THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2020/0012A-J

BETWEEN:

[1] GLENROY CUFFY
[2] DAYNE OSWALD GEORGE
[3] ATHERLEY ROBIN

Appellants/Petitioners

and

[1] MELISSA SKERRIT
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] JOSEPHINE LEWIS, RETURNING OFFICER
[4] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[5] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[6] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[7] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[8] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[9] DOMINICA BROADCASTING CORPORATION
[10] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[11] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[12] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

ERNIE LAWRENCE JNO FINN

Appellant/Petitioner

and

[1] OCTAVIA ALFRED
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] CLEVE EDWARDS, RETURNING OFFICER
[4] CLEVE EDWARDS, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

PHARO CUFFY

Appellant/Petitioner

and

[1] GRETTA BERNADETTE ROBERTS
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] SHERLINE PRESCOTT, RETURNING OFFICER
[4] GWENTH ANSELM, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION

[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

FELIX THOMAS

Appellant/Petitioner

and

[1] RAYBURN BLACKMORE
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] STEPHEN C. JOSEPH, RETURNING OFFICER
[4] LINDA BELLOT, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

FRANCISCA JOSEPH

Appellant/Petitioner

and

[1] KENT EDWARDS
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] BERTHA WARRINGTON, RETURNING OFFICER
[4] BERTHA WARRINGTON, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

DARIA EUGENE

Appellant/Petitioner

and

[1] CHAKIRA LOCKHEART HYPOLITE
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] ANNA WARNER, RETURNING OFFICER
[4] LINDA DEFOE, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION

[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

RONALD CHARLES

Appellant/Petitioner

and

[1] IRVIN MCINTYRE
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] MERILL MATTHEW, RETURNING OFFICER
[4] COLBERT PINARD, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Respondents

ANETTE SANFORD

Appellant/Petitioner

and

[1] COZIER FREDERICK
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] KATHLEEN AUGUISTE, RETURNING OFFICER
[4] HELIUS AUGUISTE, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

MONELLE WILLIAMS JNO BAPTISTE

Appellant/Petitioner

and

[1] ADIS KING
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] ANTHONY JOSEPH, RETURNING OFFICER
[4] CYNTHIA SERRANT, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION

[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Respondents

EZEKIEL BAZIL

Appellant/Petitioner

and

[1] FIDEL NEIL GRANT
[2] IAN ANTHONY, CHIEF ELECTIONS OFFICER
[3] DIANE WILLIAMS-TELEMACQUE, RETURNING OFFICER
[4] ANNIE BRUNO, REGISTERING OFFICER
[5] GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
[6] HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
[7] WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
[8] KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
[9] ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
[10] DOMINICA BROADCASTING CORPORATION
[11] ROOSEVELT SKERRIT (PRIME MINISTER AND MINISTER OF FINANCE)
[12] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[13] THE COMMISSIONER OF POLICE, DANIEL CARBON

Respondents

Before:

The Hon. Dame. Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC	Justice of Appeal [Ag.]

Appearances:

Ms. Zahidha James for the Appellants/Petitioners
Mr. Anthony Astaphan, SC with him Mr. Lennox Lawrence and Ms. Jodie Luke for the 1st Respondents
Mrs. Heather Felix-Evans for the 2nd, 3rd, 4th, 5th, 8th and 9th Respondents
Mr. Anthony Astaphan, SC with him Ms. Ernette Kangal holding for Mr. Stephen Isidore for the 10th Respondent
Mr. Levi A. Peter, Attorney General, and Ms. Nadira Lando for the 11th, 12th and 13th Respondents
No appearance for the 6th and 7th Respondents

2021: April 28;
May 21.

Civil appeal — Election petitions — Sections 40(1)(a), 40(6) and 40(7) of the Constitution of the Commonwealth of Dominica — Right of appeal from decisions in election petition proceedings — Whether decision to strike out election petitions a final decision – Whether Court of Appeal has jurisdiction to entertain appeals against decision to strike out election petitions for failure to disclose cause of action and lack of specificity

Following general elections in the Commonwealth of Dominica in December 2019, a number of citizens (together referred to as "the petitioners") filed election petitions alleging several irregularities in the election process. The respondents filed applications to strike out the petitions on the basis, *inter alia*, that the petitions did not disclose causes of action against them and were abuses of the process of the court. The applications to strike were heard and granted by Glasgow J, and the election petitions struck out on the basis that the petitions lacked the necessary details or specificity to disclose causes of action against any of the respondents.

