IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 198 OF 2013

AND IN THE MATTER OF AN ELECTION FOR THE ELECTORAL DISTRICT OF WEST BAY HELD ON THE 22ND DAY OF MAY 2013

BETWEEN:	**JOHN GORDON HEWITT**	**PETITIONER**
AND:	**TARA RIVERS**	**1ST RESPONDENT**
AND:	**DELANO SOLOMON (Returning Officer)**	**2ND RESPONDENT**
AND:	**ATTORNEY GENERAL FOR THE CAYMAN ISLANDS**	**3RD RESPONDENT**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 18TH SEPTEMBER 2014 AND THE 13TH MARCH 2015

APPEARANCES: Mr. Steve McField of A. Steve McField & Associates for the Petitioner

Mr. Paul Keeble of Hampson & Company for the First Respondent

Ms. Reshma Sharma, Senior Crown Counsel, for the Second Respondent and the Attorney General for the Cayman Islands

Election petition, statutory provision for security for costs- whether jurisdiction of the court limited to the statutory provision.

JUDGMENT AS TO COSTS

1. On 9th August 2013 judgment was delivered in this matter dismissing the Election Petition and holding in favour of the 1st Respondent that her election as a member of the Legislative Assembly for the District of West Bay is valid. At the time of delivery of judgment, the

question of the costs of the Petition was reserved, the Court expressing the hope that the question would not be pressed because of the obvious public interest in the issues taken up in the Petition. The 1st Respondent now seeks an order for her costs nonetheless, relying upon the principle that the costs should follow the event of the outcome of the Petition. The costs are quite significant in amount and so she says it would neither be fair nor appropriate that she should be required to bear them herself when they have been incurred because of the wrongful challenge to her election by the Petitioner who was acting not purely in the public interest, but also in the personal interest of his wife, who was her closest rival at the elections.

Functus Officio

On behalf of the Petitioner, Mr McField first of all submits that I have no jurisdiction to award costs because I am Functus Officio. This he says came about at the moment that I delivered judgment on 9th August 2013 without making an express order for the costs of the Petition. He puts his argument in this way:-

> *13. "The principle of Functus Officio derives from the Court of Appeal case ST NAZARINE* (sic) *CO (1879) 12 CH D.88. In ST NAZARINE* (sic) *the Court of Appeal heard that the Court has no Jurisdiction to re-open or amend a final Decision except for:*
>
> *1) Error in drawing up Judgment, and,*
>
> *2) Error in expressing the manifest intention of the Court*

14. In this case the principle of Functus Officio applies on the statutory basis of finality of the proceedings.

15. There was and is no error by the Hon. Chief Justice in drawing up his determination; and, the Hon. Chief Justice made no error in expressing the manifest intention of his Court."

From my reading of the case relied upon - *In Re St Nazarene Company (proper citation)*- it stands for the trite proposition that there can be no appeal at all to the Judge of first instance against any decision, either of his predecessor (High Court judge) or of the Appeal Court (per Jessel MR at 99-100).

The case thus stands for the principle that there shall be finality in the decision-making process of the Court. It must therefore be accepted, as a general rule, that the Court has no power under any application in an action, to allow or vary a judgment after it has been entered, or an order after it is drawn up, except so far as is necessary to correct errors in expressing the intention of the Court: *In Re St Nazarene Company* (above); *Kelsey v Donne* [1912] 2 K.B 482 and the *Notes to the Rules of the Supreme Court* ("*RSC*") 1999 Ed. paragraph 20/11/7; and the other cases cited there. At the same paragraph of the *RSC* the several exceptions to that general rule are also cited.

However, to my mind, the question at hand is better addressed by reference to the dictum of Marton J. in *Re V.G.M. Holdings Ltd* [1941] 3 All E.R. 417 (Ch. D.), which is well summarized in the headnote:

> *"Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal."*

And there is an additional editorial note to the headnote:

> *"This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction."*

This "well-settled" point of practice is that which Mr McField seeks to rely upon and given the line of cases discussed above, must indeed be recognised as settled law. But the answer to the objection raised by Mr. McField must therefore lie in the fact that upon delivering judgment on 9th August 2013, I reserved the question of costs. No final order as to costs was "passed and entered".

