EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2018/0060

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 12 OF THE NATIONAL ASSEMBLY ELECTIONS ACT CAP 2.01

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 36 OF THE CONSTITUTION OF SAINT CHRISTOPHER AND NEVIS

BETWEEN:

CUTHBERT MILLS

Claimant

and

DR. DENZIL DOUGLAS

Defendant

Appearances:-

Mr. Anthony Ross QC, with him Mrs. Stacy Ann Aberdeen-Sargeant and Ms. Nadia Chiesa for the Claimant.

Mr. Anthony W. Astaphan S.C., Mr. Delano Bart Q.C. with Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Defendant.

2018: June 15, July, 06
July 09
July 13

JUDGMENT

[1] The defendant is the Leader of the Opposition. He was elected as the member of the National Assembly of St. Kitts and Nevis representing the constituency of St. Christopher No.6 following Federal Elections held in St. Kitts and Nevis on 15th February, 2015.

[2] On July 30th 2015, he was issued a Diplomatic Passport by the Commonwealth of Dominica which recorded him as being a citizen of Dominica. The said passport bears an expiry date of 29th July, 2020. The defendant has travelled on this passport.

[3] By Fixed Date Claim Form and Statement of Claim the claimant has pleaded that by virtue of his own acts in being issued, accepting and/or travelling on a Diplomatic Passport issued by the Commonwealth of Dominica the defendant became disqualified from being elected as a member of the National Assembly and was, accordingly, required to vacate his seat in the National Assembly by reason of his becoming a person, who, by virtue of his own act, is, in accordance with the laws of Dominica, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely the Commonwealth of Dominica. The claimant therefore seeks a declaration that, pursuant to section 6 (1) (a) of the National Assembly Elections Act, Cap 2.01 or alternatively, section 28 (1) (a) of the Constitution of Saint Christopher and Nevis, the defendant has vacated his seat. The defendant duly filed a number of affidavits in response.

The applications

[4] The claimant in turn has filed an application seeking various interlocutory reliefs, including:

(i) an order striking out the defendant's affidavit filed in response; in the alternative an order striking out a number of paragraphs of the said affidavit;
(ii) an order striking out the affidavit of Tamelia Demming or alternatively paragraphs thereof;
(iii) an order that the defendant produce the diplomatic passport for

inspection or a true copy thereof;

(iv) an order that the defendant and Ms. Demming be cross-examined at trial; and

(v) an order granting leave to adduce expert evidence on the laws of Dominica.

[5] These applications were heard on 15th June, 2018. On that occasion the court also granted leave to the defendant to file a Notice of Application to Strike the claimant's application given that the defendant's intended objections were plainly foreshadowed in his written submissions in response to the claimant's interlocutory applications.

[6] The defendant seeks to strike out the claimant's application on the basis that it is an abuse of process, in that, on a proper construction of section 36 (4) of the Constitution, the claimant is precluded from making an application to the High Court to determine whether the defendant has vacated his seat once the Attorney-General has instituted a similar application. Thus the court has no jurisdiction to entertain the application.

[7] The defendant further contends that the claimant's application should be struck out because the claimant has failed to adequately plead the specific Dominican Law upon which his claim purports to be based and has failed to plead the material facts said to evince obedience, adherence or allegiance to the Commonwealth of Dominica under the laws of Dominica.

[8] In the alternative, the defendant seeks to have certain parts or paragraphs of the Fixed Date Claim struck out, namely, parts of relief 2, reliefs 4,5,6 and 7 and paragraphs 6, 8 and 10 (f) of the Statement of Claim. Further, the defendant seeks an order that paragraphs 12, 18 and 19 of the claimant's affidavit be struck out as hearsay and an order that the first affidavits of Inspector Jacqueline Brown, Immigration Officer Tishema Watson and DeHaan Henry, information and communications technology consultant to the Ministry of National Security be struck out as an abuse of process on the basis that these public officers have used their positions to disclose the defendant's personal information to the

claimant, a private citizen, to fuel his claim, in breach of the defendant's constitutional right to privacy guaranteed by section 3 of the Constitution of Saint Christopher and Nevis.

[9] If the defendant is correct in submitting that the Constitution forbids the bringing of a second application once the Attorney-General has filed an application under section 36 (4) of the Constitution, this would be dispositive and fatal to the claimant's case. Accordingly, the court will first treat with the defendant's application to strike.

The defendant's submissions

[10] On behalf of the defendant, Learned Counsel, Mrs. Angelina Gracy Sookoo-Bobb, submitted that section 36 (4) of the Constitution expressly prohibits the claimant, a registered voter in Constituency No. 6 from filing a second application in the High Court for any determination of any question under section 36 (1) (d) once a similar application has been filed by the Attorney-General. This is so, submitted Mrs. Sookoo-Bobb, because the word "or" occurring between 36 (4) (a) and (b) is disjunctive and meant to delineate between a challenge brought by a member of the house and one brought by a registered voter. Learned counsel submitted that the court should give the word "or" its natural and ordinary meaning as a disjunctive particle used to express an alternative or choice of one among two or more things. Learned counsel reinforced this submission by reference to the definition of "or" contained in the Interpretation Act, Cap. 1.02 which provides that unless a contrary intention appears, "or" is to be construed disjunctively and not as implying similarity, unless the word "similar" is used or some other word of like meaning is added.