The petitioners filed notices of appeal seeking to challenge the learned judge's decision. In response, the respondents filed notices of opposition and applications to strike out the petitioners' appeals, on the ground that Glasgow J's decision was not a final decision to which a right of appeal attached under sections 40(6) and 40(7) of the Constitution of the Commonwealth of Dominica ("the Constitution"), and therefore there is no jurisdiction vested in the Court of Appeal to hear and determine the appeals. The broad issue considered by the Court of Appeal was whether, having regard to the provisions of the Constitution, it has jurisdiction to entertain the appeals. Specifically, the Court considered: (i) whether the judge's decision was a final decision by virtue of the manner in which he disposed of the applications to strike; (ii) whether the Court can examine any alleged errors in or demerits of the decision of Glasgow J with a view to assuming jurisdiction to hear the appeals; and

(iii) whether the public importance attached to election petitions could provide a basis for the assumption of jurisdiction to entertain the appeals.

Held: striking out the petitioners' appeals; ordering that the petitioners/appellants shall, within 21 days, pay costs to each of the respondents (save and except for the 6th and 7th respondents) in the sum of $2,000.00, and save further, that a respondent named in more than one application or notice of appeal shall be entitled to one set of costs only and not in respect of each application or notice of appeal in which he/she/it is named as a respondent, that:

1. Sections 40(1)(a), 40(6) and 40(7) of the Constitution together provide that no appeal shall lie from any decision of the High Court other than a final decision determining whether a person has been validly elected as a Representative to the House of Assembly. The learned judge's decision to strike out the election petitions, before trial, on the basis that the pleadings contained in the petitions were deficient is therefore, by its very nature, not a final decision on the question of whether a person was validly elected as a Representative in the House of Assembly which the Court has jurisdiction to entertain under the provisions of the Constitution.

   Sections 40(1), 40(6) and 40(7) of the **Constitution of the Commonwealth of Dominica** Cap. 1.01 of the Laws of the Commonwealth of Dominica interpreted; **Eugene Hamilton v Cedric Liburd et al** [2006] ECSCJ No. 36 (delivered 3rd April 2006) followed; **The Attorney General of Grenada v Peter Charles David and others** [2008] ECSCJ No. 52 (delivered 2nd June 2008) considered; **Benjamin Exeter v Winston Gaymes et al** SVGHCVAP2016/0021 (delivered 13th June 2017, unreported) distinguished.

2. There is no sustainable argument in this case that the learned judge exceeded the scope of enquiry required on an application to strike, and therefore that his treatment of the respondents' applications to strike out the election petitions transformed his decision into a final decision. The judge clearly confined himself to assessing the pleadings with a view to determining whether they were sufficient to sustain particularised cases for the avoidance of the election. In the circumstances, the judge's decision was not a final decision within the contemplation of sections 40(6) and 40(7) of the Constitution.

   CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19th October 2009) considered; **Piglowska v Piglowski** [1999] 1 WLR 1360 applied.

3. On an application challenging the jurisdiction of the Court to hear an appeal, it would be highly unusual for the Court of Appeal to examine any alleged substantive errors

or demerits of the decision of the court below, prior to the determination of the threshold question of jurisdiction. Such an examination would be tantamount to an assumption of jurisdiction in relation to the substantive appeal for the purpose of determining whether the Court in fact had jurisdiction. The law does not permit such a course in proceedings of this nature.

4. The public importance attached to election petitions cannot be a basis for the assumption of jurisdiction to hear an appeal from a decision to strike out an election petition in the circumstances of this case. It is simply not open to the Court to arrogate unto itself jurisdiction to hear an appeal where no such jurisdiction has been conferred upon it by either statute or the Constitution. The Constitution's provisions are clear and have been consistently interpreted to exclude appeals in the nature of the present appeals. In all the circumstances, the petitioners do not have a right to appeal against the learned judge's decision; and the Court of Appeal as a consequence has no jurisdiction to entertain the petitioners' appeals.

Attorney General v David Brandt [2020] ECSCJ No. 394 (delivered 11th November 2020) followed.

JUDGMENT

[1] **PEREIRA CJ**: Challenges by election petitions to the validity or due return of an election are commonplace in the Eastern Caribbean. The result of these challenges is a body of jurisprudence on such matters in construing and applying election statutes and rules, within the context of the provisions of the various constitutions which are largely similar. Before this Court are notices of opposition and applications by the respondents to strike out the notices of appeal (ten in number), filed by a number of citizens of the Commonwealth of Dominica (who I refer to as "the petitioners") against the decision of Glasgow J dated 14th October 2020 by which the learned judge struck out the petitioners' election petitions. The notices of opposition and applications to strike challenge the Court of Appeal's jurisdiction and raise the singular issue of whether this Court has jurisdiction to entertain the appeals having regard to sections 40(1), 40(6) and 40(7) of the **Constitution of the Commonwealth of Dominica**[1] ("the Constitution").

