

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 47/08

APPLICATION NO. 87/08

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A (Ag.)**

BETWEEN ABRAHAM DABDOUB APPLICANT

AND DARYL VAZ RESPONDENT

**Jalil Dabdoub and Gayle Nelson instructed by Dabdoub Dabdoub & Co.,
for the applicant**

**Ransford Braham and Mrs. Suzanne Ridsen-Foster, instructed by
Livingston, Alexander & Levy for the respondent**

September 22 & 26, 2008

PANTON, P.

1. I am in agreement with my learned brothers that this application ought to be refused. The submissions by Mr. Ransford Braham, for the respondent, are well supported by the provisions of the Court of Appeal Rules 2002, particularly Rule 1.7(2)(b). We called on Mr. Braham before hearing from the appellant; however, he has successfully met the challenge in respect of the late deposit of the security for costs.

2. My learned brother, Harrison, J.A., has set out in his judgment the provisions of the existing Court of Appeal Rules as well as those of 1962. They are to be viewed in conjunction with the Election Petition (Court of Appeal) Rules 1967. When that exercise is done, it becomes clear that Smith, J.A., had the power and authority to make the order that he made on June 9, 2008.

3. The other limb of this application does not require much discourse. The respondent Vaz, after the handing down of the Chief Justice's judgment, expressed his acceptance of it and his intention to abide by it. However, he changed his mind. Having received legal advice, he decided to test the validity of the judgment by way of appeal. There is nothing, in my view, to warrant his action being described as frivolous and vexatious. The judgment is an important one. It is the first of its kind in this jurisdiction. In the circumstances, it would be unfair and unwise to deny either party, they having complied with the rules, the opportunity of being heard on appeal.

HARRISON, J.A.

1. There are two applications before us. The first was filed by the applicant Abraham Dabdoub in Application No. 87 of 2008 on June 13, 2008 and it seeks the following orders:

- "1. That the appeal of Daryl Vaz be struck out as being frivolous and vexatious and an abuse of the process of the court and/or alternatively
2. That the appeal be struck out for lack of jurisdiction due to the appellant's failure to comply with Rule 4(1) of the Election Petitions (Court of Appeal) Rules 1967".

2. Daryl Vaz is the applicant in Application No. 97 of 2008 filed on June 26, 2008 and he seeks an order that the appeal of Abraham Dabdoub be struck out as an abuse of the process of the Court. This application was withdrawn however, by Mr. Braham and no order was made as to costs.

The Jurisdictional Issue

3. The grounds filed in support of the application complaining about the lack of jurisdiction are as follows:

- (a) The Election Petitions (Court of Appeal) Rules 1967 mandates the payment of security for costs in the sum of Six Hundred Dollars (\$600.00) within three (3) days of the filing of an appeal.
- (b) That the Appellant has failed to pay the security as required by the Election Petitions (Court of Appeal) Rules 1967.

(c) That as a result of the failure of the Appellant to pay the security for costs within the mandatory time of three (3) days specified by the Election Petitions (Court of Appeal) Rules 1967 this Honourable Court has no jurisdiction to entertain the appeal or any application made pursuant thereto.

4. It was our view that since there was a challenge to the jurisdiction of the court Mr. Braham was invited by the Court to commence his submissions first in relation to the Applicant's written submissions on this issue.

5. The facts indicate that a single judge of this court had granted the Appellant extension of time on June 9, 2008 in order for him to lodge the required security for costs in respect of his appeal.

6. Section 22 of the Act which deals specifically with appeals in relation to election petitions provides as follows:

"22. (1) An appeal shall lie from the determination by a Judge of the Supreme Court on a petition under section 20 to the Court of Appeal whose decision shall be final and conclusive to all intents and purposes.

(2) So much of the provisions of this Act, and with such modifications, as may be prescribed by rules of court shall have effect in relation to an appeal under this section, and to the appellant and respondent in such appeal as they apply to a petition and to the petitioner and respondent in respect of such petition".

7. At the time of enactment of the Act and even subsequently, there was no express provision with respect to the giving of security for costs in relation to appeals. However, it is abundantly clear that the statute made allowance for certain modifications as may

be prescribed by rules of court in relation to an appeal under section 22 (supra). In 1967, the Election Petitions (Court of Appeal) Rules, (“the 1967 Rules”) were enacted and they provide inter alia, as follows:

“1...

2. In relation to appeals under section 21A of the Election Petitions Law...the Court of Appeal Rules...Title 1 Preliminary and Title 2 Civil Appeals from the Supreme Court shall apply as far as practicable.

3...

4(1) At the time of the filing of an appeal under section 21A of the Election Petitions Law, or within three days afterwards security for the payment of all costs, charges and expenses that may become payable by the appellant

(a)

(b)

Shall be given on behalf of the Appellant except when the appellant is the Clerk of the House of Representatives or the Attorney General”.

8. The issue which we therefore have to resolve is whether or not the time fixed by rule 4(1) of the Election Petitions (Court of Appeal) Rules 1967, (“the 1967 Rules”) for payment of the security for costs in relation to the presentation of an election petition appeal is mandatory and cannot be extended by the Court.

9. It seems to us that if the payment of the security for costs is a matter of procedure, then the single judge will have some powers. On the other hand, if the provisions of Rule 4(1) are peremptory, then it means that the terms for payment are to be regarded as a condition precedent and must be complied with within the specified time before the appeal can be presented.

