

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2006

SKBHCV 2004/0182

In the Matter of the National
Assembly Elections Act Cap. 162
Of the Laws of Saint Christopher
And Nevis (Revised Edition 1961)

And in the matter of the Saint
Christopher and Nevis
Constitution Order 1983

And in the matter of an Election
For the Constituency 4 held on
25th day of October, 2004

BETWEEN

LINDSAY FITZPATRICK GRANT

PETITIONER

And

RUPERT HERBERT
LEROY BENJAMIN
WENTFORD ROGERS

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT

Appearances:

Mr. Ariel Misick Q.C., Ms. Constance Mitcham, Ms. Marguerite Foreman and Mr. Fitzroy Eddy
for the Petitioners

Mr. Anthony Astaphan, S.C., and Mr. Sylvester Anthony, for the 1st Respondent

Mr. Maurice King Q.C., Hon. Delano Bart (Attorney General), Ms Nicole Sylvester, Mr. Adrian
King and Mr. Arudranauth Gossai for the 2nd and 3rd Respondents.

2006: May 2, July 12

JUDGMENT

- [1] **BELLE J.** This is the fourth step in a marathon of proceedings brought to resolve matters arising from a Petition which was filed by Mr. Lindsay Grant of the People's Action Movement on 13th November 2004 challenging the election of Mr. Rupert Herbert the 1st Respondent and the candidate for the St Kitts & Nevis Labour Party on October 25th 2004. Indeed on 26th October 2004 the 3rd Respondent had declared that the Petitioner received 919 votes the 1st Respondent 970 and one Winston Warner 11. By order dated 28th July 2005 a number of the allegations made in the Petition were struck out by Baptiste J on an application aimed at striking out the entire Petition. Both the Respondents and the Petitioner appealed against the decision of Baptiste J. However the Court of Appeal refused to hear the Appeal having upheld a submission by counsel for the Petitioner that the court lacked jurisdiction to hear an appeal on an interlocutory proceeding in an election Petition.
- [2] At the outset Mr. Misick announced that the Petitioner would not be proceeding with the issue raised in paragraph 20 (i) of the Petitioner's affidavit of November 15th 2004. This paragraph alleged that when numerous persons who were qualified to vote in the Elections did vote therein, identifying numbers or other marks were placed on ballot papers by Presiding Officers, in violation of the secrecy of ballot as it allowed the tracing of an elector's vote contrary to section 62 (1) of the National Assembly and Elections Act ("the Act") and Section 29(4) of the Constitution (The Constitution of the Federation of Saint Christopher and Nevis). It was a wise decision on the part of the Petitioner not to pursue this allegation.
- [3] Mr. Misick had also during the trial applied to have the number of ballots cast in constituency No. 4 polling division 2A recounted. I decided to wait to hear the addresses on the law before making a final decision on this matter. After having time to reflect I am of the view that such a recount and disclosure would serve no useful purpose. It is more than likely that if all of the votes in this polling division were to be declared null and void

because of the failure to inspect digits, both sides would lose a considerable number of votes. In this case the exact number is unknown. The result of such a count would be unlikely to make any difference in the result of the elections. Moreover this application should have been urged upon the court on some evidential basis and supported by the argument that there would be a change in the result or at least that the Respondent was likely to lose a specific number of votes which would affect the result. The Petitioner failed to make any such allegation and therefore the application for disclosure is refused. I do not see why in the circumstances of this case the court should assume that declaring the votes in polling division 2 A void would affect the result. The cases **McAllister Hanchell v Noel Skippings et al** Action CLNo. 25/03 and **William Bruce Williams v Emmanuel Henry Geraudy** (1978), 25 W.I.R 529 are instructive on this point.

[4] Mr. Misick stated in his opening address on the behalf of the Petitioner that the Petition was asking the Court to avoid the Election of the 1st Respondent because of irregularities committed by the Supervisor of elections and persons for whom he is responsible. Mr. Misick pointed out that the Court's jurisdiction was to be found in section 36 of the Constitution, while the procedure which was set out in Section 86 (1) of the Act was one of the most important provisions in that regard. There is no contention on these submissions.

[5] Mr. Misick also submitted that the language in the section was the same as that addressed in the case **Morgan and others v Simpson** [1974] 3 All ER 722. According to counsel, in **Morgan**, Denning LJ had summarized the law in the following terms. The result of Elections could be avoided if;

1. The elections were conducted so badly that they were not in accordance with the law.
2. If conducted in accordance with the law, the election would not be avoided provided that any breaches of law did not directly affect the result.
3. If breaches though trivial *may have* affected the election results, the election was avoided.