[1] Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I 1978 No. 1027 (UK)).

Background

[2] General elections were held in the Commonwealth of Dominica on 6th December 2019. The official results of the election were declared on 20th December 2019, and the Dominica Labour Party was returned and declared the winning party. In the days following the election, the petitioners lodged election petitions alleging several irregularities in the election process including allegations of treating, bribery, irregularities in the nomination process, irregularities in the treatment of objections to the register of electors, importation of voters, voter intimidation and police brutality. The respondents to the petitions were the Dominica Broadcasting Corporation ("DBS"), the Chairman and members of the Electoral Commission, the Commissioner of Police, the Returning and Registering Officers, and the members of the Dominica Labour Party who had been elected as representatives to the House of Assembly in the election.

[3] The respondents applied to the court to strike out the election petitions. The main grounds of their applications were that:

(i) The petitions did not disclose a cause of action and/or are abuses of the process of the court.

(ii) There was no service of the petitions on the 5th and 9th respondents and therefore, as against them, the petitions are a nullity.

(iii) The 2nd, 4th, 5th to 9th and 11th to 13th respondents were improperly joined. The Commission ought to have been joined. Alternatively, there is no cause of action pleaded against these respondents.

(iv) The petitioners had not pleaded any basis, or any sufficient basis, in fact or law for the setting aside of the election.

(v) The petitioners had, in relation to the non-election allegations against the 11th and 13th respondent, failed to plead any violation of their constitutional rights. Further there was no pleading that these

allegations rendered the election a sham or affected the result of the election.

[4] The applications to strike were heard by Glasgow J. In an extensive written judgment dated 14th October 2020, Glasgow J granted the respondents' applications to strike. The learned judge's reasons striking out the election petitions are summarised at paragraph [225] of his judgment as follows:

> "Even though I find that all the respondents (except DBS) were properly joined, the pleadings against all of them are inadequate or insufficient. In my reasons above, I have set out how they fail for failing to disclose a cause of action, lack of necessary details and/or specificity. I have therefore struck out all the pleadings. A ruling on the applications and arguments about service of the petition is therefore pointless."

[5] The learned judge accordingly made the following orders:

> "For reasons stated above, I order as follows:
> (1) All ten of the petitions are hereby struck out for the reasons set out in this judgment;
> (2) The respondents (applicants) are awarded costs in the sum of $5000.00."

The Appellate Proceedings

[6] The petitioners were dissatisfied with the decision of the learned judge and filed notices of appeal. The petitioners' purported appeals were consolidated (by consent) by an order of this Court dated 28th January 2021. The bases on which the petitioners seek to challenge the judge's decision are set out across 25 pages in each of the notices of appeal. It is not necessary for me to repeat those bases here. Taking the findings of fact and law sought to be challenged by the petitioners, and the grounds of appeal stated in the notices of appeal, the position intended to be taken by the petitioners on appeal is that the petitions disclosed sufficiently pleaded causes of action on all points raised and against all the respondents and the learned judge therefore erred in exercising his discretion to strike out the petitions.

[7] The respondents in turn filed notices of opposition and notices of application to strike out the notices of appeal. The respondents collectively oppose the appeals and seek orders striking out the appeals on the grounds that:

(i) The election petitions were filed for the determination of a question under section 40(1)(a) of the Constitution, that is, whether the respondents had been validly elected to the House of Assembly;

(ii) Sections 40(6) and 40(7) of the Constitution only permits an appeal from a final decision which determined whether a member of the House of Assembly was validly elected;

(iii) The decision of Glasgow J delivered on 14th October 2020 is not a final decision which determined the question whether a member of the House of Assembly was validly elected;

(iv) By virtue of sections 40(6) and 40(7) of the Constitution, the decision of Glasgow J is not susceptible to appeal; and

(v) Accordingly the petitioners have no right to appeal the ruling/decision of Glasgow J and/or the Court of Appeal has no jurisdiction to hear or entertain the notices of appeal filed on 6th November 2020.

[8] As already stated, the broad issue raised before us is whether this Court has jurisdiction to entertain the appeals having regard to sections 40(6) and 40(7) of the Constitution. As will soon become apparent, the determination of this issue centres on whether the decision of Glasgow J is a final decision of the High Court which determines whether the respondents have been validly elected as a Representative in the House of Assembly.

