THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

SKBHCV2020/0110

Election for the Constituency of Saint Christopher 8
held on the 5th day of June, 2020

BETWEEN:

DR.TERRANCE DREW	**Petitioner**
AND	
EUGENE HAMILTON	**1st Respondent**
ELVIN BAILEY ***(as Supervisor of Elections)***	**2nd Respondent**
CLIFFORD PEMBERTON ***(as Registration Officer for the Constituency of Saint Christopher 8)***	**3rd Respondent**
PHILLIP BROWNE ***(as Returning Officer)***	**4th Respondent**
NASSIBOU BUTLER ***(Chairman, Electoral Commission)***	**5th Respondent**
JOSEPH LIBURD ***(Member, Electoral Commission)***	**6th Respondent**
JASON HAMILTON ***(Member, Electoral Commission)***	**7th Respondent**

Appearances:-

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Petitioner.

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau and Ms. Leah Abdulah for the 1st Respondent.

Mr. Eamon Courtenay S.C., Mrs. Simone Bullen-Thompson, Solicitor General, Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Tashna Powell Williams and Ms. La Shaun Smart for the 2nd , 3rd and 4th Respondents.

Mr. Reginal Armour S.C., Mrs. Sherry-Ann Liburd-Charles, Ms. Vanessa Gopaul for the 5th and 6th Respondents.

Ms. Miselle O'Brien and Ms. Keisha Spence for the 7th Respondent.

SKBHCV2020/0111
Election for the Constituency of Saint Christopher 2
held on the 5th day of June, 2020

BETWEEN:

MARCELLA LIBURD **Petitioner**

AND

JONEL POWELL **1st Respondent**

ELVIN BAILEY **2nd Respondent**

(as Supervisor of Elections)

SHARON HANLEY **3rd Respondent**

(as Returning Officer)

Appearances:-

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Petitioner.

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau, Ms. Natasha Grey and Ms. Leah Abdulah for the 1st Respondent.

Mr. Eamon Courtenay S.C., Mrs. Simone Bullen-Thompson, Solicitor General, Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Tashna Powell Williams and Ms. La Shaun Smart for the 2nd and 3rd Respondents.

SKBHCV2020/0112
Election for the Constituency of Saint Christopher 3
held on the 5th day of June, 2020

BETWEEN:

KONRIS MAYNARD	**Petitioner**
AND	
AKILAH BYRON-NISBETT	**1st Respondent**
ELVIN BAILEY ***(as Supervisor of Elections)***	**2nd Respondent**
LAWSON ARCHIBALD ***(as Registration Officer for the Constituency of Saint Christopher 3)***	**3rd Respondent**
MELVON BASSUE ***(as Returning Officer)***	**4th Respondent**
NASSIBOU BUTLER ***(Chairman, Electoral Commission)***	**5th Respondent**
JOSEPH LIBURD ***(Member, Electoral Commission)***	**6th Respondent**
JASON HAMILTON ***(Member, Electoral Commission)***	**7th Respondent**

Appearances:-

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Petitioner.

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau, Ms. Natasha Grey and Ms. Leah Abdulah for the 1st Respondent.

Mr. Eamon Courtenay S.C., Mrs. Simone Bullen-Thompson, Solicitor General, Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Tashna Powell Williams and Ms. La Shaun Smart for the 2nd , 3rd and 4th Respondents.

Mr. Reginal Armour S.C., Mrs. Sherry-Ann Liburd-Charles, Ms. Vanessa Gopaul for the 5th and 6th Respondents.

Ms. Miselle O'Brien and Ms. Keisha Spence for the 7th Respondent.

SKBHCV2020/0113
Election for the Constituency of Saint Christopher 5
held on the 5th day of June, 2020

BETWEEN:

KENNETH DOUGLAS **Petitioner**

AND

SHAWN K. RICHARDS **1st Respondent**

ELVIN BAILEY **2nd Respondent**
(as Supervisor of Elections)

VINCENT HODGE **3rd Respondent**
(as Returning Officer)

Appearances:-

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Petitioner.
Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau, Ms. Natasha Grey and Ms. Leah Abdulah for the 1st Respondent.
Mr. Eamon Courtenay S.C., Mrs. Simone Bullen-Thompson, Solicitor General, Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Tashna Powell Williams and Ms. La Shaun Smart for the 2nd and 3rd Respondents.

SKBHCV2020/0114

Election for the Constituency of Saint Christopher 4
held on the 5th day of June, 2020

BETWEEN:

STEVE WRENSFORD **Petitioner**

AND

LINDSAY GRANT **1st Respondent**

ELVIN BAILEY **2nd Respondent**
(as Supervisor of Elections)

MIGUEL THOMAS **3rd Respondent**
(as Returning Officer)

Appearances:-

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Petitioner.

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau, Ms. Natasha Grey and Ms. Leah Abdulah for the 1st Respondent.

Mr. Eamon Courtenay S.C., Mrs. Simone Bullen-Thompson, Solicitor General, Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Tashna Powell Williams and Ms. La Shaun Smart for the 2nd and 3rd Respondents.

