in the interest of justice an good proper administration for the injunction be granted in effect pushing back the date for the elections.

[15] The facts relied on by the applicants as regarding the injunction is as follows:

- a. Section 13 of the House of Assemblies (Elections) Act (HOAE Act)¹ mandates that *“...upon the issue of the President of a writ the Chief Elections Officer (CEO) shall give notice thereof and of the day and place fixed for the nomination of candidates by publication in the Gazette at least 10 clear days before the day fixed nomination. ...”* That in the case at bar the CEO on the 7th November 2019 gazetted the notice as was required however stated that *“The date fixed to received nomination of candidates is Wednesday the 19th day of November 2019”* That there is no such date in the 2019 Calendar. The applicants contend that as a result of the erroneous publication many people believed that nomination day was on the Wednesday of the week and not the Tuesday of the week which was in fact the 19th November 2019. The applicants contend that many persons attempted unsuccessfully to present nominations of candidates on the Wednesday the 20th

¹ Chapter 2:01 of the Laws of the Commonwealth of Dominica

November 2019 causing their constitutional right to vote protected by section 33(2)(b) was breached.

- b. That the receipt of nominations by the returning officers on Tuesday the 19th November 2019 was a date that was not published in the official gazette was ultra vires, null and void. That the erroneous date appearing in the gazette was in effect worse than no publication as it operated to mislead several members of the public;
- c. That on Monday 18th November 2019 the applicant wrote and delivered to the His Excellency the President requesting that a new writ be issued, or the nomination date be adjourned as a result of the error in the gazette. That there was an acknowledgment of receipt of the letter on even date but there was no cancellation or adjournment of the nomination date. That on the day after the nomination day His Excellency the President responded to the said letter informing the applicants that he could not in his own deliberate judgment when appointing a polling day that this action was done in accordance with section 63(1) of the Constitution of Dominica upon the advice of Cabinet.

[16] It is the applicants' contention that the President is able to adjourn the holding of the polls by way of proclamation if he is satisfied of the likelihood that the final list of electors will be printed before the appointed day, this is provided for in section 19 of the HOEA.²

[17] The applicants contend that His Excellency the President and the Cabinet acted illegally, irrationally, procedurally improper and ultra vires and were motivated by bad faith and improper motives when they did the following acts:

- a. refused to recognise that the writ was invalidated by the erroneous publication in the gazette;
- b. refused to adjourn the polling date.

² Chapter 2:01 of the Laws of Dominica

[18] The applicants allege that the President and the Cabinet are motivated in the circumstances by their desire for the Dominica Labour Party (The DLP) to maintain an unfair advantage over the United Workers Party (The UWP) because the DLP has already purchased tickets and made travel arrangements for their agents and operatives to transport their supporters to Dominica for the purpose of them coming to vote for them.

The “Revised List of electors”

[19] The applicants contend that the Chief Elections Officer failed to consider or hear objections to more than one thousand, three hundred objections that were made to names on the list which he was mandated to do by virtue of section 35(1)(d) the Registration of Electors Regulations³ resulting in the list which has been published to be ultra vires, unlawful and void.

[20] The applicants further contend that the Chief Elections Officer acted illegally, irrationally, procedurally improperly, ultra vires and was motivated by bad faith and improper motives. That the revised list of electors which have been published includes names which were objected to before the 19th November 2019. That these actions have frustrated the legitimate expectation of the citizens of Dominica that the electoral list would be cleansed by removing named of ineligible voters from the list.

[21] The applicants also cite the fact that there has been no Electoral reform as has been sought over many years and that there has been a refusal and or failure to issue voter identification cards in spite of promises that this would be done, in spite of many requests made by the populace. The applicants also complain about the failure to have the Registration of Electors act and the HOAEA revised and amended.

Dominica Broadcasting Corporation

[22] The applicants also complain that the Dominica Broadcasting Corporation in breach of Section 13 of the Constitution has discriminated against the UWP on the basis of their political opinion by refusing to broadcast their events and statement as they do for the DLP.

³ Chapter 2:03 of the Laws of Dominica

Point *in limine* – Does the court have the jurisdiction to hear the applications and the matter in the case at bar?

[23] The respondents through their learned counsel Mr Lennox Lawrence, Mrs Heather Felix Evans and the Hon. Attorney General with the concurrence and endorsement of counsel appearing for Dominica Broadcasting Service Mr Stephen Isidore took the preliminary point that the court does not jurisdiction to hear the applications at bar. Counsel Lawrence initially informed the court that he wanted to make an application to strike on this ground. This court was of the view that it was a point in limine to be take or a ground for objecting to the application for the injunction and the grant of leave.

[23] The court also heard at length from Learned Counsel Miss Cara Shillingford on behalf of the claimants who with the support of her legal team valiantly argued that the court has the jurisdiction to hear the case and bar and that the court should grant the injunction sought by the applicant in the interest of justice and that the court has the inherent jurisdiction to determine whether the action of any public official of authority is lawful or award suitable relief. Further, that the actions and inactions of all named defendants are amenable to judicial review.