The Law

[9] The parties agree on the central legal principles applicable to the determination of the applications before us. The jurisdiction of the High Court to hear and determine

matters concerning the composition of Parliament is grounded in section 40(1) of the Constitution which, so far as is relevant, provides that- '(1)The High Court shall have jurisdiction to hear and determine any question whether – (a) any person has been validly elected as a Representative or Senator;…'. (Underlining supplied)

[10] The High Court's jurisdiction in this regard was originally exercised by Parliament and was transferred to the courts by way of the Constitution. The jurisdiction has been variously described as special, exclusionary and exclusive. According to section 103 of the Constitution, this jurisdiction is a separate jurisdiction from the court's original jurisdiction to hear and remedy matters concerning infringements of the Constitution. It is also separate to the court's original jurisdiction given under section 16 of the Constitution for the enforcement of the protective or fundamental rights contained in Chapter 1. It is common ground that this special jurisdiction incorporates the court's inherent jurisdiction to protect it from abuse in its exercise of the jurisdiction so that the case law is replete with decisions striking out election petitions on a number of bases ranging from failure to disclose a cause of action, substantial non-compliance with election laws, and vagueness to abuse of process.[2]

[11] Subsections (6) and (7) of section 40 speak to the rights of appeal from a decision of the High Court made under section 40(1). They provide:

> "(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining such a question as is referred to in subsection (1) of this section.
>
> (7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) of this section and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining such a question as is referred to in subsection (1) of this section." (Underlining supplied)

[2] See for example Ferdinand Frampton et al v Pinard et al DOMHCV2010/0149 (delivered 3rd April 2006, unreported) per Rawlins J (as he then was), Ethlyn Smith v Delores Christopher et al and Reeial George et al v Eileene Parsons et al, Claim Nos. BVIHCV2002/0097 and 0098, (delivered 23rd July 2003, unreported), Dean Jonas v Jacqui Quinn-Leandro et al ANUHCV2009/0141, ANUHCV2009/0412, ANUHCV2009/143, ANUHCV2009/144 (delivered 31st March 2010).

[12] Subsections (6) and (7) have been interpreted and applied by this Court in a number of decisions, the most oft cited of which is **Eugene Hamilton v Cedric Liburd et al**,[3] a decision from Saint Christopher and Nevis, which is accepted by counsel on both sides as relevant and binding authority in relation to these applications. In that case, Alleyne CJ, delivering the judgment of the Court, dismissed appeals against an interlocutory order made by Baptiste J (as he then was) striking out certain evidence sought to be led at the trial of an election petition on the basis that they contained inadmissible hearsay and irrelevant material, and striking out certain portions of the election petition on the basis that the said portions were badly pleaded and did not disclose a cause of action against the respondents. Alleyne CJ considered provisions of the Constitution of Saint Christopher and Nevis, which are materially identical to the provisions of the Constitution of the Commonwealth of Dominica under consideration in this appeal. In that matter, counsel for the respondents argued that, according to the terms of section 36 of the Constitution of the Federation of Saint Christopher and Nevis,[4] this Court had no jurisdiction to entertain an appeal against an interlocutory order on an election petition. Counsel submitted that rights of appeal require legislative authority; and, in the absence of statutory authority, the Court of Appeal cannot properly entertain an appeal.

[13] The respondents argued that the jurisdiction of the court to hear election petition matters was a special jurisdiction which was separate from the statutory jurisdiction to hear and determine civil appeals. Accordingly, the provisions made under the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act for interlocutory appeals in civil proceedings were inapplicable. Counsel for the appellants invited the Court to apply the 'order test' (as distinct from the application test)[5] to aid with determining the meaning of the expression 'final decision'. Without

[3] [2020] ECSCJ No. 394 (delivered 11th November 2020).
[4] Sections 36(6) and 36(7) provide that- "(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining any such question as is referred to in subsection (1).
(7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining any such question as is referred to in subsection (1) of this section."
[5] The application and order tests are discussed in detail in Othniel R Sylvester v Satrohan Singh.

expressing a view on the appropriateness of either test, the Chief Justice stated that, whether the application or order test was applied, the orders sought to be appealed were not final orders. Taking what appears to be a textual approach to the interpretation of the relevant sections, and accepting the submissions of the respondents, the Chief Justice concluded that:

> "It seems clear to me that section 36(7) of the Constitution of the Federation of Saint Christopher and Nevis unequivocally excludes the possibility of an appeal from any decision of the High Court in any proceedings which seeks to determine whether any person has been validly elected as a Representative to the National Assembly other than a final decision determining that question."

