[2010] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 114/2010

APPLICATION NO. 178/2010

BETWEEN	**NORMAN WASHINGTON MANLEY BOWEN**	**APPLICANT**
A N D	**SHAHINE ROBINSON**	**1st RESPONDENT**
A N D	**NEVILLE WILLIAMS**	**2nd RESPONDENT**

Abraham J Dabdoub and Raymond Clough, instructed by Knight, Junor & Samuels, for the applicant

Ransford Braham, instructed by Ernest A. Smith & Co for the 1st respondent

Lackston Robinson for the Attorney General

16 and 24 November 2010

IN CHAMBERS

MORRISON JA

[1] This is an application for a stay of the judgment of Jones J dated 8 October 2010, pending the hearing of this appeal.

[2] On 16 November 2010, I delivered judgment on a preliminary objection taken by the applicant and ordered that the 1st respondent would not be permitted to continue to

appear or to act as a party against the petition, although she remained a respondent in the proceedings. As a consequence of this ruling, the 1st respondent, although represented by counsel (who were present at all times), has taken no part in the hearing of the substantive application.

[3] In my judgment on the preliminary objection I outlined briefly the background to this application and I do not propose to repeat it here. The grounds of the appeal against Jones J's judgment are as follows:

> (a) That in arriving at his decision the learned judge erred in not considering the facts set out in the affidavit of the claimant which was the only evidence properly before him and in failing to do so the judge erred in not declaring Oswest Senior-Smith the duly elected Member of Parliament for the constituency of Saint Ann North Eastern.
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> (b) That the learned judge erred in making his decision declaring the seat vacant without affording the claimant and/or his attorneys-at-law the opportunity to address him on the question as to whether by law and based on the evidence before him Mr Senior-Smith should have been returned as the duly elected member of the House of Representatives for the constituency of Saint Ann North Eastern.
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> (c) That the learned judge erred in declaring the seat vacant as he lacked the jurisdiction as an application to substitute a respondent was filed and served on the claimant's attorneys-at-law on 1 October 2010, well within the 14 days stipulated by section 15 of the Election Petitions Act, by one Neville Williams.

[4] On the application now before the court, the applicant now seeks an order "that the Judgment of the Honourable Mr. Justice Roy Jones delivered on the 8th day of

October 2010 be stayed pending the hearing of this Appeal". The application is supported by an affidavit sworn to on 11 October 2010 by Mr Raymond Clough, who is a member of the applicant's legal team. In that affidavit Mr Clough, after outlining the contents of the applicant's election petition and the circumstances in which the 1st respondent came to file notice of her intention not to oppose the petition, states as follows:

> "8. That on the 1st day of October 2010 Messrs Kent Gammon & Co. acting on behalf of one Neville Williams, filed in the Supreme Court a Notice of Application to be substituted as a Respondent and the said Notice together with the Affidavit in Support was duly served on the Claimant's Attorneys-at-Law on the 1st day of October 2010 at 3:20 pm.
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> 9. That on the 4th day of October 2010, upon the petition coming on for hearing before His Lordship Justice Mr Roy Jones, Mr Kent Gammon attempted to make the application for Mr Neville Williams to be substituted as a Respondent but his Lordship advised that he had no such application before him and had not seen any such application. His Lordship further stated that the only application he was prepared to deal with on that day was the application for indemnity costs.
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> 10. That after hearing the Claimant's Counsel and the 1st defendant's Counsel on the application for indemnity costs his Lordship reserved his decision and indicated that the Notice of Intention not to oppose the Election petition was published in the Jamaica Gazette on the 23rd day of September 2010 and accordingly the 14 days had not yet expired whereby he could deal with the determination of the seat. The Court was adjourned to the 8th day of October 2010.
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> 11. That on the 8th day of October 2010, on attendance at Court, the Learned judge proceeded to hand down a written Judgment which included a determination declaring the seat vacant. Counsel for the Claimant indicated that Claimant was not afforded the opportunity to make submissions in

relation to whether or not Mr Oswest Senior Smith ought to be declared the duly elected Member of Parliament. His Lordship indicated that as he had already made a ruling the Claimant should appeal.

12. That on the 8th day of October at approximately 2:30 p.m. the Claimant filed an Appeal and I beg to refer This Honourable Court to the Notice and Grounds of Appeal filed herein.

13. That the Appeal had a good prospect of success.

14. That having declared the seat vacant and an appeal having been lodged the Election Petition is still not finalized and accordingly no election should be held to fill the vacancy and stay of execution should therefore be issued.

