

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO** HCV 03948 of 2007

**IN CHAMBERS**

BETWEEN	<b>RICHARD EDWARD AZAN</b>	CLAIMANT/PETITIONER
AND	<b>MICHAEL STERN</b>	1 <sup>st</sup> RESPONDENT
AND	<b>HASKELL THOMPSON</b>	2 <sup>nd</sup> RESPONDENT

Abe Dabdoub and Chumu Parris instructed by Scott, Bhoorasingh and Bonnick for the Claimant/Petitioner.

Kirk Anderson and Ms. Motheba Linton instructed by DunnCox for the 1<sup>st</sup> Respondent.

Ms. Lisa White instructed by the Director of State Proceedings for the 2<sup>nd</sup> Respondent.

**HEARD: 16, 18, 24, 25 and 30 July, 2008**

**M. McINTOSH, J.**

**JUDGMENT**

[1] This is an application, brought by the 1<sup>st</sup> Respondent under Rule 9.6 of the Civil Procedure Rules 2002, to seek a declaration that he was not duly served

with the Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars pursuant to the Election Petitions Act and that this Court therefore has no jurisdiction over this matter. The 1<sup>st</sup> Respondent also applies to strike out the above documents or set aside service of same.

### **Background**

[2] Michael Stern (the 1<sup>st</sup> Respondent) was elected as a member of the House of Representatives for the Constituency of North West Clarendon during the national elections held in Jamaica on the 3<sup>rd</sup> day of September, 2007. He ran against Richard Azan (the Petitioner), the People's National Party's candidate.

[3] On October 3, 2007, the Petitioner filed a Notice of Presentation of Election Petition, Fixed Date Claim Form (Election Petition) and Particulars of Claim in the Supreme Court. The Election Petition was filed under the Representation of the People Act and the Elections Petitions Act and it sought several declarations including, inter alia, that the 1<sup>st</sup> Respondent's nomination and election to be a Member of Parliament was null and void, as on the 7<sup>th</sup> day of August, 2007, the 1<sup>st</sup> Respondent was not qualified to be elected to the House of Representatives as he is a citizen of the United States of America.

[4] An affidavit of Service by Lescine Prendegast was filed by the Petitioner's attorneys on the 23<sup>rd</sup> October, 2007 wherein he deponed that the above documents were served on the 1<sup>st</sup> Respondent on October 10, 2007. He deponed that he effected service by sending same to the 1<sup>st</sup> Respondent by

registered post from the General Post Office, King Street, Kingston to Main Street, Frankfield, Frankfield P.O., Clarendon. Mr. Predendegast's affidavit exhibits a certificate of posting, verifying posting on October 10, 2007 to the said address.

[5] An acknowledgment of service was filed on the 7<sup>th</sup> November 2007. The application of the 1<sup>st</sup> Respondent to strike out the Election Petition and/or to set aside service of the same was filed on 12<sup>th</sup> November, 2007 supported by Affidavit of Michael Stern, sworn to on the 8<sup>th</sup> November, 2007. An Amended Notice of Application was filed on the 19<sup>th</sup> November, 2007 adding to the end of Paragraph 1 of the Orders being sought the following words "and the Particulars of Claim filed herein on October 3<sup>rd</sup> 2007 be set aside".

### **Issues for determination**

- [6] a. Was service of the Notice of Presentation of the Petition and a copy of the Petition served in accordance with section 6 of the Election Petitions Act?
- b. Were the Particulars of Claim furnished in accordance with section 8 of the Election Petitions Act?

Issue 1: *Was service of the Notice of Presentation of the Petition and a copy of the Petition served in accordance with section 6 of the Election Petitions Act?*

[7] Section 6 of the Election Petitions Act provides as follows:

*"Notice of the presentation of a Petition and the Security (if any) accompanied by a copy of the Petition shall, within ten days after the presentation of the petition, be served by the petitioner on the Respondent.*

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

[8] Sections 23(3)(a) and (b) of the Representation of the People Act provides that:

*"(a) every nomination paper shall specify such particulars of the name, address and occupation of the candidate as are sufficient to identify him; and*

*(b) his address for service of process and papers under this Act;..."*

[9] The 1<sup>st</sup> Respondent states in his Affidavit sworn to on the 7<sup>th</sup> March, 2008 and confirms in his Affidavit sworn to on the 20<sup>th</sup> day of June 2008 that his nomination paper, which is exhibited to his affidavit sworn on the 7<sup>th</sup> March, 2008, states his address as "Main Street, Frankfield". A look at Mr. Stern's nomination paper confirms that he did not specify the Post Office or the parish when completing the nomination paper. Thus, his nomination paper makes no reference to Frankfield Post Office (Frankfield P.O.) or the parish of Clarendon as part of his address, as was stated on the registered post which was sent to him.

