IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 03783

IN CIVIL DIVISION

IN THE MATTER of the Representation of the People Act

AND

IN THE MATTER of the Election Petitions Act

AND

IN THE MATTER of a General Election to the House of Representatives for the Constituency of North-East Saint Ann holden on September 3, 2007.

BETWEEN	**NORMAN WASHINGTON MANLEY BOWEN**	**CLAIMANT**
AND	**SHAHINE ROBINSON**	**1ST DEFENDANT**
AND	**RUPERT BROWN**	**2ND DEFENDANT**
AND	**DANVILLE WALKER**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**4TH DEFENDANT**

Abe Dabdoub and Dr. Raymond Clough instructed by Knight Junor Samuels for the Claimant

Ransford Braham and Nesta-Claire Smith-Hunter instructed by Ernest Smith and Company for the 1st Defendant/Respondent

HEARD: October 4 and 8, 2010

Jones J.

[1] As a result of an election held on September 3, 2007, Norman Washington Manley Bowen hereafter called the "Claimant" filed a Fixed Date Claim Form (Election Petition) contending that Shahine Robinson hereafter called the "Respondent" was a citizen of the United States of America; was in breach of Sections 39 and 40 (2) (a) of the Constitution of Jamaica; and, was not

qualified to be nominated or elected to the House of Representatives. Three years later, in an abrupt volte-face, the Respondent indicated at a Pre Trial hearing on September 15, 2010, that she no longer opposed the Petition. She subsequently filed a Notice pursuant to Section 15 of the Election Petitions Act on September 17, 2010, and her Amended Defence filed on June 3, 2010, was struck out as an abuse of the process of the Court.

[2] The Respondent having filed a Notice pursuant to Section 15 of the Election Petitions Act that she no longer opposed the Petition, which was placed in the "Gazette" on September 23, 2010, and there being no other Respondent in opposition to the Petition within the period of fourteen days after placing the Notice, there shall be judgment for the Claimant and a declaration:

a) That by virtue of Section 39 and Section 40 (2) (a) of the Constitution of Jamaica Mrs. Shahine Robinson was not qualified to be elected as a Member of the House of Representatives and accordingly the election of September 3, 2007, for the Constituency of St. Ann North-East is null and void and of no effect and the seat is declared vacant.

b) I do so certify to the Speaker of the House of Representatives.

c) That the Claimant do serve a copy of this Judgment on the Speaker of the House of Representatives and the Clerk to the Houses of Parliament.

[3] All that remains is the issue of costs. The Claimant has asked this Court to grant him indemnity costs in this matter. Should the Respondent be ordered to pay costs to the Claimant on an indemnity basis in relation to his election petition? Section 28 of the Election Petitions Act provides that all costs, charges and expenses associated with the petition, are to be paid by the parties in a manner determined by the court. The applicable Rules of Court (CPR 64.6) provides that the unsuccessful party must pay the costs of the successful party. The court may, however, order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs.

Background Facts:

[4] On September 24, 2007, the Claimant filed an Election Petition arising out of an election held on September 3, 2007. He also filed an Affidavit in support of the Fixed Date Claim Form (Election Petition) alleging the following:

a) That the Respondent was on August 7, 2007, a citizen of the United States of America and therefore not qualified to be nominated or elected to the House of Representatives.

b) That the 2nd Defendant the Returning Officer was on nomination day notified of this fact by the People's National Party candidate Mr. Oswest Senior Smith.

c) That on September 8, 2007, Nationwide News at five in a newscast stated that the Respondent had admitted to Nationwide News that both she and her brother were citizens of the United States of America.

d) That the United States of America is a foreign power or state.

e) That the Respondent was in breach of Sections 39 and 40 (2) (a) of the Constitution of Jamaica and was not qualified to be nominated or elected to the House of Representatives.

f) That Oswest Senior Smith issued printed notices to the electors in the constituency indicating that the Respondent was a United States citizen and not qualified to be nominated or elected and that any vote cast for her would be wasted.

