

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 202 of 2015

BETWEEN

LAURON BAPTISTE

PETITIONER

and

**VIL DAVIS
Returning Officer**

and

**VERONICA JOHN
Presiding Officer**

and

MONTGOMERY DANIEL

and

**SYLVIA FINDLAY-SCRUBB
Supervisor of Elections**

RESPONDENTS

- AND -

**CLAIM NO. 203 of 2015
BETWEEN**

BENJAMIN EXETER

PETITIONER

and

**WINSTON GAYMES
Returning Officer**

and

KATHLEEN JEFFERS
Presiding Officer

and

SIR LOUIS STRAKER

and

SYLVIA FINDLAY-SCRUBB
Supervisor of Elections

and

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

RESPONDENTS

Appearances – Claim No. 202 of 2015:

Mrs. Kay Bacchus Baptiste, Mr. Keith Scotland (absent), Mrs. Zhing Horne-Edwards, instructed by Ms. Shirlan Barnwell and Ms. Maia Eustace for the petitioner.

Mr. Joseph Delves holding papers for Mr. Douglas Mendes S.C. (absent) and Mr. Michael Quamina (absent) for the 1st, 2nd and 4th respondents

Mr. Grahame Bollers and Mr. Carlos James for the 3rd respondent.

Appearances – Claim No. 203 of 2015:

Mr. Stanley John Q.C., Mrs. Zhing Horne-Edwards and Mrs. Kay Bacchus Baptiste instructed by Ms. Shirlan Barnwell and Ms. Maia Eustace for the petitioner.

Mr. Joseph Delves holding papers for Mr. Douglas Mendes S.C. (absent) and Mr. Michael Quamina (absent) for the 1st, 2nd and 4th respondents

Mr. Grahame Bollers and Mr. Carlos James for the 3rd respondent.

Mr. Richard Williams holding papers for Mr. Anthony Astaphan S.C. (absent) and Mr. Kenny Kendrickson (absent) for the 5th respondent

2018: Nov. 27

(On written submissions)

DECISION

INTRODUCTION

- [1] **Henry, J.:** The most recent general elections in St. Vincent and the Grenadines were held on December 9th 2015. These proceedings emanate from those elections. Over the past three years, the instant elections petitions have ensued to determine whether the respective declarations that Mr. Montgomery Daniel and Sir Louis Straker are the elected representatives in the North Windward and Central Leeward constituencies, are void.
- [2] Mr. Lauron Baptiste and Mr. Benjamin Exeter ('the petitioners') contested the respective seats on behalf of the opposition National Democratic Party ('NDP'). They have alleged that serious irregularities took place in the polls. They are seeking among other things, declarations that the elections in the referenced constituencies are void. The trial is scheduled to resume on December 3rd 2018.
- [3] The petitioners have named the returning Officers (Vil Davis and Winston Gaymes), Presiding Officers (Veronica John and Kathleen Jeffers), Mr. Montgomery Daniel, Sir Louis Straker, the Supervisor of Elections and the Honourable Attorney General¹ as respondents. They are referred to collectively as 'respondents' in this decision.
- [4] By Notice of Motion filed on 19th June 2018 the petitioners applied for specific disclosure of certain election documents, namely, the packets containing marked copies of the registers; ballot paper accounts; the statement of rejected ballot papers; and the result of the verification of the ballot paper account. They have also sought pursuant to CPR rule 28.5, specific disclosure of the notes purportedly made at the final count of the ballots in the Central Leeward election by Mr. Clyde Robinson, Election Clerk and costs. The respondents object to the application for specific disclosure. They contend that this application is an abuse of the court's process.

ISSUES

¹ Only in the Benjamin Exeter Petition.

- [5] The issue is whether the court should make an order for specific disclosure of the notes purportedly made by the elections clerk and the referenced elections documents.

LAW AND ANALYSIS

Issue – Should the court make an order for specific disclosure of the referenced elections documents and notes purportedly made by the elections clerk?

- [6] The petitioners make their application on the ground that the documents sought are directly relevant to matters in issue in the petition and are not prohibited under rule 53 of the House of Assembly Election Rules ('HAER')². They submit that CPR 28.5 permits specific disclosure of the referenced elections documents.
- [7] The application is supported by affidavit of Madonna Barbour, legal clerk. She averred that she is informed by Ms. Eustace and believes that the petitioners seek specific disclosure of the named documents which are relevant to matters in issue in the petition and which are not prohibited under rule 53 of the HAER Rules.
- [8] The petitioners submitted that the Court of Appeal has already determined that the relevant CPR rules governing disclosure are applicable in elections petitions cases. They relied on the case of **Ezekiel Joseph v Alvina Reynolds**³. In that case the Court ruled that the provisions of CPR 2000 in respect of further information and disclosure apply in such matters, if certain conditions are satisfied. This is not disputed.
- [9] CPR rules 28.5 and 28.6 provide respectively:

'Specific disclosure

28.5

1. An order for specific disclosure is an order that a party must do one or more of the following things –
 - a. disclose documents or classes of documents specified in the order;
 - b. carry out a search for documents to the extent stated in the order;

² Representation of the People Act, Cap 9.

