

COMMONWEALTH OF THE BAHAMAS

2010

IN THE ELECTION COURT

No:

IN THE MATTER OF The Parliamentary
Elections Act 1992

AND

IN THE MATTER OF an Election for the
Elizabeth Constituency held on the 16 day
of February, 2010

BETWEEN

LEO RYAN PINDER

Petitioner

AND

JACK THOMPSON
(Returning Officer)

First Respondent

ERROL BETHELL
(Parliamentary Commissioner)

Second Respondent

DUANE SANDS

Third Respondent

CASSIUS STUART

Fourth Respondent

ANDRE ROLLINS

Fifth Respondent

AND

RODNEY MONCUR

Sixth Respondent

CLOSING SUBMISSIONS

INTRODUCTION

1. These proceedings commenced by Petition, pursuant to the Representation Of The People (Voting Under Protest) Rules 1962, prays that the validity of the protest votes cast in the bye election for the Elizabeth Constituency held on 16 February, 2010 be determined.

2. These proceedings are in our view, a component of the elections. It's contextual setting is in Part V of the Act that makes provisions for Elections the sub rubrics of which are:
- (a) Writs of Election (Sections 32-35);
 - (b) Nominations (Sections 36-43),
 - (c) Method of Election (Section 44),
 - (d) Contested Elections (Sections 45-52);
 - (e) The Poll (Sections 53-64);
 - (f) Procedure on Close of Poll Sections 65-71);
- and
- (g) Final proceedings in Contested and Uncontested Elections (Sections 72-76).

The jurisdiction conferred in the result is (generically) to assist in the determination of the results of elections.

3. Six persons cast a vote on coloured ballot paper for varying reasons:
- 3.1. Voter A. because the voter's name did not appear on the register;
 - 3.2. Voter B. because the entry relating to this voter in the Register is incorrect;
 - 3.3. Voter C. because the entry relating to this voter in the Register was incorrect;
 - 3.4. Voter D. because the voter's name did not

- appear on the register;
- 3.5. Voter E. because she was challenged by election Agents;
- 3.6. Voter F. because the voter's name did not appear on register.

SCOPE OF INQUIRY

- 4. The controlling instruments for the inquiry are the Register and the Voter's Card. In this instance the 2007 Register. It is therefore useful to set out the chronology to this register coming into being.
 - 4.1. 11 September, 2005 preparation of the register began pursuant to Section 14(2)(a) of the Act;
 - 4.2. 12 March, 2007 the register in being ceased to have effect and the new register came into force pursuant to Section 14(2)(b) of the Act;
 - 4.3. 26 March, 2007 the House of Assembly Revision of Boundaries and redistribution of Seats Order came into force;
 - 4.4. 10 April, 2007 notice published for registered voter to collect voter's card.
 - 4.5. 4 April, 2007 Writ for General Elections issued;
 - 4.6. 3 April, 2007 Register closed pursuant to Section 25(2) of the Act for the general elections.

- 4.7. 21 January, 2010 Writ of Election issued in respect to the bye election for the Elizabeth Constituency;
 - 4.8. 20 January, 2010 Register for the bye Election closed.
5. The circumstances under which a person is permitted to vote on a coloured ballot is prescribed to be:
- (a) such person's voter's card has a defect;
 - (b) the entry relating to such person in the register is incorrect;
 - (c) such person has a voter's card but his name does not appear in the register.

Any circumstance existing that touches and concerns the person's qualification for registration or entitlement to vote thereafter for reasons other than (a) – (c) above does not prohibited such person from casting a ballot and such person shall be permitted to vote on a white ballot.

