

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 93/2008

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
 THE HON. MRS. JUSTICE HARRIS, JA.
 THE HON. MR. JUSTICE DUKHARAN, JA. (Ag.)**

BETWEEN: MICHAEL STERN APPELLANT
AND RICHARD AZAN 1ST RESPONDENT
AND HASKELL THOMPSON 2ND RESPONDENT

Kirk Anderson and Mrs. Motheba Linton instructed by DunnCox for the Appellant

Abraham Dabdoub and Chumu Paris instructed by Scott Bhoorasingh and Bonnick for the 1st Respondent.

2nd Respondent not appearing.

28th October and 19th December, 2008

PANTON, P.

I have read the reasons for judgment that have been written by Harris, J.A. I agree and have nothing to add.

HARRIS, J.A.

1. This is an appeal against an order of Marva McIntosh, J., in which she refused an application by the appellant to set aside the service of and to strike out a Fixed Date Claim Form, notice of presentation of election petition and security filed by the 1st respondent.

2. The appellant and the 1st respondent were contestants in the General Elections held on September 3, 2007 for the North Western Clarendon constituency. The appellant represented the Jamaica Labour Party while the 1st respondent represented the People's National Party. The 2nd respondent is the Returning Officer for the constituency. The appellant was the successful contender.

3. On October 3, 2007, the 1st respondent filed a Fixed Date Claim Form challenging the appellant's right to be returned as a duly elected member of the House of Representatives. A notice of presentation of election petition and security was also filed. Particulars of Claim were outlined as part of the Fixed Date Claim Form; they are as follows:

PARTICULARS OF CLAIM

"1. The Election for the return of a member of the House of Representatives for the Constituency of North West Clarendon was holden on the 3rd day of September 2007, and nomination day for the said election was 7 August 2007 when Michael A. Stern, also known as Michael Anthony Stern, a citizen of the United States of America, of the Jamaica Labour Party and the Claimant/Petitioner of the People's National Party were nominated as the candidates.

2. That the final count was completed on the 5 September 2007 and the 2nd Respondent herein did declare the 1st Respondent Michael A. Stern as being the duly elected member of the House of Representatives for the Constituency of North West Clarendon.

3. That pursuant to Section 49 of the Representation of the People Act the said Returning Officer Haskell Thompson the 2nd Respondent herein, made his Election return to the Director of Elections on the 12 September 2007 by forwarding to the said Director of Elections the Election Writ with his return together with all documents specified in Section 49 (1) (a) to

(g) of the Representation of the People Act and used in the said election.

4. That the Claimant/Petitioner is a Businessman and for the purposes hereof his address is P.O. Box 56, Spaldings P.O., Clarendon.

5. The Claimant/Petitioner was on the 7 August 2007 validly nominated as a candidate for the Constituency of North West Clarendon in the General Elections held on the 3 September 2007 representing the People's National Party.

6. The First Respondent is a businessman, a citizen of the United States of America, and the holder of a passport issued by the Government of that country and for the purposes hereof his address is Main Street, Frankfield, Frankfield P.O., Clarendon, Businessman.

7. The Second Respondent is the Returning Officer for the Constituency of North West Clarendon and has conduct over the procedure for elections for the purpose of ensuring that the said election is conducted in accordance with the provisions of the Constitution of Jamaica and the provisions of the Representation of the People Act.

8. That the nomination of the First Respondent was null and void and the Claimant/Petitioner, being the only validly nominated candidate, was and is entitled to be returned as the duly elected Member of Parliament for the Constituency of North West Clarendon.

9. That the Section 40 (2) (a) of the Constitution of Jamaica specifically provides that no person shall be qualified to be elected as a Member of the House of Representatives who is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State.

10. That the United States of America is a foreign Power or State.

11. That subsequent to nomination day the question of whether a person who held citizenship in a foreign

country could be elected to the House of Representatives arose in the public media and was the subject of much discussion.

12. That the question of the disqualification of persons to be elected to the House of Representatives as a result of an acknowledgement of allegiance to a foreign power or state was one which was the subject of news broadcasts and was being widely discussed on radio and elsewhere including the fact that any vote given to a candidate who was not qualified to be elected would not be counted.

13. That throughout the election period the Claimant/Petitioner and other members of his campaign team campaigned extensively throughout the constituency of North West Clarendon and during the course of such campaigning did inform the voters, whilst on House to House visits and otherwise, that the 1st Respondent was not qualified to be elected to the House of Representatives as he was by virtue of his own act under an acknowledgement of allegiance, obedience or adherence to a foreign power or state and that any vote for him would be wasted and not counted for him.

