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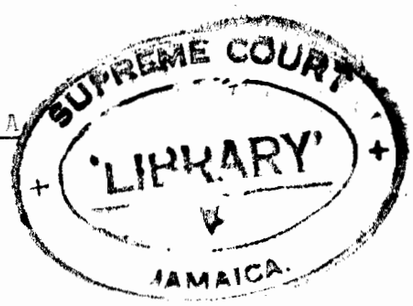

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 23 OF 1981

BEFORE: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

DUDLEY THOMPSON - RESPONDENT/APPELLANT

AND

THE ATTORNEY GENERAL - PETITIONER/RESPONDENT

Mr. Hugh Small for appellant

Mr. A.B. Edwards and Mr. R.G. Langrin for respondent

22nd February

&

26th March, 1982

KERR, P. (Ag.):

The appellant and one Owen Stephenson were the chief contestants in the General Elections of October 1980 for the constituency of Western St. Andrew. The respondent Attorney General as he was empowered to do under the Election Petitions Act (hereinafter referred to as the Act) on November 7, 1980 filed an election petition praying therein that the said election be declared by the Court "null and void" on the grounds of the irregularities alleged therein. At the time of the filing of the petition Stephenson had been declared the winner but on a magisterial recount on January 6, 1981, the appellant was declared the successful candidate. On January

29, 1981 Stephenson filed his own election petition alleging certain irregularities and praying that he be returned as the successful candidate or that the election be declared void. To this petition, the appellant duly responded by a formal reply and a cross-petition.

By summons dated 20th March the respondent applied for leave to withdraw his petition on the grounds, inter alia:

> "That the filing of the Attorney General's Petition was done in the public interest and I verily believe that that interest will be served by the Petition filed by Owen Stephenson, having regard to the similar allegations made therein.
>
> "That since another Election Petition has now been filed no useful purpose will be served by having two Election Petitions before the Court in the same matter.
>
> "That the changed circumstances in having two Election Petitions before the Court in the same matter coupled with the fact that the Returning Officer, if made a party to the proceedings filed by Owen Stephenson may have to be defended by the Attorney General or his representative, necessitate and indeed compel the withdrawal of the Attorney General's Election Petition."

Upon the summons coming up for hearing before Parnell, J. in Chambers, there was no appearance on behalf of Stephenson. The Attorney appearing for the appellant did not oppose the respondent's application but applied for costs, resting his application on Section 13 of the Act. The learned trial judge no doubt mindful of the exceptional public importance of the matter, adjourned to open court and then and there in an oral judgment granted the Petitioner leave to withdraw the petition but decreed that "there be no order as to costs." It is against that decree that the appeal is brought.

Mr. Edwards for the respondent took a preliminary objection to the hearing of the appeal on the grounds that by Section 11 (1)(e) of the Judicature (Appellate Jurisdiction) Act, no appeal shall lie without leave of the judge or the Court of Appeal on a discretionary order for costs and that in the instant case this was such an order.

In reply, Mr. Small contended that the trial judge had no discretion to disallow costs - the only issue being left to him is the matter of quantum. The provisions of the Act were not only in keeping with the general principle that costs follow the event but the purposeful intent and effect of Section 13 made it obligatory on the judge to award costs. He frankly conceded that his researches failed to reveal any case directly in point but adverted the Court's attention to a number of cases in which the word "liable" arose for interpretation including - Littlewood v. George Wimpey & Co. Ltd. (1953) 2 All E.R. p. 921; Collins v. Collins & Another (1947) 1 All E.R. p. 793; and to the definitions in Strouds Judicial Dictionary and in "Words and Phrases Legally defined."

Section 13 of the Election Petitions Act provides:

> "An election petition shall not be withdrawn without the leave of the Court, or of a Judge in Chambers, upon special application made for such leave.
>
> "No such application shall be granted unless The Court or Judge is satisfied that adequate notice has been given, in the case of an election to the House of Representatives, in the Constituency, or, in the case of an election to a Parish Council, in the parish to which the petition relates, of the intention of the petitioner to make such application.
>
> "On the hearing of the application for withdrawal, any person who might have been a petitioner in respect of the election to which the petition relates may apply to the Court or a Judge to be substituted as petitioner for the petitioner so desirous of withdrawing the petition.
>
> "If a petition is withdrawn the petitioner shall be liable to pay the costs of the respondent."