[5] On May 12, 2010, the Claimant filed a Notice of Application for Court Orders for the Defence of the Respondent to be struck out for non-compliance with Rule 10.5 of the Civil Procedure Rules 2002 and an Order that the Respondent do provide the answers to the Request for Information filed April 9, 2010, and the Further Request for Information filed May 12, 2010. Despite the Respondent's Attorneys-at-Law being notified of the date of hearing neither the Respondent nor her Attorneys-at-Law turned up for the hearing. That the application was eventually fixed to be heard at the Pre-Trial Review.

[6] On April 14, 2010, at the Pre-Trial Review neither the Respondent nor her Attorneys-at-Law appeared and after awaiting their attendance for over 40 minutes the court struck out the Defence and gave Judgment in favour of the Claimant. The Respondent subsequently on June 2, 2010, filed an application to set aside the Judgment which application was successful. In that application the Respondent filed an Affidavit to which was exhibited a Supplemental Affidavit of Shahine Robinson (Defence) in which she, inter alia, said that:

a) She was properly nominated and was not in breach of Section 39 of the Constitution of Jamaica.

b) On nomination day she was not a citizen of the United States of America. She also stated that she holds no other citizenship other than the land of her birth and that she was not a citizen of any other country on the 7 August 2007, nomination day.

c) She is not infringing the Constitution of Jamaica and that at the time of her nomination and election she was not a citizen of the United States of America.

[7] The Respondent filed an Amended Defence on June 25, 2010, in the following terms "I deny paragraph 20 of the Affidavit [of the Claimant's 21st Sept 2010 Affidavit] I am a citizen of Jamaica by birth. I hold no other citizenship other than the land of my birth. I was not a citizen of any other country on the 7th August 2007".

[8] The Claimant filed a Request for Information in which he listed the Alien Registration Card number of the Respondent, the date she took the Oath of Allegiance to the United States of America and the Naturalization Certificate Number. The Claimant also filed a Notice to Produce requesting the Respondent to produce at the trial of the Petition her Alien Registration Card number, the date she took the Oath of Allegiance to the United States of America and the Naturalization Certificate Number.

[9] On September 16, 2010, at the Pre-Trial Review hearing the Respondent through her Attorneys-at-Law indicated to the Court that she was not opposing the Petition, and in light of her declaration to the Court, she was ordered to file a Notice pursuant to Section 15 of the Election Petitions Act, which she did on September 17, 2010.

[10] On September 22, 2010, I struck out the Respondent's Amended Defence filed on the June 3, 2010, as being an abuse of the process of the Court and ordered that the Respondent do pay the Claimant's costs. The Claimant's application for costs to be assessed on an indemnity basis was adjourned for hearing on October 4, 2010.

Law:

[11] Section 28 of the Elections Petition Act provides as follows:

> "All costs and charges and expenses of and incidental to the presentation of a petition and to the proceedings consequent thereon, with the exception of such costs, charges and expenses, as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the Court or Judge may determine, regard being had to the disallowance of any costs,

> charges or expenses which may, in the opinion of the Court or Judge, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or are not on the whole successful. And the Court or Judge shall give judgment for such costs in accordance with such determination as aforesaid. Such costs shall be taxed by the proper officer of the Supreme Court according to the same principles as costs between solicitor and client are taxed in an equity suit in the Supreme Court."

[12]Section 24 of the Election Petitions Act provides that:

> (1)…
>
> (2)…
>
> (3) An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief Justice, the provisions of the Judicature (Civil Procedure Code) Law and the rules of court shall, so far as practicable, apply to election petitions.

[13]CPR 64.3 empowers the Court to make orders about costs including the power to make any person pay the costs of another person arising out of or related to all or any part of any proceeding.

[14]CPR 64.6 (1) provides that if the Court decides to make an Order as to costs of any proceedings the general rule is that it must order the unsuccessful party to pay the costs of the successful party. In deciding who should be liable to pay costs CPR 64.6 (3) provides that the Court must have regard to all the circumstances and in particular inter alia:-

a) The conduct of the parties both before and during the proceedings;

b) Whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

c) Any payment into court or offer to settle made by a party which is drawn to the Court's attention (whether or not made in accordance with Parts 35 and 36);

d) Whether it was reasonable for a party:-

i) To pursue a particular allegation; and/or

ii) To raise a particular issue.

e) The manner in which the party has pursued-

i) That party's case;

ii) A particular allegation; or

iii) A particular issue.

f) Whether a Claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

g) Whether the Claimant gave reasonable notice of intention to issue a claim.

