THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

CLAIM NO. SKBHCV2004/0183

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 an Election for the Constituency of St. Christopher 8 held on the 25th day of October 2004

BETWEEN:

Cedric Liburd
Leroy Benjamin
Wayland Vaughn ***Applicants***

And

Eugene Hamilton ***Respondent***

Appearances:

Mr Delano Bart, QC for *1st Applican*t
Mr Arudranauth Gossai, Attorney General Chambers for the *2nd and 3rd Applicants*
Mrs Marguerite A Foreman and Ms Leah Crag-Chaderton *for the Respondent*

2011: 29 July
12 August
2 December

DECISION

[1] **THOMAS J**: Before the Court are two applications for the quantification of costs. The first was filed by the second and third Applicants, Leroy Benjamin and Wayland Vaughn on 8th February 2010; while the second was filed by the first Applicant, Cedric Liburd, on 29th April 2011[1].

[2] By way of background, it is to be noted that while the first Applicant, Cedric Liburd was awarded costs consequent on the dismissal of an Election Petition filed by the Respondent, Eugene Hamilton no costs were awarded to the second and third Applicants. However, on appeal they were awarded costs to be quantified by the Court of Appeal on the 15th July, 2008 in that same Petition[2].

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[1] SKBHCV2004/0183: Eugene Hamilton -v- Cedric Liburd, Leroy Benjamin and Wayland Vaughn
[2] HCVAP2006/0012: Leroy Benajamin, Wayland Vaughn Cedric Liburd -v- Eugene Hamilton

Affidavits in Support

[3] In an Affidavit in Support of the Application, Ms Jihan Williams, Crown Counsel of the Attorney General's Chambers deposes as to the Order made by the Court of Appeal on 15th July 2008 regarding the matter of costs in this matter. And in a Supplemental Affidavit, the said affiant further deposes that she has been advised and verily believes to be true, that Maurice King, QC and Junior Counsel, Ms Nicole Sylvester submitted invoices to the Chambers of the Attorney General in relation to their respective expenses incurred in dealing with this matter.

[4] At paragraph 7 of the said Supplemental Affidavit, Ms Williams deposes as follows:

> "I am also advised by Mr Gossai and verily believe the same to be true that the invoices submitted by Mr King, QC for January 2008 could not be located despite vigorous efforts to locate the same. These invoices relate to the expenses incurred in relation to the Court of Appeal".

[5] In his Affidavit in Support, Cedric Liburd refers to the decisions of the High Court and the Court of Appeal on the said Petition and paragraphs 6 to 8 of his said Affidavit he further deposes as follows:

> "6. The Bill of Cost now produced and shown to me marked **CRL. 2** and is exhibited hereto contains the sum of the liability that I have incurred in defending the matter and I'm advised by my solicitors Delano Bart & Co that it reflects the reasonable costs for a matter of this magnitude.
>
> 7. In support of the Bill of Costs now produced and shown to me marked **CRL. 3** and is exhibited hereto is a scanned copy of the Invoice of Senior Counsel Anthony Astaphan SC who represented me as leading Counsel.
>
> 8. Further in support of the Bill of Costs is now produced and shown to me marked **CRL. 4** and is exhibited hereto, is an Affidavit of Glenford Hamilton filed on the 21st verifying the invoice of Hamilton and Co to which the Fee Note for services rendered by Hamilton and Co as counsel and solicitor is exhibited as GH1."

Affidavit in Response

Mr Eugene Hamilton

[6] In his Affidavit in Response Mr Eugene Hamilton deposes as to the reasons as to why the Election Petition was brought. According to him, the Petition was brought because he held the honest belief that he had been deprived of the proper process of his candidature for the Electoral District of St, Christopher 8 in the General Elections held in the Federation of St. Christopher and Nevis on 25th October 2004.

[7] It is further deposed by Mr Hamilton that it was brought to his attention that "matters of this elk do not normally attract costs since they are considered matters of public interest, but that in the event that I was unsuccessful and costs were awarded against me, that the basis for the quantification of these costs would be the Civil Procedure Rules 2000".

[8] At paragraph 5 of his said Affidavit, Mr Hamilton disputes the level of the costs applied for in each Application as he considers them to be both exorbitant and intimidating.

[9] At paragraphs 9 and 10 it is deposed as follows:

> "9. I am advised by my Solicitors and I verily believe that
>
> (i) If the Honourable Court had intended the costs awarded to be done outside the scope of the Civil Procedure Rules 2000, then this intention would have been expressly stated in the Judgment.
>
> (ii) That the category of costs in this matter falls under prescribed costs as set out in Rule 65.5.
>
> (iii) By virtue of Rule 65.5(2)(b)(iii) in determining prescribed costs the value of the claim in the case of a defendant, if it is not for a monetary sum – the amount of EC$50,000.00 unless the Court makes an Order under Rule 65.6(1)(a). my Claim was not for a monetary sum and no such Order was made.
>
> 10. Furthermore, fees fit for two Counsel were not ordered or agreed."