14. That the First Respondent, as a consequence of the fact that he is, by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power, namely the United States of America, is a person who is not qualified to be elected to the House of Representatives.

15. That the 1st Respondent is and was on nomination day, the 7 August 2007, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state and therefore not qualified to be elected and not qualified to be nominated.

16. That the 2nd Respondent is the Returning Officer for the said constituency of North West Clarendon and the person under the Representation of the People Act who, in the event of there being only one validly nominated candidate, ought to have returned the Claimant as the only validly nominated candidate.

17. That on the 7 August 2007 the 2nd Respondent,

the Returning Officer for North West Clarendon did deliver to the Claimant/Petitioner four sets of the Voters' List (hereinafter called the "nomination day lists") to be used in the said General Election. That to the best of the information, knowledge and belief of the Claimant/Petitioner the said Voters Lists were printed on or about the 1 June 2007 and bore the date of printing the 1 June 2007.

18. That on election day the lists supplied to the Presiding Officers in the Polling Stations across the said Constituency (hereinafter called the "election day lists") were different to those supplied to the Claimant/Petitioner on nomination day in that there were names which appeared on the nomination day list which did not appear on the election day list and there were names on the election day lists which did not appear on the nomination day lists. The said election day lists were printed on or about the 25 August 2007 and bore the date of printing the 25 August 2007. That these occurrences were as a result of the lack of due care and attention on the part of officials and/or workers of the electoral office of Jamaica acting otherwise than in good faith.

19. That there were persons who were on the nomination day lists who attended at the relevant polling station to vote but were unable to vote as their names were not on the election day lists. That the returning officer and or other electoral officials, acting otherwise than in good faith, were responsible for the omission of the names of these persons appearing on the election day lists thereby disenfranchising them.

20. That persons who were not on the nomination day voters lists and so were not entitled to vote did in fact vote at the said election as their names appeared on the election day lists. That the returning officer and or other electoral officials, acting otherwise than in good faith, were responsible for the inclusion of the names of these persons appearing on the election day lists or on transfer lists.

21. That the names of persons who were duly enumerated and verified and who were entitled to vote could not vote as their names did not appear on the election days lists. That the returning officer and

or other electoral officials, acting otherwise than in good faith, were responsible for the omission of the names of these persons from the election day lists.

22. That the Claimant claims a right of return as the duly elected Member of Parliament for the Constituency of North West Clarendon.

23. Alternatively, the Claimant/Petitioner seeks a determination by This Honourable Court that the said election was null and void."

4. On the Fixed Date Claim Form the appellant's address is stated as Main Street, Frankfield, Frankfield, P.O., to which the documents were sent by registered post on October 9, 2007. On November 7, 2007, the appellant filed an Acknowledgement of Service with respect to these documents.

5. On November 12, 2007 the appellant filed a notice of application for court orders which was followed by an amended notice of application on November 19, 2007. These were superseded by a further amended application filed on June 20, 2008 in which the orders hereunder were sought:

- "1. That the Notice of Presentation of Election Petition, and of the Security, Fixed Date Claim Form (Election Petition), and Particulars of Claim contained in the said Fixed Date Claim Form filed herein on October 3rd, 2007 be struck out and/or service on the 1st Respondent of the Notice of Presentation of Election Petition, and of the Security, Fixed Date Claim Form (Election Petition) and the Particulars of Claim filed herein on October 3rd, 2007 be set aside.
2. That it is hereby declared that the Notice of Presentation of Election Petition and of the Security Fixed Date Claim Form (Election Petition), filed herein on October 3rd, 2007 were not duly served on the 1st Respondent,

Michael Stern, and that the Particulars of Claim were not duly furnished on the said Respondent.

3. That it is hereby declared that the Notice of Presentation of Election Petition and of the Security, Fixed Date Claim Form (Election Petition), filed herein on October 3rd, 2007 not having been duly served upon the 1st Respondent, Michael Stern, and the Particulars of Claim contained therein having not been duly furnished, the Court has no jurisdiction in and over the Election Petition claim filed herein.
 4. That the costs of this application be in favour of the 1st Respondent."
6. It is of importance to set out the grounds upon which the orders were sought.

They are as follows:

- "1. The purported service of Notice of Presentation of Election Petition and of the Security, Fixed Date Claim Form (Election Petition) filed herein on October 3rd, 2007, by registered mail referred to in the Affidavit of Lescine Prendergast sworn to and filed herein on the 23rd October, 2007 is invalid, void and of no effect, they having been served out of time and contrary to Section 6 of the Election Petitions Act.
2. The purported service of the Particulars of Claim contained in the said Fixed Date Claim Form (Election Petition), by registered mail referred to in the Affidavit of Lescine Prendergast sworn to and filed herein on the 23rd October, 2007 is invalid, void and of no effect they having not been furnished on the 1st Respondent in accordance with Section 8 of the Election Petitions Act.