[24] If the respondents prevail on this ground, it will be unnecessary for the court to consider whether or not the injunction should be granted and whether or not leave to file judicial review should be entertained.

[25] It is the respondents' contention that this court has no jurisdiction to grant an injunction against the holding of elections once elections have been called. The respondents contend that the writ of election has been issued by the His Excellency the President in accordance with the provision of section 12 of the HOAE Act and once that has been done the election has started and therefore the sole remedy that would be available to the applicants would be Election Petition subsequent to the Elections. That therefore in the circumstances the court has no jurisdiction or authority at common law otherwise to deal with the orders sought or the interim relief requested.

[26] The respondents contend that the jurisdiction of the High Court to deal with matters that are related to elections is not at common law but it is that which is given to it by statute and the Constitution. That the jurisdiction of the court to deal with matters pertaining to elections is a peculiar jurisdiction.

[27] The respondents also contend that the reliefs sought by the applicants are based on the wholly speculative premise that the scheduled General Election will be not be free and fair. It is further contended that the grant of leave and or an injunction will lead to great disruption and public inconvenience and that there will be no prejudice meted out to the applicants who have the right to bring and election petition after the election.

[28] The respondents contend that the applications brought by the applicants are misconceived; totally without merit and an abuse of the court and that the application should be dismissed.

[29] In support of their contention the respondents relied on the following cases and decisions:

- a. **Seecomar Singh and another –v- R C Butler** ⁴
- b. **Radix –v- Gairy**⁵
- c. **Petrie –v- AG**⁶
- d. **Ferdinand Frampton et al –v- Ian Pinard et al** ⁷
- e. **Julian Prevost –v- Rayburn Blackmoore**
- f. **N P Ponnuswami –v- the Returning officer Namakkal Constituency et al** ⁸

[29] As a precursor to the consideration and the ruling on the point in limine I shall briefly make reference to two concepts:

- a. **Point in limine** – An *in limine* is a hearing on a specific legal point, which takes place before the actual case referred, can be heard. It is a process that addresses the technical legal points, which are raised prior to getting into the merits of the case and relates to matters of jurisdiction.
- b. **Jurisdiction** - *Jurisdiction* is the power of the court to decide a matter of controversy and presupposes the existence of a duly constituted court with control over the subject matter of the parties.⁹

⁴ 21 WIR 34

⁵ 25 WIR 552

⁶ 14 WIR 292

⁷ DOMHCV2005/0149

⁸ [1952] Supreme Court Reports 218

⁹ Black's Law Dictionary

[30] The applicants cited the following cases in support of their application and made submissions on them in their presentation to the Court:

- a. **Brantley and Others –v- Constituency Bounderies Commission**¹⁰
- b. **State of Mauritius –v- Khoratty**¹¹
- c. **Wingrove George –v- The Senior Magistrate**¹²
- d. **Frampton –v- Pinard**¹³
- e. **Radix –v- Gairy**
- f. **Hanchall –v- Skippings**

[31] In the case of **N P Ponnuswami –v- the Returning officer Namakkal Constituency et al**¹⁴ the claimant who was a candidate in an election whose nomination in an election whose nominations was a rejected by the returning officer applied to the High Court of Madras to quash the order of the Returning Officer for rejecting his nomination paper and for an order directing the Returning Officer to include his name on the list.

[32] In that case the Court of Appeal held that the Court had no jurisdiction to interfere with the order of the returning officer. This case, albeit an old case examined the “election jurisdiction of the Supreme Court”. It was held that the word “election” has by long usage been used in circumstances with the process of selection of proper representatives in democratic institutions.

[33] It was held in that case that the scheme of part of the constitution under consideration by that court should be brought up in an appropriate manner before a special tribunal and not be brought up at an intermediate state before any court. The court went on to hold that

¹⁰ [2015] UKPC 21

¹¹ [2007] 1 AC 80

¹² SKBHCV2018/0188

¹³ DOMHCV2005/0149

¹⁴ Op cit

“Under the Election Law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election into question. ... That “if the grounds calling the election into question could be raised at an earlier state and errors if any are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal any other meanings ascribed to the word used in the article would lead to an Anomalies which the Constitution would not have contemplated one of them being that concluding views may be expressed by the High Court at the pre polling stage and by the election tribunal which is to be an independent body at the stage when the matter is brought before it. Therefore, questioning the rejection of a nomination paper is questioning the election within the meaning of Article 329(b) of the Constitution and section 80 of the Representation of the People Act 1951.”

[34] **Poonaswami** went on to hold

“... if there are any irregularities committed while it (the elections) is in progress and they belong to the category or class which under the law by which elections is governed would have the effect of vitiating the election and enable the person affected to call it into question should be brought up before a special tribunal by means of an election petition and not be brought up before any court while election is in progress.

...