[14] Of interest on this point is the decision of Gordon JA in **The Attorney General of Grenada v Peter Charles David and others**[6] which evidences a slightly different approach to the determination of whether a decision is a final decision or not under the elections provisions of the Constitution of Grenada. In that case, the appellant sought to appeal a decision of Benjamin J striking out the appellant's fixed date claim form on the basis that the court could not entertain a challenge to the validity of an election where such a challenge had been instituted by way of the fixed date claim form procedure. This Court sanctioned the use of the 'application test' to differentiate between final and interlocutory decisions for the purposes of the election provisions under the Constitution, as distinct from the textual approach to interpreting the meaning of 'final decision' employed by Alleyne CJ in **Eugene Hamilton**. Following a review of the decisions on the application test, including **Othniel R Sylvester v Satrohan Singh**[7] and **JnMarie & Sons Limited v Jamie St. Louis**,[8] this Court concluded that:

> "[8] It is clear that no other conclusion than that the decision of Benjamin J was other than a final decision as referred to in section 37 (7) of the Grenada Constitution is consonant with the many decisions of this court.
> [9] In the premises this court is denied of jurisdiction by the clear language of the Grenada Constitution and in those circumstances must dismiss the application for an extension of time by the appellant/applicant."

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[6] [2008] ECSCJ No. 52 (delivered 2nd June 2008).
[7] Saint Vincent and the Grenadines Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported).
[8] Saint Lucia Civil Appeal No. 14 of 2006 (delivered 20th February 2007, unreported).

[15] It is clear however, and is agreed as between the parties in the appeal presently before us, that whichever approach is taken, an order striking out an election petition prior to trial, on the grounds that the pleadings are insufficient or fail to disclose a cause of action against a defendant, is not a final decision on the question whether any person has been validly elected as a Representative or Senator as provided for under section 40(1)(a) of the Constitution.

Discussion

[16] Again, the meaning of the relevant constitutional provisions is not in dispute. It is clear, and there is no contest between the parties, that sections 40(1)(a), 40(6) and 40(7) together provide that no appeal shall lie from any decision of the High Court other than a final decision determining whether a person has been validly elected as a representative to the House of Assembly. Further, there is no dispute that a decision to strike out an election petition on the ground that it does not disclose a cause of action or sufficiently particularise the petitioner's complaints is, by its very nature, not a final decision for the purposes of sections 40(6) and 40(7) of the Constitution. The nub of the issue here arises on the submissions made by learned counsel for the petitioners, Ms. Zahidha James, in response to the notices of opposition and the applications to strike. On the basis of the settled principles applied by this Court in relation to applications to strike including those enunciated in **CITCO Global Custody NV v Y2K Finance Inc**,[9] Ms. James submits that, on the respondents' applications in the court below, the learned judge was required solely to consider the pleadings contained in the petitions. The judge was required to assume that the pleadings were true. There was no requirement for the filing or consideration of evidence at that stage, and the judge was constrained to determine solely whether the pleadings were sufficient to warrant being heard at trial and/or whether the respondents knew what they were being asked to respond to and defend and/or whether the pleadings were an abuse of the court's process.

[9] [2009] ECSCJ No. 165 (delivered 19th October 2009).

[17] Against this background, Ms. James argues that the enquiry conducted by the learned judge exceeded the scope of the permissible enquiry on the application to strike. The learned judge instead conducted a mini trial, which led him to consider the merits of the petitions, make findings of fact and findings on the evidence relevant to the substance of the petitions, and consequently dismiss the petitions on their merits. Ms. James therefore submits that, on account of the judge's treatment of the petitions and the nature of his findings thereon, his decision to strike out the petitions was in effect a final decision within the meaning of sections 40(6) and 40(7) of the Constitution. In other words, the merits-based approach adopted by the judge finally determined the issue of whether the respondents had been validly elected to the House of Assembly. Ms. James submits that had the learned judge adhered to this mandate and limited his findings accordingly, there would be no scope to argue that his decision was a final decision.

[18] Ms. James relies on a number of authorities to make good these submissions, two of which are **Motor and General Insurance Co. Ltd v Sanguinette and another**[10] and the decision of the Caribbean Court of Justice in **Octavius John and another v Clico International Life Insurance**[11] which, it is argued, establish that a decision which would not ordinarily be considered a final decision, may be become a final decision if, the approach taken by the court is such that it finally determines the rights of the parties, whichever way the matter before the court is decided.

[19] The respondents' position as articulated by learned Senior Counsel Mr. Astaphan, is that the learned judge did not exceed the scope of required enquiry on the applications to strike. The respondents contend that the learned judge did not consider the substantive merits of the petitions or any evidential questions and confined himself to the determining whether the petitions had sufficiently disclosed causes of action in relation to all the respondents, and whether the petitions had sufficiently pleaded the particulars of the matter alleged.

[10] (2006) 73 WIR 384.
[11] CCJ Appeal No BBCV2018/005.