I therefore hold that I have jurisdiction to make an award of costs in relation to the Petition and this was in fact already expressed to be the case in a directions order of 2nd May 2014 setting this very matter down for determination in these terms (inter alia):

"IT IS HEREBY ORDERED AND DIRECTED THAT

1 This Court has jurisdiction to determine the issue for costs and is not (as raised by the Petitioner in correspondence) functus officio;"

In effect therefore, the foregoing are my reasons for that order of 2nd May 2014.

The extent of the jurisdiction

A further question of jurisdiction is raised by Mr. McField on behalf of the Petitioner. He relies on Section 86(b) and (c) of the Elections Law which expressly require a petitioner to provide the amount of CI$3,000.00 as "*security for payment of all costs, charges and expenses that may become payable by the petitioner*" to persons including:

"(ii) ..... the member whose election or return is complained of; or

(iii) ..... any other person named as a respondent in the petition."

Mr. McField submits that this is meant to be an exclusive and comprehensive provision and that my jurisdiction is therefore curtailed; that I can make no award of costs beyond that sum of security in the amount of CI$3000.

That argument would however, overlook section 90 of the Elections Law which also expressly confers on a Judge presiding over an Election Petition *"the same powers, jurisdiction and authority ..... as nearly as the circumstances admit, as in the trial of a civil action in the Grand Court....."* .

2. I am satisfied, on the basis of section 9 and for the reasons which follow, that in providing for security for costs, the Elections Law (2009 Revision) in section 86(b), is not intended to exclude the general costs jurisdiction vested by the Judicature Law (2013 Revision) and the Grand Court Rules (1995 Revision). Rather, "*security*" means, as the word implies in this as in any other context of civil litigation, a reasonable provision for costs, which at a minimum, will be available to the successful party. This form of security has never been regarded as the same thing as a provision for full standard costs, let alone a provision for full indemnity costs. It is a provision aimed at allowing the courts to ensure that at minimum the amount as prescribed (or ordered) is available to meet the costs of the successful respondent. And where, as here, the statute prescribes an amount for security for costs, it can only sensibly be regarded as doing so from the point of view of what the legislature thought reasonable at the time of passage of the law. With the passage of time the value of that sum will have been eroded by inflation. The legislature must be regarded as having been cognizant of that fact and for that reason included section 90 to preserve the ability of the court to award such costs as would be both reasonable and realistic as time goes by. It follows that the security of CI$3,000.00 required by s. 86(b) of the Elections Law (2009 Revision) should be regarded as a provision of a minimal sum which should go towards meeting the costs of the successful party. It is to be noted as well in light of section 86(b) which allows three days after the filing for deposit with the court, that the provision of that minimal security is "a condition precedent" for the hearing (or, as in the case of Jamaica, for the filing of a petition) to challenge an election. See *Dabdoub v Vaz*, in the Jamaica Court of Appeal, Application No:87/08, judgment delivered 26th September 2008.

3. Other courts have taken similar views of similar provisions for security for costs in relation to election petitions. See, for instance, *Missick v Forbes,* (in the Supreme Court of the Turks and Caicos) TC [1999] SC1, May 24, 1999 Suit No. CL22 of 1999 per Ground CJ in the formal order of the court (as he then was); *Benjamin, Rogers and Herbert v Grant*, OECS Court of Appeal (sitting for St Christopher and Nevis), judgment delivered 15th July 2008 in Cause HCVAP2006/009/0011, where the statutory provision for security was regarded by the Court of Appeal as establishing "a presumption that costs will be awarded"; *Selver v Smith, Missick, the Supervisor of Elections and the Attorney General,* Supreme Court of the Turks and Caicos Petition No. CL 237/12, judgment delivered 7th February 2014, per Ramsay-Hale J (as she then was), holding that notwithstanding the statutory provision for security "there is no reason to derogate from the principle that costs should follow the event.."

4. Counsel in this matter also very helpfully provided further material from around the Commonwealth of Nations on the treatment by the courts of this question of costs of election petitions. The cases show that the courts have consistently regarded the question of costs as being at large, to be dealt with in the exercise of the general costs jurisdiction and discretion, in keeping with the merits.

