



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 03948

BETWEEN	RICHARD EDWARD AZAN	CLAIMANT
AND	MICHAEL STEER	1 ST DEFENDANT
AND	HASKEL THOMPSON	2 ND DEFENDANT

Abraham Dabdoub and Chumu Paris instructed by Dabdoub Dabdoub & Co. for Claimant/Petitioner.

Kirk Anderson and Miss Maria Burke instructed by Dunn Cox for 1st Respondent

2nd Respondent not present or represented.

Heard: July 27 and 28 and August 12, 2009

HIBBERT, J.

On August 7, 2007 the returning officer for the constituency of North West Clarendon, Haskel Thompson (the 2nd Respondent) received the nominations of Richard Edward Azan (the Claimant/Petitioner) and Michael Stern (the 1st Respondent) as candidates to contest the General Elections scheduled to be held on September 3, 2007.

Consequent on the result of the polls the First Respondent was declared the winner and was sworn in as a member of the House of Representatives.

On October 3, 2007 the Petitioner filed on Election Petition by way of a Fixed Date Claim Form seeking the following reliefs:

1. *A Determination that the First Respondent was, on the 7th August, 2007, not qualified to be elected to the House of Representatives including for the Constituency of West North Clarendon.*
2. *A Determination that the nomination of the First Respondent on the 7 August 2007 as a candidate for the Constituency of North West Clarendon in the General Election held on the 3rd day of September 2007 is invalid, null and void and of no legal effect.*
3. *A Determination that the Claimant/Petitioner, being the only qualified validly nominated candidate on the 7th August, was and is entitled to be returned to the House of Representatives as the duly elected member for the Constituency of North West Clarendon.*
4. *An Order that the Claimant/Petitioner be returned as the duly elected Member of the House of Representatives for the Constituency of North West Clarendon, or alternatively that the said election be declared null and void.*
5. *A Certificate directed to the Speaker of the House of Representatives pursuant to Section 20 (f) of the Election Petitions Act that the 1st Respondent was not duly elected or returned and that the Claimant/Petitioner is the duly elected and duly returned candidate for the Constituency of North West Clarendon.*
6. *A Certificate of Costs.*
7. *Such further and/or other relief as This Honourable Court shall deem just.*

After the filing of the Petition, the Petitioner made requests for information pursuant to Rule 34.1(1) of the Civil Procedure Rules.

In a response dated and filed on May 26, 2009 the First Respondent admitted that on August 7, 2007 he was a citizen of the United States of America and that he travelled on a passport issued by the relevant authority in the United States of America.

In written submissions filed on behalf of the First Respondent on July 23, 2009 the following submissions were made:

3. There is no dispute that the nomination date for the General Election was the 7th August 2007 and that, as at that date Mr. Stern was a United States citizen who had before then, travelled to foreign countries, using a United States passport.

19. In the circumstances, we ask that this Court conclude and let it be known to the Speaker of the House of Representatives, that a by-election is to be held in the Constituency of North West Clarendon, insofar as, on the 7th August, 2007, Mr. Michael Stern, the First Respondent, was not duly qualified to have been lawfully elected to the House of Representatives. Based on these concessions Mr. Dabdoub on behalf of the Petitioner requested that the Court, at the outset, declare that the First Respondent was not duly returned and elected as a member of the House of Representatives for the Constituency of North West Clarendon.

Upon Mr. Anderson stating that he had no objection to the declarations being made then, and based on the formulation arrived at between both Attorneys, the Court declared as follows:

On application of the Petitioner, and the First Respondent not offering any opposition in light of the admission of the First Respondent as set out in his further response to the request for information dated and filed on the 26th May, 2009, it is hereby declared that the First Respondent was not duly returned or elected as a member of the House of Representatives for the Constituency of North West Clarendon and I will certify accordingly to the Speaker of the House of Representatives.

There remain two issues to be decided

1. Was the First Respondent validly nominated as a candidate for North West Clarendon?
2. If the answer to the first question is in the negative what are the consequences that flow therefrom?

Validity of the Nomination

Section 39 of the Constitution states:

39. Subject to the provisions of section 40 of this Constitution, any person who at the date of his appointment or nomination for election -

(a) is a Commonwealth citizen of the age of twenty-one years or upwards; and

(b) has been ordinarily resident in Jamaica for the immediately preceding twelve months,

shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and no other person shall be so qualified.