The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subjected to limitations imposed on it.”¹⁵

[35]Re: Gladys Petrie And Others v The Attorney-General And Others¹⁶ This facts in this case emanating out of Guyana though not all fours with the case at bar is relevant in that the orders which are being sought by the applicants was:

- a. Commenced after the Governor General’s proclamation that parliament was dissolved, and a date was accordingly set for general elections.

¹⁵ [1952] Supreme Court Reports 218 at 220

¹⁶ (14 WIR 292)

- b. The plaintiffs sought similar orders being sought by the applicants in the case at bar which would have resulted in the postponement of the elections which was being sought,

[35] In that case a preliminary objection (point in limine) was taken on behalf of the respondents that:

(1) *the court did not have the jurisdiction to entertain the application since the question which it raises belongs to a class of questions which are placed by the Constitution of Guyana exclusively ¹⁷within the jurisdiction of the High Court exercising a special jurisdiction and, as such, are justiciable only after the election has been held.*

(2) *having regard to art 67 and to the Proclamation issued by the Governor General on 4 November 1968, requiring the holding of the election on 16 December 1968, that the this court has no jurisdiction to grant an injunction by way of equitable relief in the manner sought in para 3 of the Summons, or indeed either of the other two orders sought in paras 1 and 2 of the Summons, which are ancillary to the main thrust of the application, and that is, to restrain the Chief Elections Officer from holding the elections. (emphasis mine)*

[36] The conduct of election in Dominica is governed strictly by the Constitution and the Elections Act. Once Elections is called so to speak the country enters into a period called “elections” Elections begin when the parliament is dissolved and a date issued for the elections. In ***Browne v Francis-Gibson et al*** ¹⁸Chief Justice Sir Vincent Floissac stated that:

The Judicial Committee of the Privy Council has repeatedly affirmed that the jurisdiction conferred on local courts of a British colony or former British colony to determine questions as to the validity of elections and appointments to the local legislature is a peculiar and special jurisdiction in at least five respects. Firstly, constitutionally, the jurisdiction is essentially a parliamentary jurisdiction conveniently assigned to the judiciary by the Constitution or by legislation. It is not a jurisdiction to determine mere ordinary civil rights. ...

¹⁷ Counsel Miss Shillingford pointed out to the court that the word exclusively does not appear in the Dominica Constitution which therefore distinguishes this case from the case at bar ... I will address this later in my ruling

¹⁸ [1995] ECSCJ No. 24,

Conclusion

[37] I agree with the submissions of the respondents any questions of issues regarding elections once elections has been called any questions and or issues fall to be determined by the High Court in its “Electoral Jurisdiction” and I am satisfied that this is what has been consistently held by our courts in the Region.

[38] I am persuaded by the decisions of the Courts in **Punaswami, Petrie, Ferdinand Frampton, Browne and Julian Prevost** that the jurisdiction to be exercised by the court at this time is an exclusive statutory decision conferred by Parliament on the Courts through legislation. This jurisdiction of the court as has been decided in previous decision must be jealously safeguarded.

[39] This court has come to view that based on the decided cases once the parliament has been dissolved and the elections have been called that is the date of elections is announced this court cannot intrude on the elections and the conduct thereof within the jurisdiction authorised by the Legislature and the constitution

[40] I am of the view that all of the applicants may have legitimate concerns which can be entertained by the court but just not as Judicial review matters or at this time ... their rights and concerns will have to be properly addressed by way of petition as they are in fact asking this court to predict the outcome of the election which just cannot be. The applicants in their various applications are seeking to invalidate the election results before the election takes place by saying the elections will not be free and fair this is calling the election into question and the basic principle of election law and the jurisdiction with which this court is clothed with can only be challenged by way of election petition pursuant to the rules and regulations of the Dominica House of Assembly Elections Act.

[41] It is to be noted that at the end of the submissions made in court when invited by the court in her rebuttal to present the court with authority that would persuade the court that the court had a jurisdiction to act after the Elections were called Counsel Miss Cara Shillingford noted that she knew of

but did not have any submissions to lay over with the court during the hearing or at the conclusion of the hearing. Learned Counsel offered to submit further authorities after the court rose for the court's consideration, Learned Counsel Felix Evans objected to Counsel Miss Shillingford's submission in this regard as the other side would not have had the opportunity to review and respond to those cases or submissions. This court has noted that after the written and oral submissions were made and the court reserved learned Counsel Shillingford sought to make submissions of further decisions on the matter which have not in the interest of natural justice not been considered as these submissions and cases were not made during the arguments of the case and the other side would not have been given an opportunity to review or respond to same.

CONCLUSION & DISPOSITION

[42] The Court's conclusion therefore is that the elections having commenced with the proclamation by the President of elections in the circumstances of this case I find that this court does not have the jurisdiction to grant hear the application for the injunctions or judicial review on matters pertaining to the Elections which have been called as is being sought by the applicants. I make no order as to costs.

[43] Leave is hereby given to the applicant to appeal my decision if they so see fit.

M E Birnie Stephenson
High Court Judge

SEAL

BY THE COURT

REGISTRAR