SKBHCV2020/0115

Election for the Constituency of Saint Christopher 7
held on the 5th day of June, 2020

BETWEEN:

LEON NATTA-NELSON	**Petitioner**
AND	
DR. TIMOTHY HARRIS	**1st Respondent**
ELVIN BAILEY ***(as Supervisor of Elections)***	**2nd Respondent**
DR. PATRICK WELCOME ***(as Returning Officer)***	**3rd Respondent**

Appearances:

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy-Sookoo-Bobb for the Petitioner; Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau, Ms. Natasha Grey and Ms. Leah Abdulah for the 1st Respondent.

Mr. Eamon Courtenay S.C., Ms. Iliana Swift, Mr. Jerome Rajcoomar, Mrs. Simone Bullen-Thompson, Mrs. Tashna Powell-Williams and Ms. La Shaun Smartt for the 2nd and 3rd Respondents;

2020: July 31; October 07 & 28

JUDGMENT

[1] **WARD, J**.: Federal Elections in Saint Christopher and Nevis were held on 5th June, 2020. The main parties contesting the polls were the incumbent Team Unity coalition comprising the Peoples' Action Party, the Peoples Labour Party and the Nevis based Concerned Citizens Movement; the St. Kitts Labour Party and the Nevis Reformation Party. The Petitioners in these applications were all candidates for the St. Kitts-Nevis Labour Party while the 1st Respondents (2nd Respondent in SKBHCV2020/0109). The first respondents were all successful candidates for the Team Unity coalition who were returned by the respective returning officers as duly elected in their respective constituencies. The second, third and fourth respondents were election officials, while the fifth sixth and seventh respondents were members of the Electoral Commission.

[2] On 26th June, 2020 five election petitions were presented which sought to void the General Election, essentially on grounds of corruption and treating:

(i) **Petition SKBHCV2020 /110 -** Dr. Drew v Eugene Hamilton et al
(ii) **Petition SKBHCV2020 /111-** Marcella Liburd v Jonell Powell et al
(iii) **Petition SKBHCV2020 /112 -** Konris Maynard v Akilah Byron-Nisbett et al
(iv) **Petition SKBHCV2020 /113 -** Kenneth Douglas v Shawn Richards et al
(v) **Petition SKBHCV2020 /114 -** Steve Wrensford v Lindsay Grant et al.

[3] On 29 June, a sixth petition was presented: **SKBHCV2020/0115 -** Leon Natta Nelson v Dr. Timothy Harris.

[4] By Notices of Application dated 16th July, 2020, the 1st – 4th respondents in Petition 0110/2020, the 2nd and 3rd respondents in Petition 0111/2020, the 1st Respondents in Petitions 0112/2020, 0113/2020 and 0114/2020 and the 2nd and 3rd respondents in Petition 0115/2020 moved the court to strike out the respective petitions. By Notice of Application dated 17th July, 2020 the 7th Respondent in Petitions 0110/2020 and 0112 of 2020 moved the court to strike out/dismiss or alternatively remove him as a respondent in these matters.

[5] Common to all applications to strike was the ground that the Notice of the Presentation of the Petition and of the Nature of the Security were served out of time in breach of Rule 9(4) of the

National Assembly (Election Petition) Rules, 2014. A number of other grounds were advanced by particular respondents.

Miscellaneous grounds to strike out

[6] In those petitions where election officials were named as respondents they also sought to strike out the petitions on the basis that the petitions disclosed no cause of action against them; that they sought a mandatory order against them which the court is not competent to make; that the Notice of Presentation of Petition and of the Nature of Security and the "Recognizance Giving Security for Costs Under Rule 9" are defective in that (i) the Notice is unsigned; (ii) the Notice stated that the security was given by deposit of money but did not say when the money had been deposited; (iii) the existence of a Recognizance contradicted the Notice and Amended Notice which had stated that security had been given by deposit of money; (iv) the Recognizance failed to identify any sureties or the usual place of abode of each surety with sufficient description so as to enable him/her or them to be found or ascertained. These defects, say the 2nd – 4th respondents, prevented them from ascertaining whether the petitioner had complied with his obligations under section 98 (b) to give security for all costs, charges and expenses at the time of the presentation of the petition or within three days afterwards and whether they should object to the Recognizance pursuant to rule 9 (5) of the National Assembly (Election Petition) Rules, 2014.

[7] The 7th Respondent sought to have the petitions against him struck out on the basis that the document captioned "Amended Notice of Presentation of Petition and of the Nature of Security" and the "Recognizance Giving Security for Costs" are defective in that (i) the Notice is unsigned; (ii) Rule 9(4) does not provide for an "Amended" Notice of Presentation of Petition and of the Nature of the Security and that the Petition fails to disclose any reasonable cause of action against him and/or the Electoral Commission as the pleadings are vague, general and fail to include and/or particularize the facts relied on in breach of Rule 3(d).

[8] Before the merits of these arguments could be determined, on 31st July the Petitioners in all six petitions gave notice of their intention to withdraw the petitions. On 21st August, 2020 the court granted leave and the petitions were withdrawn.

The respondents' submissions on costs

[9] The first respondent's argument in support of the award of costs to them starts with the general proposition derived from Common Law that costs follow the event. On general principles, the unsuccessful party will be ordered to pay the costs of the successful party. They submitted that the Eastern Caribbean Supreme Court of Appeal has on a number of occasions applied this general principle to election petition matters. They also invoke Rule 27 of the National Assembly (Election Petition) Rules 2014 (EPR) which they submitted makes it clear that the award of costs in election petitions is within the discretion of the court. Further Rule 27(3) specifically provides that the rules and regulations of the Supreme Court with respect to costs to be allowed in actions in the court shall in principle and so far, as practicable apply to the costs of election petitions. They cite CPR 64.6 (1) which provides that where the court decides to award costs, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. Since the petitioners were forced to withdraw their petitions when met with applications to strike out and with opposition to substituted service applications, the respondents are the successful party. Accordingly, the petitioners must pay their costs.