15. That should an election be held to fill the vacancy and the Appellant be successful on his Appeal the decision of the Court of Appeal would result in confusion and further litigation to determine who is the lawful Member of Parliament for the Constituency of Saint Ann North East."

[5] In a very helpful written submission provided to the court by Mr Dabdoub, the applicant sets out the main bases of the application as follows:

"**STAY OF EXECUTION**

44. The Claimant submits that this Honourable Court ought to stay execution of the Judgment of the Honourable Mr Justice Roy Jones on two basis:

GROUND ONE

That the Learned Judge, having had notice that a Notice of Application was filed within fourteen days of the date of publication in the Jamaica Gazette, as required by Section 15 of the Election Petitions Act, of the 1st Respondent's Notice of Intention not to oppose the Petition lacked the jurisdiction to come to a conclusion in respect to the Petition as there

was an application for substitution of the 1st Respondent pending before the Court.

45. That there is no doubt that Neville Williams had a right to be substituted as a Respondent and having had notice that an application had been filed within the time allowed by Section 15 His Lordship ought to have heard the said Application or await the outcome of the said Application before making his ruling declaring the seat vacant.

46. That in failing to do so His lordship exceeded his jurisdiction as his right to determine the Petition had been suspended by the intervention of Neville Williams.

GROUND TWO

47. From as long ago as 1859 in the case of the Athlone Election 1859, it was decided that writ of election must [not] be issued if the seat which has been vacated be claimed on behalf of another candidate. The ruling in that case was that the writ be withheld until after the trial of the claim.

48. In this matter the proceedings under the Election Petitions Act have not been completed as pursuant to the provisions of the Act the Appellant has filed an appeal in which he complains that he was denied the opportunity to be heard on the question of the order seeking that the seat be awarded to Oswest Senior-Smith. In other words, the trial of the petition has not been concluded until his Lordship rules on the question of whether the seat should be awarded to Mr Senior-Smith. That the Claimant having claimed the seat for another candidate the proceedings ought to be stayed pending the outcome of the Appeal against the decision declaring the election null and void and the seat vacant without deciding on the question of whether some other person should be returned as the duly elected candidate.

49. Further the Appellant submits Section 20(f) requires His Lordship to determine if 'any or what other person was duly returned or elected' and that His Lordship failed to hear submissions in that regard despite the fact that the Petition sought an order that Oswest Senior Smith be declared elected."

[6] In support of these submissions, Mr Dabdoub referred me to a passage from Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (23rd edn, pages 40-41) and two election cases from India, ***D. Sanjeevayya v Election Tribunal Andra Pradesh*** (1967 SCR (2) 489) and ***Sri Thomas Mates Gudhino v Election Commission of India*** (AIR 2002 Kant 232). This material suggests that a writ for a bye-election should not normally be issued "if the seat which has been vacated be claimed on behalf of another candidate" (May, page 40).

[7] The jurisdiction of a single judge of the Court of Appeal to order a stay is to be found in rule 2.11(1)(b) of the Court of Appeal Rules 2002 ('the CAR'), which provides for the making of an order "for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". The first question which arises is therefore whether I do in fact have the power to make the order sought by the applicant, which is that the judgment of Jones J "be stayed pending the hearing of this appeal".

[8] Section 20(f) of the Election Petitions Act sets out the orders that the judge of the Supreme Court who hears an election petition is empowered to make at the conclusion of the evidence in a trial on an election petition. It provides as follows:

> "At the conclusion of the trial, the Judge shall determine whether the member of the House of Representatives or the Parish Council, or the Council of the Kingston and St. Andrew Corporation, as the case may be, whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and

> shall certify such determination to the Speaker of the House of Representatives, or, if the Speaker be the respondent, to the Deputy Speaker, in the case of an election to the House of Representatives, or to the chairman of the Parish Council, or if such chairman be the respondent, to the vice-chairman, in the case of an election to a Parish Council or to the Mayor of the Kingston and St. Andrew Corporation or, if the Mayor be the respondent, to the Deputy Mayor, in the case of an election to the Kingston and St. Andrew Corporation; and subject to an appeal under section 22 the return shall be confirmed or altered, or the writ for a new election shall be issued, as the case may require, in accordance with such determination."