[11] Learned counsel further submitted that the proviso to section 36 (4) provides support for this interpretation because whereas it allows the Attorney-General to intervene where the application is brought by a person other than the Attorney-

General no such provision is made for any other person to intervene or join in an application brought by the Attorney-General. Mrs. Sookoo-Bobb made the point that even where the Attorney-General intervenes, it is not by way of, nor is it, a second application; it is an intervention in an existing application. Thus, submitted Mrs. Sookoo-Bobb, Parliament intentionally excluded the voter from bringing a second application or joining in the Attorney-General's application.

The claimant's submissions

[12] On behalf of the claimant, Learned Counsel Ms. Nadia Chiesa submitted via written submissions that the jurisdiction to strike is a draconian one and should be sparingly exercised and this is especially the case in election related challenges. In support of this proposition, the case of Dean Jonas v Jacqui Quinn-Leandro et al[1] was cited.

[13] In oral submissions before the Court, Ms. Chiesa further submitted that section 36 (4) must be given a purposive construction to ensure that constitutional rights are not abridged or interpreted in such a way as to drive a constitutional litigant from the court. When given a generous and purposive construction, neither section 12 (4) of the National Assembly Elections Act nor 36 (4) of the Constitution precludes the bringing of an application by a voter after the Attorney-General has done so.

[14] Ms. Chiesa submitted that sections 36 (4) (a) and (b) refer to two categories of circumstances and must be read as a whole. Section 36 (4) (a) speaks to an application to challenge a seat held by a Representative or the appointment of a senator. That is one circumstance. Importantly, however, Ms. Chiesa conceded that in 36 (4) (a) "or" is used disjunctively, so that an application may be made by either a Representative or the Attorney-General but not both.

[1] ANUHCV2009/0141

[15] By contrast, submitted Ms. Chiesa, the "or" that follows the semicolon after 36 (4) (a) is not disjunctive. It distinguishes between two scenarios and does not exclude the possibility of a voter bringing an application to challenge the seat of a Representative where the Attorney-General or a Representative has brought an application under section 36 (4) (a).

[16] Ms. Chiesa submitted that whereas an application by a Representative or the Attorney-General under 36 (4) (a) is an application brought in the interest of the public, where the voter brings an application under 36 (4) (b), the voter is exercising a constitutional right in a different capacity: he is bringing an application pursuant to a specific individual constitutional right. Accordingly, there is no restriction on him bringing an application where the Attorney-General has already done so nor is there any limit to the number of voters who may bring such an application. Given the importance of issues that arise when such an application challenge is brought, it could not have been the intention of the legislature to exclude anyone, submitted Ms. Chiesa.

[17] While acknowledging the definition of "or" contained in the Interpretation Act, Ms. Chiesa submitted that a contrary intention appears because section 36 (4) (a) and (b) seek to distinguish between two different situations as explained above. So in that context, the intention is that the "or" occurring between them should not be read disjunctively; thus entitling the voter to make an application to the High Court notwithstanding that the Attorney-General has done so.

Discussion and analysis

[18] The issue on this application to strike is whether the claimant may bring an application under either Section 36 (4) (b) of the Constitution or Section 12 (4) (b) of the National Assembly Elections Act after the Attorney-General has already made such an application under section 36 (4) (a) of the Constitution. This is a matter of statutory construction.

[19] To place the current claim in context a brief chronology is necessary. On 22nd January, 2018 the Attorney-General filed and served Claim No.SKBHCV2018/0008. This claim was brought pursuant to Section 36 of the Constitution and Section 12 of the National Assembly Elections Act. The Attorney-General's application is based primarily on the fact that the defendant is the holder of the said Diplomatic Passport on which he has travelled. The Attorney-General seeks, *inter alia*, a declaration that, since his election to the National Assembly on 16th February, 2015, the defendant became disqualified from being elected as a member of the National Assembly and was, accordingly, required to vacate his seat in the National Assembly by reason of his becoming a person, who, by virtue of his own act, is, in accordance with the laws of Dominica, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely the Commonwealth of Dominica. The Attorney-General further seeks a declaration that the defendant has vacated his seat and seeks an injunction restraining the defendant from taking his seat in the National Assembly and from performing his functions as a member thereof.

[20] On 16th February, 2018 the claimant filed the instant claim. It is evident that the action is also brought pursuant to section 12 of the National Assembly Elections Act and section 36 of the Constitution. The claim was brought with full knowledge of the existence of the Attorney-General's claim; is based on the same grounds; relies on at least three witnesses who also gave affidavits in the Attorney-General's claim; and seeks the identical reliefs sought in the Attorney-General's claim.

The statutory framework

[21] Section 36 of the Constitution provides a mechanism for challenges to be made to the election of a representative; appointment of a senator; election of a speaker; or to determine whether any member of the Assembly has vacated his seat.