6. Consequently any inquiry to determine the validity of such vote involves:
- (a) curing a defect on a voter's card;
 - (b) correcting the entry relating to such person on the register;
 - (c) restoring or placing such person's name on the register;

7. A clue to be the foregoing is to be found in an examination of the process that is engaged when a person presents himself to vote. Section

57(1)(b) prohibits a person from voting unless that person's name is on the part of the register for that constituency, the Presiding Officer has scrutinized the voter's card and is satisfied as to that person's identity and his right to vote. Section 58, that enables the voting on coloured ballot, confirms the Presiding Officer's duty and responsibility to satisfy himself as to the identity of the voter or his right to vote. If he is not satisfied as to the voter's identity or as to his right to vote because:

- (a) the voter's card has a defect;
- (b) the entry relating to the voter in the register is incorrect; or
- (c) the voter has a voter's card but his name is omitted from the register;

The voter is permitted to vote on a coloured ballot. The decisive factor for the Presiding Officer being the identity of the voter that is questionable.

8. The identity of the voter or the right to vote is influenced by the reasons adumbrated . No other reason is prescribed and the Presiding Officer is not called upon to satisfy himself as to the identity of the voter or as to his right to vote because of any other reason.. The starting point therefore is whether the person was registered and was issued a voter's card. It is the completion of this process that confers the right to vote subject to the provisions of the Act And if the person voted the presumption is that person was ordinarily resident in the constituency.

THE PROTEST VOTER

9. Voter A

- 9..1. She presented herself for registration as a voter on 17 February 2007. The register in question was the register in preparation to await the expiration of the register then in being and any revisions to constituency boundaries. She was not, as required by law, issued her voter's card but a voter registration receipt was given to her to enable her to collect the same when notified.
- 9..2. She collected her card sometime after 10 April, 2007 and it came to her attention that she was placed in the Fox Hill Constituency and her husband in the Elizabeth Constituency. By this date the Revision of Boundaries Order had come into force and the Boundaries of the Elizabeth Constituency were affected. Polling Division 12 of Elizabeth Constituency was removed by the Order and became Polling Division 12 of the Fox Hill Constituency. This Polling Division 12 of Fox Hill southern boundary was North Pine Barren Road. The address appearing on Forms B and D relating to this voter is W/Academy Street, N/Pine Barren Rd which, at the time she registered, was in the Elizabeth Constituency.
- 9.3. As a consequence the voter with others including Bullard and her husband, who gave evidence, attended the office of the Parliamentary Commissioner to have her card corrected, taking

with her the card that was originally issued. Bullard and another, Taylor, had also to have their cards corrected. All the cards that required correction were handed to an official of the Department. In respect to Voter A her husband's card that required no correction was shown to the official and a new card issued to her. Her card was handwritten, not unlike the others that were corrected. The address on her card was that which appears on her husband's voter's card. That is where the voter lived at the time of registration and when she voted. There is an abundance of evidence in support of these facts.

- 9.4. There is no suggestion that in the circumstances it could be alleged that the voter's card issued was improperly issued or that she obtained the same otherwise than in accordance with law. Recalling as well, that she voted with the same card in the general elections of 2007 in the Elizabeth Constituency. The failure to correct the internal records of the Parliamentary Commissioner's Office in respect to this voter should not be the predicate to disenfranchise her.
- 9.5. Counsel for the Third Respondent in testing the validity of this vote sought to demonstrate that the voter was not ordinarily resident at the address shown on her voter's card. Suggesting that she lived either in the Lyons Road area with her mother or Monastery Park either with her mother-in-law or in a triplex. Remarkably no issue

was joined on the fact that she lived S/Pine Barren Road which is in the Elizabeth Constituency. Either this fact was accepted or the voter was put to strict proof thereof. Suffice to say that it is uncontroverted that she lives S/Pine Barren Road and as such in the Elizabeth Constituency.

9.6. It is questionable whether the voter's qualifications to be registered and/or to vote is within the scope of this inquiry. Even if the Court is competent to so inquire, it is submitted that the third Respondent would have failed to rebut the presumption in favour of the voter that she was ordinarily resident in the constituency because the evidence led to rebut speaks merely to the voter coming from a yard in Monastery Park regularly in 2009 but does not account for the whereabouts of the voter from at least December 2009 to date.

