

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 32/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN JOEL WILLIAMS PETITIONER/APPELLANT
AND JAMES MESSAM 1ST RESPONDENT

Delroy Chuck and Arthur Williams for appellant
Maurice Tenn for respondent

November 4 and December 2, 1991

CAREY P. (AG.):

This appeal raises a short and interesting point of procedure under Sec. 8 of the Election Petitions Act, as to whether the terms of this provision are directory only as Parnell J. held in Buck v. King (unreported) or mandatory as Chester Orr J. held in the present case. Chester Orr J. by an order dated 17th May, 1991 dismissed an election petition on the grounds that:

- "(1) ...
- (2) ...
- (3) the said Petitioner failed to furnish any particulars of the acts complained of as avoiding the election or return within ten days after the presentation of the Petition as required by section 8 of the Election Petitions Act."

It is necessary to state that we found that the judge was wrong in concluding that the words were mandatory. However, on the basis of a concession by Mr. Chuck that he could not successfully apply for leave to extend time to file the particulars, we were constrained to dismiss the appeal with costs. Because of the divergence of view as to the true interpretation of the provision under debate, we have decided to put our reasons in writing which we now do.

By virtue of the Election Petitions Act, claims complaining of an undue return or undue election of a member of Parliament or a Councillor of a Parish Council are to be made to the Supreme Court - (Section 3). On the trial of an election petition the judge has 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. Analogous Courts are the Revenue Court and the Gun Court. A very important provision deals with the procedure in such a Court. Section 24(3) states as follows:

"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."

Section 4 is also relevant:

"The following provisions shall apply to the presentation of an election petition -

- (a) The petition shall be signed by the petitioner, or all the petitioners if more than one.
- (b) The petition shall be presented to the Registrar of the Supreme Court within twenty-one days after the return has been made of the member to whose election the petition relates, unless it questions the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or

"other reward to have been made by any member, or on his account, or with his privity, since the time of such return, in pursuance or in furtherance of such corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of such payment.

- (c) Presentation of an election petition shall be made by filing it in the Registry of the Supreme Court.
- (d) 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) to any person summoned as a witness on his behalf; or
 - (ii) to the member whose election or return is complained of (who is hereinafter referred to as the respondent),

shall be given on behalf of the petitioner except where the petitioner is the Clerk of the House of Representatives or the Attorney-General.

- (e) The security shall be to an amount of six hundred dollars in the case of a petitioner relating to the House of Representatives, and to an amount of one hundred dollars in the case of a petition relating to a Parish Council; it shall be given either by recognizance to be entered into by any number of sureties not exceeding four, or by deposit of money in the Treasury to the credit of the petition to abide the order of the Court, or partly in one way and partly in the other."

Specialized rules are set out herein governing these petitions. Section 5 requires the Registrar to publish a copy of the petition in the Gazette. Section 6 deals with service of the petition. Now comes Section 8 which has led to a difference of opinion in the Court below. It provides as follows:

"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."

It is at least plain that the petition must contain grounds which in law are capable of nullifying the election or return. The petitioner has ten days thereafter to condescend to particulars. By grounds, is meant those generalized heads which could lead to the voiding of the election. For example, grounds on which the petition could be based are bribery, treating, undue influence or any other corrupt or illegal practices. The petitioner is then required to condescend to particulars, that is, the allegations of fact in support of the grounds but not the evidence to be adduced. It is said that ten days is an adequate time to furnish particulars and shows the manifest intent of Parliament that election petitions should be prosecuted with despatch and the word "shall" makes that intent even plainer.

But Parliament has incorporated the provisions of the Civil Procedure Code Law, which is itself an Act of Parliament into the procedure governing election petitions. All the provisions in the Code are mandatory by reason of the use of "shall" therein. But I do not think that it is doubted that in respect of time for the doing of a variety of acts under the Code, the Court or Judge is empowered to grant extensions of time. By Sec. 676 of the Civil Procedure Code a judge has such jurisdiction. It provides as follows:

" The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

It will then become a matter for the exercise of the judge's discretion in the particular circumstances.