This latter interpretation of Morgan and Simpson is contradicted in the judgment of Ground CJ in the case **McAllister Hanchell v Noel Skippings et al**

- [6] Mr. Misick submitted further that there were three categories of complaint made in the Petition; these were: 1. the compilation and integrity of the Voters List. 2. irregularities in conduct on polling day and 3. the fairness and impartiality of the Supervisor of Elections.
- [7] Counsel contended that as far as category 1 was concerned the submission was that in the system of elections provided for in the Act the integrity of the Voters List is crucial to election results reflecting the free will of the constituency. To elaborate he argued that if as a consequence of breaches in compilation of the Voters' List, election results could thereby be affected, and then the free will would not have prevailed.
- [8] Mr. Misick submitted further that in the second category the Petition raises a number of issues fundamental to a fair election. Firstly it raised the secrecy of the ballot, which is so fundamental that it has been elevated to and is now embodied in the constitution. Section 29 (4) of the Constitution says that in any election of representatives votes should be given by ballots in such a manner as not to disclose how any person votes. If voting is not secret it gives rise to all kinds of mischief including intimidation corruption and fear in an electorate. That is why the matter of secrecy is in the constitution to ensure that as far as humanly possible it is observed. It cannot be certain that the breach of secrecy did not impact on how persons voted.
- [9] Counsel submitted that if it is established that there was a violation of secrecy provisions; it is not an election substantially in accordance with the Act and the election should be avoided in spite of whether the ballot secrecy was proven to be a factor
- [10] In the third issue was the category "identification of voters," which involved persons being delivered with a ballot and allowed to vote. It is useful to refer to section 68 (4) of the Act. Indeed Mr. Misick noted that it stated that every voter shall "declare a name address and occupation." When stated, the polling clerk should identify the voter on the register. When satisfied that a person is qualified, name address and occupation should be placed in the poll book. Proper identification is essential for the process to work. Counsel gave the example that one complaint was that voters were allowed to enter the polling booth and give a number instead of name, address and occupation, a clear breach of the Act. The election officials should be able to compare the name with that on the Register, but giving

a number circumvents this. If however the names are the same the persons should be dealt with pursuant to section 72 of the Act

- [11] Counsel added that another allegation related to identification of voters was that the digits were never checked. This failure meant that election officials could not be sure that persons who voted before did not vote a second time. He referred to section 72 which stated that persons applying after another had voted in the same name shall establish identity to the satisfaction of the election official. Counsel opined that this provision was designed to ensure that a person votes only once and that another person does not vote in a name, which is not his. All is subject to identification. Firstly according to learned counsel a person must prove his qualification to vote; second he is required to take the oath, and thirdly he must establish his identity as being a person entitled to vote, to the satisfaction of the presiding officer. In some cases a person had already voted and the person who came in with the same name was not administered any oath.
- [12] Counsel cited a broad principle that the matter was not about a personal contest between a winner and a loser, but the public has an interest in a free and fair election, which is paramount. If unfair damage is done not to the candidate but to the larger populace it is important that these allegations be looked at. The Poll Book and the Voters List would establish whether the allegations were true or not counsel insisted. He alleged that with regard to section 72, even where the oath was administered it was not the practice to ask for identification of the voter.
- [13] Counsel further submitted that the other point raised in the Petition related to fairness and impartiality of the Supervisor of Elections. He opined that the Supervisor was appointed pursuant to section 34 of the Constitution by the Governor General and according to section 35 of the Act the Supervisor is not to subject to directions and control of any other authority.
- [14] Section 83 of the Act directs that the Supervisor is to exercise certain powers. Sections 57 and 58 granted the right to make appointments. Counsel submitted that the Supervisor

failed to record objections. In addition on election day only one side was permitted in the restricted area.

- [15] Counsel also addressed the relevance of the report of the Commonwealth Observer Team and argued that the reports of the Commonwealth Observer Team and the Caribbean Observer Team were irrelevant since these persons were not charged with the authority of deciding whether the election was viable or not. A person's views are irrelevant if they have no authority. He then cited the cases **Three Rivers District Council & Others v Bank of England** 2001 All ER 573 and, **Savings and Investment Bank v Gasco Investment** 1984 1 All ER 296 in support of this proposition. Indeed I agreed with Mr. Misick on this point and ruled accordingly. Therefore the contents of the reports of the Commonwealth and Caribbean Observer Teams will not be considered; neither will the report of the Electoral Commission.
- [16] Mr. .A. Astaphan S.C. in his opening statement focused on the remaining allegations against the First Respondent which he identified as paragraphs 8 (xi) and paragraph 9 (p) of the Petition. He argued that there was not a shred of evidence to support paragraph 8 (xi) of the Petition. Paragraph 9 (p) referred to the use of bunting.
- [17] Mr. Astaphan insisted that there was no evidence that Mr. Herbert the First Respondent registered any person to vote at all. With regard to the allegation about buntings; he opined that all that would result from a finding that the First Respondent was responsible for buntings is that there would be some penalty for a criminal offence. But furthermore they were no specifics re: the registration number of the vehicle carrying the bunting and no evidence describing the bunting or banners. I agree with Mr. Astaphan. This allegation cannot upset the result of the elections.
- [18] All of the other allegations were against the 2nd and 3rd Respondents not the First Respondent Mr. Astaphan argued.
- [19] Mr. Maurice King Q.C in setting out the case for the 2nd and 3rd Respondents said that the elections were conducted substantially in accordance with the provisions of the Act

together with the regulations thereunder and that in any event nothing was done that affected the result of the election. He stated that the Petitioner failed to establish there was non-observance of or non-compliance with the law governing elections or that there were irregularities so great as to satisfy the court that the election has been conducted in a manner contrary to the principle of an election by ballot and that irregularities complained of did affect the result of the election.