[10] As it relates to the manner in which such costs are to be quantified, the first respondent submits that while the court is not bound by the **CPR** costs regime, the court ought not to act arbitrarily and ought to take into consideration all the relevant circumstances.

[11] The first respondent identified the following factors as relevant to the award and assessment of costs:(a) one process server was employed to serve six persons within a limited time frame and compounded by the dilatoriness in handing over the documents to him for service and his own tardiness in serving them; (b) that instead of acknowledging their failure to ensure proper and efficient service, the petitioners compounded matters in Petitions 111 and 115 by making an application for substituted service on the basis that the respective respondents were evading service; and (c) the volume of research and work that had to be undertaken to meet the very specific allegations in the petitions.

[12] The second, third and fourth respondents, invoke **EPR** 27 which they submitted sets out the general rules regarding costs of an election petition. Sub rule (1) confers a general discretion on the court to determine liability for and the proportions of cost. However, that general discretion is qualified by the words "Except where specifically provided in these Rules". They argued that it is specifically provided in Rule 14 (5) that if a petition is withdrawn, the petitioner is liable to pay the

costs of the respondent; therefore, the court *must* order the petitioner to pay the whole of the respondents' costs. In the alternative, they submitted that if the court retains a general discretion to award costs, then by virtue of Rule 27(3) of the **EPR**, the general rule that costs follow the event is applicable. The respondents submitted that this Court should assess the costs payable, as the respondents are not limited to costs in the amount of the security lodged by the petitioners pursuant to section 98(1) of the National Assembly Elections. They submitted that Rules 27(5) and (7) demonstrate that the petitioner's liability extends beyond this sum.

[13] The second, third and fourth respondents say that the following factors are relevant to the award and assessment of costs: the volume of work undertaken by counsel for the respondents between 5th July and the first hearing on 17th July. This included critically reviewing all of the petitioners' documents and undertaking extensive research. Based on these matters, the second, third and fourth respondents submit that the court should fix the costs of each petition in the sum of $58,646.00.

[14] The fifth and sixth respondents also invoke Rule 27 EPR as grounding the court's discretion to award costs. They submitted that the meaning and effect of Rule 27(3) is that CPR 2000 applies to election petitions on the issue of costs so far as practicable. Therefore, they submitted, the general rule as to costs under CPR 64.6 applies in election petitions and they draw an analogy between the liability in costs of a claimant who discontinues a claim by notice under CPR 37.6(1) and a petitioner who has withdrawn the petition. The respondents submitted that the general rule applies particularly where the withdrawal is an acknowledgment that the matter cannot be pursued. They cite the decision of the Trinidad and Tobago Court of Appeal in **Chief Fire Officer and anor v Sumair Mohan**[1] in support. They submitted that withdrawal of the petitions in this case amounts to a recognition of the fatal defect in their case flowing from a breach of Rule 9 (4). They submitted that there are no circumstances which warrant the displacement of the general rule.

[1] The fifth and sixth respondents submitted that relevant circumstances to be considered on the question of costs include the fact that the notice of intention to withdraw was communicated by the petitioners on the morning set for hearing the strike out applications, at the hearing itself and not previously. They submitted that given the settled state of the law relating to the specific nature of

[1] Civ. app. No. 45 of 2008

the non-compliance, it must have been obvious to the petitioners that they could not pursue the election petitions and yet they allowed parties to attend before the Court on at least two occasions.

[2] On behalf of the seventh respondent, learned counsel, Ms. Miselle O'Brien's argument took as its starting point the general proposition that costs follow the event and submitted that it also applied in election petitions. The court's jurisdiction to award costs in election petitions was said to be grounded in Rule 27 of the **EPR**. While accepting that the jurisdiction is discretionary, Ms. O'Brien submitted that in the context of election petition cases, the case law shows that that discretion is exercised in favour of the successful party. In support of this contention, two cases were cited as illustrative of this practice: **Henry v Halstead**[2], **Leroy Benjamin, Wentford Rogers & Rupert Herbert v Lindsay Fitzpatrick Grant** and **Leroy Benjamin, Wayland Vaughn, Cedric Liburd v Eugene Hamilton**[3].

[3] Ms. O'Brien further submitted that this latter authority also establishes that the public interest basis for disallowing costs in election petitions, is but one factor to be considered and is not to be presumed. The court's duty was to consider all the circumstances when determining whether to make a costs order. These include the fact that the party was unsuccessful, the merits of the case and the strength of the case. Further, the presence of section 98 (1) of the National Assembly Elections Act and the **EPR** requiring the mandatory provision for security for costs on presenting an election petition, supports the argument that costs follow the event. The weakness of the petitioner's pleadings, the unacceptable and substandard manner in which the petitioner pursued the proceedings, the last minute withdrawal on the morning of the hearing of the applications to strike and the incorrect filing of documents which resulted in further unnecessary appearances and needless expense, are all factors that are relevant to the issue of costs, which they submitted should be assessed.