10. In **Allen v Wright** (1960) 2 W.I.R. 102, the Federal Supreme Court in its Appellate jurisdiction, held that the court could not extend the time for the service of an election petition, because the time stipulated for service was not a matter of procedure but a condition precedent. The Court found that in the face of section 23 of the Election Petition Law, Cap. 107, the Rules of Civil Procedure could not be called in aid because the provision for the litigation of these petitions is a matter of substantive law and, like the Statute of Limitation, cannot be dispensed with by the Court.

11. Similarly, in **Stewart v Newland and Edman** SCCA 18/72 Rowe J., (as he then was) held that the statutory conditions in the Election Petitions Act are not merely matters of procedure but are conditions precedent which must be strictly observed and the Court had no power to extend the time lines recited in the statute. When the matter went on appeal (12 JLR 847) the Court had to examine section 676 of the Civil Procedure Code ("the CPC") which gave the court power to enlarge or abridge the time appointed for compliance and they accepted the reasons of Rowe J where he held that despite section 676 of the CPC he had no jurisdiction to extend time for service of the petition as the requirements of the Election Petitions Act were mandatory and must be strictly complied with.

12. It is also abundantly clear from a reading of section 4(d) of the Act that the giving of security for costs in respect of the petition that is filed in the Supreme Court is a matter of substantive law and would be regarded as a condition precedent. Section 4(d) reads as follows:

"4(d) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner -

(i) to any person summoned as a witness on his behalf; or

(ii) to the member whose election or return is complained of (who is hereinafter referred to as the respondent),

shall be given on behalf of the petitioner except where the petitioner is the Clerk of the House of Representatives or the Attorney- General". (emphasis provided)

13. Mr. Braham has submitted however, that the draftsman in drafting Rule 2 of the 1967 Rules expressly incorporated Titles 1 and 2 of the previous Court of Appeal Rules and that based on this legislative framework the single Judge of Appeal had the jurisdiction to grant the extension of time for payment of the security for costs.

14. However, Mr. Jalil Dabdoub, on behalf of the Applicant, submitted that the Appellant having failed to give the security for costs required by Rule 4 of the 1967 Rules, the Court of Appeal lacks jurisdiction and likewise the single judge would lack jurisdiction to extend the time for giving security for costs. He submitted that the 1967 Rules supersedes the provisions of the Court of Appeal Rules 2002 and makes it mandatory that the security for costs be given within the specified time of three days. There is no provision he said, for extending the time to do so. He relied on the authorities of **Stewart v Newland** (supra) which as we have said before, deals with the statutory requirement for the time within which an election petition must be presented and **Patterson v Nicely** [1973] 12 J.L.R. 1241, which concerned an appeal under

section 266 of the Judicature (Resident Magistrate's) Act where an appellant failed to pay the required security for the due prosecution of the appeal.

15. We have given serious consideration to the submissions made on behalf of the Applicants and it is our view that there is merit in the submissions of Mr. Braham. It seems to us that it was the intention of the draftsman that the 1967 Rules and Titles 1 and 2 of the Court of Appeal Rules 1962, should be read together. Title No. 1 of the Court of Appeal Rules (1962) deals with Preliminary matters and Title No. 2 deals with Civil Appeals from the Supreme Court. Rule 9 which comes under Title 1 states as follows:

"9. Subject to the provisions of subsection (3) of section 15 of the Law and to rule 23 of these Rules, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these Rules in any other way where this is required in the interests of justice".

16. Rule 1.7(2) (b) of the Court of Appeal Rules 2002 is more or less in similar terms to section 9 (supra) and provides as follows:

"1.7(2)(b) – Except where these Rules provide otherwise, the court may-

extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

17. In our judgment, the 1967 Rules are merely procedural so failure to comply with them is not fatal and does not oust the jurisdiction of the Court in extending time. The single judge of appeal clearly had sufficient material before him in order to have properly exercised his discretion when he made the order extending time to give the necessary security for costs. It would seem that he also took into consideration the explanation given by Mrs. Ridsen-Foster, an Attorney at law. She stated in her affidavit that she had overlooked payment of the security for costs and had only realized this after she was served with the respondent's Counter Notice of Appeal. The failure to make the required payment she said, was entirely due to her fault. We are therefore of the view that the challenge to the Court's jurisdiction fails.

The Abuse of Process Issues

18. Both Applicants have sought to move the Court for the respective appeals to be struck out as an abuse of the process of the court. We have already indicated that Counsel had withdrawn Application No. 97 of 2008. We have given serious considerations to the submissions of Mr. Dabdoub but we are unable to accept them.

19. It does seem to us that the Applicant Vaz made a number of statements in relation to the acceptance of the decision of the Honourable Chief Justice immediately after she handed down her judgment but this would not preclude him from pursuing an appeal since he may wish to change his mind about certain things especially after receiving legal advice.

20. We are also of the view that this application should be refused and that both appeals ought to proceed for hearing on November 24, 2008.

DUKHARAN, J.A.

I agree

PANTON, P.

ORDER

1. Application No. 87 of 2008 by Abraham Dabdoub is hereby refused.
2. Costs to the respondent Daryl Vaz to be agreed or taxed.