[20] With reference to the issue of the alleged defects in the Register of Voters, which the 2nd Respondent failed to correct although requested by the Petitioner, counsel referred to section 43E of the Act, which governs the preparation, and publication of a Register of Voters. He quoted the subsections dealing with the preparation of the register no later than the 31st day of January in any year. That register consisted of all persons who were in the Register of Voters last published for the constituency and all persons whose names appear in the revised monthly list of voters prepared and published under section 43H for the constituency since the date of publication of the Register.

[21] Mr. King opined that further analysis of the Act revealed that section 43 F provided for the publication of monthly lists and 43H provided for a revised monthly list. Section 43J determines what constitutes a Register of Voters for any elections. According to this section the Register of Voters and the revised monthly lists of voters published for each constituency shall constitute the Register of Voters for that constituency and shall be used for any election held in that constituency after the publication of the Register until it is superseded by the Register of Voters published and constituted for that constituency in the next succeeding year in accordance with the Act. This is not contested

[22] Indeed then whenever a writ is issued between the publication of the last revised monthly list and any other revised monthly list, the last revised monthly list shall be used for the purpose of the conduct of the poll. According to section 43K the Register of Voters prepared under the Act and Regulations shall for the purposes of the Act be conclusive for the purposes of the taking of the poll on the questions whether or not any person registered was at the date of publication of the Register resident at the address shown,

and whether or not that address is in any constituency or any particular part of that constituency.

- [23] Mr. King argued that there was nothing intrinsically wrong therefore with the publication of the Register of Voters on October 14, 2004. Between January and October 2004 the Petitioner had every opportunity to make objections to the inclusion of names in accordance with the law. It was for the Petitioner to take necessary steps to make claims and objections and to acquire the Register of Voters when it is published. I agree with this submission.
- [24] Mr. King's view was that section 44 of the Act provided an avenue of redress for any person aggrieved by a decision of any Registration Officer on the hearing of claims or objections for registration in the register. An appeal shall lie to a judge of the Eastern Caribbean Supreme Court from any decision of a registration officer on any claim or objection, which has been considered by him under the Act. Mr. King submitted this is conclusive and settles the issue. See: **Terence Henry v Leonard O'Loughlin et al** Civil Appeal No 12 of 1999 (Saint Christopher Circuit).
- [25] Mr. King argued that the law had been followed in St Kitts in January 2004 and by the end of March a new Register of Voters was produced, which reflected the transfers, additions, and deletions of names from the January register. This register then replaced the current updated register, which replaced the register of January 31st 2004. Thereafter, monthly lists and revised monthly lists were published pursuant to the provisions of section 43F and H of the Act. The Register of Voters for the October 25th 2004 election therefore consisted of the sanitized Register of Voters published on March 31st 2004 together with the monthly lists and revised monthly lists published between January and September 2004.
- [26] Mr. King noted that the 2nd Respondent's answer to the Petitioner's allegations of irregularities in the Register of Voters is detailed in paragraph 10 of the Affidavit of Spencer Amory the assistant Secretary of the Electoral Office. It is to be noted that the Second Respondent assumed office as Supervisor of Elections on July 26th, 2004 consequent on the death of the previous Supervisor of Elections.

[27] Mr. Amory stated in his affidavit that he was informed by Miranda Francis an office clerk of the Electoral Office about Mr. Grant's appearance at the Electoral Office on June 16th 2004 when he produced a document and complained that there were about 7000 duplicated names on the Register of Voters. However he was not aware of any official letter or notice of objection produced along with the said document. He perused the document subsequently and noted what appeared to be duplications on the list. But the document did not appear to be an official document but rather a list of names generated by Mr. Grant himself. He noted that occupations of persons were not noted; names of voters resident overseas were included. He also noted that persons bearing similar names were listed as duplicate names when in fact they were different names altogether.

[28] Mr. Amory continued that based on his experience in the electoral office many applicants carry the same surnames and Christian names. As a result the electoral office was taking great care to elicit the middle names or initials from applicants. They also differentiate between person by the address and occupation. Therefore the Petitioner's list was not helpful and the electoral office was not satisfied that there was any duplication of names and was fortified in its belief based on the conduct of the political parties. I take this to mean that there were no objections to the inclusion of certain names on the Register of Voters between March and September 2004.

[29] Mr. Amory concluded as follows:

" I verily believe that prior to the publication of the Register on October 14 2004 no claims or objections to inclusion or removal of names from the Register of Voters were made by the Petitioner or by anyone on his behalf in the manner required by law."

[30] Mr. King concluded that the Petitioner did not satisfy the requirements of the law regulating the inclusion or the removal of names from the Register of Voters. With the regard to the complaint that the 2nd Respondent delivered to the chairman of the party, documents purporting to be the final definitive Register of Voters which did not bear any official stamp or signature, Mr. King argued that there is no obligation in law for the 2nd Respondent to deliver a copy of the Register of Voters to the Petitioner. Once the Register is published the Petitioner should obtain his copy from the Electoral Office. In any event it did not

appear to me that the Petitioner's counsel vigorously pursued this allegation related to the authenticity of the list received prior to the elections.