[15]CPR 64.6 (5) makes provision that the Court's orders may include orders that a party must pay-

a) A proportion of another party's costs;

b) A stated amount in respect of another party's costs;

c) Costs from or until a certain date only;

d) Costs incurred before proceedings have begun;

e) Costs relating to particular steps taken in the proceedings;

f) Costs relating to a distinct part of the proceedings;

g) Costs limited to basic costs in accordance with rule 65.10; and

h) Interest on costs from or until a certain date, including a date before judgment.

[16]Mr. Ransford Braham hereafter called "Counsel for the Respondent" contended that the Election Petitions Act cannot be interpreted in a way that allows the court to go outside the provisions of the Act. He says that Section 28 of the Election Petitions Act governs and controls costs that are awarded in an election petition. There is no mention in that Act of awarding costs on an indemnity basis and the Civil Procedure Rules 2002 although applicable is subject to the provisions of the Act. He says the UK cases cited by Mr. Dabdoub do not apply and that if the court wishes to make an order for costs it should do strictly within the terms of the statute and refer the matter to the Registrar of the Supreme Court for taxation.

[17]He referred the court to the following passage in the judgment of Megarry J. in the case of **C&J**

Clark Limited v Inland Revenue Commissioners [1973] 1 WLR 905 at page 911:

> "In my judgment, the phrase "subject to" is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision. Where it appears in the opening words of section 78 (4), it does nothing, in my judgment, to demonstrate that subsection (2) allows an apportionment to be made even if there has been no shortfall."

[18]In truth, the proposition advanced by Counsel for the Respondent that indemnity costs are not applicable under the CPR 2002 is misleading and must fail for three reasons. First, although there is no use of the term "indemnity costs" in the Jamaican CPR 2002, CPR 64.6 incorporates the traditional indemnity principle by making it clear that where the Court decides to make an Order as to costs of any proceedings "the general rule is that it must order the unsuccessful party to pay the costs of the successful party". In other words, the indemnity principle that "costs follows the event" is alive and well under the CPR 2002. Support for this is found in the following passage from the learned author of **Zuckerman on Civil Procedure and Practice 2nd Edition** at page 1000 where he makes the point that under the new Civil Procedure Rules:

> "The allocation of costs between parties to litigation continues to be governed by the traditional indemnity principle, which has three limbs. First the successful party is normally entitled to his litigation costs from the unsuccessful party. Second, the receiving party is not entitled to claim as costs more than he has actually spent or is duty bound to pay. Third, the receiving party is only entitled to recover costs that were reasonably incurred and that are reasonable in the amount"

[19]The general indemnity principle that underpins CPR 64.6 (1) is qualified by 64.6 (2) which gives the court the power to make another order, or no order, having regard to all the circumstances. In summary, the range of costs orders available under the CPR 2002 are as follows:

a) Successful Party "Indemnity" Costs under CPR 64.6 (1),

b) Fact or Issue Based Costs under CPR 64.6 (2),

c) Basic Costs under CPR 65.10,

d) Summarily Assessed Costs under CPR 65.8 or 65.9,

e) Wasted Costs under CPR 64.13, and

f) Fixed Costs under CPR 65.4, 65.5 and 65.6

[20]Second, there is no conflict between the CPR 2002 provisions on costs and Section 28 of the Election Petitions Act, which deals with costs at the conclusion of an election petition, as "the rules of court shall, so far as practicable, apply to election petitions". Where the application of the CPR 2002 is not practicable it is not to be applied. Where it is of assistance it should be applied, and that is solely in the discretion of the Court. Third, this court has a wide discretion whether under the CPR 2002 or under Section 28 of the Election Petitions Act to determine by whom and to what extent the costs of proceedings are to be paid.

[21]For all the above reasons, the Respondent (the unsuccessful party) shall pay all the costs of the Claimant (the successful party) in accordance with CPR 64.6 (1) to be taxed by the Registrar of the Supreme Court in accordance with CPR 65.13, if not agreed.