9.7. Further the evidence in support of her being ordinarily resident in the constituency is overwhelming e.g.

- recorded address in public institutions;
- visits of the third Respondent and his agents;
- voting in 2007 elections;
- husband voting in 2007 and 2010 elections.

9.8. In the premises, it is submitted that her vote should be allowed because:-

- (i) she was issued and is the holder of a valid voter's card;

- (ii) she has been properly identified as the person living at the address appearing on the voter's card;
- (iii) the address of the premises identified on the voter's card is in the Elizabeth Constituency;
- (iv) voter should not be disenfranchised because of the failure of the Parliamentary Commissioner's Office to correct their internal records;
- (v) no further issue affecting the identity of the voter exists.

As a consequence the Register should be rectified accordingly.

10. Voter B

10.1. The voter's Form B and D have the date of birth as 15 June, 1963 and the entry in the register relating thereto 15 January, 1963. The Parliamentary Commissioner accepts that the entry in the register is incorrect.

10.2. This vote should be allowed because:-

- (i) an obvious clerical error has been made;
- (ii) voter should not be disenfranchised because of a clerical error on the part of the Parliamentary Commissioner's Office;
- (iii) no further issue affecting the identity of voter exists.

As a consequence the Register should be rectified accordingly.

11. Voter C

11.1. This voter's Form B, her voter's card and passport have her date of birth as 3 January, 1970. Her Form D and the entry in the Register relating thereto, the 13 January, 1970. The Parliamentary Commissioner accepts that there were clerical errors made in the register and on Form D.

11.2. This vote should be allowed because:-

- (i) obvious clerical errors have been made;
- (ii) voter should not be disenfranchised because of clerical errors on the part of the Parliamentary Commissioner's Office;
- (iii) no further issue affects the identity of this voter.

As a consequence the Register should be rectified accordingly.

12. Voter E

12.1. This voter produced other sufficient means of identification to cast her ballot. She used her passport. She was challenged by an election agent on the grounds that she did not live in the constituency. She took the prescribed oath in the circumstances and was given a coloured ballot.

12.2. An examination of the voter's card, Form B and D reveals that Form B & D record her address as S/Sandilands Village Road, W/Fox Hill Road, E. Alligator Court. The voter's card records the same except E. Alligator Road is recorded thereon. This latter discrepancy does

not appear in the register because of computer constraints. It is apparent that the permission to vote was not associate with this discrepancy.

12.3. This vote should be allowed because:-

- (i) the Presiding Officer misdirected himself in permitting the voter to cast her vote on a coloured ballot;
- (ii) the voter should not be disenfranchise by reason of the misdirection;
- (iii) no further issue affecting the identity of this voter exists.

Commentary – Revising Officers should be advised and/or trained to appreciate the computer constraints of the department to avoid errors appearing in the register.

13. Voters D and F

13.1. These voters are taken together as the testing of the validity of their votes involves an examination of the legislative regime conferring the entitlement to register, to vote, having registered being retain on the register and the duties and responsibility of the Parliamentary Commissioner in connection therewith.

13.1.2. Section 12(5) of the Act obligates the Parliamentary Commissioner, in mandatory terms to keep the register and to carry out the requirements of

the Act regarding the registration of voters and the holding of elections;

- 13.1.3. Section 2 of the Act defines register or register of voters as the register of persons entitled to vote at an election prepared and kept under the Act.
- 13.1.4. Section 13 of the Act creates the register of voters to be prepared and thereafter revised and amended from day to day in accordance with the provisions of the Act. It is to be framed in separate parts for each polling division and the parts of the register for the polling divisions making up one constituency shall together form the register of voters for that constituency.
- 13.1.5. By Section 14 of the Act the Register ceases to have effect upon such date as the Governor General may appoint by gazette notice or at the expiration of five (5) years from the date of its coming into force. The Parliamentary Commissioner is obligated to have prepared a new register in readiness for the expiration of the register in being.
- 13.1.6. Any person wishing to be registered as a voter, being a person whose name has not at any time been included in the current register, and who

has not been issued a voter's card during the period for which that register has been in force, shall apply for registration in the Polling Division in which he is ordinarily resident. Any person who is or has at any time been registered in the current register may, whether or not he is still so registered, make application for a transfer of registration following a change of residence (Section 18).