Section 40 (2) states:

40 (2) No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who -

(a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State;

The nomination of candidates who seek election to the House of Representatives is governed by the Representation of the People Act.

Section 23(2) of that Act states:

23(2) Any ten or more electors qualified to vote in a constituency for which an election is to be held may nominate any person qualified to be a member of the House of Representatives as a candidate by signing a nomination paper in the form set out in the Second Schedule and causing such nomination paper to be handed to the returning officer between the hours referred to in subsection (1)

Provided that no candidate shall be deemed not to have been validly nominated by reason only of the fact that subsequent to nomination day any person by whom his nomination paper was signed is struck off any of the official lists for the relevant constituency.

Mr. Anderson on behalf of the First Respondent urges the Court to find that the nomination of the First Respondent was validly made. He places reliance on the judgments of Panton, P at paragraphs 39 to 42 and Harrison, JA at paragraphs 129 to 131 in **Dabdoub v Vaz and Ors (unreported) SCCA 45 of 2008** and **Vaz vs. Dabdoub (unreported) SCCA 47 of 2008**.

I do not think that these portions of the judgments assist him. Their Lordships were there concerned, not with the validity of the nomination of Mr. Vaz, but with the consequences which flowed from the fact that on the face of it a nomination was made.

Mr. Anderson also relies on Section 23(6) of the Representation of the People Act. It states:

(6) The returning officer shall not accept any deposit until all other steps necessary to complete the nomination of the candidate have been taken, and upon his accepting any deposit he shall give to the person by whom it is paid

to him a receipt therefor which shall be conclusive evidence that the candidate has been duly and regularly nominated.

This provision is identical to Section (17) (b) of the Parish Councils Acts and was considered by Smith C, J in **Mattison vs Junor (1977)** at page 199 of the judgment Smith C.J stated:

"It seems doubtful in view of the words underlined, whether a nomination to which no objection was taken can be upset at all so as to prevent a poll being taken on Election Day."

Here the Learned Chief Justice was referring to the words "which shall be conclusive evidence that the candidate has been duly and regularly nominated."

In dealing with the duties of the returning officer on nomination day he went on to say:

"But it is quite clear that there is no statutory duty on him to do so, and the weight of the authorities seem to suggest that he has no authority to decide on questions of disqualifications, except it be something appearing on the face of the nomination paper."

Panton, P in **Dabdoub v Vaz and Ors**. Having reviewed the decision in **Nedd v Simon (1977) 19 WIR, 347** expressed similar sentiments when he stated:

"The question whether the appellant had not been duly nominated was of no concern to the returning officer. I adopt the reasoning of that court."

It is quite clear, therefore that the provisions of Section 23 (6) of the Representations of the People Act merely serves to give the electors

notice that a candidate has been nominated, and does not give to the returning officer the power to pronounce on the qualification of the candidate.

To hold that the First Respondent was validly nominated as a candidate would be to ignore the clear and unambiguous provisions of the Constitution and the Representation of the People Act which state that only persons who are qualified to be members of the House of Representatives can validly be nominated as candidates for election to that House.

Accordingly I find that the nomination of the First Respondent was invalid.

Consequences

In the past the courts in Jamaica have adopted the common law principle of "votes thrown away" or "wasted votes" where it is found that a candidate who has been elected to a parish council or the House of Representatives was not qualified to be so elected.

Halsbury's Law of England Fourth Edition at paragraph 835 states:

"votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and to decide this scrutiny is not necessary. The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of willful perverseness on the part of the electors voting for the disqualified person"

In **Hobbs vs Morey (1904) 1 KB 74** Kennedy, J at page 78 said:

"The expression 'valid nomination', therefore includes the case of a person who is disqualified in fact, but whose disqualification is not apparent on the nomination paper and whose nomination has been sustained by the mayor. That being so, the election must proceed, and the question - as has been pointed out in some of the cases - becomes not a question between the two candidates, but between the successful candidate and the electorate. The election of such an unqualified person can be objected to in only one way, namely, by election petition to the court. The court on the hearing of the petition cannot, I think, declare that a candidate who has a minority of votes is elected unless it has first decided that the votes given to the candidate who is returned at the head of the poll are votes thrown away. I agree, however, that there are cases in which the court has power so to decide"

