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

CLAIM NO. 189 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:

MARTIN GALVEZ **APPLICANTS**

AND

MARK KING
NOREEN FAIRWETHER **RESPONDENTS**

In court.

Before: Chief Justice Kenneth Benjamin

April 3 & 4, 2012.

Appearances: Ms. Lisa Shoman, SC for the Applicant, Mr. Denys Barrow, SC, Ms. Naima Barrow with him, for the Respondents.

JUDGMENT

[1] This is an application seeking leave to commence proceedings by election petition to challenge the validity of the election of Mark King as a member of the Lake Independence Electoral Division at the General Election held on March 7, 2012. The Applicant is an unsuccessful candidate at the said election and the Returning Officer is joined as a Respondent with Mark King, the successful candidate.

[2] It is a requirement of section 86(2) of the Belize Constitution, Chap 4("the Constitution") that in order to have determined by the Supreme Court a question as to whether a member of the House of Representatives has been validly elected, the proposed Petitioner must first obtain the leave of a Judge of the Supreme Court. No procedure is prescribed in the constitution or by statute, neither is the test for the grant of leave so prescribed.

[3] This Court has adopted the low threshold propounded by de la Bastide, CJ (as he then was) in the cases of **Peters v. Attorney General et al** and **Chaitan v. Attorney General et al (2001) 62 WIR 244**. The relevant dictum reads:

> "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 vexations or plainly have no chance whatever of success."

At this hearing, learned Senior Counsel for the Applicant urged the Court to adopt the test set out by Awich, J. in the case of **The Belize Tourism Industry Association v. The Prime Minister of Belize et al. - Action No. 565 of 2004.** His Lordship in dealing with an application for leave to commence proceedings for judicial review and had this to say :

"6. To commence judicial review proceedings, leave of court must be obtained. The purpose for obtaining leave is to give the Court opportunity to summarily dismiss trivial, inconsequential, frivolous and vexatious complaints against decisions, actions or inactions of administrative authorities or tribunals. The stage of obtaining leave serves to filter and exclude cases that are unarguable – see ***R v. Secretary of State for Home Department, ex parte Cheblak [1991] 1 WLR 890.*** This case is at the stage of application for leave, the vetting and filtering stage.

7. For leave to be granted to BTIA, I have to ensure first, so far as the affidavits filed have disclosed at this stage, that the applicant has sufficient interest in the matters the subjects of the agreement, so that it is entitled to bring this action to court, a point commonly referred to as *locus standi* of *standing* in the application. Then I have to decide whether the complaints of BTIA, so far as the affidavits have disclosed, are based on facts that establish arguable legal grounds good

enough for the Court to examine in detail later at a full hearing. That necessarily means that the Court is not required at this stage to examine the affidavit evidence in great details as it would at a full hearing to decide the complaints."

The approaches in both cases are co-extensive as to the granting of leave or permission. The threshold is a low one and all this is required of the Applicant is that there be demonstrated that there is a serious issue to be litigated and that the proposed election petition would not be frivolous and vexatious or would have any chance of success. This is all that the Court need be persuaded of.

[4] This takes me to the point of procedure raised by the Respondents as to the modeemployed to bring the present application with supporting affidavits. This represents an adoption of the procedure laid down in Part II of the Supreme Court (Civil Procedure) Rules, 2005. Learned Senior Counsel for the Respondent was content to embrace this approach and I am equally content to concur having regard to the absence of any procedures guide being set out in the law.

[5] Learned Senior Counsel for the Respondent took this adoption a step further by proceeding to argue that since Rule 11.9 requires as a general rule that evidence in support of an application must be contained in an affidavit, therefore Part 30, which deals with the content of affidavits, is applicable. Let me at once say that I am not prepared to go this far. I am advised that before the Rules of Court were changed in 2005, applications for leave were brought by Notice of Motion. I believe that such mode, like the present use of the notice of application, would have been adopted for convenience to bring the issue of leave before the Court. These proceedings are quasi-civil in nature, as surmised by Chief Justice de la Bastide but, are proceedings brought

under an enactment; ergo, applying Rule 2.2(3)(e), the Supreme Court (Civil Procedures) Rules 2005 d not apply to the present application.

[6] Not to be daunted, the argument went on to address section 64(4) of the Evidence Act, Chapter 95 which enacts: -

> "64(4) Oral evidence taken upon affidavit must be confined to the facts the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted."

