



[2016]JMSC Civ. 227

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2016 HCV05178**

**IN THE MATTER OF THE
REPRESENTATION OF THE PEOPLES ACT**

AND

**IN THE MATTER OF THE INTERPRETATION
ACT.**

AND

**IN THE MATTER OF THE LOCAL
GOVERNMENT ELECTION FOR THE RAE
TOWN ELECTORAL DIVISION OF THE
CONSTITUENCY OF THE KINGSTON
CENTRAL DIVISION HELD 28th DAY OF
NOVEMBER 2016.**

AND

**IN THE MATTER OF AN APPLICATION BY
ROSALIE HAMILTON FOR PERMISSION TO
APPLY FOR JUDICIAL REVIEW [CPR 56.3]**

BETWEEN ROSALIE HAMILTON APPLICANT

**AND THE PARISH JUDGE RESPONDENT
(PARISH COURT FOR THE CORPORATE AREA)**

Application for Judicial Review - extension of time for filing under section 47 of the Representation of the People Act - whether subsidiary legislation can operate to amend substantive law.

Ms. Georgia Hamilton and Mr Donovan St. L Williams instructed by Donovan St. L Williams for the applicant. Mr. Bert Samuels and Mr. Able Don Foote instructed by Knight Junior and Samuels for the interested party Mr. Shawn McGregor.

Heard on the 13th December 2016, 20th of December 2016 and the 28th of December 2016.

Shelly-Williams J.

BACKGROUND

[1] On the 12th of December 2016 the Applicant filed a Without Notice Application for Leave for Judicial Review. An affidavit in support sworn by Rosalie Hamilton was also filed on the said date. The application sought the following orders namely:-

- a. Leave be granted to the Applicant to apply for Judicial Review of the decision of the Parish Judge of the Parish Court of the Corporate Area, Holden at Sutton Street made on the 12th day of December 2016 to proceed with the recount of the ballots cast in the Local Government Election for the Rae Town Electoral Division in the Constituency of Kingston Central on the 28th of November 2016 (“the said recount proceedings”).
- b. There be a stay of the said recount proceedings pending the outcome of these judicial review proceedings.
- c. Cost to be cost in the claim.

[2] A Local Government election was held on the 28th of November 2016. On the 29th of November 2016 the applicant was certified as the member elect for the Rae Town Division of the Central Kingston Constituency. She was issued with a certificate

from the returning officer to that effect. A copy of the certificate was attached to an affidavit that she filed in support of this application.

[3] On the 5th day of December 2016 the applicant was served with an affidavit for a Magisterial Recount. On the following day she was served with a copy of a Summons to appear in the Magisterial Recount to be held on the 12th of December 2016. On the 8th of December the applicant received a letter from Messrs. Knight Junior and Samuels, attorneys for Mr Shawn McGregor, asking for an indication if she would be willing to attend the recount proceedings on the 9th of December instead of the 12th of December 2016. She indicated that she could not attend the hearing on that 9th day of December 2016.

[4] On the 12th of December prior to the recount the attorneys for the applicant made a preliminary challenge to the recount indicating that the time for the filing of the application for recount as well as the time for the recount had expired and as such the recount ought not to proceed. The learnt Magistrate ruled that:-

- a. The Parish Court Rules are an extension of Representation of the People's Act (ROPA), as the Act is silent on whether proceedings can be held on Saturdays; the expiration of the time for filing an application for a magisterial recount should be extended to a day when the Parish Court is open;
- b. The gazetted time for the opening of the Court is Monday to Friday and by virtue of that fact, Saturdays are excluded; and
- c. In computing the time under ROPA for setting the recount proceedings down for hearing, this must be done using the concept of clear days thereby excluding not just the date on which the election results were certified but also the fourth day, so that the matter was properly set down for hearing on 12th December 2016.

[5] The applicant filed a Without Notice Application for Leave to file Judicial Review on the 12th of December 2016 however the Claimant was ordered to serve the

application. The Respondent was served by means of e-mail and the interested party was served on the 13th of December 2016. The parties were short served but the time was abridged and the application proceeded. During the course of the proceedings it was indicated to the court that the recount had concluded. Counsel for the applicant still proceeded with the application as she argued that this is an issue that is of grave importance and should be settled to avoid any future occurrences.

CLAIMANT'S SUBMISSION

[6] Counsel for the Claimant argued that leave should be granted for Judicial Review as the learned Parish Judge erred in her findings. Counsel argued that all issues relating to election decisions are to be dealt with speedily. The computation of time is to be strictly adhered to and as such the Parish Judge could not extend time by excluding Saturday in her computation of the time for the filing of the application for the recount. Under Section 47 of ROPA the time allotted for the filing of the application for the recount was four days. The time for the filing of the application for the recount ended on the 3rd of December 2016 however it was filed on the 5th of December 2016. The Parish Judge is a creature of statute and as such there was no avenue for her to extend time as she did. The only days that could be excluded were Sundays and public holidays as per Section 8 of the Interpretation Act.