3. That the 1st Respondent relies upon Rule 9.6 of the Supreme Court of Jamaica Civil Procedure Rules, 2002.”
7. The learned judge, on July 31, 2008, made the following orders:-
- “1. Application to strike out Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused.
 2. Application to set aside service of Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused.
 3. That the First Respondent file and serve his Defence by August 12, 2008.
 4. That the matter will be set down for Case Management Conference on the 23rd September 2008.
 5. Costs to the Claimant/Petitioner to be taxed if not agreed upon.”
8. The following grounds of appeal were filed:
- “a) The learned Judge erred in concluding that the methods of service under Section 6 of the Election Petitions Act must be understood to apply not only to documents to be served under that Section, but to how all accompanying documents are to be served including Particulars of Claim.
 - b) The learned Judge erred in equating “serve” as is used in Section 6 of the Election Petitions Act to “furnish” as is used in Section 8 of the same Act. thereby ruling that the Particulars of Claim were furnished at the time when they were posted.
 - c) The learned Judge further erred in

stating that since the Act gives the Petitioner the option of providing the particulars at the time of service of the Election Petition or within ten days **after service** (Emphasis ours), then the Particulars may be furnished either by personal service or by registered post.

- d) The learned Judge further erred in concluding that the provisions of Section 8 are directory
- e) The learned Judge erred in equating the address on the First Respondent's nomination paper to the address to which the documents were posted by concluding that **"the address to which the documents were posted was the address stated in the nomination paper, though they were not identical"**. (Emphasis ours).
- f) The learned Judge further erred in ruling that the address to which the documents were sent is the same address as the one on the nomination paper, as long as it referred to the same place where the First Respondent could be found or communicated with.
- g) The learned Judge erred in considering receipt of the relevant documents by the First Respondent in concluding that those documents were served in accordance with Section 6 of the Election Petitions Act."

9. I must pause here to state that Section 24 (3) of the Election Petitions Act prescribes that the provisions of the Judicature (Civil Procedure Code) Law, (now the Civil Procedure Rules 2002), shall be applicable to election petitions as far as practicable. Rule 8.1 (4) of the Civil Procedure Rules 2002 provides for the filing of a petition by way of a Fixed Date Claim Form. There can be no dispute that by the

issuance of the Fixed Date Claim Form on October 3, 2007, the election petition had been presented.

10. Two main issues arise for determination. The first is whether the copy of the Fixed Date Claim Form and the notice of presentation of petition and security were served in compliance with the requirements of section 6 of the Election Petitions Act. The second is whether particulars of claim had been furnished in accordance with section 8 of that Act.

11. I will now address the first issue. The brunt of Mr. Anderson's submissions on this issue was that the service of the Fixed Date Claim Form, the notice of presentation of the election petition and security was defective as the documents were not served in accordance with the provisions of section 6 of the Election Petitions Act.

12. Section 6 of the Act governs the service of an election petition, as well as the service of the notice of the presentation of the petition and the security. The section reads:

"6. Notice of the presentation of a petition and the security (if any) accompanied by a copy of the petition shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent.

Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

13. By section 6 of the Act, service of the petition must be effected by registered post within 10 days of the presentation of the petition. The question of service of an election petition was decisively determined in this court in the recent case of **Mitchell v Mair and Others**, C.A. 125 of 2007 delivered 16th May 2008, in which it was held that a copy of an

election petition together with the notice of presentation of the petition, transmitted by registered post, were duly served immediately upon the posting of the documents.

14. The Fixed Date Claim Form recited the appellant's address as that which appears on his nomination papers, namely Main Street, Frankfield, Frankfield P.O. The documents were dispatched to him by registered post at the address stated in his nomination papers. They were transmitted on October 9, 2007, within 10 days as promulgated by section 6 of the Election Petitions Act. It is of worth to mention that the appellant acknowledged receipt of them by filing an acknowledgement of service. It is without doubt that the complaint as to an irregularity, or, defect in the service of the documents is clearly unmeritorious.

15. I will now turn to the second issue which relates to the question as to the service of the particulars. Mr. Anderson submitted that section 8 of the Election Petitions Act makes express provision for the furnishing of particulars of the claim. The word 'furnishing', he argued, must be interpreted as being peculiar to section 8 of the Act and the word 'served' in section 6 cannot be imported into section 8 to cure the requirement of the furnishing of the particulars. If Parliament had so intended, it would have so provided, he argued. Section 6, he further argued, provides for the service of an election petition only and the manner in which the petition ought to be served and clearly not for the service of particulars.