[20] Ms. James' submissions raise an interesting jurisprudential question, that does not appear to me to have been addressed frontally by this Court in any of its written judgments. That question is whether a decision, which would not ordinarily be a final decision, can lose its character as a final decision by virtue of a judge's treatment of the application before him or her. It is however unnecessary for me to make a finding one way or the other on this question as, assuming (for now) that the law is as Ms. James has argued, I am not of the view that the learned judge determined the matters before him in such a way that could transform his decision into a final decision within the meaning of sections 40(6) and 40(7) of the Constitution.

[21] At paragraphs 5 to 25 of the judgment, the learned judge set out in summary form the allegations made by each of the petitioners' election petitions. The judge considered that the principles applicable to the applications to strike out were set out in **Dean Jonas v Jacqui Quinn-Leandro et al**,[12] **Ferdinand Frampton et al v Ian Pinard et al**,[13] **Lonrhro PLC v Fayed and others (No 2)**.[14] In short, the principles relied upon by the learned judge were that:

(i) A petitioner must plead facts sufficient to disclose a cause of action so as to enable the respondent to know the case which he or she must answer. Evidence need not be pleaded because that will come from the affidavits and from oral evidence which is to be considered at trial.

(ii) A petition or a pleading should be struck out if it discloses no reasonable cause of action, is bound to fail, vague, or abusive of the process of the court.

(iii) The power to strike out pleadings at a preliminary stage ought to be exercised sparingly and only in the clearest of circumstances.

[12] ANUHCV2009/0141 (delivered 31st March 2010, unreported).
[13] DOMHCV2005/0149 (delivered 26th October 2005, unreported).
[14] [1991] 4 All ER 961.

[22] The judge considered that the applications to strike raised two questions – (i) whether the petitioners have brought suit against the correct respondents ("the parties question"); and (ii) whether the claim against any or all of the respondents is properly laid out ("the pleadings question"). In considering the parties question, the learned judge considered that all the parties except the Dominica Broadcasting Corporation were properly joined in the proceedings.

[23] As to the pleadings question, the judge considered firstly, in relation to the nominations process, that the petitioners failed to plead a nexus between the alleged irregularities in the nominations process and the outcome of the election. At paragraph 112, the judge considered:

> "There is no pleading to show how this irregularity affected or may have affected the result of the elections. The petitioners state that the election is null and void due to this error. How this is so is not set out in any form or fashion on the pleadings. Evidence is not required at this stage but the respondents would need to know in what manner the results were rendered unsafe or void as asserted by the petitioners."

The judge continued that:

> "…The pleading must go on to show how this is either an elections offence or irregularity, that it affected or may have affected the outcome of the elections or was such a departure from the proper conduct of the elections that there was in essence no electing at all. This pleading falls far short of the requirement."

[24] In relation to points raised by the petitions as to the non-determination of objections filed in relation to the register of electors, the judge at paragraph 118 points to a number of matters which, in his view, ought to have been pleaded which rendered the petitions defective on this issue. The learned judge noted at paragraph 119 of the judgment that the respondents filed evidence of numbers produced from the office of the Chief Registering Office. The respondents claimed that the evidence contradicted the allegations raised on the petitions and as such proved that they are patently wrong and an abuse of the court's process. The learned judge was careful not to consider this evidence. The judge said:

> "I refrain from going down that road into a discourse on the factual disputations. A number of authorities have instructed against the practice of conducting a mini trial on a strike out application. What does concern me is the patent lack of specificity or precision on the pleadings in the manner I have stated above."

[25] The judge further considered complaints in relation to the use of different registers of electors on polling day, the failure to disclose the names of newly registered electors, the allegations of treating, the importation of voters, the lack of access to the DBS, intimidation, police brutality, irregularities at the level of the Electoral Commission, complaints in relation to the electoral officers, bribery, voting irregularities, advertisements and disqualification of elected members. I will not reproduce the learned judge's reasoning on each point, as I consider the above-quoted portions of the judge's judgment as representative of the approach he took to the pleadings in the context of the respondents' application to strike. These portions of the judge's judgment are found for example at paragraphs 121-127, 130-131, 132, 133, 140-142, 146, 156 and 159.

[26] The learned judge was careful to hold faithfully to his remit on the applications to strike. The learned judge made reference on more than one occasion to the learning in **CITCO** and several other cases, and confined himself to the question of the whether, in his view, this was an appropriate case for the exercise of the court's jurisdiction to strike out the election petitions. The learned judge refused to consider the affidavit evidence before him which went to the merits of the petitioners' case. He took the pleadings as true so as to determine whether they were, in his view, sufficient to sustain particularised cases for the avoidance of the election. In my view, the judge did not step outside the permissible bounds of the court on an application to strike.

