IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 176 OF 2012

In the matter of section 86 (two) of the Belize Constitution

AND

In the matter of an application for leave to institute proceedings by way of election petition to determine the validity of the election on March 7, 2012 of Mark King as member of the House of Representatives for the Lake Independence Electoral Division.

AND

In the matter of the Representation of the People Act, Chapter 9.

BETWEEN:

YOLANDA SHAKRON
WHYLMA WHITE MUNNINGS **APPLICANTS**

AND

MARK KING NOREEN FAIRWEATHER
ATTORNEY GENERAL **RESPONDENTS**

In Court.

Before: Chief Justice Kenneth Benjamin

March 26 & 30, 2012.

Appearances: Mr. Godfrey Smith, SC, Ms. Lisa Shoman, SC, with him for the Applicants, Mr. Denys Barrow, SC, Ms. Magalie Perdomo Crown Counsel, and Mr. Andrew Bennett, Crown Counsel, with him for the Respondents.

JUDGMENT

[1] The 17th day of February, 2012 was fixed by Proclamation as Nomination Day ahead of general elections which were held on March 7 2012. The first Applicant, Yolanda Schakron, offered herself as a candidate for the Lake Independence Electoral Division by presenting to the Returning Officer, Noreen Fairweather (who is named as the Second Respondent in these proceedings) a nomination paper in the prescribed form. The said nomination paper was completed by the First Applicant and six others registered voters including the Second Applicant, Whylma Munnings. Also tendered was a receipt evidencing payment to the Government of Belize of the requisite deposit of $200.00 as per Rule 6(1) of the Elections Rules set out in the Third Schedule to the Representation of the People Act, Chapter 9 of the 2005 Revised Edition of the Laws of Belize.

[2] An objection was made to the Returning Officer in respect of the nomination of Schakron. The basis of the objection was that Schakron was disqualified to be elected as a member of the House of Representatives pursuant to the provisions of section 58(1) of the Belize Constitution, Chapter 4. The affidavit of Schakron sets out the objection in paragraph 8 as follows:

> "The objector objected to my nomination… by virtue of my United States citizenship."

The Returning Officer received representations on behalf of the objector and on behalf of the Schakron and allowed the objection. The nomination paper of Schakron was not accepted.

[3] The election proceeded without the name of Yolanda Schakron as a candidate on the ballot. Mark King, the first Respondent, was returned as being duly elected as a Member of the House of Representatives for the Lake Independence Electoral Division.

[4] Yolanda Schakron is dissatisfied with the rejection by the Returning Officer of the nomination paper in her name. She is desirous of challenging the return of Mark King as the duly elected candidate. The basis for the challenge is that the decision of the Returning Officer to refuse to accept her nomination paper was unlawful.

[5] The present proceedings are the first step towards the challenge of the return of Mark King. The leave of the court is being sought to bring an election petition to vindicate the position asserted by Schakron that her nomination paper was unlawfully rejected.

[6] The requirement that leave or permission of the Supreme Court be sought to commence proceedings for the determination of any question as to membership of the House of Representatives emanates from the Constitution. Section 86, as far as relevant to these proceedings, provides as follows:

> "(1) any question whether –
>
> (a) Any person has been validly elected as a member of the House of Representatives...
>
> (b)...
>
> (c)...
>
> shall be determined by the Supreme Court in accordance with the provisions of any law.

> (2) Proceedings for the determination of any question referred to in the preceding subsection shall not be instituted except with the leave of a justice of the Supreme Court.
>
> (3). No appeal shall lie from the decision of a justice of the Supreme Court granting or refusing leave to institute proceedings in accordance with the preceding subsection."

It is for the court to determine in these proceedings whether or not leave ought to be granted to Schakron and Munnings to bring an election petition to challenge the entitlement of Mark King to membership of the House of Representatives.