Parnell J. in Buck v. King (supra) held that a failure on the part of a petitioner to supply particulars of the acts complained of within ten days of the presentation of the petition is not destructive of the petition. He took the position that to hold the provision mandatory, would defeat the whole purpose of filing a petition. He pointed to a situation where an order for inspection was required and continued at p. 11 as follows:

"In order to supply the particulars extractable from the poll books and the application forms, the petitioner is bound by law to apply to the Supreme Court for an order to inspect. And having obtained a date for hearing, the judge may refuse the application. The period of ten days since presentation may pass before a hearing is fixed or before a determination is made by the judge."

He came to his conclusion on a genealogical review of the legislation whose progeniture was the English Parliamentary Act 1863, and he did not allude to Sec. 24(3). The learned judge in the present case appears to have overlooked that provision altogether however. He was attracted to the view of Rowe J. (as he then was) in Stewart v. Newland, 12 J.L.R. 847 who stated as follows:

"The Privy Council has recently restated the principle that the interests of the public require the speedy determination of election petitions, and consequently when a statute lays down time for service of the petition, that statutory provision should be regarded as mandatory, and a failure to observe the time for service thereby prescribed rendered the proceedings a nullity (Nair v. Teik [1957] 2 All E.R. 34)."

But Rowe J. was concerned with service of notice and copy petition as required by Sec. 6 of the Election Petitions Act, not Sec. 3 and concluded that the provision for service was mandatory. He was bound by Allen v. Wright (No. 2) [1950] 2 W.I.R. 102. The headnote sufficiently details the matter:

"Section 6 of the Election Petitions Law, Cap. 107 [J.], provides that a copy of the petition shall, within ten days after the presentation of the petition, be served on the respondent. E.A.'s petition was presented to the court on August 18, 1959, but was not served until September 17, 1959. On September 7 the petitioner applied ex parte for an extension of the time for service of the petition. The application was heard on September 9, when an order was made extending the time for service to fourteen days from September 9. On October 15, 1959, the respondent moved the court to set aside the order extending the time for service of the petition and to set aside the service of the petition. He also moved to have the petition taken off the file of the court or to be struck out. On the hearing of the respondent's motion, the court set aside the order made on September 9 and ordered that the petition be struck out as being void and of no legal effect. From that order the petitioner has appealed.

HELD: The appeal should be dismissed on the ground that the provision regarding time is a matter of substantive law and cannot be dispensed with by the court."

The matter of substantive law which is contemplated thereby would be the jurisdiction of the Court to hear the petition. Compliance with Sec. 6 of the Election Petitions Act constitutes a condition precedent to the Court hearing the matter. It is clear that the Court had in mind Sec. 24(3) of the Act which incorporates the Civil Procedure Code Law. At p. 104 Hallinan C.J. sitting in the Federal Court said this:

"... even though the rule of court regarding the discretion to enlarge time is applicable to the Election Petition Law [J.], one still has to decide whether the provision regarding time is a matter of substantive law or is procedural. It is a matter of substantive law just like the Statute of Limitations, it cannot be dispensed with by the court. Counsel for the appellant has conceded that in s. 4 of our Cap. 107 where it is provided that a petition must be presented within twenty-one days, that provision is substantive and not procedural and it cannot be enlarged by the court in its discretion; so that one is thrown back on the necessity (as the court in the Tenby case [1879], 5 C.P.D. 135; 49 L.J.Q.B. 325; 42 L.T. 187; 44 J.P. 348; 28 W.R. 616; 20 Digest 184, 1598 was of deciding which of the provisions regarding time are procedural and which constitute conditions precedent. I think the learned judge has rightly decided that the time prescribed for serving the respondent was a condition precedent."

In general, rules as to particulars or grounds, in my view relate to a matter of procedure and do not bear on the question of jurisdiction. Section 8 is concerned wholly with what amounts to the filing of particulars of claim called particulars of grounds. The incorporation by reference to the Civil Procedure Code in Sec. 24(3) means that a judge can intervene to extend time. I conclude therefore that sec. 8 is directory only and the learned judge fell into error as he misconceived the significance of Allen v. Wright (No. 2) (supra).