INTERESTED PARTY'S SUBMISSION

[7] Counsel for the Mr Shawn McGregor who had been served as an interested party argued that this was not a case for Judicial Review as the Applicant had other avenues for redress namely by Election Petition. He argued that the Election Petition Act details the direct law and procedures whereby a person can seek redress for all election issues. He contended that this is not a situation that the learned Parish Judge exceeded her jurisdiction. The Parish Judge is governed by means of the Resident Magistrate's Act and as such she has to abide by the Resident Magistrate rules. Rule 36 (15) makes provision for the opening of the courts office and based on this the courts office is not open on a Saturday. Due to the closure of the courts office on the Saturday the application was permitted to be filed on the next available date which was Monday

the 5th of December 2016. He also argued that when the rules are silent you may refer to Civil Procedure Rules and that Rule 3.2 allows for filing of documents on the next available date if the courts office was closed.

ANALYSIS

[8] In considering whether or not to grant leave for Judicial Review that court has to consider a number of issues including:-

- a. is there an alternate form of redress?
- b. whether the applicant has an arguable case?
- c. Is this an appropriate case for Judicial Review?

ALTERNATIVE FORM OF REDRESS

[9] Parliament in enacting laws relating to election challenges has made time of the essence. The Election Petition Act, the Representation of the People Act and all other related statutes lay down strict procedures and time lines by which challenges can be heard. This is due to the need for certainty in relation to who is elected to a particular position so elected persons can proceed to conduct the business of the people. In this regard the courts ought not to entertain challenges that seek to lengthen the time in finalising election issues.

[10] The procedure for and the substantive law related to challenges to elections are for the most part dealt with under the Election Petition Act. This Act provides the avenue by which an interested party may file a petition to challenge issues from uncounted ballots to complaints of the conduct of returning officers. On perusal of this Statute there is no avenue by which a person can apply to the courts if there is a complaint that a Parish Judge has exceeded her jurisdiction. In light of the nature of the challenge it would appear that the most appropriate course to seek to address the issues raised in this application would be by means of Judicial Review.

JURISDICTION OF THE PARISH JUDGE

[11] The next issue is whether the Parish Judge exceeded her jurisdiction on two occasions namely:-

- a. When she ruled that the application could be filed on the 5th of December 2016.
- b. Whether the Parish Judge should have commenced counting the ballots within four days of the application.

The first issue is whether the Parish Judge exceeded her jurisdiction when she ruled that the application could be filed on the 5th of December 2016.

The applicant in these proceedings was declared the winner of the said seat on the 29th of November 2016. The application for the recount of the seat was filed on the 5th of December 2016. What are the time lines that should apply?

[12] The application before the Parish Judge was made under Section 47 of ROPA which states that:-

47. (1)---If within four days after the day on which the returning officer has declared a candidate elected it is made to appear, on the affidavit of a credible witness, to the Resident Magistrate hereafter described, that a returning officer in counting the votes has improperly counted or improperly rejected any ballot papers or has made an incorrect addition of the number of ballots cast for any candidate, and if the applicant deposits within the said period with the clerk of the court of such Resident Magistrate the sum of forty dollars as security for the costs of the candidate declared elected, the Resident Magistrate shall appoint a time within four days after the receipt of the affidavit to recount the said votes.

)2) The Resident Magistrate to whom applications under this section may be made shall be the Resident Magistrate for the parish in which is situated the place whereat the declaration of the election was made.

(3) If applications for a recount of the votes in two or more constituencies are made under this section to the same Resident Magistrate, such Resident Magistrate shall first proceed with the recount in the constituency in respect of which application is made to him, and successively with the recounts in the constituency or constituencies in respect of which applications were later made, and all such recounts shall proceed continuously from day to day until the last of them has been completed.

(4) This Resident Magistrate shall appoint and give written notice to the candidates or their agents of a time and place at which he will proceed to recount the votes.

(5) The Resident Magistrate shall also summon the returning officer and his election clerk to attend at the time and place so appointed with the parcels containing the used and counted, the unused, the rejected, and the spoiled ballot papers, or the original statements of the poll signed by the presiding officers, as the case may be, with respect to or in consequence of which such recount is to take place.

(6) Every candidate shall be entitled to be present and to be represented by an agent at any proceedings under this section.

[13] ROPA allows for four days within which a person may file an application to challenge the results of the election. ROPA however does not define, nor does it assist as to how the four days are to be computed. In the absence of such guidance I would then have to seek assistance from the Interpretation Act. Section 8 of the Interpretation Act states that:-

8. (1) In computing time for the purpose of any Act, unless the contrary intention appears---

- (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;
- (b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;
- (c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day, not being an excluded day;
- (d) when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

(2) In this section “public holiday” means any public general holiday and includes Good Friday and Christmas Day.