[7] At the outset, it is convenient to settle the requirements of an application for leave or permission to bring proceedings. This necessary procedural requirement was recognized by this court in **Re: An Election Judge (1989) 1 Belize Law Reports 196**. It is to be noted that neither the Constitution nor the legislation provides any guidance as to the threshold to be met in applications for leave under section 86(1). The observation was made that the legislation in the form of the Representation of the People Act predated the Constitution which introduced the requirement that leave be sought and obtained before an election petition can be filed. Learned Senior Counsel for the Applicants drew the Court's attention to the helpful dictum of de la Bastide, CJ (as he then was) in the case of **Peters & Chaitan c. Attorney General and another (2001) 63 WIR 244**. His Lordship put the matter in this way:

> "While election proceedings may be regarded as 'sui generis', they are more akin to civil than criminal proceedings. The question of giving a defendant an opportunity to be heard before he is sued does not normally arise in the context of civil proceedings. Whenever leave is required before civil proceedings are

> commenced, it is the invariable practice that such leave may be applied for and granted 'ex parte'. The most common case in which such leave is required is for the institution of judicial review proceedings. Another, much less common, case is when a 'vexatious litigant' against whom an order has been made pursuant to section 34(1) of the Supreme Court of Judicature Act, wishes to institute proceedings of any kind. The requirement of leave in these cases serves the same purpose as it is intended to serve under s 52 of the Constitution, namely to prevent the launching of actions that are frivolous and vexatious or plainly have no chance whatever of success."

It can be distilled that the Judge of the Supreme Court must satisfy himself that the proceedings to be brought are not frivolous in the sense of being trivial or without substance or are not vexatious, that is to say, amounting to an abuse of the process of the court by re-litigation of previously decided issues or otherwise. I agree with Mr. Smith that the threshold is low and an arguable case with some realistic prospect of success will suffice. The written submission laid over by Learned Senior Counsel for the Respondents are ad idem and, indeed, cited the dictum which I have adopted above.

[8] The grounds of the Applicants' application for leave are set out in extenso in the Notice of Application. These can be succinctly stated as follows:

1. The Returning Officer having refused the nomination paper of Yolanda Schakron acted unlawfully thereby resulting in the election being held without her name on the ballot as a candidate for the Lake Independence Electoral Division.

2. The decision of the Returning Officer was unlawful and not authorized by the Election Rules as the nomination paper was on its face in accordance with the Election Rules.

3. Yolanda Schakron was deprived of the opportunity to stand as a candidate.

4. The election was invalid and the return of Mark King as the duly elected representative for the Lake Independence Electoral Division was accordingly void.

The Applicants crave the leave of the Court to institute proceedings by way of an election petition for a declaration that: (a) Mark King was not duly elected; and (b) the election was void for non-compliance with the provisions of the law.

[9] The thrust of the Applicants' position was forcefully and comprehensively articulated by Learned Senior Counsel, who provided ample relevant authorities. It was said that when the Returning Officer rejected the nomination paper on May 17, 2012, she was not clothed with the power to do so. The proposition was founded on the provisions of the Representation of the People Act, to which I will now turn to provide the necessary context.

[10] The duties of the Returning Officer with regard to the acceptance of nominations are set out in Rule 3 of the Election Rules which states:

> "3(1). On the day and at the place or places fixed by the Returning Officer, he or any Assistant duly authorized by him shall attend between the hours of ten o'clock in the forenoon and four o'clock in the afternoon and receive the nomination of any duly qualified candidate or candidates for the seat to be filled.

(2). Every candidate shall be nominated in writing on one nomination paper signed by six persons whose names appear on the register of voters for the electoral division concerned.

(3). The candidate shall assent to the nomination in writing by affixing his signature to the nomination paper."

The requirement of the deposit is provided for in Rule 6 of the Election Rules.

[11] The power to entertain an objection resides in Rule 8 which states: -

"8(1). It shall be lawful for any person whose name appears on the register of electors for any division to object to the nomination paper of any candidate and the Returning Officer shall decide on the validity of every objection made

(2). If the Returning Officer disallows the objection his decision shall be final, but if he allows the same his decision shall be subject to reversal on petition questioning the election or return."