³ SLUHCVP2012/0014, at para. 113.

- c. disclose any document located as a result of that search.
- 2. An order for specific disclosure may be made on or without an application.
- 3. An application for specific disclosure may be made without notice at a case management conference.
- 4. An application for specific disclosure may identify documents –
 - a. by describing the class to which they belong; or
 - b. in any other manner.
- 5. An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

'Criteria for ordering specific disclosure

28.6

- 1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
- 2. The court must have regard to –
 - a. the likely benefits of specific disclosure;
 - b. the likely cost of specific disclosure; and
 - c. whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
- 3. If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.
- 4. If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.
- 5. The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed.'

[10] The petitioners also relied on rules 51 and 52 of the HAER. They state:

'51 Delivery of documents to Supervisor of Elections:

- (1) The returning officer shall then himself or by his agents, not later than the seventh day after the final count, deliver to the Supervisor of elections the following documents-
 - (a) The packets of ballot papers in his possession;
 - (b) **The ballot paper accounts and the statements of rejected ballot papers and the result of verification of the ballot paper accounts;**
 - (c) The list of blind and incapacitated voters assisted by companions, the list of votes marked by the presiding officer and the statements relating thereto, and the declaration made by the companions of blind voters;
 - (d) The packets of counterfoils;
 - (e) The packets containing marked copies of the registers;
 - (f) The packets containing transfer certificates of presiding officers and poll clerks;
and
 - (g) All other documents used for the election, endorsing on each packet a description of its contents, the date of the election to which they relate and the name of the constituency for which the election was held.
- (2) The Supervisor of Elections shall, on receiving the documents, give a receipt to the person delivering them, and shall register them in a book kept by him for the purpose of specifying the date and time of receipt and shall deposit them in the Electoral Office.
- (3) Any receipt to be given for the documents shall show the date and time of their receipt.

52. Custody of election documents: The Supervisor of Elections shall keep the election documents referred to in rule 51 in safe custody and shall allow no person to have access to them:

Provided that if an election petition has been presented questioning the validity of any election or return the said Supervisor shall, on the order of a judge of the Court, deliver to the Registrar of the Court the documents relating to the election that is in dispute:

Provided also that ...'.

54. Retention and public inspection of documents:

- (1) The Registrar shall retain for one year all documents relating to an election delivered to him under these Rules by the Supervisor of Elections, and then, unless otherwise directed by order of the Court, shall cause them to be destroyed.
- (2) The said documents, except ballot papers and counterfoils, **shall be open to public inspection at such time and subject to such conditions as the Registrar may direct.**
- (3) The Registrar shall on request, supply copies or extracts from the documents open to public inspection on payment of such fees and subject to such conditions as may be prescribed.' (bold added)

[11] The petitioners submitted that the foregoing provisions are similar to the corresponding provisions of Section 70(2), (3) & (5) of the applicable Elections Laws of St Lucia. They pointed out that the learned Chief Justice considered the Saint Lucia provisions in the **Joseph v Reynolds case** and opined:

‘[113] Mr. Astaphan, SC, conceded, correctly in my view, that this section provides for disclosure of election documents for the purpose of a petition which has been filed questioning an election or return. He submitted, however, that in order for petitioners to rely on section 70(2) the petitions must be valid.

‘[114] It is obvious that section 70(2) contemplates that the court may order all documents that are related to an election, which are in the custody of the Clerk of the House or in the custody of any electoral officer be produced or inspected.

....

[115] ... It seems to me **that if a petitioner pleads, with sufficient particularity, that the ballots that were rejected in error exceeded the margin of victory in an election, the court may examine and count the rejected ballots.** In any event, where there is an objection to the count, the election court may demand that all records relating to the ballots be brought intact into the court by the officer who has custody of them, **once the judge**

is satisfied on the pleadings, including any affidavit, that there may be reason to examine the ballots. There is nothing, in my view, that requires an application under CPR 2000 in order to have this disclosure and production of all records papers and documents, including the 4 ballots.' (bold supplied)

[12] The petitioners argued that these principles were pronounced in relation to inspection under section 70(2) which is in *pari materia* to Rule 53. They pointed out further that Rule 54 is the equivalent provision to section 70(4) which provides:

(4) All other reports or statements received from election officers, all instructions issued by the Chief Elections Officer pursuant to the provisions of this Act, all decisions or ruling by him upon points arising thereunder and all correspondence with election officers or others in relation to any election shall be public records and may be inspected by any person upon request during business hours.'