5. In *Dabdoub v Vaz*, in the Jamaica Court of Appeal Application No:45/2008, judgment delivered 13 March 2009, it was held (following *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* (2001) EWCA 535) inter alia *that "the starting point for exercise of the discretion [given by the Elections Petitions Act] is that costs should follow the event. It*

may be said, in light of section 28[1]*, that to make an order by which the costs did not follow the event, there must be good cause."*

6. The position in England is confirmed by *Halsbury's Laws of England* which states (at Vol. 15(4) Fourth Edition 2007 Reissue, paragraph 868) that: "*The rules of the Supreme Court with regard to costs to be allowed in actions, causes and matters in the High Court are in principle and so far as practicable to apply to the costs of election petitions and other proceedings under the relevant provisions*"; citing among others, the Representation of the People Act 1983.

7. In *Peters and Another v. Attorney General and Another* [2002] 3 LRC 32, in its application of section 144 of the Representation of the People Act of Trinidad and Tobago, the Court of Appeal (per de la Bastide CJ) regarded the courts as having the same general jurisdiction to award costs as vested under the rules of court. The Court of Appeal accordingly awarded costs to be taxed "fit for junior and senior counsel" for each of the successful parties.

8. The cases also show that substantial amounts of costs will be awarded where it is appropriate to do so.

[1] Which (as summarized in the judgment of Smith JA at paragraphs 108-109) gives an explicit power to the court to disallow costs and expenses caused by: (1) vexatious conduct, (2) unfounded objections on the part of either the petitioner or the respondent and further provides that regard should be had to the discouragement of need less expenses by throwing the burden of paying such costs on the culpable party whether or not such party is on the whole successful.

9. In *Pilling and Others v Reynolds* (above), the successful respondent Mr Reynolds was awarded his costs in the amount of £10,000.00, and the successful second respondent the returning officer Mr Rumbelow, the amount of £20,000.00; amounts well above the maximum prescribed for security for the costs of the petition in that case.

10. In *Cedric Liburd and ors v Hamilton* SKBHCV2004/0183 (OECS, St Kitts and Nevis), costs well in excess of the statutory security were awarded, amounting to well over USD600,000.00 for the fees of two teams of leading and junior counsel.

Indemnity costs

11. Mr Keeble on behalf of the 1st Respondent seeks an award of her full indemnity costs of responding to the petition. He points to a letter sent to the Petitioner shortly before the hearing in which it was offered that should the Petitioner withdraw the petition, the 1st Respondent would seek no order as to costs. He also argues that arguments put forward in support of the petition were untenable and so caused the 1st Respondent to incur unnecessary and wasteful costs in responding to them.

In response, I am reminded by Mr. McField that the provisions of the Elections Law and the Constitution allow the challenge of an election by the bringing of an election petition and that this connotes a public benefit and allows members of the public to challenge and to investigate through the Court, an election in respect of which they have doubt and concerns. It is in this sense that there is always a public interest in election petitions and an award of indemnity costs, usually premised upon the litigant acting unreasonably, would be inappropriate and would be discouraging of petitions in the future.

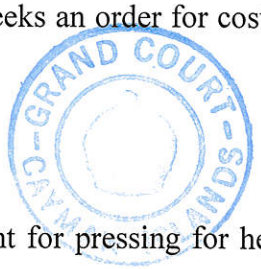
It was with this principle in mind that in the case of *Pilling and others v Reynolds (above)*, that Mr. Justice Blake stated at [39]:

> *"In our judgment, public law principles for the award of costs are an appropriate guideline in the case of a legitimate and serious challenge to a ballot paper that was decisive of the outcome of an election. There is an important public interest in clarifying the legitimacy of the ballot and the vote on which the disputed paper depends. It would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner. There is some analogy with the court's concerns to limit the costs consequences of public interest challenges in environmental litigation or on other important public law claims: see per Carnwath LJ in R (on the application of England) v Tower Hamlets London BC [2006] EWCA Civ 1742, [2006] All ER (D) 314 (Dec), 20 December 2006, and the report of Sir Maurice Kay 'Litigating the Public Interest' (July 2006)."*

Earlier, in *R(Corner House Research) v. Secretary of State for Trade and Industry* [2005] 3 Costs LR 455, the English Court of Appeal had set out important governing principles and practical guidance relating to protective costs orders in public interest litigation. These included that a cost capping order for a claimant's costs will normally be required in all such cases by reference to the courts' powers to make such orders identified in *King v Telegraph Group* [2004] EWCA Civ 613.