The point was made on behalf of the Applicants that since the Returning Officer had upheld the objection Yolanda Schakron was entitled to seek the reversal of the decision of election petition. The Respondents have no quarrel with the general principle that an aggrieved objectee can mount a challenge by election petition but they dispute the Applicants' entitlement to do so in the peculiar circumstances of the case

[12] Part VIII of the Representation of the People Act enacts provisions for disputed elections. Section 46 sets out the grounds cognizable by the election judge where the avoidance of an election is being sought by way of election petition. The Applicants say that the Returning Officer purported to act on the ground set out in section 46(1)(e)

which amounted to a usurpation of the power reserved for the election judge. Section 46(1)(e) reads:

> "46(1). The election of a candidate as a member shall be declared to be void on an election petition on any of the following grounds which maybe proved to the satisfaction of the election judge:-
>
> (a) …
>
> (b)...
>
> (c)...
>
> (d)...
>
> (e) that the candidate was at the time of his election a person disqualified for election as a member."

The Applicants surmised that the power was reserved to the Election Judge as a practical matter given the complexity of such matters.

[13] Learned Senior Counsel for the Applicants referred to the case of **<u>Abraham Vaz v. Dabdoub</u> Civil Appeal Nos. 45 and 47 of 2008** (Court of Appeal of Jamaica). In these conjoined appeals, Counsel sought to argue that since one of the two candidates nominated was not qualified, that candidate could not have been properly qualified; consequently the other candidate ought to have been declared the winner of the election as the only candidate properly nominated. Panton JA did not agree and expressed himself in this way (at paragraph 40):

> "The Returning Officer was merely required to see that the necessary ten qualified electors had signed the nomination paper."

Adopting the reasoning in **<u>Nedd v Simon</u> (1972)3WIR 347**, he went on to add (at paragraph 41) -

"The questions whether the appellant had not been duly nominated were of no concern to the Returning Officer."

Mr. Smith drew the Court's attention to the complexity of the issues of fact and law with which the Court was required to grapple in the **Vaz** case. The same point was made by reference to the recent decision of Thom, J in **Ronald Green v. Peter Saint Jean and Maynard Joseph v. Roosevelt Skerritt- Civil Claims Nos. 6 and 7 of 2010 (Dominica).**

[14] In **Nedd v. Simon**, an election petition was filed in Grenada. On appeal to the Court of Appeal of the West Indies Associated States, an argument identical to that raised in the **Vaz** case was rejected by Lewis, CJ in these words:

"The Returning Officer, therefore, acted quite correctly in accepting the appellant's nomination paper and leaving the question of her possible disqualification to be determined by the Court."

The learned Chief Justice took the view that whether or not the appellant was duly nominated in the sense of whether there was a valid nomination was of no concern to the Returning Officer. Reference was made to the statement of Kennedy J in **Hobbs c. Morey [1904] 1 K.B. 74 at p. 78**:-

"The expression 'valid nomination", therefore, includes the case of a person who is disqualified in fact, but whose disqualification is not apparent on the nomination paper, and whose nomination has been sustained by the mayor. That being so, the election must proceed, and the question as has been pointed out in some of the cases, becomes, not a question between the two candidates, but between the successful candidate and the electorate. The election of such an unqualified person can be objected to in only one way, namely, by election

petition to the court. The court on the hearing of the petition cannot, I think, declare that the candidate who has a minority of votes is elected, unless it has first directed that the votes given to the candidate who is returned at the head of the poll are thrown away."

[15] The line of cases goes as far back as 1888 to **Pritchard v. The Mayor of Bangor (1888) 13 H.L. 241** which was followed in **Harford v Linskey [1899] 1 Q.B. 852** on a case stated by an election Court to the Queen's Bench Division. The clear principle that emerges from these cases is that the Returning Officer is restricted to deciding objections which arise on the face of the nomination paper itself and is not empowered to entertain an objection involving questions of the personal qualification of the candidate.