The petitioners' submissions

[4] On behalf of the petitioners, Learned Senior Counsel, Mr. Anthony Astaphan submitted that Rule 27 of the **EPR** did not affect, alter or repeal the existing law, principles and settled practice on the court's inherent jurisdiction and discretion on the issue of costs in election and public interest matters. He submitted that under the **EPR** Rule 27, the court has a discretion to refuse to make an order of costs on the withdrawal of a

[2] (1991) 41 WIR 98

[3] HCVAP2006/009/0011/012

petition. Citing **Halsbury's Laws of England,**[4] Mr. Astaphan submitted that at common law there was no right to costs unless the court exercised its discretion to award costs. Mr. Astaphan submitted that the general rule at common law relating to costs was modified or reversed by the High Court in the exercise of its inherent jurisdiction in election matters. This was premised on the grounds that challenges to elections are crucial to our democracies, and that the election jurisdiction of the High Court is not concerned with private rights or such other personal interests or matters. Thus, the petitioners submitted that in election matters prior to the **EPR** 2014, the court did not apply the rules relating to costs in civil proceedings. Instead, the court, having regard to the importance of the peculiar nature of the election jurisdiction, challenges to elections and the public interest, created and applied the rule that each party would bear their own costs unless there was some material justification for an order of costs. The application of this rule is said to be illustrated in **Ethlyn Smith v Delores Christopher et al,**[5] **Julian Prevost v Rayburn Blackmore and Others,**[6] **Ronald 'Ron' Green v Petter Saint Jean**[7] and **Joseph Parry v Mark Brantley.**[8] The **EPR** 2014 did not have the effect of repealing this settled common law rule. The petitioners further submitted that there are strong public interest factors in this case that militate against a costs order: the need to encourage persons to bring electoral challenges since these go to the heart of the democratic process; the petitioners did not act in bad faith or unreasonably in bringing the petitions; there was no prevarication or bad faith in the decision to withdraw the petitions; and a petitioner should not be condemned in costs where he promptly withdraws his petition on sound legal advice.

Discussion

[5] The issues in the case are: (1) whether there is a rule of practice applicable to election petitions that each party would bear their own costs unless there was some material justification for an order of costs; (2) if there is such a special rule in relation to election petitions, whether it has been displaced by the **EPR 27** such that the general rule that costs follow the event applies in election petition cases and (3) if costs are payable, the basis upon which this should be done and, in particular, whether they are limited to the sum deposited as security for costs upon the presentation of the petition.

Issue 1 - Costs in election petition cases pre-Election Petition Rules 2014

[4] 5th Edition, Vol. 12 (A) (2015) para 1698
[5] BVIHCVAP2002/0097
[6] DOMHCV2005/0177
[7] DOMHCVAP2012/0001
[8] At para 90.

[6] The question whether costs should be awarded in election petition cases was addressed by the Court of Appeal in **Henry v Halstead.**[9] In that case a petition had been filed praying that the parliamentary election held on 9th March, 1989 for the constituency of St. John City West be declared invalid. The appellant was the returning officer for that election while the respondent was the unsuccessful candidate. The successful candidate was Mr. Simon. The principal ground of challenge was that an irregularity occurred by the prolongation of the statutory voting hours on the authority of an Order of the High Court. At the conclusion of the trial, the election judge declared the election invalid and ordered the appellant and the successful candidate to pay the respondent's costs "certified fit for one Queen's Counsel and two junior counsel to be taxed if not agreed." On appeal, the sole issue was whether the election judge was right or wrong to have awarded costs to the respondent and against the appellant. The appellant relied on the ground that he could not be blamed for the irregularities which were held to have affected the result of the election which led to the election being avoided, since it was done on the authority of a High Court Order.

[7] The Court of Appeal first found that the jurisdiction to award costs in election petition cases derived from sections 46, 61, 62 and 63 of the Representation of the People Act 1975. Section 46 provided:

> "(1) An election petition shall be tried by the High Court of the West Indies Associated States Supreme Court and the judge presiding at the trial of an election petition is hereinafter referred to as the Election Court.
>
> (2) The Election Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of the High Court of the West Indies Associated States Supreme Court."

[8] Section 61 provided:

> "All costs of and incidental to the presentation of an election petition and the proceedings consequent thereon, except such as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the Election Court may determine; and in particular any costs which in the opinion of the Election Court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or of the respondent, and any needless expense incurred or caused on the part of the petitioner or respondent, may be ordered to be defrayed by the parties by whom it has been incurred or caused whether or not they are on the whole successful."

[9] Section 62 was said not to be relevant for the purposes of the case.

[10] Section 63 provided:

[9] (1991) 41 WIR 98

> "The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with respect to an election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction."

[11] Basing itself on these provisions, the Court of Appeal held that the award of costs in election petitions was governed by Order 62 , rule 3 of the Rules of the Supreme Court. In short these rules provided that a party is entitled to costs unless the court otherwise ordered but that where the court in its discretion decided to award costs, it should order the costs to follow the event, except where the court finds that in the circumstances of the case some other order should be made.