[13] The petitioners submitted that the respondents are on record as admitting in the course of an earlier unsuccessful application by the petitioners for inspection of counted ballot papers pursuant to Rule 53, that the ballot boxes are to be produced to the court. They reasoned that the respondents are now estopped from opposing this application under rule 54, for inspection of the documents specified in the Notice of Motion.

[14] The petitioners contended that issues are raised on the pleadings regarding various breaches and irregularities in relation to the accuracy of the number of ballots cast and the information contained on the Form 16 Statements. They submitted that disclosure of the information on these documents will benefit the resolution of these issues. They did not indicate on which part or parts of the pleadings those matters are outlined or in what way the requested documents would elucidate such matters. The court is not permitted to speculate and I therefore refrain from doing so.

[15] The petitioners submitted that the documents are already in the Supervisor of Elections' custody as deposed in her affidavit dated 21 Dec. 2015. They argued that it would require minimal to no

expenditure to disclose them. They reasoned that in any event, rule 54 contemplates production and public inspection in certain circumstances.

- [16] Mr. Baptiste and Mr. Exeter submitted further that the referenced documents are contained in sealed envelopes in the ballot boxes in respect of 15 polling stations. They argued that the Supervisor of Elections stated in her witness statement⁴ that after the election, all ballot boxes were delivered to her by each returning officer; have been kept by her in a locked room since then; and that no member of her staff nor the general public had or have access to this locked room; the Electoral office has 24 hour police protection and at times SSU protection; and that therefore there can be no serious question about the security of the boxes.
- [17] The petitioners contended that on the court's order, the keys to this room may now be placed in the custody of the Registrar for the purposes of disclosure and upon suitable arrangements being made. They submitted that access may be given to her to remove the envelopes containing the subject documents and copies made of them at their expense, after which they may be replaced and the security of the ballot boxes and the room maintained under the current arrangements. The respondents made no contrary submission.
- [18] The proposal for election documents to be handed to the Registrar for copying and subsequent return to the Supervisor of Elections is not contemplated by Rule 52 of the HAER or any other rule. What is provided for, is a transfer of custody from the Supervisor of Elections of any elections documents in respect of which the court makes an order for inspection or disclosure. It does not appear to accommodate a removal from and return to the Supervisor of any elections documents; or shared custody between the two officers.
- [19] The petitioners submitted further that the Supervisor of Elections is the holder of public office and therefore has the resources of the State. They contended that the referenced documents are in her custody and disclosure would require minimal resources. They submitted further that the elections laws contemplate that ordinarily the State is to have any such resources available, should public inspection be permitted.

⁴ At para. 18.

- [20] The respondents did not counter this submission. They submitted simply that this application for specific disclosure is the third one of its kind and ought to be dismissed on the ground that it is a 'naked abuse' of process. They contended that in any event the disclosure does not assist the petitioner as he had not pleaded (as required by law) that the result of the election was in fact affected. They advanced no legal authority for either submission. I note that paragraph 115 of the **Ezekiel Joseph case** highlights the need for particularity in pleadings.
- [21] In earlier interlocutory proceedings in this case, the parties made extensive submissions on the legal principles applicable to the concept of 'abuse of the court's process'. They were catalogued in a decision rendered on February 27, 2018. I will summarize them for present purposes.
- [22] At that time, the parties cited a number of cases including **Henderson v Henderson**⁶ and **Ferguson v Ferguson**⁵. The principles emerging from those cases demonstrate that parties are required to outline their entire case at the first available opportunity. A party who fails to do so will not usually be permitted to re-litigate identical issues (involving the same parties) or any part of the case which he could have made during earlier proceedings. However, he may be allowed to do so in special circumstances. This rule applies to every aspect of the case which the parties with reasonable diligence could have discovered and advanced at an earlier time.
- [23] In applying those principles to the present application, it is to be noted that the petitioners had applied on two previous occasions for inspection of certain elections documents. The instant application seeks disclosure. I observe that the petitioners are not repeating an application which was made previously. No application for inspection (so-called) was made before. It does not go unremarked however, that the documents in respect of which disclosure is sought, form part of the elections documents created during the 2015 elections.
- [24] The court must determine whether an order for specific disclosure would amount in substance to the grant of an order for inspection (albeit of copies as opposed to originals) and have the effect of circumventing and nullifying the principles governing abuse of the court's process. It seems to me that an order for disclosure of the referenced documents would in spirit, be an order permitting the petitioners to inspect copies of the referenced elections documents.