[14] The Interpretation Act states that the day of the event ought not to be included which mean that the 29th of November 2016 cannot be included in the four day period in computing time. The Interpretation Act also states that Sundays and public holidays ought not to be included. I note that there were no public holidays immediately after the 29th of November 2016. The four days, utilising the mere arithmetical method, would then start to run from the 30th of November 2016 and end on the 3rd of December 2016.

[15] The Parish Judge it would appear sought to take into consideration the Parish Court Rules to assist in the calculation of the four day period and as a result ruled that the four days ended on the 5th of December 2016. The Parish Judge took into consideration that Court Offices are no longer open on Saturdays and as such the applicant for the recount would have been deprived of one day to file her application.

These rules are a subsidiary legislation and the question that arises is whether a subsidiary legislation can amend the substantive law. There are a number of decisions that seems to answer that question in the negative.

Just as an aside I note that when the Rules were enacted in 1933 they did envision that the courts offices would be open on a Saturday. Order 1 of the 1933 Resident Magistrate Rules states that:-

1---An office shall be kept at the Head Station of the Court, and at such of the Out-stations as the Governor shall direct, and such Office at the Head Station shall be kept open to the public every day, and at any such Out-station as aforesaid on such days as the Governor may appoint, from ten o'clock in the forenoon until three o'clock in the afternoon, except on Public Holidays, provided that on Saturdays the Office may be closed at twelve o'clock, noon.

[16] Counsel for the Applicant argued that an administrative decision to close the courts office on a Saturday cannot seek to amend the substantive law stated in ROPA as to the timeline within which applications can be filed. Counsel further argued that the Parish Judge had exceeded her jurisdiction by ruling that time could be extended by the use of the Parish Court Rules.

In analysing this argument I took a number of cases into consideration. There does not appear to be any cases that speaks specifically to this issue, however there were a number of cases that addressed time in relation to election petitions. I found the court's approach in those cases to be of great assistance in this matter. The case of **Allen v Wright** (1960) 2 WIR 102 was an appeal from a decision of the court to strike out a petition and to extend time for service of the petition.

Hallican CJ held that Rules of Civil Procedure could not be used to facilitate the extension time for the service of the election petition. The time stipulated for service was not a matter of procedure but a condition precedent. The court found that in light of Section 23 of the Election Petition, Law Cap 107 of the Rules of the Civil Procedure could not be used as the petitions were a matter of substantive law, and like the Statute of Limitation, cannot be dispensed with by the Court.

[17] In the case of **Stewart v Newland and Edman** SCCA 18/72 there was an application to extend the time to serve an election Petition. After perusing the law Rowe J (as he then was) at page 851 stated that

In my opinion, and I so hold, the provisions of s 6 of Cap 107 which provides that the documents named therein, 'shall within ten days after the presentation of the petition, be served by the petitioner on the respondent' are mandatory and must be strictly complied with. The provisions of s 9, Cap 107 which deems election petitions to be proceedings in the Supreme Court is made subject to the provisions of the Election Petition Law and does not have the effect of empowering this court to apply s 676 of Cap 177 to enlarge the time for service prescribed by s 6 of Cap 107. I hold that I have no jurisdiction to extend the time for service as requested by the Petitioner in the summons.

In the case of **Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolytle** HCVAP 2012/0014 decided on the 31st of July 2012 Sir Hugh Rawlins CJ stated at paragraph 87 that:-

“Two important observations occur to me from the foregoing. The first is that CPR 2000 cannot be used to vary, amend or modify any of the substantive procedural requirements made by Parliaments for election petition proceedings under sections 88 and 89, in particular, of the Election Act. These are provisions made by Parliament in primary legislation. The second observation is that the CPR 2000 cannot be used by any event to introduce such practice and procedures into electoral proceedings which Parliament did not empower the Chief Justice to regulate. As I earlier observed, by Section 89(2) of the Election Act, Parliament empowered the Chief Justice to make rules for the specific purposes stated therein and they do not point to rules for an interlocutory pre-trial process.”

[18] It would appear that the court has taken a strict interpretation of statutes relating to challenges to election matters in that subsidiary legislation cannot be used to amend substantive legislation especially as it relates to time. The position adopted by the Parish Judge seemed to be opposed to these positions. In light of this I find this would have been an arguable case with a realistic prospect of success to be placed before the court for Judicial Review.

[19] However the reliefs being sought were that:-

- a. An order quashing the decision of the Parish Judge of the Corporate Area Parish Court made on December 12, 2016 to proceed with the recount of the ballots contained in ballot boxes which were cast in the Local Government elections for the Rae Town Division of the Kingston Central Constituency held on the 28th of November 2016.
- b. An order prohibiting the Parish Judge from issuing a declaration pursuant to Section 48(7) of the Representation of the People Act.

The application had been pursued after the Parish Judge’s decision on the preliminary application. During the time of the application the counting had commenced and had

concluded prior to the conclusion of the application for Judicial Review and a declaration was in fact made. The relief being sought is no longer available to the applicant and as such the application for Judicial Review is refused.

Although the application for leave was refused there will be no order as to cost.