13.1.7. The Parliamentary Commissioner is obligated to cause the several parts of the register to be compared and to be kept under continuous review for the purpose of ensuring that no person shall be named more than once or registered by virtue of a qualification which he does not hold. In the event the Parliamentary Commissioner has reasonable cause to believe that any person whose name is included on any part of the register is not entitled to be so registered or to be retained there, he is to send a notice to that person stating that objection fixing a date for a hearing of that objection (Section 22).

13.1.8. The register for an election shall be the register comprising of those persons named therein at the end of the period for the normal attendance of

public officers at their offices on the day immediately preceding the day of the issue of the Writ of Election and no name or entry shall be removed from any of the appropriate parts of the register under Section 22 until after poll day. Any pending objection would be noted on the register and the voter required to subscribe to the same oath as if his right to vote had been challenged by a candidate (Section 25).

13.1.9. A person is entitled to be properly registered if on the day of application he is a citizen of The Bahamas of full age and not subject to any legal incapacity (See Section 10) and during the whole of the period of three (3) months immediately preceding that day he is and has been ordinarily resident in premises in that constituency. No person's name which is included in any part of the register shall be retained therein if that person is not entitled to have his registration retained in that part in accordance with the provision of the Act (Section 8).

13.2. The register is the Register for The Bahamas (Section 26(2)). Once registered the responsibility and duty fall upon the Parliamentary Commissioner to ensure that persons registered are in the proper

constituency – and the act provides the necessary tools under penalty for him to discharge the same. (Sections 16 and 22).

- 13.3. Unfortunately, failures in the Parliamentary Registration system persist. And the Parliamentary Commissioner's failure to ensure the integrity of the registration process and as a consequence the register continues.

What is lamentable is that this Court has had the occasion to point these facts out and admonished action on the part of the Parliamentary Commissioner but alas to nought. Here we are again – years later. It was noted that these failures threaten to undermine the fundamental basis of our Parliamentary democracy – but this too was unheeded.

13.4.. Voter D

13.4.1. The voter was on the register for the Elizabeth Constituency having registered on 11 January, 2010. The address that appears on the oath she swore (Form B) and counterfoil is in the Elizabeth Constituency. The Parliamentary Commissioner acknowledges that her name was removed from the register of the Elizabeth Constituency on the 30 January, 2010 and placed on the register for the Yamacraw Constituency.

13.4.2. The Parliamentary Commissioner's Act was contrary to law.

As noted above Section 22 of Act sets out the procedure for such an act and is expressed in mandatory terms. The procedure was not followed. Having reasonable cause to believe that the voter's name was not entitled to be on that part of the register, a Writ of Election having been issued and the process not completed, he is required to mark in the appropriate column in the register signalling to the Returning Officer to challenge the vote in the same manner as a candidate, requiring the voter to take the prescribed oath.

13.4.3.Both the voter and the Parliamentary Commissioner could be mistaken, which would resolve following the fulfillment of the Section 22 process. Until then she was entitled to have her name retained on that part of the register. She was not challenged on poll day, but for the fact that her name was omitted from the register she was permitted to vote on a coloured ballot. It is for the Election Court set up under part VII of the Act to decide whether this voter should be disqualified.

13.4.4.This vote should be allowed because:-

- (i) The address of the voter sworn to by her is in the Elizabeth Constituency;
- (ii) The changed address placing the voter in the Yamacraw Constituency is not of her making;

- (iii) The voter was and is entitled to have her name retained on the register until the Section 22 procedure is completed;
- (iv) There is no further issue affecting the identity of this voter.

As a consequence the Register should be rectified accordingly.