Submissions

[10] In submissions on behalf of the Applicant, Cedric Liburd, Mr Delano Bart, QC contends that the only attack on the contents of the Bills by the Respondent/Petitioner is that "fees fit for two counsels were not ordered or agreed". The further contention questions the existence of a rule of Court that requires that there be a certification that the matter is fit for two counsel. According to learned Queen's Counsel: "what the Court in assessing the costs claimed has to concern itself with [is] whether or not the sum claimed is reasonable".

[11] In the alternative, submissions are also made in the event that assessment is governed by CPR 2000.

[12] Further submissions are made on the following matters: the care, speed and economy involved in the preparation of the case; the finding of the Court that the Applicant had no case to answer; the seriousness of the matter to the Applicant and to the entire country; and doubting the fees changed by both counsel and solicitor can be termed excessive.

[13] Mr Gossai for the 2nd and 3rd Applicants makes an early submission that the Respondent does not identify the basis upon which the costs are challenged which in turn invites speculation. Submissions with authorities are also made with respect to the questions of the general rule of reasonableness of costs, and the level of costs.

[14] In the final analysis Mr Gossai submits at paragraph 43 the following: "The 2nd and 3rd Applicants humbly submit that the terms contained in the Bill were reasonably incurred in the circumstances of this case and this Honourable Court ought to grant the entire amounts contained in the Bill."

[15] In so far as the Respondent is concerned the submission relate to the question of the basis upon which cots are awarded in these circumstances. And after an analysis of Part 65 of CPR 2000 and certain other authorities[3] this final submission is made:

> "In all the circumstances, we humbly request this Honourable Court not to grant the costs as quantified in the Applications herein and to determine the level of costs based on prescribed costs at rule 65.5(2)(b) of the Civil Procedure Rules 2000 and on consideration of the submissions set out above and the authorities and arguments in the Respondents documents already filed".

[16] The affidavits and submissions filed on all sides give rise to the following issues:

1. The legal basis for the award of costs in election petition cases
2. The measure of costs to be used by the Court in the award of costs in an election petition case
3. Whether a Bill of Costs can be challenged in submissions relating to an application for quantification of costs
4. Whether the costs claimed by the Applicants should be awarded.

ISSUE NO. 1

The legal basis for the award of costs in an election petition case.

[17] As noted before, the Respondent's basic contention is that Part 65.5 of CPR 2000 applies in these circumstances so that a value of $50,000.00 will be applicable. It is also deposed by the Respondent that if the Court had intended the costs to be awarded outside of the scope of CPR 2000, this intention would have been stated in the judgment.

[18] Counsel for the Applicants rejects this contention. Mr Delano Bart Q.C. for the 1st Applicant submits that the contention is wrong as the Petition was brought under the National Assembly Elections Act and the Constitution.

[19] Mr Gossai for the 2nd and 3rd Applicants travels further, and after referring to paragraphs 9 and 11 of the Respondent's Affidavit in Response says as follows:

> "46. In the Court of Appeal judgment on the costs issue, Barrow JA said @ p. 2 para. (3); p. 13 para. [27] [TAB 7 – Bundle of Documents of 2nd and 3rd Applicants]
>
> > "(3) There is no special rule as to costs for election petitions and an unsuccessful petitioner must expect to pay costs in accordance with the application of the normal costs rule. That such is the legislative intent is clear from the fact that section 83 (1) of the Act requires security for costs to be paid by the petitioner or within three days thereafter.
> >
> > [27] ...We would order the respondents to these appeals to pay the costs of the appellants, to be quantified, both in this court and in the court below".

[3] Greenslade on Costs (10th Ed.); Jonas et al v. Quinn-Leandro et al Civil Appeal Nos. 18 – 20/2010 (A&B)

47. The judgment of the Court of Appeal made it quite clear that there are no special rules in relation to costs in election petitions and that the costs are to be quantified both in the High Court and the Court of Appeal.

48. There is nothing in the judgment which states that the costs are to be quantified in accordance with CPR 2000.

49. In fact, it has consistently been held in our courts that the CPR 2000 does not apply to election petitions. [This was so held in the recent Court of Appeal case of ***Jonas et al v Quinn-Leandro et al.*** *Civ. App. 18 to 20 of 2010 – Antigua & Barbuda].*

50. It is therefore respectfully submitted that this Honourable Court has to quantify the costs based on the available materials.