[31] As far as the allegation that the agents of the Petitioner were unlawfully evicted from the printing process was concerned, it was prudent to look at the affidavit of the government printer Mrs. Morton Mr. King suggested. I find that the differences between the parties at the printers seemed to have arisen for totally unnecessary reasons. Nevertheless there has been no evidence led to prove that this incident had anything to do with any problem with the ballot, which had any kind of effect on the elections. **In that regard, the court ordered the disclosure of unused ballot papers and saw that they were properly and clearly printed that the registration number was carried at the perforated end of the counterfoil which was left behind in the ballot book when the ballot was torn off, and at the back of the counterfoil which was severed from the ballot before the ballot was placed in the ballot box and separately held and secured by the Presiding Officer at each polling station. There were no markings whatsoever on the back of the ballot.**

[32] In support of the Petitioner's allegations the Petitioner gave evidence and called witnesses. The evidence is addressed and summarized under the following subheads.

Compilation of the Register of Voters

[33] The Petitioner himself gave evidence in relation to the compilation of the Register of Voters. I am satisfied that his evidence does not prove that there was no avenue for objections to voters who were added as a result of transfers or new registrations. Indeed the Petitioner said under cross-examination that monthly lists were accompanied by a notice advising of the right to object. The Petitioner admits that objections could be made in January but only in relation to deaths and transfers. He insisted that there was no opportunity to object to transfers during the year other than at the January review. The 2nd Respondent however said that the right to object to transfers existed and was permitted. Either way, it appears that there was some opportunity available to the Petitioner and his supporters to object to new registrants, transfers and the names of dead persons.

More than one person voting in the same name

- [34] Some credible evidence is gleaned from the affidavit of Laureen James who witnessed people voting twice in the names of four persons and the permission being granted to 3 voters whose names were not on the list. Those persons were Iva C. Belle Eleen Dore and Sandra Bradshaw. It is clear that in light of the provisions of regulation 26 of the 1984 Regulations these latter three persons should not have been allowed to vote.
- [35] Laureen James stated she also knew that votes were cast in the name of Leroy Welsh, Bevon Baker and Stanley Fleming, but she does not say that she objected in the affidavit, only under questioning did she claim to have objected. The court is unable to act on this questionable evidence. Furthermore her statement at paragraph 21 of her affidavit that persons who lived in other divisions of the constituency were registered and voted in the wrong division is obviously a complaint for the Registration Officer when the time comes for review. This kind of objection cannot be taken up on election day when the voters list is deemed to be settled. As Mr. King submitted, Section 43J of the Act states;

“The register of voters and the revised monthly lists of voters published for each constituency under sections 43E and 43G respectively in any year shall constitute the register of voters for that constituency and shall be used for any election held in that constituency after the publication thereof until it is superseded by the register of voters published and constituted for that constituency in the next succeeding year in accordance with this Act.”

- [36] The evidence of Shefton Fyfiled though indicating that he had objected to persons who stated their registration numbers rather than their names leaves the court in doubt as to actually how many instances he had objected to. He refers to “a number of people.” I think that a Petition to vitiate an election requires more specific evidence. This vague kind of allegation leads to pleadings being struck out. See **Spencer v Attorney General and Others** [1999] 3 LRC 1. How many people were they who conducted themselves in this manner, referring to a piece of paper and asking to vote in the name they had written on that paper? If the witness was so certain of the wrongdoing why did he not pursue it with the Returning Officer or the Electoral Commission so that relevant objections could be

made at the time of the count? Why did he not take down the names and demand an immediate investigation? Only in one case did he recall the name. That name was Nigel Muckle. But again he took no steps to institute an investigation. However, even if this name is added to the list of possible illegal votes for the 1st Respondent, and the vote voided, it only reduces his count by 8 votes.

[37] The other objections go to the bad folding of the ballot paper, which is not proved to have been intentionally done. This in my view is not the kind of infraction, which voids a vote or an election unless it can be shown to have been done purposely to satisfy a bribe, or in response to some kind of intimidation. Furthermore relevant supporting evidence was not forthcoming. How many times was this error committed and did it deter anyone from voting?

[38] As far as the two votes in the name of Verna Williams were concerned, again the allegation is vague, since it not said that there was only one Verna Williams on the register. But this may be one of those cases where the laws permit people to claim that they are the person registered and to produce evidence that they carry the name while failing to prove that they are registered by that name. The additional information of middle initials, profession/vocation and address, would make it less likely that this kind of duplicate voting would take place. However on the evidence, the exclusion of the affected vote would at best reduce the 1st Respondent's count by 9 votes.