[10] The 1<sup>st</sup> Respondent therefore submits in paragraph 16 of his skeleton submissions that the “failure to post the documents to the address given by the 1<sup>st</sup> Respondent on his nomination paper is contrary to the provisions of the Election Petitions Act and therefore nullifies the purported service.” Further, he uses the Court of Appeal judgment in Phyllis Mitchell v Desmond Mair et al, Supreme Court Civil Appeal No. 125/2007 to support the proposition that the provisions of the Election Petitions Act must be strictly construed. In essence he submits that since the documents were not sent to the identical address on the nomination paper the requirement in section 6 of the Election Petitions Act had not been met, and therefore he was not properly served.

[11] A few undisputed facts must be stated. Firstly, the 1<sup>st</sup> Respondent in paragraph 7 of his affidavit, sworn March 7, 2008, claims that “he has always had his address at Main Street, Frankfield in the parish of Clarendon” and in paragraph 6 that “I have had my offices at Main Street, Frankfield in the parish of Clarendon for the past 19 years.” Notably, in his Affidavit the Respondent added “in the parish of Clarendon”, which was not stated on his nomination paper. Additionally, he has never said that Main Street, Frankfield, Frankfield P.O., Clarendon is not his true address or that it is a different place from that stated on his nomination paper. Further, the 1<sup>st</sup> Respondent during cross examination admitted that Frankfield, Clarendon has only one post office which is situate on Main Street, Frankfield, Clarendon.

[12] It is therefore undeniably palpable that the address on the nomination paper and the address to which the documents were posted refer to the same place. In fact, the 1<sup>st</sup> Respondent admits that he received all of the documents mailed to him.

[13] In light of this, to accept the 1<sup>st</sup> Respondents proposition that he was not properly served because the words "Frankfield P.O." and Clarendon" were included in the postal address would make a mockery of the proceedings. The Court must apply common sense to matters on which it adjudicates. The candidate in this instance failed to specify his address in order to facilitate service, as he is required to do under the Representation of the People Act. The reality is that the address on the nomination paper was incomplete. The Claimant/Petitioner addressed the letter in a more detailed manner than was stated in the nomination paper, but it was clearly the correct address and all of the documents were received. It cannot be said that the Petitioner should have addressed the letter to the incomplete address that was stated on the nomination paper.

[14] The Petitioner's submissions are accepted. It is clear that "Main Street, Frankfield, Frankfield P.O., Clarendon" and "Mainstreet, Frankfield" refer to the same place. The address to which the documents were posted is the address 'stated in the respondent's nomination paper', though they are not identical. The only difference, as counsel for the Petitioner has submitted, is that the former address is written with more specificity than the latter. The address to which the

document is posted does not have to contain the same words as on the nomination paper; it is the same address as long as it refers to the same place where he can be found or communicated with. The Notice of Presentation of the Petition and a copy of the Petition were therefore served in accordance with section 6 of the Election Petitions Act.

*Issue 2: Were the Particulars of Claim furnished in accordance with section 8 of the Election Petitions Act?*

[15] Section 8 of the Election Petitions Act provides that:

*"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 (10) 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."*

1<sup>st</sup> Respondent's Submissions

[16] The 1<sup>st</sup> Respondent in his Affidavit filed on 12<sup>th</sup> November, 2007 deponed that on the 31<sup>st</sup> October, 2007 he received a Notice of Presentation of the Election Petition and the Fixed Date Claim Form (Election Petition) which set out Particulars of Claim as part of the said Fixed Date Claim Form.

[17] The 1<sup>st</sup> Respondent argues that although he received the Notice of Presentation of the Election Petition and the Fixed Date Claim Form (Election Petition) and Particulars of Claim, he was not 'furnished' with the particulars within ten (10) days of presentation of the petition, as section 8 stipulates. He therefore makes a distinction between being "furnished" and "served". He submits that "the use of the word furnished in section 8 of the Act, must, of necessity, as a matter of statutory interpretation and the guiding principles which are applicable thereto, be interpreted as meaning something different from "served" which is the terminology used by the draftsman in section 6 of the same Act." He contends that since the words "furnished" and "served" are two different words used in the same Act, they should be interpreted by the Court, as meaning different things.

[18] Further, he submits that the word "furnished" is defined in the Concise Oxford English dictionary as meaning, inter alia, "be a source of, provide". He also submits a definition of the word from "Words and Phrases Legally defined, Volume D – J, 3<sup>rd</sup> Ed. as "provided for use...and in such a position as will reasonably enable one to make use of what is furnished".



submitted, it is plain that the section contemplates that the Election Petition itself may contain, not merely the 'general grounds', but also the particulars on which the Petitioner relies. It is also patent that these particulars may be furnished at the same time that the petition is served pursuant to section 6 of the Act. The Act clearly gives the petitioner the option of providing the particulars either at the time of service (that is, as part of the election petition) OR within ten (10) days after service. Thus, in light of the amendment to the Election Petitions Act, the most reasonable conclusion is that particulars may be furnished either by personal service or by registered post.