The effect of this provision is that, following the rules relating to viva voca evidence, the deponent to an affidavit can only swear as to facts within his or her own knowledge. An exception is made for interlocutory applications. Reference was made to the case of **Rossage v. Rossage [1960] 1 All ER 600** in which hearsay material contained in affidavits sought to be relied upon was ruled to be irrelevant and inadmissible. In those proceedings it was held that though interlocutory in form the application to suspend a mother's right of access to her child was determinative of the rights of the parties and hence not interlocutory proceedings with the meaning of the proviso.

[7] It was reasoned that since it was open to the Judge to refuse leave form which refusal there was no right of appeal, the present application ought not to be treated as interlocutory in nature. Further, the Court was invited to approach the matter as the Court did in Re: **Polly Peck International Plc(No.2)[1998] 3 All E.R.812**. In that case, upon an application for leave to commence proceedings against the company and its administrators, the Court of Appeal concluded that the court would not grant the claim for a remedial constructive trust, hence leave was not granted.

[8] There followed a meticulous examination of the affidavits filed on support of the application to highlight whether there was a distinction drawn between facts within the knowledge the deponents Martin Galvez, Marlon Charles and Henry Usher and matters of information and belief with the sources identified. Without repeating the analysis seriatim, it is sufficient to say that the affidavits were drawn with a hopeless disregard for the care required to identify hearsay statements and from whom or what source the same emanated. The was also the curious situation of the affidavit of Marlon Clarke being sworn on a date preceding the stated date of his purported attendance and request for a search at the Belize Companies and Corporate Affairs Registry in Belmopan.

[9] After careful stripping away the hearsay from the affidavits what is left is the contract between the Government of Belize and Brints Security Services which by Para 10 of his affidavit Martin Galvez is alleged to be signed by Mark King as general manager of Brints Security Services Limited. I do not agree that it is for the affidavit to recite that the deponent is familiar with the signature of saw the document signed. That is before me is a document that purportedly bears the name of the first Respondent.

[10] Learned Senior Counsel for the Respondents devoted a considerable portion of arguments to the interpretation of section 58(1) (h) of the Constitution, upon which the Applicant grounds his application for leave. The section reads:

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

(h) is a party to, or a partner in firm or a director or manager of a company which is a party to, any contract with the Government for or on account of the public service and has not, within on month before the day of election, declared publicly and in a newspaper circulating in the electoral division for which he is a candidate a notice setting out the nature of the contract and his interest, or the interest of any such firm or company therein."

The interpretation was directed to the words "any contract with the Government for or on account of the public service".

[11] The fons et origo for the provision was identified to be the House of Commons(Disqualification) Act 1782 in which section 1 speaks of "all persons holding constracts… for the public service." The Court was taken to the case of Re: **Samuel [1913] AC 514** in which the Judicial Committee of the Privy Council determined that contracts made for or on account of the public service, meant any service of the crown anywhere.

[12] In the context of the Constitution, Learned Senior Counsel averted to the definition of 'the public service' appearing in section 131(1)'of the Constitution as establishing that the public service' as an institution was being referred to definition for "public service" reads:

"the public service" means, subject to the provisions of this section, the service of the Crown in a Civil capacity in respect of the Government.

As, it was said, only civilian public service contracts are envisaged. Further references were made to the cases of **LaForest vs. Cargill (1959) 1 WIR 178** and **Savarin Vs. Williams (1995) 51 WIR 75**. These authorities were prayed in aid of the interpretation

of section 58(1) (h) as not being addressed to contract for services as is the bedrock of the intended election petition.

[13] Learned Senior Counsel for the Applicants differed in her interpretation of section 58(1)(h) and held to the view that as general manager of a firm that is a party to a contract with the Government for the security services and surveillancethere existed a 'contract with the Government of or on account of the public service'.

[14] I have strongly resisted the temptation to rule on this issue. My reasons are two-fold: firstly I am not satisfied that in all fairness to the Applicant, the matter has been fully argued before me; and secondly, I am acutely aware that the role of the Judge at this stage is not to conduct a mini-trial. These matters ought to be left for a full hearing which I consider to be attracted by the document exhibited to the affidavit of the Applicant. The opportunity would be afforded thereby to have the law judicially interpreted for the benefit of all concerned.

[16] Leave or permission is accordingly granted for proceedings to be issued by way of election petition to determine the validity of the election of Mark King on March 7, 2012 as a member of the House of Representatives for the Lake Independence Electoral Division.

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KENNETH A. BENJAMIN
Chief Justice