Failure to Examine Digits of Voters

[39] The allegation of Keris Baker that the presiding officer in Polling Division 2A failed to inspect the digits of voters to ensure that no marks of electoral ink appeared on voters to prohibit multiple voting, is strange because again one would have thought that this would have been reported to the Retuning Officer early in the day and the specific votes noted so that it could be addressed at the count if necessary. At the end of that day however an irregularity such as this would have created the conundrum that, had the Returning Officer decided to disallow the votes based on this allegation, in circumstances where the voter was not to be blamed, the loser would have had a ground to challenge the result of the

count, since it would be unclear how many bona fide voters would have been disenfranchised as a result of their exclusion on this basis. In **Morgan v Simpson** where a number of voters were disenfranchised because of a lapse on the part of electoral officials the result was deemed to be affected because those votes had been excluded as a consequence of the error. I can only conclude that Mr. Baker being aware of this, decided not to take her objection any further during the election process, but yet decided to mention it for the purposes of the Petition. The 3rd Respondent, Returning Officer was unaware of these complaints.

- [40] This kind of transgression in my view if proved would fall into the category dealt with in **Islington case (Medhurst v. Lough & Gasquet (1901) 5 O'M. &H. 120; 17 TLR 210)**. In this case it was held (using Mr. King's language) that where there have been transgressions of the law without corrupt motive by the returning officer or any other election officials in the conduct of an election, if the election was in substance conducted in accordance with the law and the result could not have been affected by the transgressions the election will not be avoided. Since there was no challenge to the validity of these votes at the time of the vote or later at the count it cannot be assumed that the votes cast in this polling division affected the outcome of the elections. See: **Athurton v Fergus [1988] LRC 115**. Furthermore there is no evidence that any of the persons affected voted, or attempted to vote more than once in the elections.

The Ballot Papers

- [41] Ms Baker's credibility is also tainted by her statement that the ballot papers were so thin that it could easily be seen how persons had voted. Indeed I did order the production of unused ballot papers inter alia in this case and in my judgment being cognizant of the fact that like anything made by man, the ballot could be abused, one would have to go out of one's way to examine the ballot to find out how a person voted when it was folded, and indeed if written in pencil without any great pressure applied it would be quite impossible to see how a person voted as long as the ballot was properly folded. On discovery, the ballot paper appeared quite appropriate and could not be said to be too thin

- [42] Counsel for the Respondents submitted that other allegations against election officers were too vague to allow for proper responses. Indeed it should also be noted that the court is not aware of any evidence that complaints were made on election day to the Supervisor of Elections or to anyone in authority against the presiding officers in relation to the performance of their duties.
- [43] The evidence in this case does not lead to a conclusion that there were irregularities of such a degree that it could be said that the elections were not conducted in accordance with the election laws and regulations. The fact is that the election laws of St. Christopher and Nevis leave open a number of avenues for abuse. Abuse in some circumstances cannot be said to lower the conduct of the elections to a degree, which make the elections a nullity. Indeed the sum total or preponderance of the credible evidence leads to the conclusion that assuming that the specific voters and votes legitimately objected to were all for the 1st Respondent, his count would be reduced by 9 votes. This in itself is speculative, but any other conclusion more favorable to the Petitioner would be even more speculative.
- [44] I generally accept the submissions of Mr. King in this case. However I would beg to differ on two issues with the Respondents' Counsel in general.
- [45] The first issue on which I would differ with the Respondents' counsel in particular Mr. Astaphan relates to the interpretation of Section 42 of the Act. In my view the language and context of the section leads to the conclusion that a qualified voter should only be registered to vote in a constituency where he/she resides, is ordinarily resident or, is domiciled. Any other interpretation would lead to an absurdity, making it possible that a person would be able to go anywhere and register. This would make it very difficult for candidates and voters to trace and prevent double registration. The word "therein" used in the section only makes sense if it refers to the district in which one resides is ordinarily resident or is domiciled.
- [46] The second point on which I differ is that in my view a plethora of irregularities even if each one by itself cannot cause the elections to be vitiated, because the specific law dealing

with it does not say so, may cause the court to conclude that the elections were not conducted substantially in accordance with the law. It boils down to a matter of the degree of compliance with the law in the electoral process. I do not think that **Tannis v Robertson** (1973), 20 W.I.R 560 is to be interpreted to be saying otherwise.

[47] With regard to the other issues I find that between the parties the main bones of contention are:

- (1) Is it that an election ought to be set aside if an irregularity *may* have affected the result of the election or *did affect* the result of the election?
- (2) Is it that the Supervisor of Elections should take measures to clean up the voters list even if there are no objections, thereby going outside of the terms of the Act and the Regulations of 1984?
- (3) Is it that an irregularity or breach of the Act, which carries a specific penalty, can never be cause to vitiate an election?
- (4) Can a register of voters be challenged after an election for any reason other than the failure of a Registration officer to comply with an agreed correction of the list?