[16] Applying the learning to the present matter, the law precluded the Returning Officer from entertaining an objection to the candidacy of the Yolanda Schakron on the basis of her alleged disqualification by virtue of section 58(1)(a) of the Constitution which reads:

"58(1). No person shall be qualified to be elected as a member of the House of Representatives who -

(a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state."

The Returning Officer acted beyond her statutory power which was confined to a refusal of the nomination paper to ensure compliance with the prescribed form and the requirements of Rule 3 of the Election Rules. So far as this was not the case, a matter not disputed by the Respondents, the Applicants have an arguable case with a realistic prospect of success.

[17] Before leaving this aspect of the matter, I wish to turn my attention briefly to the submissions made by Mr. Barrow that Yolanda Schakron does not qualify as a person who may present an election petition. This arises from section 48 of the Representation of the People Act which enacts:

> "48. An election petition may be presented to the Supreme Court by any one or more of the following persons -
>
> (a) Some person who voted or had a right to vote at the election to which the petition relates; or
>
> (b) Some person claiming to be a candidate at such election."

Unlike as set out by Whylma Munnings in her supporting affidavit, Yolanda Schakron did not aver that she voted at the election in issue.

[18] The point can be taken shortly by adopting the submission of Mr. Smith. Learned Senior Counsel helpfully turned up the headnote of **<u>Hartford v. Linskey</u>** (supra). The answer lies in the words of Wright, J who said:

> "Here the petitioner was nominated in fact, his nomination was in form regular, and he was therefore a candidate, and in our opinion qualified to maintain his petition (not of course for the purpose of claiming the seat, but for the purpose of showing there was no valid election), as any of the persons who voted at the election might have done, whether they had a right to vote or not."

I adopt the conclusion so stated and I hold that Yolanda Schakron is to be treated as a 'candidate' within the meaning of section 48 of the Representation of the People Act, for the purpose of bringing an election petition.

[19] Learned Counsel for the Respondents invited the Court to enter the reservation to the principles as espoused in **Pritchard v. The Mayor of Bangor** to as recent as the **Vaz** case (which were not disputed). If there was incontrovertible or clear evidence as to a matter of disqualification, and a fortiori if it was admitted to, then it would be an exercise in futility or absurdity for the Returning Officer on that material to decline to act and to treat the proposed candidate as disqualified. In this connection, the observation was made that it was not depose to nor was it set out in the grounds of the application for leave that Yolanda Schakron was properly qualified or that she disputed the allegation that she was disqualified.

[20] In the course of the arguments, I did accept this reservation although contemporary examples did not readily come to mind. The point is not a new one and it was adequately dealt with by Wright J in the closing paragraph of his judgment in **Harford v. Linskey** (supra). His Lordship said: -

> "Our decision does not involve the proposition that in every case a person whose nomination has been rejected on the ground of disqualification or want of qualification, can maintain a petition. We do not understand it to be laid down in the Bangor case (supra) that a nomination cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality...there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection."

I dare say it would be exceptional for this reservation to the otherwise limited power of the Returning Officer to be exercised.

[21] The written submissions of the Respondents stated that the test for the eligibility of a person for election has to be determined on nomination day and not on Election Day. This principle is well settled and if authority is required the case of **Peters and Chaitan v. Attorney General et al (2001) 23 W.I.R.** restated that nomination day is the operative day for determining whether or not a person is eligible for election.

[22] The Notice of Application and the supporting affidavits of Yolanda Schakron and Whylma Munnings made no mention of Claim No. 109 of 2012 - **Yolanda Schakron & Moses Sulph vs. Noreen Fairweather and the Attorney General of Belize**. Mr. Barrow substantially rested his response to the application for leave on these proceedings and contended that the said claim rendered the mounting of an election petition by Yolanda Schakron vexatious. It was argued relying on the ruling of Legall J in the claim that the issue sought to be litigated by way of election petition had been determined; and, further, that there has been no appeal therefrom.