From the cases, it is clear that the meaning of "liable" is often coloured by the context in which it is used. In making this observation I am not a little influenced by the following excerpt from "Words and Phrases Legally Defined", 2nd Edition p. 154:

" 'The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the event has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorised person to decide whether or not to proceed with the enforcement - cf. James v. Young (1884), 27 Ch. Div. 652; Re Loftus Ottway, (1895) 2 Ch. 235. The word 'liable' is sometimes used in the sense of exposure to liability, but this is not the ordinary natural grammatical meaning of the word. It would require a context to give the word this meaning.' 3 O'Keefe v. Calwell, (1940) A.L.R. 381, per Williams, J., at p. 401. "

The Election Petitions Act is a special statute dealing with the judicial process, pleadings, procedure and practice both at first instance and on appeal. I therefore interpret Section 13 of the Act as not being concerned with the power of the Court to award costs but rather declaring that a petitioner who withdraws his petition is exposed to the risk of being condemned in costs in favour of the respondent.

In this the legislature has been wisely consistent. By Section 4 (d)(ii) of the Act (post) a member against whose election or return a complaint is made is designated a respondent whether or not the petitioner named him as such or made any allegation of impropriety against him. However, he has a seat to lose and the Act gives him a locus standi. A petitioner could therefore not plead as an excuse or exemption from liability the fact that he neither named the member as a respondent nor included him in his allegations of irregularities in the election.

In Squibb Staff Association v. Certification Officer (1979) 2 All E.R. p. 452 in interpreting the phrase "liable to interference" Lord Denning at p. 457 said:

"The material words are 'liable to interference'. To be independent the trade union must be one which 'is not liable to interference by an employer.

> "The certification officer interpreted the words 'liable to interference' as meaning 'vulnerable to interference' or 'exposed to the risk of interference' by the employer. Whereas counsel for the association suggested that it meant 'likely' or 'not likely' to be subjected to interference by the employer."

and at p. 458:

> "I agree that there are two possible meanings of the word 'liable'. It is a very vague and indefinite word. Having heard very good arguments on both sides, it seems to me that the certification officer's interpretation of 'liable' is correct and the association's interpretation is not correct. "

I am comforted by this decision in my interpretation of 'liable' in Section 13.

Accordingly I am of the view that Section 13 and 29 are complementary; while Section 13 imposes liability for costs to the respondent on the petitioner who withdraws his petition, Section 29 deals generally with the powers of the Court to award or disallow costs. It would be inconsistent with that power to hold that the judge has no discretion whether or not to order costs on the withdrawal of a petition. If for example, before a respondent had retained counsel or incurred costs, the Attorney General had given a firm undertaking that he intended to withdraw his petition, could not a judge in such circumstances decline to order costs?

In short, I do not read into Section 13 an erosion of the discretionary power of the Judge in relation to the award of costs as conferred by Section 47 of the Judicature (Supreme Court) Act and as impliedly extended to Election Petitions by Section 24 (1) and (3) of the Act which reads:

> "(1) On the trial of an election petition the Judge shall, subject to the provisions of this Act and to any directions given by the Chief Justice, have all the powers, jurisdiction and authority of a Judge of the Supreme Court; and the Court held by him shall constitute a Court of the Supreme Court.

"(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."

The Court had deferred its ruling on this point and to avoid the inconvenience of part-hearing the case entertained arguments on the merits.

Mr. Small then contended in effect that the judge erred in his approach to the question of costs. It did not appear that he had addressed his mind to the question whether or not he considered if the respondent's conduct merited his being deprived of his costs. He referred to Section 28 as to the circumstances which would empower a judge to disallow costs.

Mr. Edwards in reply in addition to his support for the judge's decision contended in the alternative that the appellant was not a respondent within the meaning of Section 13 as at the time of filing the petition he was not the member whose election or return was being complained of. He relied for this submission on his interpretation of Section 4 (d)(ii) of the Act.

The Court expressed surprise at this glaring volte face, because on the pleadings from petition to summons applying for leave to withdraw the petition, the appellant was designated and treated as a respondent. Ignoring the gaucherie of that submission I turn to Section 4 (d)(ii) which reads:

"At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner -

(i) .....

(ii) to the member whose election or return is complained of (who is hereinafter referred to as the responddent), shall be given on behalf of the petitioner except where the petitioner is the Clerk of the House of Representatives or the Attorney-General. "

The Section was primarily concerned with the petitioner timeously providing the necessary security for costs to meet

(i) the expenses of witnesses

(ii) the respondent's costs

and purposefully made a member of the House of Representatives whose seat was in issue a respondent.

The particulars of the petitioner's pleadings impliedly recognized this and in appreciation of the close results of the election named both as respondents and pleaded thus:

> "Take notice that the following are the Particulars of the acts complained of as avoiding the election or return of either of the Respondents pursuant to section 8 of the Election Petitions Act."

The prudence in so pleading was justified as at the filing of the summons for leave to withdraw the petition the appellant was (and still is) the sitting member of the House of Representatives. There really is no merit in this argument.