The Law

[48] I have already answered number three on the list. However there is no doubt that there were glaring irregularities in the electoral process in constituency No. 4 and in particular Polling Division 4 where we heard that 3 persons' names were presented to the Presiding Officer by Dr. Denzil Douglas along with letter from the Supervisor of Elections saying that they were entitled to vote. As I stated earlier this was done in violation of the election laws of the Federation in particular Regulation No.26 of 1984. The Supervisor of Elections states that he wrote the letter directing that the three persons should be allowed to vote on the basis that they had registration certificates for the constituency. However only one such certificate was produced in court and that was for Sandra Bradshaw. The reason for writing letters to ask that the other two be permitted to vote is therefore not supported by any independent evidence. But this is not all. We did not hear from the Supervisor of Elections any mention of a meeting or an investigation other than being informed of certification. Neither did we hear of a notification prior to the election to anyone that there

had been an error and that as a result these names would be inserted in the list. Such notice is required under regulation 26 of the 1984 Regulations. This incident was rather unfortunate and should not have occurred. It is clear on the evidence that the 2nd Respondent could not have complied with section 26 (3) of the regulations. This regulation reads:

"The Chief Registration Officer shall not insert the name of any person expunged from the list of voters in pursuance of an objection made to that person's registration or claim or at any time after the third day not including Sunday next before polling day."

[49] In addition to the regulation above the reasons for my finding are founded in sound legal doctrine and practice. Indeed I would describe the 1984 Regulations as being interwoven with the fabric of *lis inter partes* and the duty to hear interested parties. By way of illustration I point to Regulation 22, which states as follows:

"CONSIDERATION OF CLAIMS AND OBJECTIONS (1) The Registration Officer shall consider all claims and objections of which notice has been given to him in accordance with these Regulations and for the purpose shall give at least five (5) days notice in writing, of which there is evidence that it has been received by the addressee, or notice by registered post, to the claimants or objectors and the persons in respect of whose registration or claims notice of objection has been given of the time and place which the claims or objections will be considered by him."

[50] When where and how was the Supervisor of Elections able to consider these claims on the behalf of the three persons who were permitted to vote even though their names were not on the Voters List for the district No 4. When would notice have been given to the candidates before a decision was made?

[51] But does this kind of irregularity mean that the elections as a whole were conducted in a manner contrary to the (statutory) principles running through the electoral process. What are the identifiable principles running through the relevant legislation? I conclude that these principles include but are not necessarily limited to the following:

(a) All necessary facilities must be put in place to facilitate voting by all qualified voters on an equal footing and this is to take place in accordance with the Act and the regulations.

- (b) All voters must be registered to vote at the time they present themselves to receive a ballot.
- (c) The vote must be tendered by secret ballot, respecting all of the confidentiality that is required to keep the vote of each voter secret.
- (d) Voters should vote once only for one candidate in the elections.

Challenging the Register of Voters

[52] I have concluded that the allegations made in this Petition fall into the category where irregularities have been identified, but they are not of such gravity as to vitiate the election unless it can be shown that they affected the result. Such irregularities may be considered in an election petition. This may include irregularities relating to the Register of Voters where the law is not complied. However I do not see the allegations in this case as an exception to the principle pronounced in **Radix v Gairy** (1978) , 25 W.I.R 553. The Petitioner claims that the elections laws were not complied with in relation to registration, but he has been unable to prove to the satisfaction of the court that his allegation that objections to the voters list were not allowed other than in January and then only in relation to transfers and deaths.

Exceptions to Radix v Gairy

[53] Some time was spent debating whether the compilation of the voters list was a matter for an election petition. Counsel for the Petitioner made reference to the finding of Baptiste J in the decision **Eugene Hamilton v Cedric Liburd et al** Suit No. SKBHCV 2004/0183 on the strike out application. He argued that that decision was in agreement with the decision in **McAllister Hanchell and Noel Skippings et al** Action CL No. 25/03.

[54] Baptiste J opined in his decision that the conclusiveness of the register is not absolute. It is conclusive evidence according to Baptiste J for the purposes of taking of a poll on the questions of whether any person registered therein on the date of its publication, is resident at the address shown and whether the address is in any constituency or any part of that constituency. He agreed with Mr. Misick that it did not prevent the court from looking

at whether or not any irregularity has occurred in the compilation of the list. Indeed Baptiste J opined that matters, which strike at the root of the process, can be questioned on an Election Petition, notwithstanding the finality of the Register on the question of qualification.

[55] Mr. Astaphan submitted that on the issue of the Register/ Voters list the matter was on all fours with the case Dominican case **Ferdinand Frampton v Ian Pinard** Claim No. DOMHCV2005/0149. Counsel referred to paragraph 41 of that decision where Rawlins J had this to say;

[41] *"It is noteworthy that in **Hanchell v Skippings**, Ground CJ, qualified the statement, which the Chief Justice made in **Radix v Gairy**. He stated that in the Turks and Caicos Islands the Electorate Register that is used at elections is final as it relates to the qualification of voters listed therein to vote at the elections. This, in my view is also true for Dominica. The result, according to the Ground CJ. is that the issue whether persons who are listed on the Register are qualified to vote could attract judicial review on objections which are made before an election. However the issue is not amenable to challenge by way of election petition after elections are held.*