This passage was cited with approval by Smith C.J. in **Mattison v Junor**

(1977) 15 JLR 194 who at page 199 went on to say:

"It appears from Hobbs v Morey (1904) 1KB 74 and from other authorities to which reference has been made, that the over-riding principle is this:

That once an election is held, effect must be given to the will of the majority of the electorate and that a court should not lightly reject the will of the majority and impose upon an electorate a person whom the majority of them did not select to represent them. But the authorities are quite clear that if the electorate has due notice that a candidate is disqualified to be elected and with that knowledge they nevertheless vote for that candidate, then that will be tantamount to throwing their votes away and in that event the candidate who received the minority of the votes is entitled to be declared duly elected."

In **Dabdoub v Vaz and Ors** Panton, P stated:

*"I have no hesitation in saying that Smith C.J has in **Mattison v Junor** stated the position that applies in Jamaica."*

Mr. Dabdoub, however, submits that the "votes thrown away" principle conflicts with the Jamaican Constitution and the Representation of the People Act. He seeks to distinguish **Hobbs v Morey** by submitting that Section 23(b) of the Representation of the People Act imposes a duty on the returning officer to satisfy himself that all the necessary steps have been taken to complete the nomination of the candidate. I cannot agree with Mr. Dabdoub that this requires the returning officer to satisfy himself as to whether or not the proposed candidate is qualified to be elected.

Section 23 of the Act deals with procedure on nomination day and in my view all that the returning officer is required to do is to ensure that on the face of it the nomination form shows what appears to be a valid nomination.

Mr. Dabdoub also places reliance on Section 27 (1) which states:

27-(1) Whenever only one candidate has been nominated within the time fixed for that purpose the returning officer shall forthwith make his return to the Chief Electoral Officer, in the form set out in the second schedule, that such candidate is duly elected for the said Constituency and shall send within forty-eight hours a duplicate or certified copy of such return to the person elected.

With reference to this provision Mr. Dabdoub submits that the returning officer ought to have declared the Petitioner to have been duly

electd. Again I cannot agree with Mr. Dabdoub. Undoubtedly this section directs what the returning officer should do on nomination day where there is only one purported nomination.

The other section of the Act relied on by Mr. Dabdoub is Section 28-(1) which states:

28-(1) If more than one candidate is nominated for the Constituency in the manner required by this Act, the returning officer shall grant a poll for taking the votes of the electors.

He submits that a poll should only be held where more than one candidate is validly nominated. As the First Respondent was not qualified to be elected he submits that the holding of elections on North West Clarendon should be declared null and void thus any votes cast in this election should also be declared null and void and of no effect as anything arising from a nullity must also be a nullity.

Section 23 of the Representation of the People Act clearly sets out what is required for a valid nomination. Two scenarios may be looked at where the returning officer erred through inadvertence.

- (1) The returning officer certifies that candidates A and B were duly nominated and causes a poll to be held. Candidate A receives the majority of the votes, but it was subsequently discovered that only eight and not the required ten electors signed the nomination form.

(2) The returning officer certifies that candidates A and B were duly nominated and causes a poll to be held. Candidate A receives the majority of the votes, but it was subsequently discovered that only seven of the ten persons who signed the nomination form were at the time qualified to vote in that constituency.

On election petitions being filed no doubt the Court in each case would declare the nomination of A to be invalid and I would believe award the seat to candidate B.

Mr. Dabdoub therefore asks; "Why should the consequences of an invalid nomination because of the disqualification of the proposed candidate be treated differently?"

He places heavy reliance on the decision of the Indian Supreme Court in **Konappa Rudrappa Nadgouda v Vishwanath Reddy and Ors. (1968), INSC 215 (13th September 1968)**. In that case out of seven candidates who filed their nomination papers for election five withdrew their candidature leaving Nadgouda and Reddy. The nomination of Reddy was challenged on the grounds that he was disqualified by virtue of Section 9A of the Representation of the People Act.

That objection was overruled by the returning officer. At the polls Reddy secured the majority of the votes.