As was shown in Charles v. Golding (unreported) 7th June 1991, unless particular provisions in the Code enact that non-compliance makes a breach of the provision void, the Court has a discretion to make such order as may be just. Section 678 of the Civil Procedure Code enacts as follows:

"Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

The failure to file particulars of claim in a timely manner is not a provision non-compliance with which, the Code ordains to be void. In the present case, the petition contained the following paragraph - viz. para. 6:

"That on the election day there was within the division impersonation, the beating and/or assaulting and/or threatening of duly appointed agents of the Petitioner and of duly appointed election personnel thus preventing them from carrying out their duties, and/or forcing them to carry out such duties under duress; the exclusion of duly appointed agents of your Petitioner from the polling stations thus preventing them from performing their duties, tampering with ballots and ballot boxes; the pre-marking of ballots for the head when the ballots were still attached to the book; double voting; persons lawfully entitled to vote were prevented by violence and threats from casting their votes; the turning away of voters from polling stations thus preventing them from exercising their right to vote; unauthorised persons had dealings with and access to ballot boxes; the delivery of ballots and ballot boxes to unauthorised and/or unidentified persons; the stealing and carrying away of ballot boxes and ballot papers and the marking of the said ballots for the Respondent before returning them to the Counting Centre the stealing and carrying away of ballot boxes and ballot papers; the early closing of polling stations before all the duly registered electors had cast their votes; the forcing of presiding officers by beatings and/or assaults and/or threats to initial ballots for the purposes of open voting, compulsory open voting; open voting; mal fides on the part of a number of persons; fraud; violence, mistake and other irregularities which affected the outcome of the election.

WHEREFORE your Humble Petitioner prays that it may be determined by this Honourable Court that the said JAMES MESSAM was not duly elected or returned and that your Humble Petitioner was duly elected and ought to have been returned to serve as a member of the Parish Council of the Parish of Clarendon for the Electoral Division of Denbigh."

I would have thought that the allegations therein .
tained amounted to particulars of which further and better
particulars could have been ordered under Sec. 8. In my view,
the allegations were not in the strict sense grounds within the
contemplation of the provision. But this is all academic as any
present application for extension of time would be bound to fail
on the basis of inordinate delay as Mr. Chuck prudently conceded.

For these reasons, I agreed with the order which was made
on 4th November 1991.

A handwritten signature in black ink, appearing to be 'K. J. King', written in a cursive style with a long horizontal stroke extending to the right.

I would have thought that the allegations therein . . .
tained amounted to particulars of which further and better
particulars could have been ordered under Sec. 8. In my view,
the allegations were not in the strict sense grounds within the
contemplation of the provision. But this is all academic as any
present application for extension of time would be bound to fail
on the basis of inordinate delay as Mr. Chuck prudently conceded.

For these reasons, I agreed with the order which was made
on 4th November 1991.

A handwritten signature in black ink, appearing to be "K. J. King" or similar, written in a cursive style.

DOWNER, J.A.

The important point of law to be decided on this appeal is the true construction of Section 8 of the Election Petitions Act (The Act). That section reads as follows:

"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."

Issue has been taken in this case as to whether the particulars which the petitioner wished to serve on the respondent pursuant to Section 8 must be served within ten days as the respondent contends, or whether a Judge of the Supreme Court has a discretion to extend the time in the interest of justice.

How the issue arose

Just as the Revenue Court is in substance the Supreme Court exercising a special jurisdiction in revenue matters, so the Election Court is in substance the Supreme Court exercising a special statutory jurisdiction in relation to disputed elections for the House of Representatives and Parish Councils. It is therefore a court of constitutional importance and recognised as such by Section 44 of the Constitution.

This matter came on a motion before Chester Orr, J. Proceedings were instituted by Desmond Burton, the Returning Officer to dismiss the petition which was presented and served within the appropriate period. The motion was supported by James Messam, the first respondent, who was elected Councillor for the Denbigh Division

of the Clarendon Parish Council on 8th March, 1990. His contention of 7th May, 1991 for dismissing the petition reads as follows:

"2. That I have never been provided or served with any PARTICULARS of the Acts Complained of in Paragraphs 4, 5 & 6 of the Election Petition herein dated the 22nd March, 1990, as provided by S 8 of the election Petitions Act."