[22] Section 36 (1) provides:

> "(1)The High Court shall have jurisdiction to hear and determine any question whether-
> (a) any person has been validly elected as a Representative;
> (b) any person has been validly appointed as a Senator;
> (c) any person who has been elected as Speaker from among persons who were not members of the National Assembly was qualified to be so elected or has vacated the office of Speaker; or
> (d) any member of the Assembly has vacated his seat or is required by virtue of section 31 (4) to cease to perform his function as a member of the assembly."

[23] Sections 36 (2) and 36 (3) provide for applications to be made to the High Court for determination of any question under 36 (1) (a), (b) and (c). Section 36 (4) provides for applications to be made to the High Court for the determination of any question under section 36 (1) (d) and is the subsection directly engaged in the defendant's application to strike.

[24] Section 36 (4) provides:

> "An application to the High Court for the determination of any question under subsection 1(d) may be made –
> (a) By any Representative or by the Attorney-General; or
> (b) In the case of the seat of a Representative, by any person registered in some constituency as a voter in elections of Representatives,
> and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then and there appear and be represented in the proceedings."

[25] It is convenient to observe at this juncture that Section 12 (4) of the National Assembly Elections Act is in identical terms as 36 (4).

[26] Section 36 (4) therefore creates three (3) categories of persons who may bring an application to the High Court for the determination of any question arising under 36 (1) (d), namely, any Representative; the Attorney-General or a registered voter where it concerns the seat of a representative.

[27] May they all bring parallel applications; or does the Constitution contemplate one application? Is the "or" separating 36 (4) (a) and 36 (4) (b) to be read disjunctively

or not? That is the question on which issue is joined.

[28] I turn therefore to consider the proper construction to be placed on the word "or" where it occurs therein.

[29] The word "or" may be used conjunctively or disjunctively. When used disjunctively, it expresses a choice between two mutually exclusive possibilities.[2] In some cases, its meaning is shaped and derived from the context in which it is used.

[30] The Interpretation Act, Cap. 1.02 provides that unless a contrary intention appears, "or" is to be construed disjunctively and not as implying similarity, unless the word "similar" is used or some other word of like meaning is added.

[31] In my view, the Interpretation Act dictates that the default position is that the word "or" is to be construed disjunctively where it occurs within 36 (4) (a) – as the claimant has fully conceded – and also where it occurs between 36 (4) (a) and (b), there being no such word as "similar" or other word of like meaning occurring anywhere in section 36 (4) so as to manifest a contrary intention.

[32] To so restrict applications under section 36 (4) produces no discernable injustice or prejudice to the voter or the public interest since the issue which the voter seeks to place before the court for its determination would nonetheless be fully ventilated before the court in the Attorney General's application.

[33] On the other hand, the court considers that, as a matter of principle, the position contended for by the claimant would be oppressive in that a defendant would be vexed twice, and possibly more, by claims based on the same facts and seeking identical reliefs. It is for that reason, it seems to me, that the right to intervene in an application brought under section 36 (4) is reserved to the Attorney-General and only to the extent that he may appear or be represented in those extant

[2] Oxford Dictionary of English, Oxford University Press, 2010,2017.

proceedings. To permit a multiplicity of claims would lead to an unwarranted consumption of judicial time, and would defeat the objective of determining election challenges in a timely manner.

[34] Promptitude in the resolution of election challenges is better achieved where the Court is seised of one application. This seems consonant with the Parliament's intention as expressed in section 36 (4) of the Constitution.

[35] For completeness, I should add that all that has been said above relating to the interpretation of section 36 (4) of the Constitution applies with equal force to section 12 (4) of the National Assembly Elections Act.

[36] The distinction that the claimant seeks to make between the nature of a claim brought by a representative or the Attorney-General under section 36 (4) (a) and one brought by a voter under section 36 (4) (b) cannot withstand scrutiny given the claimant's clear concession that in the former case there can only be one application. No public interest consideration occurs to me that would justify why a voter should be placed in a better position than a representative. Put another way, if, as the claimant concedes, a representative cannot bring an application where the Attorney-General has already done so, why should a voter? Their entitlement to bring an application stems from the same source, is of equal constitutional force and weight and is designed to enable the same enquiry, namely whether a member has vacated his seat in the National Assembly.

[37] The court holds that on a proper construction of section 36 (4) of the Constitution and section 12 (4) of the National Assembly Elections Act, the claimant is precluded from bringing an application to determine whether the defendant has vacated his seat given that the Attorney-General has already moved the court for that very determination relying on the very grounds and facts relied on by the claimant in this case.

[38] The court further holds that in the circumstances of this case where, the claimant's application was brought almost one month after, and with full knowledge of, the existence of the Attorney-General's claim; is based on the same grounds; is grounded on the same facts; relies on at least three witnesses who also gave affidavits in the Attorney-General's claim; and seeks the identical reliefs sought in the Attorney-General's claim, the filing of the instant claim constitutes an abuse of the process of the court.

[39] The claim is accordingly struck out.

[40] In view of the conclusion to which I have come on the jurisdiction issue, consideration of the other submissions is rendered otiose.

Trevor M. Ward, QC
Resident Judge

By the Court
Registrar