[23] The written ruling of Legall J related to interlocutory proceedings founded on a constitutional motion comprised in an amended Claim Form filed on February 17, 2012 (the said Nomination Day). In its amended form, the Notice of Application applied for the following:

> "An order granting urgent interim relief to the Claimants/Applicants by way of injunction restraining the Returning Officer or any person who deputizes for her for who is duly authorized by her as Returning Officer for the Lake Independence Electoral Division in Belize City from determining any issue as to the eligibility of Yolanda Schakron's candidacy to be nominated to run for elected office in the House of Representatives to represent the Lake Independence Electoral Division

on February 17, 2012, and until this Honourable Court has heard and finally determined the issues in this claim form."

The application was heard inter partes and the application was refused.

[24] His Lordship rehearsed the arguments and the issues arising therefrom. In his view the matter was distilled to this: 'What is meant by the phrase "duly qualified candidate" appearing in Rule 3(1) of the Rules..." The decision was stated as follows.

> "In my view the Returning Officer in carrying out his duties under Rule 3(1) of the Rules is entitled to consider section 58(1)(a) of the Constitution in deciding whether the applicant for nomination is a duly qualified candidate, because the process to be elected to the House of Representatives commences on nomination day."

The case of **Peters and Chaitan** (supra) was relied on to support the proposition that the operative date is nomination day.

[25] Learned Counsel for the Respondents submitted that the Applicants are bound by the ruling of Legall J. Further it was said that until overruled, the decision stands as a judgment of the Court in full effect. The Applicants in these proceedings are questioning whether the Returning Officer ought to have made the decision to reject the nomination of Yolanda Schakron and that matter is precisely the issue that was decided by Legall J.

[26] The Respondents have raised the doctrine of res judicata as the basis for urging the Court to find that Yolanda Schakron is precluded as against Noreen Fairweather, the Returning Officer, from denying the correctness of the decision in Claim No. 109 of

2012. The principle of estoppel by res judicata has been condensed in this statement: "Where a final judicial decision has been pronounced on the merits by an English or (with certain exceptions) a foreign judicial Tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party... is estopped in any subsequent litigation from disputing such decision on the merits, whether it be used as a foundation of an action, or as a bar to any claim..." (See Spencer Bower, Turner and Handley on the Doctrine of Res Judicata, 3rd edition, paragraph 9)

[27] It is worthy of mention as was alluded to by Mr. Barrow, that the correctness in law or fact of the decision need not be established, so long as the decision is final by a court with competent jurisdiction as to the same question and between the same parties. Such decision remains binding until upset on appeal. It was put in this way in the case of **Crown Estate Commissioners v. Dorset County Council [1990] Ch. 297 at p. 305**:-

> "Res judicata...gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the question the decision may be wrong."

The submissions by Mr. Smith on behalf of the applicants have provided ample authority to support the principle that the Returning Officer is only empowered to decide objections arising on the face of the nomination paper. Be that as it may, the decision of Legall, J is a final one on the matter and stands in its full force and effect.

[28] In his submissions in reply, Mr. Smith did not accept that the cause of action was the same nor were the parties the same as between the matter before Legall J and the question sought to be litigated in the election petition. I respectfully disagree. There is

more than an overlap of issues and to say that the election petition is a challenge to the return which was not before Legall, J is a failure to identify the substantive issue in both cases, which is the same. I have dealt with this extensively in this judgment.

[29] It was also submitted without vigour that Munnings was not a party to the earlier proceedings. This is of no moment as the main parties, namely, Yolanda Schakron and Noreen Fairweather are common to both proceedings.

[30] In the premises, the Applicants have failed to attain the threshold for leave to commence proceedings by way of election petition pursuant to section 86(1) of the Constitution. The application for leave is therefore refused. The Respondents are entitled to their cost on this application. Costs are fit for Senior Counsel and are fixed in the sum of $5,000.00 in respect of both Respondents.

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KENNETH A. BENJAMIN
Chief Justice