[27] The learned judge in his judgment used the words 'you are enjoined to plead and prove' and referred to some of the matters alleged by the petitioners as 'impugned'. Ms. James placed great store on these words in support of her contention that the judge exceeded the scope of the exercise he was required to conduct on an

application to strike. In **Piglowska v Piglowski**,[15] at page 1372, Lord Hoffmann cautioned against the overzealous dissection by an appellate court of the language used by a judge in its assessment of whether the judge misdirected themself. Lord Hoffman's comments, albeit made in the context of an appeal challenging the exercise of a discretion by a lower court, are apposite in a case such as this. The judge's reasoning and conclusion clearly showed that he was not treating the matter as some sort of summary trial, nor was he deciding the merits of the matter including whether the petitioners had proved their case. When a global view is taken of the learned judge's judgment, it is evident that the judge's central concerns were the propriety of the respondents to the matter, and whether, on the pleadings, the petitioners had sufficiently particularised their bases of challenge in the petition. I do not therefore consider that the use of the words 'impugned' and 'enjoined to plead and prove', in the context in which they were used, indicate anything other than the learned judge's focus on the sufficiency of the pleadings in relation to the matters alleged in the petitions against the respondents.

[28] In these premises, the judge's decision was not a final decision on the question of whether the various respondents had been validly elected as a Representative to the House of Assembly. The petitioners therefore do not have a right to appeal the learned judge's decision, and the Court of Appeal as a consequence has no jurisdiction to entertain the appeal.

The Benjamin Exeter decision

[29] In making her submissions, Ms. James relied on the decision of this Court in **Benjamin Exeter v Winston Gaymes et al**.[16] In that case, the Court of Appeal heard and determined an appeal from a decision of a High Court judge to strike out

[15] [1999] 1 WLR 1360.
[16] SVGHCVAP2016/0021 (delivered 13th June 2017, unreported).

election petitions before trial. Ms. James argued that the decision is binding on this Court in keeping with the well-known principle of stare decisis, and that this Court is required, as a matter of law, to adopt the course taken in that case. I do not agree. In **Benjamin Exeter**, the High Court judge struck out election petitions on the basis that they did not comply with Saint Vincent's elections laws. The appellants sought to have the judge's decision set aside on the basis of apparent bias on the part of the judge. In a well-reasoned judgment, Baptiste JA found that the judge was tainted by apparent bias, and therefore ought to have recused himself from hearing the application to strike out the petitions, even though there had been no such application for recusal made by the parties. Accordingly, the appeal was allowed and the petitions, which had been struck out, were reinstated.

[30] The Constitution of Saint Vincent and Grenadines contains similar provisions to those set out at section 40 of the Constitution of the Commonwealth of Dominica. This notwithstanding, the question of the Court of Appeal's jurisdiction to entertain the appellant's appeal was not addressed by the Court, and understandably so, as it is clear that the Court was not given the benefit of the submissions on jurisdiction that we have before us in this matter. The jurisdiction of the Court was neither raised nor addressed. I am of the view then, that in so far as **Benjamin Exeter** appears to support the view that an appeal is permissible from an order that is not a final order within the contemplation of sections 40(6) and 40(7), it must be distinguished on the basis that the threshold issue of jurisdiction was not before the Court. In other words, I take the view that **Benjamin Exeter** does not provide a basis for departing from the settled stream of jurisprudence that appeals in the nature of the present appeals are not countenanced by the Constitution.

[31] For what it is worth, **Benjamin Exeter** is in a sense emblematic of the myriad of irregularities which may arise in the lower court from a judge's treatment of an election petition. Other examples of similar nature include a decision arrived at on an election petition in denial of the right of a party to be heard, or the right to be represented by counsel, or where there is some actual or apparent bias on the part

of the judge. It may very well be that these are matters which can be investigated by way of some alternative route of challenge. For the purposes of the question before us though, I need not and do not express a view thereon. Suffice it to say that, in view of the consistent approach to interpreting section 40 and like sections across the jurisdiction of this Court by route of the election petition which turns out to be unmaintainable and consequently struck out, there is no right of appeal from such an order.

Errors made by the judge, Public Importance and the Overriding Objective

[32] Ms. James pointed us to a number of the judge's legal findings which, she says, were erroneous. She argued that the matter before the learned judge was of great public importance and, therefore, it is not in keeping with the overriding objective and the public interest for the election petition proceedings to end at this stage in view of the judge's errors. Learned counsel relies on statements made by the Court in **Benjamin Exeter** where the Court underscored an election petition:

> "…is not a matter involving litigation of a private right in which considerations of justice arise simply as between the disputants, with no additional public interest element falling to be considered. An election petition, by its very nature, is often a matter of great public interest and importance. The right to the hearing and disposal of an election petition by an impartial tribunal is a matter of tremendous public interest."