Although the second respondent did not appear on appeal, it is perhaps helpful to set out the grounds on which he sought to dismiss the petition in view of the importance of the issues. They are as follows:

- "(1) the said Petition fails to state the grounds on which the Petitioner relies for seeking relief against the Second Respondent with respect to the return of the First Respondent;
- (2) the said Petition contains no reasonable cause of action or complaint against the Second Respondent; and
- (3) the said Petitioner failed to furnish any particulars of the acts complained of as avoiding the election or return within ten days after the presentation of the Petition as required by section 8 of the Election Petitions Act."

Since the complaint in issue by the first respondent was that he was never served with particulars pursuant to Section 8 of The Act, it is necessary to refer to those paragraphs which he alleges required particulars. If particulars were required then the appellant Williams had a duty to take out a summons to incorporate such particulars by way of addition or amendment to the petition. The material paragraphs which required particulars read thus:

"4. And your Petitioner states that more valid ballots were properly cast in favour of your Petitioner than the amount of valid ballots that were properly cast in favour of the Respondent JAMES MESSAM and your Humble Petitioner claims a right to be returned as the member of the Parish Council of the Parish of Clarendon for the Electoral Division of Denbigh.

"5. That persons whose names appear in the poll books as having voted in the said Election did not in fact vote.

6. That on the election day there was within the division impersonation, the beating and/or assaulting and/or threatening of duly appointed agents of the Petitioner and of duly appointed election personnel thus preventing them from carrying out their duties, and/or forcing them to carry out such duties under duress; the exclusion of duly appointed agents of your Petitioner from the polling stations thus preventing them from performing their duties, tampering with ballots and ballot boxes; the pre-marking of ballots for the head when the ballots were still attached to the book; double voting; persons lawfully entitled to vote were prevented by violence and threats from casting their votes; the turning away of voters from polling stations thus preventing them from exercising their right to vote; unauthorised persons had dealings with and access to ballot boxes; the delivery of ballots and ballot boxes to unauthorised and/or unidentified persons; the stealing and carrying away of ballot boxes and ballot papers and the marking of the said ballots for the Respondent before returning them to the Counting Centre the stealing and carrying away of ballot boxes and ballot papers, the early closing of polling stations before all the duly registered electors had cast their votes; the forcing of presiding officers by beatings and/or assaults and/or threats to initial ballots for the purposes of open voting; compulsory open voting; open voting; mal fides on the part of a number of persons; fraud; violence, mistake and other irregularities which affected the outcome of the election."

The Returning Officer did contend that the petition as it stood did not state generally the grounds on which the petitioner relies for challenging the election or return. However, it certainly stated some particulars in paragraphs 4 to 6. The petitioner therefore ought to have been concerned with further particulars which he would have had to serve on the respondent by amending or adding to his petition after taking out a summons. Alternatively, the respondent could request such further particulars on summons.

Against this background it is appropriate to construe Section 3 of The Act, to determine whether the obligation on the petitioner to supply particulars was mandatory as the first respondent contended. Be it noted that the learned judge accepted the first respondent's contention.

As stated previously, Section 3 requires the petitioner to state generally the grounds on which he relies to challenge the election. Then further Sections 4 and 5 make provision for the presentation of the petition on the Registrar of the Supreme Court and for publication in the Gazette. Then Section 6 provides for the notice of presentation, the nature of the proposed security (if any), and stipulates that the petition shall be served within ten days after presentation on the respondent. It is important to observe that the Court assumes jurisdiction of the petition when it has been presented and then served on the respondent.

In construing Section 3 of The Act, it is necessary to resolve the rival contention as to whether it is mandatory to serve particulars on the respondent within ten days, and the contrary stance of the appellant that the provision is directory so as to permit enlargement of time. Section 24 (1) and (3) of The Act is relevant. In the 1953 edition of the Laws of Jamaica this was Section 23. So the judgment of Allen v. Wright No. 2 [1960] 2 W.I.R. 102 and Stewart v. Newland [1972] 19 W.I.R. 271 must be read against that background. That section in so far as is material is as follows:

"24.—(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.

(2) ...

(3) An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief Justice, the provisions of the Judicature

"(Civil Procedure Code) Law and the rules of court shall, so far as practicable, apply to election petitions."