⁵ SLUHCV2012/0387 (unreported).

- [25] The petitioners have not advanced any reasons why they did not seek disclosure of those documents when they filed the first or second application for inspection. They have not directed the court's attention to any pleadings from which the Court could conclude that the documents are relevant. It is not for the Court to investigate this independently of the petitioners, less it be accused of stepping into the arena. The Court will refrain from conducting an exercise which would require it to review and analyze every paragraph in the petitions to determine whether such matters are pleaded.
- [26] I remind myself of the pronouncements made by the Honourable Chief Justice Sir Hugh Rawlins at paragraphs 114 and 115 of the **Ezekiel Joseph case**. He opined that there was nothing which necessitated an application pursuant to CPR 2000 for disclosure of documents, since the Elections Petitions rules made provision for a judge to order inspection in a case where the pleadings disclosed the relevant details and need for such inspection.
- [27] Similarly, I am of the view that there is no need for the petitioners to apply for specific disclosure of the referenced documents in this case, where they could have invoked the court's power pursuant to rule 52 of the HAER for production and inspection. Furthermore, it seems to me that the petitioners neglected to make such application when the two previous applications/motions were made for such production and inspection. They have not identified any pleadings where reference was made to the subject documents or their relevance highlighted expressly or implicitly.
- [28] I am satisfied that the petitioners could have made this application for specific disclosure at an earlier stage and that they failed to do so. They have not explained why. I am therefore unable to determine if they had good reason for such failure. I am also satisfied that to grant the referenced application would run afoul of the abuse of court principles. For the foregoing reasons, the application is dismissed.

COSTS

- [29] The respondents made no extensive submissions on this motion. I therefore make no order as to costs.

Miscellaneous

[30] At the case management hearing on 13th November 2018, the petitioners represented to the court that bundles 4 through 8 contain all documentation related to the interlocutory applications in respect of the matters addressed in those bundles. I have since realized that they do not contain the Notice of Motion and affidavits in support, and that those are likely to be necessary at the resumption of trial. I therefore order that the petitioners file one or more additional trial bundle(s) incorporating those primary documentation⁶ and serve them on or before November 30th 2018.

[31] By Notice filed on 4th December 2017, the 5th Respondent (the Honourable Attorney General) signaled that he intended to 'object to the admissibility of or reliance on the affidavits of Ms. Maia Eustace sworn and filed in this cause and in particular the affidavits filed on 15th June 2016 and 17th December 2017⁷ respectively. He indicated that he intended to do so on the grounds that:

1. Miss Maia Eustace:

(a) is an attorney at law admitted to the bar of the ECSC;

(b) has appeared and remains on record for the petitioner Benjamin Exeter in this cause;

(c) had sworn to numerous affidavits on alleged facts despite objection from the second and fourth defendants by letter dated 1st February 2016; and

2. the Eastern Caribbean Supreme Court has ruled that it is highly improper for an attorney on record to swear to affidavits of fact in the same proceedings in which they appear on record.

[32] At the most recent case management conference in November⁸, learned counsel for the petitioners flagged this as an outstanding application. No formal application was made either orally or in writing. There is no such pending application before the court. Suffice it to say, that Counsel for all parties are reminded of the dicta in the cases of **Casimir v Shillingford**⁹ and **Richard Frederick et al v**

⁶ Namely: Motions, Affidavits in support, affidavits in opposition and supporting documentation including exhibits.

⁷ Page 89 of the fifth Respondent's bundle and Page 263 of the fifth respondent's bundle, respectively.

⁸ On the 13th.

⁹ (1967) 10 W. I. R. 269.

Comptroller of Customs et al¹⁰.

ORDER

[33] It is accordingly ordered:

1. The petitioners' application for specific disclosure of certain election documents, namely the packets containing marked copies of the registers; ballot paper accounts; the statement of rejected ballot papers; the result of the verification of the ballot paper account; and the notes purportedly made at the final count of the ballots in the Central Leeward election by Mr. Clyde Robinson, Election Clerk is dismissed.
2. No order as to costs.
3. The petitioners are to file and serve on or before 30th November 2018 one or more additional trial bundles incorporating the primary documentation (namely all Motions, Affidavits in support, affidavits in opposition and supporting documentation including exhibits) in respect of the applications and motions dealt with in trial bundles 4 through 8.
4. No order as to costs.

[34] The assistance provided by counsel in the form of written submissions and electronic copies of documentation is appreciated.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar

¹⁰ SLUHCVP2008/037 at para. 49.