[42] *On the other hand, Ground CJ stated, at paragraph 25 in **Hanchell v Skippings**, that an irregular or unlawful act or omission by a Chief Elections Officer in relation to the registration process could properly be subject of an election petition. This would also be true for Dominica. The Chief Justice stated that the failure by a Chief Elections Officer to implement a decision made on the claims and objections process would amount to such an irregularity. His view with which I agree would be that such a failure would be different from a mere error of judgment.*

[45] *There must be an irregularity of the kind to which, Ground CJ referred. There must first be a claim or objection and a decision thereon, which the Chief Elections Officer has failed to implement. In the present cases there are no complaints that the Chief Elections Officer acted irregularly in this regard."*

[56] Counsel for the 1st Respondent argued further that the exception to the rule in **Radix v Gairy**, where Sir Maurice Davis CJ, stated that issues related to the Register must be raised before it is proclaimed by the Head of State, must apply, but there are no pleaded grounds for its application in this case. Indeed the Petitioner does not specifically state that

the Supervisor of Elections refused to entertain challenges to voters; the allegation was in more general terms that there was duplication, and persons voted in constituencies where they did not reside.

Irregularities vs. Substantial Compliance

[57] After listening to the submissions of counsel, reviewing the law and the various factual accounts, I am convinced that the process of registration of voters in St Kitts and Nevis is seriously flawed. Indeed when a person registers as a voter to have their name placed on a voters list there appears to be no request for evidence of identity. Neither does there appear to be any process by which a person who has already registered in one constituency can be prevented from doing so in another other than by way of the partisan process of objecting. This leaves the list open to fraudulent registration, duplicate registration in various constituencies, and personation on the date of the poll by persons who know that a person by a particular name is unlikely to turn up to vote. The fraudster thus seeks to use the absentee's identity. In this case there is no credible evidence that the 2nd Respondent acted illegally in the compilation of the Register of Voters, therefore the challenge to the list should not be the subject of this Petition.

The Register of Voters

[58] It is difficult to prove the use or abuse of the voters list in this manner. However I have no doubt that there were such abuses, but as I pointed out to counsel during the hearing of the Petition, it is not possible to say that such abuses were not practiced by the Petitioner's agents and supporters as well as the Respondents and there is no evidential basis to find that it was to the advantage more to one side than the other. No doubt there were objections to irregularities both before and during the ballot, but they were insufficient to cause a difference in the result of the elections.

[59] Indeed generally the evidence failed to show that the Petitioner and his agents acted consistently to ensure that the result of the elections would not be tainted by the irregularities cited. There is no evidence that anyone objected to the votes of certain

persons being **counted** because they voted illegally. It therefore stands to reason that at the time of the counting the Petitioner and his agents considered these votes to be valid.

See: **Athurton v Fergus** where Redhead J refused to conduct a scrutiny to investigate circumstances that were neither mentioned nor objected to at the time of the count. Nevertheless it is clear that in the case of Iva C Belle, Eleen Dore and Sandra Bradshaw, the votes were invalid because there was no authority to add their name to the list in the manner adopted by the Supervisor of Elections. This clear irregularity along with the others who presumably voted for the 1st Respondent would reduce the 1st Respondent's vote to 961. This is still a clear majority over the Petitioner.

[60] The other allegations against the Supervisor of Elections relating to registration and cleaning up the list of false and incorrect registrations, can only stand up if it could be proved that the persons who were allegedly improperly registered in the constituency contrary to agreement and statutory procedure, had in fact voted. This was not proved. The other specifically named instances where two persons may have voted in the same name would not be sufficient to eliminate the 1st Respondent's majority and would therefore leave us with the same result.

[61] He Supervisor of Elections being the Chief Registration Officer can be blamed for certain problems relating to the list. However the scheme of the legislation places the onus on all voters and the supporters of political parties to object to any apparent false, erroneous, or illegal listings. If they fail to discharge this duty they cannot be heard to complain thereafter as to the consequences and indeed the Supervisor's hands would be tied with regard to any cleaning up of the Register of Voters in the circumstances. See the Rawlins J statement on this issue in **Ferdinand Frampton v Ian Pinard**.

[62] On issue number 4 on the list above, since fraud vitiates everything, I would also consider it permissible to prove that there was fraud involved in compiling the final Register of Voters in any petition challenging the result of an election. Of course fraud would have to be alleged and proved. The Petitioner in this case had not alleged fraud in compiling the voter's list but merely the failure of the Supervisor of Elections to remove certain names

and generally clean up the list. This kind of allegation would fall into the category, which would be prohibited in an election petition.

Did Affect The Result or May Have Affected The Result?

[63] Counsel for the petitioner urged upon me that I could not be sure that the result of the election was unaffected based on all of these noted and possible irregularities. He relied heavily on the reasoning of Ground CJ in **McAllister Hanchell and Noel Skippings et al**, where the learned CJ held that the case led to the conclusion that one of the tests to be applied to determine the effect of irregularities on the validity of the election is whether the election result **may** have been affected. I have already addressed the matter of my conclusions on the preponderance of the evidence. There was evidence of irregularities in the registration process in the **Hanchell** case and these were dealt with in detail. That is not the case here. Indeed in the preponderance of the evidence it was possible to find in **Hanchell** that the result had been affected even if the standard Ground CJ thought applied was “may have been affected.” On its facts therefore the case changes nothing in my view. The reality is that a court will not guess that the election result may have been affected and overturn the election result. The court makes a decision based on the evidence. In my view if the evidence fails to prove the case for the Petitioner, the case is not proved, regardless of what **may** have happened.