16. It was Mr. Dabdoub's submission that section 6 must be read conjunctively with section 8. He argued that, in this case, the grounds as well as particulars of the claim are bound together. Rule 8.2 (1) of the Civil Procedure Rules 2002 provides that a Claim Form may be served without furnishing particulars of the claim; however, if the claimant

has included the requisite particulars in his Claim Form, then there would be no need for further particulars, he argued. He further submitted that the Fixed Date Claim Form, in conformity with the rules, contained all material facts, which, by their very nature are also material particulars and as a consequence, all relevant particulars had been served on the appellant, and were furnished so soon as the Fixed Date Claim Form had been dispatched to him by registered post.

17. The learned judge found that section 8 of the Election Petitions Act was directory and concluded that particulars of the claim were furnished in accordance with that section of the Act. Was the learned judge correct in ruling that the provisions of section 8 of the Act are directory and that particulars of the claim were furnished by way of the Fixed Date Claim Form? Does section 8 impose a mandatory requirement for the furnishing of particulars of the claim? The answer to these questions depends on the result of an inquiry not only into the provisions of section 8 but also section 6. The first task with which the court is faced is to embark on a quest of discovering the true meaning of section 8.

18. Section 8 makes provision for the contents of an election petition to include general grounds on which the petitioner places reliance and for the furnishing of particulars of the acts complained of within 10 days subsequent to the presentation of the petition. The section states:

"8. "It shall be sufficient that a petition shall state generally the grounds on which the petitioner relies for challenging the election or return, concluding with a statement of the relief sought; particulars, however, of the acts complained of as avoiding the election or return shall be furnished by the petitioner to the respondent, within ten days after the

presentation of the petition.

It shall be lawful for a Judge of the Supreme Court, on a summons taken out by the respondent for the purpose, to order further and better particulars to be furnished by the petitioner, or on a summons being taken out by the petitioner to allow such particulars to be added to or amended."

19. It is a settled and well known canon of construction that words should be given their natural and ordinary meaning. In **The Attorney-General of Ontario v Mercer** (1883) 8 A. C. 767 at 778 the Privy Council in dealing with the construction of words in a statute, in its advice, stated that:

"It is a sound maxim of law, that every word ought, prima facie to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context".

20. Where the meaning of words in any enactment is plain and unambiguous, then there is no need to have regard to any interpretation other than that which is prescribed in the statutory instrument. In circumstances where the language of the enactment is clear, effect must be given to it, as, the words of the statute represent the intention of Parliament. **In Warburton v Loveland** (1882) 2 D & C 480 at 489 the rule was defined by Tindal C. J. thus:-

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature"

21. Unless a statutory provision admits of more than one interpretation, the court is obliged to adhere to the words as used in their natural sense. The fundamental duty of

the court, is to unearth the natural meaning of the words used in the context in which they occur, such context being taken to include any other section of the statute or any other phrase therein which may elucidate the true intention of the legislature. See in **Re MacManaway** and in **Re The House of Commons** [1951] A.C. 161

22. In seeking to interpret a statutory provision to determine the intention of Parliament, a court is required to exercise great care and ferret out such intention from the statute itself as expressed in the words used and cannot import into the statute any extraneous material. The legislative intent can only be discovered from what Parliament wishes to be done. Thus, the true meaning of an enactment may only be established by determining what the legislators elect to enact either by express words or by reasonable and necessary implication.

23. It cannot be disputed that section 6 of the Election Petitions Act mandates that an election petition shall be served within 10 days of its presentation. Nor can it be denied that section 8 makes provision for the furnishing of those acts forming the complaints on which the petition is founded within ten days following the service of the petition. Does the word "furnish" used in section 8 convey a different meaning from the word "serve" and as a result the provisions of section 6 ought to be disregarded in deciding whether the relevant particulars had been furnished, as Mr. Anderson contends? This leads to an inquiry into the meaning of the word 'furnish'.

24. To ascertain the meaning of the word, it is necessary to resort to its definition by referring to an authoritative dictionary. The concise Oxford English Dictionary defines the word 'furnish' as 'be a source of; 'provide'; 'supply with equipment or information'.

25. There are authorities of this court and the court below which show that the word "furnished" in section 8 of the Election Petitions Act is directory and not mandatory. In the case of **Buck v King** C.L.B 16 of 1977 (del. 03/01/1980) Parnell J., dealt comprehensively with the question of the construction of the word 'furnished' within the context of section 8 of the Election Petitions Act. He held that the word was directory and not mandatory.