[25] The distinction which counsel for the 1<sup>st</sup> Respondent has attempted to make between 'furnishing' and 'serving' the particulars is therefore untenable. Further, one cannot apply different principles regarding service to section 6 and section 8 of the Act as counsel for the 1<sup>st</sup> Respondent is suggesting. If a method of service (i.e. by registered post) was added to section 6 of the Election Petitions Act, the argument that that method only applies to section 6 of the Act cannot be accepted. The method of service must refer broadly to how the Election Petition and accompanying documents are served.

[26] The court has to have regard to, and is in fact constrained by, the Court of Appeal ruling in the Phyllis Mitchell case. Here, one is reminded that section 6 of the Election Petitions Act was amended to provide for service by way of registered post in order to cure the mischief brought about by respondents evading service. (See page 23 per Smith, J.A.). Against this background, the

court found that on a true construction of section 6 of the Election Petitions Act the Notice of Presentation of Petition and the other documents were served and given on the date when the letter containing them was dispatched by registered post.

[27] In the light of the court's ruling in the Phyllis Mitchell case, it is clear that in the instant case the particulars were served on the 1<sup>st</sup> Respondent when they were dispatched on October 10, 2007. Given that the Election Petitions Act does not preclude providing the particulars at the time of service of the petition, the only logical corollary is that the particulars were 'furnished' to the 1<sup>st</sup> Respondent on October 10<sup>th</sup> when he was served with the particulars as part of the Fixed Date Claim Form, within the ten days required by law.

[28] Counsel for the 1<sup>st</sup> Respondent has asked the court to have regard to the ordinary meaning of the word 'furnished'. With the greatest respect to learned counsel, the definition he has provided in no way excludes 'service' of the documents. The two terms are not mutually exclusive. Once the documents were properly served, they were, in keeping with the 1<sup>st</sup> Respondent's definition, 'provided for use'. In fact, since the 1<sup>st</sup> Respondent admits that he received the documents it is axiomatic that they were 'provided for use' when they were served on him. Therefore, when the 1<sup>st</sup> Respondent states that the particulars must be 'delivered to' him in order for them to be furnished, he is expanding his own definition and perhaps exceeding the ordinary meaning of the word.

[29] Before concluding, out of respect for the submissions from both counsel, a few words should be said about whether section 8 is mandatory or directory. The importance of this is that if the section is deemed mandatory and the Petitioner has failed to comply with the provision, the petition is rendered a nullity and the court will have no jurisdiction over the matter. Counsel for the 1<sup>st</sup> Respondent has provided a number of cases to show how a court should determine if a 'shall' in a provision is mandatory or discretionary. It is however patent that the Court of Appeal decision in Joel Williams v James Messam is clearly on point with what is at issue in the instant case and is the most relevant case pertaining to the peculiarities of election petitions. The case clearly states that the position in Jamaica is that section 8 is directory because, as Carey, P. (Ag) states at page 602, "rules as to particulars or grounds, in my view relate to a matter of procedure and do not bear on the question of jurisdiction".

[30] The 1<sup>st</sup> Respondent relied on the Jamaican case Stewart v Newland and Edman (1972) 12 J.L.R. 847 to support the proposition that sections 6 and 8 of the Election Petitions Act ought to be viewed as mandatory provisions. However, the judge in Stewart v Newland was concerned only with section 6 of the Act and determined that that section was mandatory; this is confirmed by all the judges in Joel Williams. Further the judges in the latter case agreed with the ruling of Parnell J. in Buck v King that provision of section 6 is mandatory because the court has no competence to adjudicate on a petition until it has been served on the respondent. However, once the petition is served, 'the court is entitled to

resort to its inherent jurisdiction to govern its procedure...as section 24 (3) of the Act provides." (per Downer, J.A. at page 606).

[31] Thus, even if this court had found that the 1<sup>st</sup> respondent was not furnished with the particulars within the ten days stipulated by law, the jurisdiction of the court would not have been ousted.

### Conclusion

[32] The Fixed Date Claim Form (Election Petition), Notice of Presentation of the Petition and a copy of the Petition were mailed by registered post to the address stated on the 1<sup>st</sup> Respondent's nomination paper. The 1<sup>st</sup> Respondent was therefore served in accordance with section 6 of the Election Petitions Act.

[33] The Particulars of Claim were furnished in accordance with section 8 of the Election Petitions Act.

[34] The words of section 8 of the Election Petitions Act are directory.

[35] This Honourable Court has jurisdiction to try the instant case.

I therefore make the following orders:

1. Application to strike out Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused.

2. Application to set aside service of Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused.
3. That the 1<sup>st</sup> Respondent files <sup>and serves</sup> his defence by August 12, 2008.
4. That the matter will be set down for a Case Management Conference *on 23rd September 2008 at 10 am.*
5. Costs to the Claimant/Petitioner.
6. *Leave to appeal granted*