51. As a respectful reminder, one of the essential, if not the most essential, material, that is, the Bill of Costs has not been disputed by the Respondent and therefore should be granted in its entirety.

Conclusion

[20] The Respondent's submissions on the matter of costs rests on a decision of the Court of Appeal in **Leroy Benjamin el al v. Lindsay Fitzpatrick Grant and Leroy Benjamin et al v. Eugene Hamilton**[4] from which the following is quoted:

> "Costs in an election petition in the Federation of Saint Christopher and Nevis fall within the ambit of section 87 of the National Assembly Elections Act. This section provides in a far more general way than the legislation reviewed in **Henry v. Halstead,** but to similar effect that on an election petition. The Election Court shall have the same powers and jurisdiction and authority as a judge has on a trial of a civil action in the Supreme Court. The Supreme Court's jurisdiction in relation to costs is contained in Parts 64 and 65 of the Civil Procedure Rules 2000".

[21] More recently in **Lindsay Grant v. Glen Phillip et al,** Hariprashad-Charles J, at paras. 61 – 62 of her judgment:

> "I am bound to follow the numerous judicial authorities from the Privy Counsel and our Court of Appeal that the election jurisdiction is a special and peculiar jurisdiction. The very special and peculiar nature of the Election Court jurisdiction is such that without an express application of the CPR by the provisions of the Elections Act on 'the yet to be made' Rules election proceedings do not fall within the ambit of civil proceedings under CPR 2.2. Consequently, I find that this CPR 2000 does not apply and the correct position to adopt is that held by **Baptiste, J** in ***Lindsay Grant v. Rupert Herbert*** that the Court will, in the absence of express rules, be guided by its inherent jurisdiction".

[22] The reference by Justice Hariprashad-Charles to CPR 2.2 is some considerable importance since subparagraph (3) of that rule prescribes the proceedings to which CPR 2000 does not apply. And at subparagraph (3)(e) the following is stated:

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[4] HCVAP2006/009/11 and HCVAP2006/0012

"any other proceedings in the Supreme Court instituted under an enactment, in so far as rules made under that enactment regulate those proceedings".

[23] In the Federation of Saint Christopher and Nevis, elections are governed by a statute bearing the short title of National Assembly Elections Act[5]. And section 100 thereof vests in a Judge at the trial of an election petition the same powers jurisdiction and authority as in the trial of a civil action in the High Court.

[24] With CPR 2000 excluded, it means that a trial judge in an election case derives power to award costs from the inherent jurisdiction of the High Court as restated at section 100 of the National Assembly Elections Act.

[25] It is contended by learned counsel for the Respondent that the recent consolidated case of **Jacqui Quinn-Leandro and Dean Jones, John Maginley and Charles Henry Fernandez and Winston Baldwin Spencer and St. Clair Simon** is not authority for the proposition that CPR 2000 does not apply to election cases.

[26] The Court can concede that it does not say that expressly but in addressing the issue of costs the Learned Chief Justice said that he did not propose to disturb the trial judge's costs order and then he went on to say this: "In any event, I think that her Order was a proper exercise of her discretion exercised in accordance with principle on the basis of the relevant statute". The statute in question in the case of Antigua and Barbuda is the Representation of the People Act which expressly empowered the Court to award costs in the presentation of election petitions. The said statute was analyzed by Justice Blenman at paragraph 413 to 425 of her judgment.

[27] Therefore, both the National Assembly Elections Act in the case of Saint Christopher and Nevis and the Representation of the People Act, in the case of Antigua and Barbuda there is a statute as contemplated by Rule 2.2 and thereby excludes CPR 2000 from the costs equation and otherwise. This means that the Grant case has been overruled sub silentio, by the Court of Appeal itself.

ISSUE NO. 2

The measure of costs to be used by the Court in the award of costs in an election petition case.

[28] This is hardly an issue as it is common ground that costs must be reasonable whether it is an election petition case or an ordinary civil case. This rule is of long standing and the following dictum of **Bovill, CJ** in **Hughes v. Meyrick** makes the point: "a party to whom costs were awarded was entitled to be identified against all costs reasonably incurred by him. No absolute or definite rule can be laid down as to what expenses are incurred reasonably, that must depend upon the particular circumstances of each case..."[6]

ISSUE NO. 3

Whether a Bill of Costs can be challenged in submissions relating to an Application for Quantification of Costs.