The Court subsequently declared the election of Reddy void on the grounds of disqualifications under Section 9A of the Representation of the People Act which reads:

A person shall be disqualified if, and for so long as, there subsist a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or, for the execution of any works undertaken by that Government.

Two other Sections of the Representation of the People Act came up for consideration, Section 84 provides that ---

Petitioner may in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

Section 101 provides:

If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion

- (a) that in fact the petitioner or such other candidate received a majority of the valid votes; or (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes, the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate as the case may be, to have been duly elected.

Previously, in **Keshar Laxman Borkar v Dr. Devras Laxman Anande (1960) 1SCR 902** the Court had ruled that votes cast in favour of a

disqualified candidate would be deemed to be thrown away, only when the voters had notice of the disqualification, and that in the absence of such notice there can only be fresh election.

The correctness of that decision was challenged in **Nadgouda v Reddy and Anor.**

After reviewing the English decision in **Drinkwater v Deakin (1874) 9 CP 626, Hobbs v Morey (1904) 1 KB 74, Hope v Lady Sandhurst (1889) 23QB 79** and **Re Bristol South East Parliamentary Election (1981) 3 All ER 354**, (all of which were considered by the Jamaican Courts), the Court held that the decision in **Borkar v Anande** was wrong, Shah, J. who delivered the judgment of the Court stated:

"The cases decided by the Courts in the United Kingdom appears to have proceeded upon some general rule of election law that the votes cast in favour of a person who is found disqualified for election may be regarded as thrown away only if the voters had notice before the poll of the disqualification of the candidate.

But in our judgment the rule which has prevailed in the British Courts for a long time has no application to our country. Section 53 of the Representation of the Peoples Act renders a poll necessary only if there are more candidates contesting the election than the number of seats contested.

If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary.

Where by an erroneous order of the returning officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected. The rule enunciated by the

Courts in the United Kingdom has only the merit of antiquity. But the rule cannot be extended to the trial of disputes under our election law, for it is not consistent with our statute law

Later in the judgment Shah, J. stated:

"We are again unable to see any logic in the assumption that votes cast in favour of a person who is regarded by the Returning officer as validly nominated, but who is in truth disqualified, could still be treated as valid votes, for the purpose of determining whether a fresh election should be held. When there are only two contesting candidates and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification."

Mr. Dabdoub urges the Court to adopt the reasoning in **Nadgouda v Reddy** and to declare Mr. Azan as the elected candidate for North West Clarendon. He submits that although there are no statutory provisions in Jamaica which are equivalent to Section 84 and 101 of the Indian Representation of the People Act, there is nothing to bar the Petitioner from asking the Court to declare him duly elected. He further submits that Section 20(f) of the Election Petitions Act is broad enough to permit the court to so order.

As attractive as Mr. Dabdoub's arguments may seem, he has been able to convince me that the circumstances of this case can be distinguished from the case of **Dabdoub v Vaz** and I am bound by the decision of the Court of Appeal in that case.

Accordingly, in adopting the principle governing "votes thrown away" as enunciated in **Mattison v Junior** and **Dabdoub v Vaz**. I rule that a by-election should be held to elect a candidate for North West Clarendon.

My findings therefore are as follows

1. The first Respondent was on nomination day, August 7, 2007 not qualified to be elected to the House of Representatives.
2. His nomination and subsequent election as the candidate for North West Clarendon are invalid. Consequently he was not duly returned or elected as a member of the House of Representatives.
3. There being no evidence on which I can find that the votes of the electors are to be treated as "thrown away", the application of the Petitioner to be declared duly elected is refused.
4. A by-election should be held to fill the vacancy which exists in North West Clarendon.

As a consequence costs are awarded in favour of the Petitioner against the first Respondent.

In closing I wish to remark that persons who offer themselves and political leaders who put them up for election owe a duty to the electorate to ensure that only persons who are duly qualified to be elected are to be nominated. The words of Weeramantry J in **Peiris v Perera (1969) 72 New Law Reports of Ceylon 232** should be heeded. At page 270 he said:

"Essential to the proper conduct of elections is the requirement that only candidates qualified in law to be

Members of Parliament should offer themselves to the electorate.

Those who already labour under a disqualification which by law prevents them from taking their seat in Parliament go to the polls at their peril"