Section 24 (3) is a legislative reference to the Judicature Civil Procedure Code and particulars are part of procedure. The provision in the Code which is relevant is Section 676:

"676. The Court shall have power to enlarge or abridge the time appointed by this law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Since The Act makes no provisions for enlargement of time then Section 676 of the Code is a provision which is practicable to apply to election petitions. It is practicable because the enlargement of time is a procedural matter which it may be appropriate for a Court to grant, once it has assumed jurisdiction.

This was the determination arrived at by Parnell, J., in Buck v. King (unreported) C.L. 16/77 delivered January 3, 1980. In arriving at his conclusion, Parnell, J. expressly relied on the Parliamentary Act 1968 (U.K.) as an external aid, and the absurdity which would result if the provision as regards time to serve the particulars within ten days were mandatory. At page 9 he cited the procedural rule under that Act thus:

"And Rule 6 provided as follows:

'Evidence need not be stated in the Petition, but the Court or Judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered.' "

Then in two compelling passages Parnell, J. stated the reasons why the provisions requiring ten days to furnish particulars on the respondent may be extended. At page 11 the learned judge stated it thus:

"... A petitioner may allege general grounds in his petition. He may have reasonable grounds to believe that an inspection of the Poll Books for 4 polling stations and an examination of 20 form C applications would be sufficient for him to supply the particulars of the acts complained of. He is under a duty to present his petition within 21 days after the return has been made of the member whose election is being questioned. The time limit for presentation is mandatory. There is no dispute about this fact. In order to supply the particulars extractable from the poll books and the application forms, the petitioner is bound by law to apply to the Supreme Court for an order to inspect. And having obtained a date for hearing, the judge may refuse the application. The period of ten days since presentation may pass before a hearing is fixed or before a determination is made by the judge.

Through no fault of his own the time mentioned in sec. 8 would have expired and as a result, the election petition which is of concern to the petitioner and to the public is defeated in limine. The consequence is so disastrous, the result is so unreasonable and unjust that the Court is bound to avoid it by rejecting Mr. Knight's interpretation and by putting an alternative interpretation on the section. And the alternative interpretation is to hold - and I do hold - that a failure on the part of a petitioner to supply particulars of the acts complained of within 10 days of the presentation of the petition is not destructive of the said petition. In other words, the first part of the section is directory only." (Emphasis supplied)

There are features to note in approving the logic of these passages. Buck v. King pertained to an election to the House of Representatives, but Section 2 of The Act defines petition as follows:

" 'petition' or 'election petition' shall mean a petition complaining of an undue return or undue election of a member of the House of Representatives or a councillor of a Parish Council, presented to the Supreme Court under the provisions of this Act."

Similarly, although the Representation of the People Act governs election to the House of Representatives, some sections also apply to Parish Councils by virtue of Section 47 and Section 48 of that Act.

Consequently, by virtue of Section 52 of the Representation of the People Act, the appellant was obliged to apply to a judge of a Superior Court to inspect the election papers or to have the Chief Electoral Officer produce them. Then again by reiterating that "the time limit for presentation is mandatory, there is no dispute about this fact" Parnell, J. recognised that Sections 4 and 6 of The Act pertain to jurisdiction adverted to previously in Section 24 (1) of The Act. Those provisions are therefore mandatory so the Court has no competence to adjudicate on a petition until it has been served on the respondent. Once it is served then the Court is entitled to resort to its inherent jurisdiction to govern its procedure or apply the provisions of the Civil Procedure Code as Section 24 (3) of The Act provides. That this was the basis of the reasoning in Stewart v. Newland [1972] 12 J.L.R. 847 or [1972] 19 W.I.R. 271 and Allen v. Wright [1960] 2 W.I.R. 102 is evidenced by the following passage in Devan Nair v. Yong Kuan Teik [1967] 2 A.C. 31 where the election petition had not been served on the respondent according to the rules. The election judge struck out the petition as invalid and in affirming his decision, Lord Upjohn said:

" With all respect to the Federal Court their Lordships cannot attribute weight to the circumstance that the rules contained no express power to strike out a petition for non-compliance with rule 15. When there is a withdrawal by a party it is obviously desirable that the rules should make provision for such an event and that it should receive due publicity by publication in the Gazette but, if the proceedings never begin in any real sense by reason of the failure to serve the petition, there seems no compelling reason for any formal order. The election judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules."