It was out of such concerns that I expressed the views I did when handing down judgment on 9th August 2013, in exhortation to the successful parties not to press for costs in what by any measure, was a petition that raised important constitutional issues. And recognizing as well, how the award of a full indemnity for costs could impact upon a well-meaning but unsuccessful petitioner.

I am therefore pleased to note that neither the 2nd nor 3rd Respondent seeks an order for costs against the Petitioner.



But none of these concerns may preclude the successful 1st Respondent for pressing for her costs. Her position as a private litigant was very different from that of the 2nd and 3rd Respondents who participated in their roles as public officer holders, funded by the public purse.

12. I must therefore fall back on the settled principles for the award of indemnity costs and it is well recognized that an order for indemnity costs will not usually be made unless a party has behaved improperly, negligently or unreasonably such as by refusing a reasonable offer of settlement (see *In Re CVC/Opportunity Fund* 2002 CILR 531 CA) or by raising frivolous and vexatious arguments (see *AHAB v SAAD Inv Co Ltd and ors* 2013 (2) CILR 344) .

13. In recognition of the public interest nature of the Petition going beyond the private interests of the Petitioner (or, for that matter, those of his wife as the contending candidate that he sought to advance); I do not consider it appropriate to award costs on the full indemnity basis here. It

can in no wise be said that the petition was "improperly, negligently or unreasonably" brought.

14. Nor do I regard the petition as one that was frivolously or vexatiously argued, although presented on a basis which has been found to be erroneous in law. Rather, it was presented as premised upon legal advice following, I am told, high judicial precedent from another Commonwealth jurisdiction. Mr McField also explains that the Petition was brought against the background of the Petitioner being informed of legal advice given to the Returning Officer for the District of Bodden Town which resulted in the disqualification of another candidate, a candidate who is described as being similarly positioned as the 1st Respondent and on constitutional grounds of disqualification similar to one of those unsuccessfully raised in the Petition.

15. From the foregoing survey of the case law, it is well settled that costs will follow the events of petitions challenging the validity of elections and that the discretion of the court for the award of costs (including where appropriate indemnity costs) is preserved.

16. I hold that the costs shall follow the event in this case, as in the usual course of any other kind of civil litigation conducted before the Grand Court. The costs are therefore awarded to the successful 1st Respondent to be taxed if not agreed, not on the indemnity basis, but on the standard basis as set out in Order 62 of the Grand Court Rules (1995 Revision) and Practice Direction No. 1 of 2011 emanating from those Rules.

17. For the guidance of the taxing officer, I also note my acceptance that it was necessary for the 1st Respondent to have engaged both leading and junior counsel, as well as the expert, Prof Cole, who testified on United States law.

18. The question also arose for consideration whether I should make an order for contribution by the 2nd and 3rd Respondents to the 1st Respondent's costs (or to those to be paid to her by the Petitioner). I decided that it would be inappropriate to make such an order here. While I do not doubt the existence of the power to make such an order (the 2nd and 3rd Respondents were parties to the petition), I must bear in mind that they were joined and responded only in the public interest. As already noted, it is also clear that the Petitioner obtained and acted upon independent legal advice. Thus, his Petition was not necessarily predicated upon the outcome of the legal advice given to the Returning Officer for Bodden Town - that which is said to have resulted in the disqualification of a potential candidate for that District on similar grounds to those relied upon by the Petitioner.

19. Any contribution to the costs of the 1st Respondent not covered by the costs ordered to be paid by the Petitioner must be a matter for the Government of its own volition to consider.

Dated 13th March 2015

The Hon. Anthony Smellie
Chief Justice