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[5] Cap. 2.01 (2002 Revised Edition) Laws of saint Christopher and Nevis

[6] 1[1870] R.R 5CP 407, 410

[29] The Court ordered that submissions be filed on this issue having regard to the novelty thereof. In this connection learned counsel filed submissions which read in part as follows:

> "4. At pages 8 – 10, paragraphs 27 – 28 of the Petitioner's Submissions; Counsel for the Petitioner, Mr Hamilton purports to make issue, de novo, with the Bill of Costs filed by the 2nd and 3rd Applicants/Respondents.
>
> 5. It is respectfully submitted that the contents of paragraphs 27 – 28 are matters of fact which have to be properly presented to the Court.
>
> 6. It is highly uncommon practice and one frowned upon by this Court where Counsel who has conduct of the matter seeks to present evidential matters in place and instead of their clients.
>
> 7. As submitted previously, it would be highly improper and severely prejudicial to the 2nd and 3rd Applicants if Mr. Hamilton were to be allowed to contest items on the Bill in his submissions.

[30] The Court agrees with the above submissions.

ISSUE NO. 4

Whether the costs claimed by the Applicants should be awarded.

Submissions

[31] Mr Delano Bart, QC for the 1st Applicant submits the following:

> "6. The only attack on the contents of the Bills by the Respondent/ Petitioner is that 'Fees fit for two counsels were ordered or agreed'. There is no rule of the Court that requires that there be certification that the matter is fit for two counsels. What the Court in assessing the cost claimed has to concern itself with [is] whether or not the sum claimed is reasonable".

[32] Mr Adranauth Gossai for the 2nd and 3rd Applicants advances the following:

> "19. It is to be noted at the outset the Mr Hamilton has not disputed any item on the Bill of Costs submitted by the 2nd and 3rd Applicants and it is respectfully submitted that this Honourable Court should therefore award the entire amount in the Bill of the Applicants.
>
> 24. It is respectfully submitted that the bare statement that the costs are exorbitant and intimidating cannot in any way be seen as a real challenge to the Bill presented by the Applicants".

[33] As noted above, the Respondent in his Affidavit in Response in disputing the level of the costs for in each application to be "both exorbitant and intimidating".

Bills of Cost and Fee Notes

[34] The Court notes that in all cases the bills of costs and fee notes are not supported by documentation. However, in the case of the bills of costs, these reveal great detail in terms of the type of expenditure or fees involved.

1st Applicant

[35] With respect to the 1st Applicant there are two fee notes: one by Anthony W. Astaphan, SC and the other from Hamilton & Co.

Astaphan, SC

[36] The fee note contains two items as follows:

"7.07.09 To: (1) brief fee pending, review of documents research and preparation of case US$25,000.00

(2) Appearances before the High Court for the hearing of petition US$25,000.00"

[37] As noted above, the criterion to be applied to costs in what is reasonable in the circumstances. And this is nothing to suggest that US$50,000.00 or EC$135,000.00 is not a reasonable fee for senior counsel in an election petition case.

Hamilton & Co

[38] The fee note for Hamilton & Co contains the following:

FEE NOTE
GH

18th March 2011
Delano Bart C.Q.
Delano Bart & Co
Sands Complex
George Street
BASSETERRE

RE: Election Petition arising out of Elections held on October 25, 2004 in St Kitts and Nevis Claim No. SKBHCV2004/0183

Date	Particulars	Amount	Total
	To professional services retained and rendered by Hamilton & Co. as solicitors for Cedric Liburd - the Respondent, including but not limited to:-		
	Interviewing the Respondent, agreeing to act as Solicitors for the Respondent, taking instructions, giving advice, interviewing upward of fifteen (15) potential witnesses, drafting affidavits for said potential witnesses, assisting in the drafting and review of response to petition, filing response to petition, to disbursements for stamps, stationery, travel, telephone and faxes:-	US$15,000.00	

To fee brief pending review of documents, research and preparation of case (2/3 of Senior Counsel's Fee which is US$25,000.00)	US$16,500.00
To appearances before the High Court for hearing of the Petition (2/3 of Senior Counsel's Fee which is US$25,000.00)	US$16,500.00
VAT	US$8,160.00
TOTAL DUE	**US$56,160.00**

[39] It must be that the work done by senior and junior counsel must necessarily cover the same ground. In this case the first item relating to "interviewing the Respondent ..." was not a part of Mr Astaphan's fee note. More particularly, the Court considers that the said item fall within the general heading of preparation of the case which is an item of Mr Astaphan's fee note.

[40] In the fee note for Hamilton & Co. the said item claims a fee in the amount of US$15,000.00. However, for the reasons given above this said item is disallowed.