26 This court, in **Williams v Messam & Anor**, 28 J.L.R 598, in dealing with the true construction of section 8 considered the meaning of the word 'furnished' and concluded that it was merely directory. At page 602 Carey J.A. said: -

"Section 8 is directory only and the learned judge fell into error as he misconceived the significance of **Allen v. Wright** (No. 2) (supra) (Emphasis mine).

27. Mr. Anderson argued that the decision in **Williams v Messam & Anor.** (Supra) was *per incuriam*. With this submission, I unhesitatingly disagree. This court exercises final appellate jurisdiction in respect of cases involving election petitions. The doctrine of *stare decisis* places the court under an obligation to adhere to its previous decisions. There are of course exceptions to this rule. The exceptions to the rule manifest themselves in the circumstances where a previous decision of the court has been expressly overruled by the Privy Council, or where there are conflicting decisions of the court, in which event the court must determine which of the conflicting decisions should be followed.

28. **Williams v. Messam & Anor.** does not fall within any of the exceptions. The court, in **Williams v. Messam & Anor.** in deciding whether it was empowered to extend time for presenting and serving particulars, after giving consideration to the true

meaning of section 8, made a definitive pronouncement that section 8 is directory only. This decision of the court must be followed.

29. Was it in the contemplation of Parliament that a claimant is bound to embark on a further exercise of furnishing separate particulars following the service of a Fixed Date Claim Form containing extensive particulars of the claim? A claimant may file a Fixed Date Claim Form with or without particulars. Where he exercises the option of filing and serving such document without particulars, he would be obliged to supply particulars to the defendant within 10 days after service of the Claim Form. However, in circumstances where the Claim Form particularizes detailed material allegations, then it cannot be said that sufficient particulars have not been adduced. The object of particulars is to apprise an opponent of the nature of the case he will have to meet at trial. If full particulars are provided in the requisite Claim Form which had been served, Parliament in its wisdom would not have made it a compulsory requirement for a claimant to provide similar and separate particulars.

30. By section 8 of the Election Petition Act, in reciting that it would be enough for the petitioner to state general grounds in his petition, the legislators would have intended that grounds are part and parcel of the material facts in the case and that such grounds would unquestionably constitute material particulars of a claim. They would have intended that where full particulars are filed and served such particulars could be regarded as incorporating both the grounds and the material facts upon which a claimant intends to rely. Such particulars they would regard as being sufficient to bring to the attention of the opponent the nature of the case against him

31. Where adequate particulars have been presented, it would not have been in the

contemplation of the legislators to have made it obligatory on the part of a claimant to duplicate the particulars by providing any further information other than that which had been supplied. Therefore, it would not have been their intention to have made it mandatory for him to provide further particulars of the claim beyond those advanced by way of the Fixed Date Claim Form.

32. Turning to the case under review, it cannot be said that the averments in the Fixed Date Claim Form have not comprehensively outlined all the material particulars upon which the 1st respondent intends to rely. All particulars in support of the 1st respondent's case would have come to the notice of the appellant. He would therefore have been provided with all the information which the 1st respondent seeks to present at the hearing of the election petition. Such information being particularized, were provided, they having been served by way of the Fixed Date Claim Form. To embark on a further exercise of providing the same particulars at a subsequent date would have been absolutely unnecessary. The particulars had been furnished at the time of the service of the petition.

33. Mr. Anderson also contended that the court does not have the power to grant an extension of time within which the particulars may be presented and served. It was his further contention that even if this court considers itself bound by the ruling in **Williams v Messam & Anor.** (supra), the requisite particulars had not been furnished within the prescribed time and no application had been made for an extension of time for filing them.

34. The primary issue before the court in the case of **Williams v Messam & Anor.** (supra) was whether time could be extended to enable a petitioner to furnish particulars.

In that case, the petitioner had failed to file particulars within the prescribed time. The learned judge on an application ruled that the requirement for the furnishing of the particulars within ten days subsequent to the presentation of the petition was mandatory. On appeal it was held that the provision was directory. There can be no doubt that, the court having clearly and unequivocally ruled that section 8 of the Act is directory, the time for the filing of the particulars can be extended. It would be open to the respondent to make an application for extension of time to seek additional particulars. There is an avenue available to the appellant to obtain those particulars if he deems it necessary to do so. Section 8 permits him to seek further and better particulars and this he could do by making an application for a request for information under Rule 34 of the Civil Procedure Rules 2002.

35. I would dismiss the appeal with costs to the 1st respondent.

DUKHARAN, J.A.

I agree.

PANTON, P.

ORDER

The appeal is dismissed. Costs awarded to the first respondent, to be agreed or taxed.