[12] Applying the general rule therefore, the Court of Appeal held:

> "The principal irregularity complained of was the prolongation of the statutory voting hours. This was done on the authority of an order of the High Court. If the order was ul*tra vires* and the voting thereunder was an irregularity, this was not the fault of the appellant. Nor was it the fault of the respondent or Mr. Simon. Fault is therefore a neutral factor in this case.
>
> The fact remains that the respondent was the successful party in the proceedings before the Election Court and therefore was prima facie entitled to be awarded his costs of those proceedings."

[13] The proposition derived from this case is that the general rule that costs follow the event applies in election petition cases. I will return to this case later in this judgment because it was subsequently overruled in part by the Court of Appeal in **Lindsay Fitz-Patrick Grant v Rupert Herbert et al[10].** For the moment though, I turn attention to another Court of Appeal case which directly addressed the issue whether, as a general rule, costs are payable in election petition cases.

[14] In the consolidated appeals of **Leroy Benjamin et al v Lindsay Fitz-Patrick Grant and Leroy Benjamin et al v Eugene Hamilton,[11]** ("the consolidated appeals") the appeals arose out of election petition cases where the trial judge decided not to award costs against the unsuccessful challenger to the election results on the basis of the public interest in election petitions even though

[10] SKBHCV2012/0001
[11] HCVAP2006/0011/0012

he appreciated that the usual rule is that costs follow the event. He decided that the public interest in election petitions justified a departure from that rule. The Court of Appeal dealt frontally with the question whether there is a special rule as to costs for election petitions and addressed the relevance of the public interest factor to the award of costs in an election petition case.

[15] The Court followed the **Henry Halstead** case in holding that the election court exercises the same powers in respect of costs as a judge of the High Court and that the general rule that costs follow the event applied in election petitions. Relating this issue specifically to this jurisdiction Barrow, JA stated at paragraph 9:

> "Costs in an election petition in the Federation of Saint Christopher and Nevis fall within the ambit of section 87 [now S.103] of the National Assembly Elections Act. This section provides, in a far more general way than the legislation reviewed in **Henry v Halstead,** but to a similar effect, that on an election petition the Election Court shall have the same powers, jurisdiction and authority as a judge has on a trial in the civil action in the Supreme Court. The Supreme Court's jurisdiction in relation to costs is contained in Parts 64 and 65 of the **Civil Procedure Rules."**

[16] By the foregoing dicta, Barrow JA meant that **CPR 64** and **65** applies to election petition cases. As will be seen presently, this aspect of the case was subsequently overruled by the Court of Appeal in **Lindsay Fitz-Patrick Grant v Rupert Herbert et al.**[12]

[17] However, as it relates to the general rule Barrow JA stated:

> "The general rule, in relation to claims for an administrative order is that no order for costs may be made against an applicant unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application[13]. That is a special provision. It expresses a policy set by the rule making authority that the public interest in the bringing of such claims is so significant that it justifies a departure from the normal rule that the unsuccessful party should pay the costs of the successful party…[14]

[12] Supra, N. 10
[13] CPR 56.13(6)
[14] At para 13

> Because rule 56.13 (6) establishes a rule of practice, a court dealing with the matter of costs on such a claim is required to do no more than apply the rule. Unless the claimant acted unreasonably in making, or in his conduct of, the application the court may not award costs against him. The starting point, therefore, is no costs."[15]

[18] Barrow JA considered this public policy rule as it relates to election petitions and held:

> "We accept, in principle, that the public interest in an election petition is a factor that a judge may consider in deciding whether to award costs. But it should be fully considered and not assumed. This is so because there is no comparable rule in relation to election petitions as exists in relation to claims for an administrative order."[16]

[19] Barrow JA thus held that the public interest factor was but one factor; the court must consider all of the circumstances of the case in determining whether to award costs.

[20] It seems to me that Barrow JA makes a clear distinction between claims for an administrative order, where the default position is no costs, and election petition cases where the default position is that the general rule applies unless some factor justifies departure.

[21] Barrow JA fortified the view that costs follow the event in election petitions by invoking section 83(1) (b) and (c) of the Act[17] which mandates that at the time of presenting a petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner to any respondent shall be given on behalf of the petitioner; the amount and manner of paying the security; and which provides for the Chief Justice to make rules not inconsistent with the Act as to, *inter alia*, the deposit of security. Based on these provisions, Barrow JA concluded:

> "Further, that Act confirms that the normal rule in election petition cases is that an unsuccessful petitioner must expect to pay costs….In light of the clear legislative and

[15] At para 17
[16] At para 13
[17] Now section 98(1)

judicial indicators to the contrary, we cannot accept the submission that there should be any special rule as to costs for election petitions."[18]

[22] The petitioners stridently contend that there is indeed such a special rule in election petition cases. They fasten to the dicta of the Court of Appeal in another case from this jurisdiction, **Joseph Parry v Mark Brantley,**[19] which they argue recognised and applied that rule. Additionally, they submitted that the consolidated appeals case of **Leroy Benjamin** and the case of **Henry Halstead** which it followed, have been overruled by the Court of Appeal in **Grant v Herbert**.

[23] That assertion overstates the extent to which these judgments were overruled. The first observation is that **Grant v Herbert** was concerned with whether the **CPR** costs regime applies to election petitions. It proceeded on the assumption that costs orders could be made in election petitions but disagreed that its quantification was governed by **CPR**.