[41] The second and third items are in alignment with the two items contained in Mr Astaphan's fee note and 2/3 of senior counsel's fee is claimed which accords with the established rule in this regard.

[42] The only fee note or bill of costs in which value added tax (VAT) is claimed in this matter is that of Hamilton & Co. The evidence is that the petition was filed after the general election on 25th October, 2004 so that engaging of counsel would have started at that time with preparation and related matters taking place at that time and with the actual trial in the High Court taking place on May 02, 2006.

[43] The Court takes judicial notice of the fact that the Value Added Tax Act No 3 of 2010 came into operation on 1st November, 2010. It is a tax on a certain goods and services at the time of sale or the rendering of such service. It is not a retroactive tax. However, by way of complex but unusual Hamilton & Co. claims VAT in the modest amount of US$8,160.00. This is beyond the unsavory. And what is more unsavory is the fact that junior counsel's fees are US$5160.00 more than that of senior counsel.

[44] The claim for US$8,160.00 is disallowed since it is contrary to law, in all respects.

[45] Fees of US$33,000.00 are allowed as being reasonable, being 2/3 of senior counsel's fees.

2nd and 3rd Applicants

Maurice King,QC and Nicole Sylvester
The full extent of the bill of costs are set out in Appendix A.

[46] Essentially the bills of costs cover the following general: brief, fee, legal fees, hotel expenses, faxes, telephone calls and photocopying, airfare, taxi and airport service charge.

[47] With respect to administrative expenses such as photocopying and binding although the expenses are high, the Court notes that several copies were required both for the trial and the appeal. These are reasonable expenses.

[48] The airfares, taxi expenses and airport service charge are also standard and consistent and as such there is no ground airport service charge are also standard are consistent and as such no ground is advanced for disturbing same. The Court also determines that these expenses are reasonable.

[49] The hotel expenses reveal an average of US$307.00 per day. This would include all expenses for meals and other related expenses. These expenses too are reasonable for type of accommodation involved.

[50] The brief fee of US$65,000.00 contrasts with that of Mr Astaphan's fee of US$25,000.00, but the Court notes that Mr Astaphan, SC appeared for one litigant, while Mr King, QC appeared for two litigants.

[51] In so far the fees are concerned, these are matters that fall entirely within the province of counsel. But the constituents would include the experience of counsel (in this Queen's Counsel), the nature of the matters and the actual appearances in Court.

[52] A fee of US$2,500.00 per day for senior counsel cannot be considered to be unreasonable. Further, the dates on which Mr King appeared in Court are detailed in the said bill of costs.

[53] As expected, the bill of costs for junior counsel, Ms Nicole Sylvester follows that of her senior and the 2/3 rule is applied with respect to the brief fee and the legal fees.

[54] In so far as the air fares are concerned these vary considerably and a reasonable influence to be drawn is that junior counsel journeyed to St. Kitts from a number of places other than her home base of St. Vincent and the Grenadines.

[55] The total of $545,36841 due on the Bill of Costs is allowed

Interest

[56] In accordance with the Judgments Act interest is payable from the date of the judgment until it is satisfied. The award of costs falls to be so considered.

ORDER

[57] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. In the Federation of Saint Christopher and Nevis the power to award costs with respect to election petitions is contained in the National Assembly Elections Act.

2. The cases of **Leroy Benjamin et al v. Lindsay Fitzpatrick Grant and Leroy Benjamin et al v. Eugene Hamilton** was overruled sub silentio by the Court of Appeal own decision in **Jonas et al -v- Leandro et al** Civil Appeal Nos. 18 – 20/2010 (A & B).

3. In light paragraph (e) of Part 2.2 of CPR 2000 coupled with the power to award costs in election petitions under Section 100 of The National Assembly Elections Act, CPR 2000 is not applicable to election petitions.

4. There is no absolute or definitive rule regarding the measure of costs and the rule followed is what costs were reasonably incurred in the particular circumstances.

5. A Bill of Costs cannot be challenged in submissions relating to quantification of costs.

6. With respect to the 1st Applicant the fee note for Mr Anthony Astaphan, QC in the amount of US$50,000.00 or EC$135,000.00 is reasonable and is allowed; but the fee note for junior counsel, from Hamilton & Co. in the amount of US$56,000.00, this amount is unreasonable in the circumstances and the amount of US$33,333.00 or EC$90,000.00 is allowed.

7. With respect to the 2nd and 3rd Applicants the costs involved concern senior and junior counsel and are considered reasonable in the circumstances and the amount of $545,368.41 due on the Bill of Costs is allowed.

8. Interest is payable in accordance with the Judgments Act.

ERROL L. THOMAS
High Court Judge (Ag.)

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