All those cases followed Williams v. Tenby Corp. [1879] 5 C.P.D. 135. There the language of common law was "condition precedent" rather than the term "jurisdiction" which is the preferred term of the draftsman in Section 24 (1) of The Act. What is significant is that Grove, J. delivering the judgment of the Court of Common Pleas

recognised for procedural matters, as say the extension of time to serve particulars, would be treated as directory. Marnan, J. in Allen v. Wright (supra) after referring to Section 23 of The Law w Section 24 at page 105 approved the following words of Grove, J.:

"If it is a matter of procedure then the judge will have some powers."

Further, Rowe, J. as he then was in Stewart v. Newland makes specific reference to Section 24 (3) then Section 23 (3) of the Elections Petition Law and Section 676 of the Civil Procedure Code and showed that his decision that those sections were not applicable was directed to Section 6 of the Election Petitions Act which was the section he had to construe.

Chester Orr, J. should therefore have followed Parnell, J. in Buck v. King which correctly acknowledged that provisions as regards time in Section 8 of The Act was directory. But the order in the Court below could still be affirmed on other grounds and this aspect was grasped by the learned judge. At page 2 of his judgment he stated:

"I hold that the petitioner has not furnished any particulars as required by section 8."

Further at page 5 he added:

"... It is now some 14 months since the election and there is not a scintilla of evidence which could identify the location or the identity of the perpetrator of any alleged illegal act."

What were the consequences of these findings as regards the discretion of the judge to extend time? That issue must now be determined to decide this appeal.

Why the appellant lost his appeal?

The appellant presented his petition within twenty-one days as ordained by Section 4 of The Act: Stewart v. Newland 12 J.L.R. 847 and 19 W.I.R. 271. The return was made on 8th March, 1990, the petition presented 22nd March, 1990 so the Court had jurisdiction. Yet it was not until 24th June, 1990 that the appellant invoked the jurisdiction of the Supreme Court to inspect the election documents in the custody of the Chief Electoral Officer and then a further

application was made on 7th January, 1991. So while the appellant could have had an extension of time if such an extension was in the interest of justice, he would have to show the requisite promptitude in seeking the assistance of the Court to get an extension of time to serve particulars. He must file the particulars within a reasonable time given the desirability of having a hearing within ninety days of filing the petition. The policy of The Act is that membership of the Parish Council is to be determined with promptitude. All this was conceded by Mr. Chuck.

On the other hand, Chester Orr, J. held that the particulars must be filed within ten days and that failure to comply warranted dismissal of the petition. I think the learned judge erred in not following Parnell, J.. Had he followed that learned judge, he would have realised he had power to extend the time. However, his order must stand because in any event too long a time elapsed before the petitioner sought the assistance of the Court. Yet even then, the particulars sought were not filed.

So the upshot is that Chester Orr's, J., order below was affirmed at the end of the hearing although he misconstrued Section 8 of The Act. The order was that the appellant should have costs in this Court which are to be agreed or taxed.

Henderson Jones

BINGHAM, J.A. (AG.)

Chester Orr, J. following a hearing on 13th May, on 17th May, 1991 dismissed a petition brought by the appellant under the Election Petitions Act. The matter was before the learned judge by way of an application by the first named respondent that the petition be dismissed on the ground that there had been a non-compliance on the part of the petitioner with Section 8 of the said Act in that "he failed to deliver particulars of the acts complained of as avoiding the election or return within ten (10) days after the presentation of the said petition."

In a very carefully written judgment in which several authorities were referred to, the learned judge came to a determination that Section 8 of the Act called for a mandatory interpretation and that the petitioner's failure to furnish particulars within the period of ten (10) days fixed by the statute rendered the petition nugatory and that accordingly it stood dismissed. He also ordered costs to the first respondent.

The petitioner now challenges this decision on the following grounds:

- "1. That the Learned Trial Judge erred in law in holding that the Petition did not contain particulars of the acts complained of, as avoiding the election.
2. That the Learned Trial Judge erred in law in holding that a failure to supply particulars of the acts complained of as avoiding the election within ten days of the presentation of the Petition (if such was the case) must result in the Petition being dismissed.
3. That the Learned Trial Judge erred in law in holding that the provision of Section 8 of the Election Petition Act is mandatory."

