



[2018] JMSC Civ 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016HCV05124

COSTS JUDGMENT

| | | |
|----------------|--|------------------------------|
| BETWEEN | CONSTANTINE D BOGLE | PETITIONER |
| AND | DEAN RIPTON JONES | FIRST RESPONDENT |
| AND | FRANKLYN HOLNESS | SECOND RESPONDENT |
| AND | MARVALYN PITTER | THIRD RESPONDENT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | FOURTH RESPONDENT |

IN OPEN COURT

Bert Samuels, Bianca Samuels and Dana Daynia instructed by Knight Junor and Samuels for the petitioner

Marvalyn Taylor-Wright, Anwar Wright and Christal Brown (received judgment) instructed by Taylor-Wright and Company for the first respondent

Susan Reid Jones and Carla Thomas instructed by the Director of State Proceedings for second and fourth respondents

September 27, 2018

ELECTION PETITION – COSTS – WHETHER ENTITLED TO COSTS ON INDEMNITY BASIS – SECTION 28 OF ELECTORAL PETITIONS ACT

SYKES CJ

- [1] When the reasons for judgment in the petition were delivered Mr Samuels made an application for subsequent orders. These were orders for the repayment of salary, emoluments and benefits paid to Mr Jones for the time he sat as councillor on the St Thomas Municipal Council.
- [2] It is necessary to point out that an order of the type now sought was not pleaded. There was good reason for that. Mr Bogle did not pay Mr Jones any money and neither did Mr Bogle have any right in or over the money paid to Mr Jones. Therefore, Mr Bogle had no standing before the hearing of the petition to seek such an order. Nothing has changed to alter that position. The fact that Mr Jones lost the petition is not a sufficient reason for such an order for the same reasons just stated.
- [3] The only person who can bring such a claim is the St Thomas Municipal Council. In this matter, only the Council has sufficient standing to bring a claim for moneys it paid to Mr Jones during his brief sojourn as a member of the council. Such a claim would be subject to any legitimate defences that can be raised to such a claim. This is sufficient to dispose of this aspect of the matter.
- [4] The next order sought was an order for costs on an indemnity basis against Mr Jones. Mr Samuels relies on section 28 of the Elections Petitions Act as well as cases. Section 28 of the Electoral Petitions Act reads:

All costs and charges and expenses of and incidental to the presentation of a petition and to the proceedings consequent thereon, with the exception of such costs, charges and expenses, 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 Court or Judge may determine, regard being had to the disallowance of any costs, charges or expenses which may in the opinion of the Court or Judge, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing

the burden of defraying same on the parties by whom it has been caused, whether such parties are or are not on the whole successful. And the court or Judge shall give judgment for such costs in accordance with such determination as aforesaid. Such costs shall be taxed by the proper officer of the Supreme Court according to the same principles as costs between solicitor and client are taxed in an equity suit in the Supreme Court.

- [5] The principles relating to costs on an indemnity basis are not in doubt. Also, it is now established law that the absence of the words indemnity or standard basis from the CPR does not mean that indemnity costs do not apply in Jamaica (see **RBTT Bank Jamaica Ltd v YP Seaton** [2014] JMSC Civ 139, [40] – [55], affirmed **Sagicor Bank Jamaica Limited v YP Seaton** [2018] JMCA Civ 23 [81] – [92]).
- [6] There are two principal reasons for Mr Bogle to be seeking indemnity costs. These are (a) the hearing was unnecessarily delayed because of objections taken by Mr Jones and (b) the court's finding that Mr Jones did not retire in November 2016 but in December 2016. The court will deal with the first reason given. In respect of (a) the submission is that on May 24, 2017 Mr Bogle took objection to paragraphs in Mr Bogle's statement. This objection resulted in the matter being set on May 25, 2017 for a case management conference to be held. On May 25, 2017 it was said that Mr Jones asked the trial judge to recuse herself, which she did which resulted in the matter being set for another case management conference to be held on June 15, 2017. On June 15, 2017, it is said that Mr Jones even objected to the case management conference being held. The consequence was that the issue of the admissibility of certain parts of Mr Bogle's statement was unresolved. It is not clear if anything else happened on June 15, 2017. The matter was set to commence on July 4, 2017.
- [7] On July 4, 2017, the admissibility issue was resolved. This led Mr Samuels to say that Mr Jones' handling of this aspect of the matter led to unnecessary delay. The court does not agree that this conduct rises to the level that indemnity costs are awarded. It may have been inconvenient to raise the admissibility issue at the

time when it was done but that in and of itself, annoying though it may be, is not sufficient to attract costs being awarded on an indemnity basis.

[8] The court now turns to the second reason. The proposition is that the court having found that Mr Jones did not hand in his resignation in November 2016 but in December 2016, it necessarily followed that Mr Jones knew that when he said he handed in the resignation in November 2016 he was not speaking the truth and had he spoken the truth a full hearing was not necessary.

[9] The evidence in the case was that there were three letters all purporting to be the resignation letter. The one that the court accepted to be the copy handed to Mrs Morgan Rogers was attacked on the basis that Mr Jones' immediate supervisor's signature was a forgery. No evidence other than the assertion of the witness was presented to support the proposition that the signature was forged. However, that does not mean that Mr Bogle is entitled to a costs order on an indemnity basis. The fact that the court has made a finding adverse to a litigant does not by itself mean that the successful party is entitled to a costs order on an indemnity basis. The case did not depend on any finding of intention and no such finding was made. Thus, the suggestion that Mr Jones knew that he in fact handed in his resignation in November and was lying is not a finding that the court made, and it was not necessary to the case. It could be that he was mistaken as distinct from deliberately misstating the truth. The court has said enough to indicate that it will not make an order for costs on an indemnity basis.

[10] The court does not find any evidence of vexatious conduct or the making of unfounded allegation or unfounded objections. The mere fact of advancing a case contrary to the petitioner is not a sufficient basis to bring the case within the meaning of the phrase 'vexatious conduct, unfounded allegations or unfounded objections' as used in section 28 of the Electoral Petitions Act.

[11] The court is of the view that costs should be awarded to the successful party. The case was presented on two bases of which only one succeeded. It must also be borne in mind that even though Mr Bogle succeeded on one basis he secured

his major objective which was the unseating of Mr Jones. Thus Mr Bogle succeeded on the petition.

- [12] Mrs Marvalyn Taylor Wright proceeded by an analogy with public law litigation to suggest that costs should not be awarded against Mr Jones because it might have a chilling effect on those who wish to pursue cases of this nature. To this end learned counsel relied on the case of **Pilling and others v Reynolds and another** [2008] EWHC 316 (QB). In particular counsel cited dictum from Blake J ([39]). Now Buckley J did say words that encouraged counsel but in the end all that was achieved in that case was a reduction of costs and not the setting aside of the costs order.
- [13] On the question of how that assessment should be done, this court need only cite the authority of the Court of Appeal of Jamaica in **Bowen v Robinson** [2015] JMCA Civ 57 which sets out what the Registrar is to do. The Court of Appeal also interpreted section 28 of the Electoral Petitions Act and no useful purpose would be served by repeating what was so clearly set out by Dukharan JA at [53] - [55], [75] - [79].
- [14] Costs of petition to the petitioner to be agreed or taxed.