[24] It was this aspect of Barrow's judgment in the Consolidated Appeals that was overruled. This is reflected at paragraph 32 of the judgment where Webster JA stated:

> "In the circumstances, I would overrule the decision of this court in the Consolidated Appeals insofar as it directed that the costs be quantified under the CPR." (My emphasis)

[25] Webster JA found that costs were a matter within the inherent jurisdiction of the court. His Lordship's statement, overruling a discreet point in the judgment of Barrow JA, leaves undisturbed the alternative basis on which Barrow JA premised his conclusion that in election petitions costs follow the event, namely, the statutory provisions mandating a deposit of money as security for costs.

[26] As it relates to H**enry v Halstead**, Webster JA, while overruling the finding that **CPR** applied to election petitions, expressly acknowledged that Floissac, CJ had correctly stated the law prior to his statement that the award of costs by the High Court sitting as an election court was governed by Order 62, rule 3. Webster JA commented thus:

> "The judgment of the Court of Appeal was delivered by the Chief Justice, Sir Vincent Floissac. In dismissing the appeal and confirming the costs order, the Chief Justice said,

[18] At para 25
[19] HCVAP2012/0003

'The jurisdiction in regard to the award of costs by the High Court (sitting as an Election Court) is governed by sections 46, 61, 62 and 63 of the Representation of the People Act 1975.'

The Chief Justice then set out the sections of the Act that he referred to, including section 61, which provides that -

"All costs of and incidental to the presentation of an election petition and the proceedings consequent thereon, except such as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the Election Court may determine; and in particular any costs which in the opinion of the Election Court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or of the respondent, ad any needless expense incurred or caused on the part of the petitioner or respondent, may be ordered to be defrayed by the parties by whom it has been incurred or caused whether or not they are on the whole successful."

Up to this point the Chief Justice's exposition of both the power to award costs in election cases and the quantification of such costs cannot be faulted. Section 61 gives the election judge the power to award and assess the costs of an election proceedings without reference to any rules of court. However, the chief Justice went on to include the Rules of Court in the process."[20] (My emphasis)

[27] I understand Webster JA to be there acknowledging that an election court has an inherent jurisdiction - not governed by CPR - to award and assess costs in election petitions. Indeed, this was the finding of the Court of Appeal in **Grant v Herbert.** It seems to me that when one excises the impugned dicta from the judgments which purported to incorporate the **CPR** costs regime into election petitions, the following propositions derived from **Henry v Halstead** and the consolidated appeals remain valid: (i) that the general rule is that costs follow the event in election petitions; (ii) there is no special rule to the contrary as in claims for an administrative order; and (iii) that the public interest is but one relevant factor in the determination of costs.

[20] At para 10

[28] The petitioners are right to say that **Joseph Parry's** case recognised and applied the public law rule to an election case. At paragraph 92 of that judgment Mitchell JA stated:

> "The normal rule in our jurisdiction in public law matters is that each party bears his own costs unless there is some special cause to order otherwise. The rule is based on the premise that meritorious public interest litigation is not to be unduly restrained by the fear of being burdened personally by an order for costs."

[29] To the extent that this dicta may be read as conflicting with Barrow JA's in the consolidated appeals, I note that while the issue of the applicability of the public law rule to election petitions was directly engaged, and therefore a live issue, in the consolidated appeals, that was not a live issue before the court in **Joseph Parry.** Thus, the court did not have the benefit of argument on the point. In those circumstances I would respectfully accord greater deference to the reasoned judgment of Barrow JA on a point that was directly in issue before that court.

[30] The petitioners rely on a number of cases where no costs order was made which are said to be illustrative of the application of the "well settled general rule" that there ought not to be an order for costs in election cases unless there are special or extraordinary circumstances to warrant such an order. Among the election cases where no costs were ordered are **Smith v Christopher,**[21] **Prevost v Blackmore and Others**[22] **and Ronald 'Ron' Green v Petter Saint Jean.**[23]

[31] The petitioners placed great reliance on the dicta of Rawlins J in **Prevost v Blackmore** where he stated at paragraphs' 23 and 24.

> "This claim was brought under Part 56 of the Rules... [Having summarised the provisions, Rawlins J continued]
>
> It may well be that the Claimant should not have the benefit of costs considerations under Part 56 because he should not have instituted the action under that part. Notwithstanding this, it is my view that since electoral challenges go to the very heart of our democratic process, unsuccessful parties, even where a Claim is struck out should not be condemned

[21] Supra N.5
[22] Supra N.6
[23] Supra N.7

in the costs unless the challenge is spurious, frivolous and vexatious or an abuse of the process of the Court."

[32] The deployment of this case in the consolidated appeals in support of the argument that this public law rule applies in election petitions, bore no fruit. Barrow JA observed:

> "Rawlins J specifically based his decision not to award costs on Rule 56.13(6) which establishes the special rule for administrative orders. This decision cannot support the argument of counsel that there is or should be some special treatment of costs on election petitions."[24]

[33] For this reason, and those to be developed below, this argument fares no better on this occasion. The petitioner cites other cases where the court did not award costs to the successful party. However, in a number of those cases there was no indication of the basis for the judge's decision, so they do not really assist on the point. Mr. Astaphan, citing **Halsbury's Laws of England,**[25] properly submitted that at common law there was no right to costs unless the court exercised its discretion to award costs. Accordingly, those cases cited by him, without more, are simply illustrative of the manner in which the judge chose to exercise this discretion in a particular case.