Mr. Chuck for the petitioner, while conceding that the appeal must fail as no proper particulars setting out the grounds upon which the petitioner had based his complaint had up to the time of the hearing of the motion below been furnished, nevertheless,

sought to contend that the learned judge erred in holding that:

"... the petitioner has not furnished any particulars as required by section 8."

Learned counsel for the appellant further contends that the requirement under Section 8 was directory in nature, hence a failure to furnish such particulars within the period set out did not thereby invalidate the petition.

The learned judge seemed to have laid great store by the dicta of Rowe, J. (as he then was) in Stewart v. Newland [1972] 12 J.L.R. 647; [1972] 19 W.I.R. 271, and Nair v. Teik [1967] 2 All E.R. 34. The latter being a judgment of the Privy Council is binding on this Court. In both cases it was held that the provisions in a statute as to the filing and service of an election petition within the time frame laid down by the Act was mandatory and called for a strict interpretation.

A failure to adhere to the requirement of the Act, therefore, rendered the petition in each case null and void. Stewart v. Newland (supra) followed a decision of the Federal Supreme Court in Allen v. Wright (No. 2) [1960] 2 W.I.R. 102 in which a similar question was considered with the same result. In that case, Hallinan, C.J. said (p. 104):

"The difficulty in accepting counsel's submissions is that even though the rule of court regarding the discretion to enlarge time is applicable to the Election Petition Law (J.), one still has to decide whether the provision regarding time is matter of substantive law or is procedural. If it is a matter of substantive law just like the Statute of Limitations, it cannot be dispensed with by the court."

The test for determining whether a particular enactment is directory or mandatory is one that admits of no easy solution. The learned editor of Maxwell on the Interpretation of Statutes 11th edition puts the matter in this manner: (p. 364)

" It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied

"nullification for disobedience beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps, be found generally correct to say the nullification is the natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justice."

It is in the light of the above that whereas Sections 6 and 8 set out a time frame within which certain acts shall be done, Section 6 in so far as it fixes a period of twenty-one (21) days for the filing and service of the petition, goes to the question of jurisdiction. A failure by a petitioner to comply with the terms of Section 6 would, therefore, of necessity be fatal to his petition. It is against this background that the statement of Hallinan, C.J. in Allen v. Wright (supra) has to be read and understood.

Section 8 on the other hand, has to be examined subject to Section 24 (3) of the Act in so far as it seeks to incorporate "the provisions of the Judicature (Civil Procedure Code) Law and the rules of Court so far as is practicable." In this regard, Section 676 of the Code provides that:

" The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require." ...

This section is of general application in order to extend the time for furnishing such particulars within Section 8. A failure to furnish such particulars to the respondent as to the grounds of the petitioner's complaint within the period set out in Section 8 would not therefore render the petition fatal. This section, in my opinion, admits of a directory interpretation. Here the Court by virtue of Section 24 (3) of the Act is being given the power to regulate its own procedure.

Section 24 (3) in so far as it incorporates the Judicature (Civil Procedure Code) Law does provide (Section 676) for the petitioner to apply for an extension of time within which to amend

or file particulars or failing such particulars being lodged, would allow for the respondent under the same rules to apply for further and better particulars, and in the event of such failure to have the said petition struck out or dismissed.

Chester Orr, J. therefore, in coming to a determination that:

1. The petition has not furnished any particulars as required by Section 6.
2. That Section 3 of the Act called for a mandatory interpretation.

fell into error.

The dictum of Parnell, J. in Buck v. King C.L.B. 016/80 (unreported) judgment delivered on January 3, 1980 and the reasoning of the learned judge at pp. 11 and 12 which sought to deal with a similar question as that now before us is, in my view, sound and ought to be approved.

As, however, there is a concession by learned counsel for the appellant as to the effect on the petition due to a failure on the part of the petitioner to have proper particulars lodged within a reasonable time, it was for these reasons that I joined with my brethren in agreeing that the ruling of Chester Orr, J. be upheld and that the appeal be dismissed with the order for costs to the 1st respondent.


~~1/16/80~~