[33] These arguments fail for obvious reasons. Firstly, on an application challenging the jurisdiction of the Court to hear an appeal, in circumstances such as the present case, it would be highly unusual for the Court to examine any alleged substantive errors or demerits of the decision of the court below, prior to the determination of the threshold of jurisdiction. Such an examination would be tantamount to an assumption of jurisdiction in relation to the substantive appeal for the purpose of determining whether the Court in fact had jurisdiction – in short assuming what could only be some residual inherent power through the back door to address alleged errors which may be viewed as matters of public importance notwithstanding the clear constitutional prohibition. The law is well settled that an inherent jurisdiction cannot be prayed in aid to override a clear provision of law let alone a constitutional

provision. Although election petitions involve matters of considerable public interest, I know of no legal principles which permit resort to such a course in proceedings of this nature. Secondly, I have already distinguished **Benjamin Exeter** on the basis that a point was never raised as to the Court's jurisdiction to hear the appeal in that case. It was not a question in issue on which the Court decided. The correctness and continued relevance of the comments by the Court in **Benjamin Exeter** on the importance of election petition matters are not doubted. However, in circumstances where the question of the Court's jurisdiction was not raised, the statements in **Benjamin Exeter** cannot provide a basis for the assumption of jurisdiction in this case.

[34] In **Attorney General v David Brandt**,[17] it was argued that what were in essence interlocutory criminal appeals by the Director of Public Prosecutions and Attorney General could proceed on the footing of an inherent right of appeal in the public interest. That argument was rejected by this Court. I took the view in that case that the public interest is not a basis for the assumption of jurisdiction in circumstances where such jurisdiction is not conferred by statute or the Constitution. At paragraph 48, I opined:

> "It is simply not open to this Court to arrogate unto itself jurisdiction to hear an appeal where no such jurisdiction has been conferred upon it by either statute or the Constitution. Indeed, this would be a step unto a slippery slope. As the majority of the Privy Council noted in **Hunte and another v The State**, the assumption of jurisdiction where none has been conferred raises obvious issues in relation to the rule of law and the separation of powers – it places the judiciary in direct conflict with the executive and legislature whose responsibility it is to make provision for the court's jurisdiction through legislative action. Where Parliament has prescribed, either in the Constitution or in statute, the circumstances in which the court is permitted to exercise jurisdiction, it is open to the court only to interpret the provisions conferring jurisdiction and not to exceed or completely ignore those provisions in favour of exercising jurisdiction in circumstances not contemplated by Parliament."

[17] [2020] ECSCJ No. 394 (delivered 11th November 2020).

[35] I am still of that view. In these circumstances, where the Constitution's provisions are clear and have been consistently interpreted to exclude appeals in the nature of the present appeals, and there being no arguable position that the learned judge's decision was (in effect) a final decision, the petitioners did not have a right of appeal from Glasgow J's decision, and this Court does not have jurisdiction to hear the petitioners' appeals. The petitioners' appeals must be struck out.

Costs

[36] The Court heard the parties on the appropriate costs order to make in these circumstances. Ms. James sought an order that each party bears its own costs. The respondents disagree. Counsel for all the respondents were agreed that they should receive their costs, but that the quantum of costs be determined by the Court. Having considered the totality of the circumstances, I am of the view that it would be appropriate to make an award of costs in favour of the successful parties on their applications. I am also mindful that some of the respondents are represented by the same counsel and further that, the applications were consolidated and heard together. I would accordingly order that the petitioners bear the costs of each respondent (save and except for the 6th and 7th respondents who did not participate) on the applications in the sum of $2,000.00, and save further that where a respondent is named as a respondent in more than one application or notice of appeal, the respondent shall only be entitled to one set of costs and not in respect of each application or notice of appeal in which that party was named as a respondent.

Conclusion

[37] For all the above reasons, I would make the following orders:

(1) The petitioners'/appellants' consolidated appeals against the decision of Glasgow J dated 14th October 2020 are struck out.

(2) The petitioners/appellants shall, within 21 days, pay costs to each of the respondents (save and except for the 6th and 7th respondents) in the sum of $2,000.00, and save further, that a respondent named in more than one

application or notice of appeal shall be entitled to one set of costs only and not in respect of each application or notice of appeal in which he/she/it is named as a respondent.

I concur
Gertel Thom
Justice of Appeal

I concur
Gerard St. C Farara, QC
Justice of Appeal [Ag.]

By the Court

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

Chief Registrar