14.. Voter F

14.1. A distinction is made between a person whose name was not at any time included in the current register and who was not issued with a voter's card during the period for which the register was in force and a person who is or has been at any time registered as a voter in the current register following a change of residence. The former is mandated to apply for registration while it is discretionary to apply for a transfer of registration.

14.2. The voter is on the register for The Bahamas though not on the proper part thereof. The voter is entitled to be properly registered and is entitled to vote in the Elizabeth Constituency. That entitlement should not be lost by reason of the failure of the Parliamentary Commissioner

to place the voter in the proper part of the register or by reason of the fact that the voter failed to apply to transfer, an application that is discretionary on the part of the voter.

14.3. The voter evinced an unequivocal intention to participate in the electoral process by registering in the first place and the legislative regime is constructed in such a way not to deprive the voter of her unequivocal intention. The vote is valid and should be allowed. The voter was entitled to be properly registered and was entitled to vote in the Elizabeth Constituency. Consequently the register should be rectified to include her name on that part of the register for the constituency of Elizabeth and the court should so order.

14.4. Alternatively, section 9 makes it clear that regard must be had to the entire Act when determining the voter's entitlement to vote. Section 58(1) makes it clear that where the presiding officer is not satisfied as to the voter's right to vote because the voter has a voter's card but her name does not appear on the register for the relevant constituency or polling division, the presiding officer shall permit her to cast her vote on a coloured ballot paper and that vote shall be called a protest vote. Section 69 of the Act invokes the jurisdiction of the Election Court to test the validity of protest

ballots for the purpose of certifying the outcome of the election. Section 69(4) makes it clear that once the Election Court is satisfied after taking into account the matters mentioned in paragraphs (a) (b) and (c) of subsection (1) of section 58 or any of them that she was entitled to be properly registered and was entitled to vote in Elizabeth then it shall allow her vote and, if necessary order that the register be rectified accordingly. Evidence has been adduced to satisfy the Election Court of the provisions of section 58(1) (c) and that she was entitled to be properly registered and was entitled to vote in the Elizabeth Constituency.

14.5. Alternatively, as noted, the voter evinced an unequivocal intention to participate in the electoral process by registering in the first place. The legislative regime is constructed in such a way not to deprive the voter of her unequivocal intention. The Election Court should be reticent about disenfranchising a registered voter. This voter can only vote in Elizabeth where she has been ordinarily resident since 2006. She is on the register as defined by the Act. She falls within section 69(4). The Election Court has the jurisdiction to rectify the register in so far as it applies to her

14.6. This vote should be allowed because:-

(i) The act is enabling and to be construed to

enfranchise and not to disenfranchise;

- (ii) The registration process is voluntary but once engaged by the citizen the Act mandates the Parliamentary Commissioner to ensure that the person remains on the proper part of the register;
- (iii) No duty is imposed upon the elector to ensure that she is on the proper part of the register other than to comply with any inquiries made by the Parliamentary Commissioner;
- (iv) No issue affecting the identity of the voter exists.

Dated the 17 day of March, A.D. 2010

SUBMITTED BY:

Philip E. Davis

Valentine Grimes

Wayne R. Munroe

Keod Smith

CONCLUSION

15. In the premises of the Petitioner prays:-

- (i) that Court determines that all the protest votes cast be allowed as each voter casting the same was entitled to be properly

registered and was entitled to vote in the Elizabeth
Constituency;

- (ii) that the register for the constituency of Elizabeth be rectified to include the names of voter B and F.
- (iii) that the register for the constituency of Elizabeth be rectified to include the name of voter D to abide the outcome of a Section 22 of the Act proceedings.
- (iv) that it be certified to the First Respondent that five (5) of the protest votes have been allowed for the Petitioner and one for the Fourth Respondent.
- (v) that copies of the certificate mentioned in (iv) above be forwarded to the Governor General and to the Clerk of the House of Assembly.

SUBMITTED BY

Philip E. Davis

Valentine Grimes

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