[34] It follows that I do not agree with the petitioners' contention that prior to the enactment of the Election Petition Rules 2014, the general rule at common law relating to costs was modified or reversed by the High Court in the exercise of its inherent jurisdiction in election matters. Put another way, I do not find that prior to **EPR** 2014 there was a rule that in election petitions each party would bear its own costs. It follows from this that the issue whether **EPR** 2014 displaced such a rule is moot. Nonetheless, it is still necessary to examine **EPR 27** to ascertain its meaning and effect on the issue of costs.

Issue 3- The measure of costs - whether limited to the deposit for security

[35] In 2014, Election Petition Rules were made by the Chief Justice pursuant to the National Assembly Elections Act, section 98 (2) which provides:

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[24] At para 24

[25] 5th Edition, Vol. 12 (A) (2015) para 1698

"(2) Rules, not inconsistent with the provisions of this Act, as to the deposit of security and the practice and procedure for the service and hearing of election petitions and matters incidental thereto may be made by the Chief Justice."

[36] Statutory Rules and Orders No. 4 of 2014 was gazetted on 27th February 2014.[26] Among the matters provided for in those Rules was the general costs of an election petition. Rule 27 provides:

""27. General costs of petition

(1) Except where specifically provided for in these Rules, all costs, charges and expenses of and incidental to the preparation of a petition, or of any consequent proceedings shall be in the discretion of the Court and shall be defrayed by the parties to the petition in a manner and in proportions as the Court may determine.

(2) The Court may disallow any costs, charges or expenses which may, in its opinion, have been caused by -

(a) vexatious conduct,
(b) unfounded allegations; or
(c) unfounded objections

on the part of either the petitioner or the respondent and shall have regard to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether or not the parties are on the whole successful.

(3) The rules and regulations of the Court with respect to costs to be allowed in action, causes and matters in the Court shall, in principle and so far as practicable, apply to the costs of election petitions and connected proceedings and the amount of the costs may be fixed by the judge or may be directed to be assessed."

[37] The meaning of this provision is clear. In an election petition, the question of costs is within the discretion of the court except where specifically provided in the Rules. The manner in which such costs are to be quantified, where awarded, is a matter for the judge who may, in principle and so far as practicable, draw on the rules relating to costs in the **CPR.**

[26] Gazette No. 10 of 2014

[38] The similarity between this Rule and Section 61 of the Antigua Representation of the People Act 1975 (discussed above in **Henry v Alstead** and by Webster JA in **Grant v Herbert)** is striking but for one major difference, namely; the inclusion of sub rule (3) referencing the rules and practice of the courts in relation to costs. Otherwise, the only difference between the two provisions is that the Antigua model is composite while in Saint Christopher and Nevis it is deconstructed into subsections. In **Grant v Herbert**, Webster JA commented on the meaning of that provision in the following terms:

> "Up to this point the Chief Justice's exposition of both the power to award costs in election cases and the quantification of such costs cannot be faulted. Section 61 gives the election judge the power to award and assess the costs of the election proceedings without reference to any rules of court."[27]

[39] In other words, Webster JA was saying that in Antigua the power to award and assess costs in election petitions derived from that provision and not rules of court. With the advent of the **EPR** 2014 in Saint Christopher and Nevis, there can now be no doubt that the election judge has an inherent jurisdiction whether to award and assess costs, and, in so doing, he may in principle draw on rules of the Supreme Court in relation to the award of costs so far as practicable. **CPR 64** and **65** embody the common law principle that costs follow the event.

[40] However, a relevant consideration in this case is that the question of costs arises, not after a trial of the petition, but upon the withdrawal of the petitions by the petitioners when met with applications to strike them out. Rule 14 (5) is therefore material since it specifically speaks to liability for costs where a petition is withdrawn. It provides:

> "If a petition is withdrawn, the petitioner is liable to pay the costs of the respondent."

[41] This is one reason for concluding that where the election judge determines to award costs, the general common law rule, embodied in Order 64 and 65, that costs follow the event is applicable to an election petition under the statutory regime obtaining in Saint Kitts and Nevis. Even under Rule 14 (5), however, the decision whether or not to award costs is discretionary. I do not agree with the submissions of learned Senior Counsel, Mr. Courtenay that the Rule is to be interpreted as

[27] At para 10

mandatory, with the result that once a petition is withdrawn the judge *must* award costs[28]. The word "liable" does not translate to shall. The judge must yet make an informed, evaluative judgment based on an assessment of the various circumstances relating to the case in determining this question.

[42] I consider that section 98(1) (b) which mandates the deposit of security for costs on presentation of an election petition also bears on the issue. It provides:

> ""(b) at the time of the presentation of the petition, or within three days afterwards, security for payment of all costs, charges and expenses that may become payable by the petitioner
>
> (i) to any person summoned as a witness on his or her behalf; or
>
> (ii) to the member whose election or return is complained of, or to any other person named as a respondent in the petition,
>
> shall be given on behalf of the petitioner.
>
> (c) the security shall be to an amount of twelve hundred dollars and shall be given by recognizance to be entered into by any number of sureties not exceeding four approved by the Registrar of the High Court, or by deposit of money in the High Court, or partly in one way and partly in the other."