The learned trial judge in dealing with the application for costs had this to say:

> "The mere fact that the applicant, the Attorney General has asked - in the circumstances, outlined in the affidavit filed by the Solicitor General - the Court to grant leave for the petition to be withdrawn, so that Mr. Stephenson may prosecute his complaint; does this fact alone give rise for an order for costs?
>
> " Is the respondent Thompson, entiled to any costs? In the wording of the Section:
>
> 'If a petition is withdrawn, the petitioner shall be liable to pay the costs of the respondent.'
>
> "This is not a case where there is a withdrawal of the petition simpliciter. In other words, something is being put in its place. This is not a case in which allegations of a personal nature, touching the conduct of Mr. Thompson or of any particular person having been made,

"the petition is being withdrawn on the ground that there is nothing to support it. This is simply a case where the Attorney General, to use the words of Mr. Edwards, as parens patriae, having been informed of a certain situation that had taken place in the constituency filed a petition to declare what what taken place null and void. He was acting for and on behalf of the public generally. He has argued that events have taken place subsequently, in which the fortunes of one candidate have changed and he has taken upon himself to file and prosecute his own petition. The allegations generally remain the same. So then, the Court asks itself this question: What has been put before it, so that its discretion may be exercised in ordering costs against the Attorney General? What is the matter that has been put before the Court?

" In my view, I haven't seen anything, nothing of substance. There is nothing at all other than a reference to the power which the Court has and a suggestion that these petitions are separate and distinct. In my view, the cross-petition by Mr. Thompson - and at the moment, I am not prepared to make any remark as to whether or not a cross-petition is appropriate in an election petition - is relevant in the question of costs. There is a thing called putting up recriminatory evidence by a respondent against a petitioner, where the petitioner claims the seat. But that is something quite different from a cross-petition. However, for the purpose and the point that I am making, Mr. Thompson, himself, in his own cross-petition has put forward facts to show that there is a good cause for an election petition to be filed by somebody, touching the election that was held in this very constituency."

In ruling as he did the learned trial judge was obviously concerned with the unquestioned laudable motives of the Attorney in bringing the petition and the practicalities which moved him to withdraw it.

However, a distinction must be drawn between a joint petition which is signed by more than one (Section 4(a) of the Act) and several petitions by different persons. In my view it is only of the former that the following provisions of Section 13 are applicable:

"Where there are more petitioners than one, no application to withdraw a petition shall be made except with the consent of all the petitioners."

In the latter, the proceedings are independent and a petitioner may withdraw his petition at will as was done in the instant case and that petitioner alone would be liable for costs under the provisions of Section 13.

I have given anxious consideration to this aspect of the matter because notwithstanding the clear an unambiguous provisions of Section II (i)(e) of the Judicature (Appellate Jurisdiction) Act, in a number of decided cases concerned with similar provisions in the English Act the opinion has been expressed that notwithstanding such provisions a Court of Appeal may entertain an appeal against an order in relation to costs where the appeal involves a question of law or a fundamental principle.

In Donald Campbell & Co. v. Pollak (1927) All E.R. Rep. p.1 at p.4:

> "Branson, J., who re-tried this action (under an order for a new trial) without a jury, decided the issues of fact in favour of the defendant (the respondent in this appeal), but gave judgment for him without costs. In arriving at his decision not to give the defendant his costs, the learned judge relied mainly upon the fact - established by the verdict and judgment in another action which had been consolidated with the present action - that the defendant had been guilty of improper conduct which (as he held) had induced the liquidator of the appellant company and indeed, had forced him, in the execution of his duty, to bring the present action. On an appeal by the defendant to the Court of Appeal against so much of the judgment of Branson, J., as had ordered that no order should be made as to costs, that court held that the trial judge was not entitled to take into account the proceedings in the other action - which (as they held) had been "de-consolidated" and wholly separated from the present action by the order for a new trial of this action - and, accordingly, that the judge had no materials before him upon which it was right for him to exercise his discretion as to costs; and they allowed the appeal and declared the defendant entitled to his costs of action. The plaintiffs have now appealed to this House against the order of the Court of Appeal. The costs in question amount to a very large sum, as they include the costs of two long trials and several appeals. The respondent raises the preliminary objection that the appeal is incompetent as being an appeal as to costs only, and your Lordships have now to deal with this preliminary objection. "

On appeal to the House of Lords it was held that:

> "Under s. 5 of the Supreme Court of Judicature Act, 1890 (see now s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925), the costs of and incidental to all proceedings in the High Court are in the discretion of the court or judge. This discretion must be exercised judicially, and if a judge were to refuse to give a successful party his costs on the ground of some misconduct wholly unconnected with the case, or of some prejudice,

> "the Court of Appeal would have power to intervene, but when the judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation, which have been proved before him or which he has himself observed during the progress of the case, than the Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by statute from entertaining an appeal from his decision. "

In Jones v. McKie and Mersey Docks and Harbour Board (1964) 2 All E.R. p. 842 the defendants' driver by the negligent driving of their lorry damaged the plaintiff's van. The plaintiff brought an action for damages for negligence against the driver and the board. In defence the board pleaded that the driver who, as was a common practice was on his way home for his dinner, and therefore, was not at the time acting in the course of his employment. Judgment was given in favour of the plaintiff against the driver but in favour of the board against the plaintiff. In the exercise of his discretion, the trial judge made no order as to the board's costs having regard to the lax system of control of its transport which he considered the board had permitted and in view of the fact that, the driver being unemployed, the plaintiff had little likelihood of recovering costs against him.

Applying the decision in the Donald Campbell case Wilmer, L.J. quoted with approval the following passage on page 844:

> "..... A successful defendant in a non-jury case has no doubt in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if - to put a hypothesis which in our courts would never in fact be realised - a judge were to refuse to give a party his costs on the ground of some misconduct - wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene."

In Bayliss Baxter Ltd. v. Sabath (1958) 2 All E.R. at p. 215 Jenkins, L.J., put it this way:

> "The matter as it now stands really comes to this, that in a case of this sort - that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs - such an application should not be entertained, in view of the express terms of s. 31 (1)(h) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect, 'In this case the learned judge did not in truth exercise his discretion at all'. It is only in a case of that kind that this court has jurisdiction to entertain such an appeal. "

In the instant case the learned judge took into consideration the state of the pleadings in this case, of the pleadings in the other petitions and was able to compare the conduct of the appellant in relation to those proceedings with that in the instant case. Because of my decision on the preliminary point, the question whether or not his reasons for making no order as to costs were sufficient does not now arise. Accordingly as I cannot say that the matters the judge considered were unconnected with the question of costs and he having exercised his discretion although the sufficiency of his reasons may be open to question, I am of the view that the Court is prohibited by statute to entertain the appeal from his decision without leave having been sought and obtained.

In the Court below, I note with interest that there was no positive opposition to the application for costs. Here before us the respondent was concerned in seeking an authoritative answer to the question whether or not there was a discretion in the Court in relation to costs. I find myself constrained to answer that question in the affirmative and for the reasons stated above to uphold the preliminary objection.

I would dismiss the appeal but like the judge in the Court below I would make no order as to costs.

CAREY, J.A.:

I have had the privilege of reading in draft the judgment of the learned President (Ag.) and desire to state that I am in entire agreement. I venture a comment on the true construction of the words - "if a petition is withdrawn the petitioner shall be liable to pay the costs of the respondent." - Section 13 Election Petitions Act.

A short historical excursus is useful in determining whether or not the section is concerned to allow a judge a discretion to award cost in the event of withdrawal of a petition. The Election Petitions Act which was enacted as far back as 1885 is a derivative of the United Kingdom Parliamentary Act 1868. Prior to that time matters affecting Parliament were dealt with by that body and were not within the purview of the Courts. The Election Petitions Act, although not procedurably exhaustive, does prescribe a code for the determination of matters such as corrupt practices at elections. It provides for a special judge, /Section 20/, and the procedure which should be followed. Secs. 4, 8, 20, 23, 24.

So far as the award of costs goes, all the possible permutations are set out. Section 28 provides:

> "28. 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 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. "

Where a petition has been prosecuted to a conclusion, the judge has an unfettered discretion in the award of costs. The section is not concerned to preserve the rule that costs follow the event so that the successful party would be entitled to his costs subject to his power to disallow costs in appropriate circumstances. By virtue of this section, the court could award costs to an unsuccessful party where he is compelled to meet, as the section indicates, vexatious conduct on the part of the other, unfounded allegations or unfounded objections. In this code, section 13 deals with the question of costs when a petition is withdrawn which is the only remaining situation. So as I have said all the situations in which costs may be ordered have been embraced. Seen in this way, section 13 does no more than section 28 which gives a discretion to award costs.

I must confess that during the arguments at the Bar, I had formed the view that Section 13 could very well have been included to remove the court's discretion. Parliament is deemed to know that costs follow the event. When the Act is read as a whole, however, it is perfectly plain that the discretion to award costs had not been removed. In my view any attempt to remove the discretion in the courts, whether to award costs or punishment should require words of the clearest import. The court should be slow to hold that any Act had removed a discretion from a superior court except compelled to do so by clear and unambiguous language.

WHITE, J.A.:

I agree that the appeal should be dismissed in the terms proposed by the learned President (Ag.)

KERR, P. (Ag.):

Accordingly, the appeal is dismissed. No order as to costs.