[9] The operative paragraphs of Jones J's judgment accordingly read as follows:

> "1. That by virtue of Section 39 and 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 Saint Ann North East is null and void and of no effect and the seat is declared vacant.
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> 2. That I do so certify to the Speaker of the House of Representatives.
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> 3. That the Claimant do serve a copy of this Judgment on the Speaker of the House of Representatives and the Clerk of the Houses of Parliament.
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> 4. That the 1st Respondent (the unsuccessful party) shall pay all the costs (meaning on an indemnity basis) 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."

[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with

regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Woolf as follows (in 'The Declaratory Judgment', 2nd edn. para. 1.02):

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

[11] Although the application before me seeks an order staying "the Judgment" of Jones J, it will already have been seen that the power given by rule 2.11 is to "stay execution of any judgment or order". However, I make no point about this, since it is

clear from Mr Clough's affidavit that the application is in substance for a stay of execution.

[12] More to the point, in my view, is the further question that now arises, which is whether the court has any power to stay execution of a purely declaratory order. Although the word 'execution' is not defined in the CAR, it is, as Lord Denning MR observed in ***Re Overseas Aviation Engineering (G.B.) Ltd*** [1963] Ch. 24, 39, "a word familiar to lawyers…[which] means, quite simply, the process for enforcing or giving effect to the judgment of the court". This dictum is cited as authority for the definition, in almost identical terms, to be found in Halsbury's Laws of England (4th edn, vol. 17, at para. 401) and it clearly connotes, in my view, the setting in motion of some kind of process, directed at the party obliged by the terms of the judgment to give effect to it.

[13] In the work 'Declaratory Orders', 2nd edn, Mr P. W. Young QC, an Australian author, makes the point (at para. 212), that "The enforceability of a declaratory order is the weak spot in its armour, as there is no sanction built into the declaratory relief". And further (at para. 2408) -

> "The effect of the court's order is not to create rights but merely to indicate what they have always been…Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings. Thus if it is held that the decision of a licensing authority is void and accordingly the licences issued are null and void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal."

[14] Thus, in the case of ***Director of Public Prosecutions v Mark Thwaites et al*** (SCCA No. 14/2009, Application No. 39/2009, judgment delivered 5 March 2009), this Court had to consider an application for a stay of execution of a judgment of the Full Court of the Supreme Court granting the respondents a series of declarations in respect of the constitutional status of certain statutory provisions, pursuant to which the respondents had been charged and their trial commenced in the Resident Magistrate's Court. The Director appealed and sought a stay of the proceedings in the Resident Magistrate's Court pending the hearing of the appeal. The application was heard and refused by Dukharan JA sitting as the single judge and the Director applied to the court itself for the discharge or variation of his order. The court (Panton P, Harrison and Harris JJA) dismissed the application and this is what Panton P said in his brief oral judgment (at para. 5):

> "…we are satisfied that Mr Justice Dukharan made no error, in that, it was impossible for him to stay the execution of that type of judgment delivered by the Full Court and so the application to vary or discharge his order has to be refused. So far as the request for a stay of the proceedings in the Resident Magistrate's Court is concerned we accept the submissions, and we are confident that we are correct in so accepting, that the Resident Magistrate's Court proceedings are not before us. That being so, there is nothing for us to grant a stay." (For a decision of the Court of Appeal of Belize to similar effect, see ***Attorney General et al v Jeffrey Prosser et al*** Civil Appeal No. 7/2006, judgment delivered 8 March 2007).

[15] In the instant case, it seems to me to be clear from section 20(f) of the Act that, the election of the 1st respondent on 3 September 2007 for the constituency of Saint Ann North Eastern having been declared a nullity by the judge's order, such further steps as may be necessary to give effect to the court's decision do not require either the applicant or the 1st respondent herself to take, or to refrain from taking, any action of any kind: the issue of a writ for a new election, for instance, is a matter squarely within the purview of the Governor-General acting on advice, pursuant to section 3 of the Representation of the People Act and the provisions of the Constitution of Jamaica. I should perhaps say for completeness that I have not lost sight of the decision of this court in ***Phyllis Mae Mitchell v Abraham Joseph Dabdoub*** **et al** (SCCA No. 95/2001, judgment delivered 25 October 2001), which was that the words "subject to an appeal under section 22" in section 20 (f) of the Act cannot be interpreted to mean that there is an automatic stay of execution once an appeal has been filed. However, the decision does not affect the question with which I am faced on this application, which is whether a stay of execution is appropriate in the case of a purely declaratory judgment.

[16] It follows from this therefore that, in my judgment, no question of a stay of execution can arise in this case and the application must be refused accordingly. In the circumstances, there will be no order as to the costs of this application.