[64] This issue relates to the request for disclosure. Counsel for the petitioner urged upon me that it would be prudent to find out how many votes were cast in division 4 of the district to enable the court to be sure how many people might have been affected by the failure of the Presiding Officer and others to observe certain statutory provisions. The court held that there was no basis for doing so then and at this juncture continues to so hold. I was referred to the case of Kenneth **Anthony Edgell v Ivan Glover and Michael Garnett** [2003] EWHC 2566. However for a number of reasons I find that this authority does not assist the Petitioner. In that case the learned trial judge held that the preponderance of the evidence led to a finding that the failure of two voters to make declarations called a DO1

on their ballots affected the result of the elections and the result therefore had to be upset. But in that case there was ample and specific evidence of election irregularities and consideration of the ramifications of the failure of a voter to make the required declaration called a DO1. Indeed one of the agents had drawn the omission to the attention of the returning officer. In addition the margin of votes between the Petitioner and the Respondent was 2. This must have been a vital consideration in the decision to inspect the votes in that case. It should also be noted that the returning officer in this case agreed with the idea of an inspection.

[65] It is notable that no similar evidence was available to the Petitioner in this case. The Petitioner relied on the possibility that some persons had voted twice under the same name, that there were three persons permitted to vote who were not on the register and that there may have been some problems with the voters list in terms of the ability to object to voters who had transferred from one constituency to another prior to the October 2004 general elections. But in this case there was not evidence that these irregularities affected the result. However, counsel urged that as long as it **may** have affected the result I cannot be **sure** that the election produced a true result. I find however that there are two problems with this statement.

[66] Firstly I disagree with the statement because I do not have to be sure that the result was not affected. In **Walcott v Hinds** (1967), 10 W.I.R, 521. Douglas CJ stated as follows:

"In my view the standard of proof required in these proceedings is that applicable in civil cases generally, namely, proof on a balance of probability. I hold that the degree of probability must be high, bearing in mind the gravity of the issue- and here I adopt the language of Martin, B., in saying that the return of a member is a serious matter and not to be lightly put aside and remembering always the consequences attendant on a finding of guilt in respect of an illegal practice."

Even in case where the Claimant is attempting to prove that a criminal act was committed the degree of proof is still a balance of probabilities. In **Hornal v Neuberger Products Ltd** [1957] 1 QB 247 Denning LJ said,

“The degree [of probability] depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it still does require a probability which is commensurate with the occasion.”

[67] Nobody has a burden to prove that the result was not affected. Secondly it is the Petitioner who has to prove that the result was affected. The court however may make up its mind on the preponderance of the evidence. In **Re Kensington North Parliamentary Election** 1960 2 All ER 150, Streatfield J was of the view that in the **Islington** case the burden rested on the respondent to prove that the election was conducted substantially in accordance with the law because of the wording of the Ballot Act 1877, but that the question of the burden of proof did not arise on a strict wording of section 16 of the Representation of the People Act, 1949 which is in terms similar to section 86 of the St Christopher and Nevis Act. He therefore opined that it was for the court to make up its mind on the evidence as a whole.

Conclusion

[68] I therefore find on the preponderance of the evidence that the Petitioner has not proved that the irregularities, which occurred, affected the result neither does the Petitioner succeed on the ground that the election was conducted generally in breach of fundamental principles and indeed the law, and therefore was a nullity. I find that all necessary facilities were put in place to facilitate the voting which took place on the 25th October 2004 in accordance with the Act and the regulations. It appeared with some exceptions that voters were registered to vote at the time they presented themselves to receive a ballot. Based on the evidence the votes were generally tendered by secret ballot, respecting all of the confidentiality that is required to keep the vote of each voter secret. Finally there was no evidence that voters voted for more than one candidate in the elections. Neither was there any allegation that a decision or omission of an election officer on polling day caused the Petitioner to lose a specific number of votes.

[69] I therefore dismiss the Petition but I make no order as to costs. My reason for not making an order as to costs is that the public’s awareness of the flaws in the electoral system has

been raised by this Petition. The Petition therefore served the public's interest and any hyperbole and sweeping accusations on the part of the Petitioner in the case can be viewed in the context of the adversarial nature of the trial process. However at the end of the day the Supervisor of Elections, Presiding Officers, Returning Officers Poll Clerks and Agents will all be more vigilant in future as a result of this case and some of the arguments put forward by counsel on both sides, along hopefully, with the decision of the court.

[70] I wish to thank counsel for their most helpful guidance during the trial. In spite of my order on costs I believe that theirs was time well spent. Finally I order all election documents with the exception of those specifically identified as exhibits, returned to the Supervisor of Elections to be dealt with according to law.

Francis H V Belle
High Court Judge