[43] I concur in and adopt the reasoning of the Court of Appeal in the consolidated appeals where it was held that this provision confirms that the normal rule that costs follow the event applies in election petitions. As Barrow JA stated:

> "Further, that Act confirms that the normal rule in election petition cases is that an unsuccessful petitioner must expect to pay costs. This appears from the provision contained in s. 83 (1) (b) and (c) of the Act, which states that at the time of presenting a petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner to any respondent shall be given on behalf of the petitioner. The section specifies the amount of security to be given and the manner of giving it. In subsection (2) it is stated that the Chief Justice may make rules not

[28] At para 13 of 2nd ,3rd, and 4th respondents' written submissions dated 4th September, 2020

inconsistent with the provisions of the Act as to the deposit of security, among other things. In light of the clear legislative and judicial indicators to the contrary, we cannot accept the submission that there should be any special rules as to costs for election petitions."[29]

[44] The petitioners submitted that in the event that costs are to be awarded it should be limited to the $1,200 deposited as security for costs. To my mind, nothing contained in section 98(1) of the Act or the **EPR** 2014 supports such a contention. On the contrary, as learned Senior Counsel for the second, third and fourth respondents persuasively argued, Rules 27 (5) and (7) demonstrate that the petitioner is liable beyond the amount of the security given. Those Rules provide:

> "(5) Execution shall immediately issue out of the Court for the recovery of the amount of the costs ordered to be paid against the petitioner and the sureties jointly and severally to the extent of the amount for which they are bound by the recognizance, but the petitioner is always liable to pay the full amount of the costs,.
>
> (7) If a respondent who is ordered to pay any costs to the petitioner fails to do so within fourteen days from the date of the order directing the payment, execution shall immediately be issued out of the Court for the recovery of the amount of costs."

[45] These provisions do not contemplate any limit on the costs to be awarded, save that the sureties are liable only to the extent of the amount for which they are bound by the recognizance while the petitioner is always responsible for the full amount.

Conclusions

[46] Based on my review of the authorities prior to the introduction of the **EPR**, 2014, the provisions of the **EPR** 2014 and of the National Assembly elections Act, s. 98(1) (b), the current state of the law in relation to costs in election petitions in Saint Christopher and Nevis may be summarised as follows: (1) Rule 27 gives the court the discretion whether to award costs, except where specifically provided by the Rules, and the power to assess such costs; (2) where the issue of costs arises on the withdrawal of an election petition, the petitioner is liable to pay costs in the discretion of the judge; (3) where the judge decides to award costs, the normal rule is costs follow the event unless

[29] At para 25

there are special circumstances that justify the making of a different order; (4) such costs are not limited to the amount of the security given.

The relevant circumstances in this case

[47] In determining whether I should exercise my discretion to award costs in this case, a number of factors are highly pertinent. First, I consider the public interest. Undoubtedly there is much to be said for not discouraging meritorious election petitions from being presented. At the same time, a situation must not be encouraged whereby frivolous and vexatious petitions are allowed to be filed almost reflexively after each general election. This sentiment merely recalls the sage admonition of Michel JA in **Ronald Green v Petter Saint Jean** when he stated:

> "While the filing of an election petition is the right of every election candidate, those seeking elective office should be careful not to transport their electoral contests from the political platforms to the law courts unless there is a good basis for challenging the outcome of an election. To file election petitions as a matter of course or whenever there is a close result or there is some inconsequential or unprovable allegation of impropriety is inimical to our democratic process which is based on first past the post and not first into court."[30]

[48] As against the public interest, I balance the following. The filing of election petitions after general elections in Saint Christopher and Nevis seems to be commonplace when one considers the number of cases from this jurisdiction that litter the law reports. A petitioner who contemplates presenting a petition must therefore be astute to ensure that they acquaint themselves with the strict requirements of the election law. It is by now notorious that fastidious compliance with time strictures for presenting and perfecting election petitions is an uncompromising requirement, the non-observance of which will render an election petition stillborn. It behooves a petitioner therefore to fasten an eye on the clock when presenting a petition.

[49] The petitioners have failed wholly to do so in every one of these petitions. Seemingly, it took the filing of applications to strike them out to prod the petitioners into withdrawal. And even so, no explanation was furnished in the petitioners' applications to withdraw as to how this state of affairs

[30] At para 50

came about and persisted for so long without the obvious dawning upon them, namely, that the petitions were out of time. I agree with Ms. O'Brien that it lay within the bosom of the petitioners to say why.

[50] In some cases, even when the documents were presented to the petitioners' process server or when he first attempted to serve them, they had already run afoul of the time stipulations for service of Notice of the Nature of the Security set out in Rule 9 (4).

[51] No doubt this state of affairs has produced unnecessary expense as, given the very serious nature of the allegations made in the petitions, the respondents had to mobilize very experienced counsel in order to answer the petitions when, with reasonable diligence, it should have been clear that the petitions should have been promptly withdrawn as early as the first hearing as they were hopelessly out of time.

[52] In my view, the circumstances of this case warrant the making of an order for costs. There are no special circumstances that justify the making of a different order. The respondents have not in any way contributed to this state of affairs as they have neither engaged in vexatious conduct nor made unfounded objections. It is right, therefore, that the burden of defraying the needless expenses that have been incurred in these election petitions be thrown on the petitioners by whom they were caused.

[53] Accordingly, the order of the court is that the petitioners shall pay the costs of the respondents, such costs to be assessed if not agreed.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar