IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
(NEVIS CIRCUIT)

Claim No. NEVHCV20233/0001

IN THE MATTER of Section 33, 34, 36, 96, 101(4) and 104 of the Constitution of Saint Christopher and Nevis;

AND

IN THE MATTER of the National Assembly Elections Act, Cap 2.01 as amended;

AND

IN THE MATTER of the Nevis Island Assembly Election for the Constituency of Nevis 2 (Parish of St John) held on the 12th day of December 2022.

Claim No. NEVHCV2023/0001

IN THE MATTER of Section 33, 34, 36, 96, 101(4) and 104 of the Constitution of Saint Christopher and Nevis;

AND

IN THE MATTER of the National Assembly Elections Act, Cap 2.01 as amended;

AND

IN THE MATTER of the Nevis Island Assembly Election for the Constituency of Nevis 2 (Parish of St John) held on the 12th day of December 2022.

BETWEEN:

DR. PATRICIA BARTLETTE		**Petitioner**
And		
[1]	**MARK BRANTLEY**	**1st Respondent**
[2]	**OAKLYN PEETS (SUPERVISOR OF ELECTIONS)**	**2nd Respondent**
[3]	**CALVIN FAHIE (REGISTRATION OFFICER FOR THE CONSTITUENCY OF ST JOHN)**	**3rd Respondent**
[4]	**ROHAN CLAXTON (RETURNING OFFICER FOR THE CONSTITUENCY OF ST JOHN)**	**4th Respondent**
[5]	**THE ELECTORAL COMMISSION**	**5th Respondent**
[6]	**THE ATTORNEY GENERAL OF ST CHRISTOPHER**	**6th Respondent**

Claim No. NEVHCV2023/0001

IN THE MATTER of Section 33, 34, 36, 96, 101(4) and 104 of the Constitution of Saint Christopher and Nevis;

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IN THE MATTER of the Nevis Island Assembly Election for the Constituency of Nevis 2 (Parish of St John) held on the 12th day of December 2022.

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AND

IN THE MATTER of the National Assembly Elections Act, Cap 2.01 as amended;

AND

IN THE MATTER of the Nevis Island Assembly Election for the Constituency of Nevis 2 (Parish of St Paul) held on the 12th day of December 2022.

BETWEEN:

JAEDEE S.K. CAINES		**Petitioner**
And		
[1]	**SPENCER BRAND**	**1st Respondent**
[2]	**OAKLYN PEETS (SUPERVISOR OF ELECTIONS)**	**2nd Respondent**
[3]	**CALVIN FAHIE (REGISTRATION OFFICER FOR THE CONSTITUENCY OF ST PAUL)**	**3rd Respondent**
[4]	**ROHAN CLAXTON (RETURNING OFFICER FOR THE CONSTITUENCY OF ST PAUL)**	**4th Respondent**
[5]	**THE ELECTORAL COMMISSION**	**5th Respondent**
[6]	**THE ATTORNEY GENERAL OF ST CHRISTOPHER**	**6th Respondent**

BEFORE: **His Lordship Justice Patrick Thompson Jr.**

APPEARANCES: Mr. Patrice Nisbett, Ms. Sandra Hector and Mr. Eustace Nisbett for Petitioner Bartlette
Dr. David Dorsett and Ms. M. Angela Cozier for the Petitioner Caines
Mr. Brian Barnes and Ms. Leigh Ann Wellington for the 1st named Respondents
Mr. Delano Bart K.C. and Jason Hamilton for the 2nd 3rd and 4th named Respondents
Mr. Dennis Merchant for the 5th named Respondent
Mr. Anthony Astaphan S.C., Mr. Sylvester Anthony, Ms. Renal Edwards and Mrs. Simone Bullen Thompson for the 6th named Respondent

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2023: February 15th & 27th

JUDGMENT

[1] **THOMPSON JR J:** Everyone agreed these two petitions should be heard together. In any event, Rule 19 of the National Assembly (Election Petition) Rules ("the Election Rules") provide that where more than one petition relating to the same election is presented the petitions shall be dealt with as one petition on such terms as the Court thinks fit.

[2] Secondly, Ms. Cozier sought to argue that the strike out applications filed by all of the Respondents should be struck out as the Civil Procedure Rules ("the CPR") do not apply to election petitions. In her view, if the CPR did not apply then the strike out applications that were filed pursuant to the CPR were liable to be themselves struck out.

[3] Everyone was agreed that the CPR did not apply to election petitions. Everyone was also agreed that a High Court hearing an election petition was empowered to strike out a petition where it was warranted. The long established Privy Council authority of Teik v Nair [1967] 2 WLR 846 confirms as much and this Court can do no better than cite the words of Lord Upjohn at page 856 that:

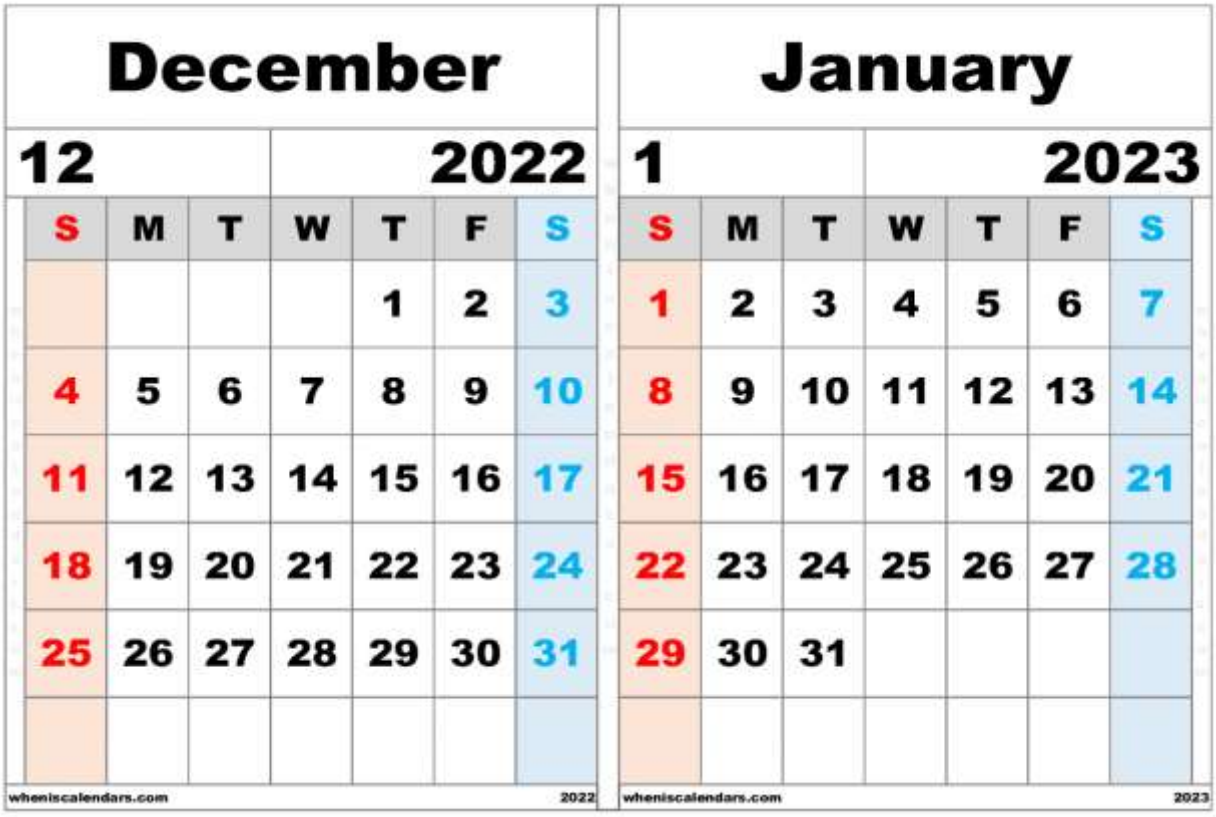
"The election judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules."

[4] Therefore, the fact that one or some of the Applicants may have omitted to expressly cite in their applications this Court's inherent powers to strike out the petitions is of no moment. Counsel for the Petitioners accepted this Court's inherent powers to strike out election petitions that were nullities and as such this court had little difficulty in proceeding to hear the arguments on whether the petitions were in fact amenable to being struck out.

The Caines Petition

[5] The Caines Petition was filed on January 10th, 2023. Counsel for the 6th named Respondent submitted that the Caines petition was a nullity as it was not filed within the 21 day period provided for by Section 98 of the National Assembly Elections Act ("the Act"). Counsel for the 1st named Respondents and for the 5th named Respondent adopted and relied on the submission by Mr. Anthony for the 6th named Respondent while counsel for the remaining respondents remained neutral having not addressed the point in their respective skeleton arguments.

[6] Mr. Anthony's submission was a simple matter of arithmetic best illustrated by the following table.



December

12 **2022**

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

wheniscalendars.com 2022

January

1 **2023**

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

wheniscalendars.com 2023

[7] Election Day was Monday December 12th, 2022. Tuesday December 13th, 2022 was a bank holiday in Nevis. Time started to run from Wednesday December 14th, 2022 and once the 25th, 26th and 27th of December and 1st, 2nd and 3rd of January, 2023 were excluded pursuant to Section 123[1] of the Act the latest day that the Caines petition could have been lawfully filed was January 9th, 2023.

[8] Counsel for the Petitioner Caines submitted that the counting of days commenced on December 15th, 2022 and relied on two bases in support of her submission that the Caines petition was filed in time. Firstly, Ms. Cozier argued that the clear days regime provided for under Part 3 of the CPR

[1] Section 123 of the Act provides that " (1) In reckoning time for the purposes of this Act, Sunday shall be included but Christmas Day, Good Friday and any bank holiday shall be excluded (2). Where anything required by this Act to be done on any day falls to be done on Sunday or any such excluded day, that thing may be done on the next day, not being one of the excluded days"

applied to the counting of days. This submission was at odds with Mrs. Cozier's previous submission that the CPR did not apply to election petitions and Mrs. Cozier was hard pressed to demonstrate on what basis the CPR could now apply.

[9] Secondly, Mrs. Cozier, supported by Dr. Dorsett, changed tack and contended that Section 6(a) of the Interpretation Act applied to the counting of days and that this regime was analogous to the clear days regime under the CPR. In reply, Mr. Astaphan SC for the 6th Respondent submitted that the Act provided a clear regime for the computation of time and that this court should not revert to the Interpretation Act to determine how to compute the relevant time period.

[10] In this court's view, the Act is clear and set out a timeframe for the filing of a petition. Additionally, Section 123 of the Act sets out a formula for the computation of time. In this Court's view, there is no need to revert to the Interpretation Act when the Act itself is clear on which days are excluded. Furthermore, Chief Justice Douglas in the case of Brathwaite v Edwards (1967) 11 WIR 475 expressly declined to rely on the Interpretation Act in computing time under the Barbados election law when a similar argument was advanced. This Court is thus compelled to reject the Petitioner's argument for this court to rely on the Interpretation Act in computing the relevant days.

[11] The return presented by the returning officer was presented on December 13, 2022. 21 days from December 14, 2022 meant that once the 25th (Christmas Day), 26th and 27th (bank holidays) of December 2022 and the 1st, 2nd and 3rd of January 2023 (bank holidays) were excluded from the count, the 21 day period for the valid presentation of the Caines petition expired on Monday January 9th, 2023.

[12] This Court finds that the Caines petition was filed on January 10th, 2023 and not within the 21 day period prescribed for doing so. The Caines petition is thus a nullity and is struck out and dismissed.

[13] This Court notes that no evidence was advanced by counsel for the Petitioner Caines to explain why their petition, by their own arithmetic, was filed on the last possible day for doing so. This Court has no jurisdiction to extend the time for the filing of an election petition but in this Court's view it behooved the Petitioner (Caines) to proffer some explanation to the general public (in these proceedings) as to why their petition was filed so late. Election petitions are matters of significant public interest and the fact that the Caines petition was filed 4 days after the Bartlette petition has not escaped this court's attention particularly since both petitioners appear to belong to the same political party. The Caines petition being filed at the 11th hour ran the risk of succumbing to the Respondent's challenge. Future election petitioners would do well to avoid this risk by filing as soon as is reasonably practicable.

The Bartlette Petition

[14] The following facts are agreed.

- The Bartlette Petition was filed on Friday January 6th, 2023
- Security for Costs for the Bartlette petition was given by a recognizance on Monday January 9th, 2023.

- On January 13th, 2023 the Bartlette petition and an authorization code was served on the offices of the 6th named Respondent and on the 1st to 5th Respondent on divers dates in early January 2023

- On January 13th, 2023 the recognizance dated January 9th, 2023 was filed on the Electronic Litigation Portal ("the ELP") by Dr. Bartlette's lawyers.

- On January 19th, 2023 a Notice of Presentation of Petition was filed on the ELP by Dr. Bartlette's lawyers.

[15] The arguments for the 6th named Respondent were adopted by counsel for the other Respondents and can be summarized as follows. Rule 8(1) of the Election Rules provides that:

> *"The Petitioner shall serve a petition on the respondent by delivering a Notice of presentation of the petition together with a copy of the petition to the respondent personally within ten days after the presentation of the petition"*

[16] Rule 9(4) of the Election Rules provides that:

> *"Within three days after the giving of security as required by this Rule, notice of the nature of the security given shall be served by the Petitioner on the Respondent"*

[17] Everyone is agreed that while the Petitioner Dr. Bartlette did serve the Respondents with a copy of the petition, the Respondents were not personally served with a notice of presentation of the petition since a copy of this notice was filed on the ELP on January 19th, 2023.

[18] Everyone was agreed, including counsel for Dr. Bartlette, that the failure to strictly comply with the requirements of the Act and Election Rules meant that the court's jurisdiction to strike out a petition was engaged. The wealth of legal authority, both regional, local and from the highest appellate courts, confirm as much. These authorities are legion and are cited without more. See SKBHCV2010/0020 – Cedric Liburd v Eugene Hamilton and others; Williams v Mayor of Tenby [1879] 5. C.P. 135; Nair v Teik; Allen v Wright (No. 2) [1960] 2 W.I.R. 102; Sabga v Solomon (1963) 5 W.I.R. 66; Stevens v Walwyn and another (1967) 12 W.I.R. 5; St John Payne v Petty, McLachlan and Jones - Suit No. 19 of 1984 (St Kitts and Nevis). BVIHCV 2002/0097 – Ethlyn Smith v Christopher and the Supervisor of Elections; DOMHCV2005/0149 – Ferdinand Frampton v Ian Pinard; Quinn-Leandro v Jonas et al (2010) 78 W.I.R. 216

[19] Everyone is also agreed that the Civil Procedure Rules did not apply to election petitions. Everyone agrees that there is no shortage of High Court and appellate authority to this effect. See Ethlyn Smith v Christopher and the Supervisor of Elections; ANUHCV 2009/0147 – Daven Joseph v Chandler Codrington; SLUCHVAP 2012/0014 - Ezechiel Joseph and others v Alvina Reynolds and others

[20] Counsel for the Petitioner Dr. Bartlette conceded, albeit with some reluctance, that there was no physical service of the notice of presentation of the petition nor of the notice of security. Furthermore, counsel accepted the authorities confirmed that the requirement for service was mandatory and

peremptory and that noncompliance with these requirements meant that Dr. Bartlette's petition was liable to be struck out if noncompliance was proved.

[21] In this Court's view, counsel's tacit concession puts an end to any argument by Dr. Bartlette to the contrary. The failure to physically serve the notice of presentation of the petition and the notice of security is fatal to the validity of the Bartlette petition. Chief Justice Rawlins at paragraphs 20-21 of his judgment in Quinn-Leandro v Jonas et al (2010) 78 WIR 216 stated:

> *"In keeping with the strict approach, our courts have generally insisted that the provisions in elections legislation must be strictly complied with because the paramount public interest is that elections petition challenges should be determined as quickly as possible so that the assembly and the electors should know their rights at the earliest possible time. Our election courts have consistently stated that they have little or no discretion to waive noncompliance with the applicable statutory requirements. Accordingly, the consistent result is that failure to comply is fatal to the petition rendering it a nullity, unless the court finds that the failure goes to form. The jurisprudence in our courts states that time and other electoral proceedings statutory requirements are conditions precedent to instituting a proper electoral challenge which are mandatory and peremptory. The election court has no power to extend time or allow amendments filed out of time unless election legislation so provides. It was on the foregoing basis that the Dominica election court stated in Ferdinand Frampton and others v Ian Pinard and others that a petitioner must file and perfect the petition within the time limited in the legislation for the presentation of the petition. The Petitioner must enter security for costs in the manner and within the time prescribed. A petition must be served within the time prescribed."*

[22] Rule 8(1) of the Election Rules requires personal service of the petition and the notice of presentation of the petition on the Respondents. There is no scope for an argument that the mandatory requirements of Rule 8(1) are matters of form nor is there any scope for a bifurcation of the need to personally serve the petition from the need to give notice of the presentation of the petition. The reasoning of Chief Justice Rawlins is clear, these matters cumulatively fall within the ambit of perfecting the petition. An imperfect petition is a nullity and it is telling that no authority was cited in argument on what imperfections go to form and which go to substance.

[23] Even if were arguable that filing on the ELP amounted to service, January 19th is not within 10 days after the petition was presented on January 6th, 2023. Therefore, even by their own documents, the notice of presentation of the Bartlette petition was not served in time. By the same token, the notice of Dr. Bartlette's security was filed on the ELP on January 13th, 2023, outside of the 3 day period, prescribed for doing so. It is significant that January 9th to 13th were all week days and as such it was open to Dr. Bartlette's lawyers to take every possible step to ensure that they had complied with the strict requirements of the Act and Rules.

[24] The reasoning of Mr. Lord Justice Laws (as he then was) in Absalom v Gillett [1995] 1 WLR. 128, at page 138 on the ambit of the discretion to grant relief is instructive:

> *"We greatly doubt whether the public interest in the speedy determination of election disputes – an interest which we readily acknowledge – requires so draconian a regime as regards time for service as that created by rule 19 of the Election Petition Rules 1960. We*

should have thought that there should be some scope for some limited judicial discretion to extend time though no doubt it would be sparingly exercised and only if very good cause were shown. But that is not the present position. Given the present state of the law the application to strike out must succeed."

[25] Lord Justice Laws' view that even if such a discretion existed it could only be sparingly exercised and only for a very good reason is instructive. The consequence that a petition would not be heard on its merits would not in and of itself amount to a very good reason because that is the consequence of a striking out. Dr. Bartlette's lawyers have not advanced any special circumstances or reasons to justify the exercise of any such discretion in their client's favour. This Court is thus compelled to find that Dr. Bartlette's petition is struck out for non-compliance with Rules 8(1) and 9(4) of the Rules.

Miller v Bull

[26] This Court drew the attention of the parties to the authority of Miller v Bull [2009] EWHC 2640 (QB). Dr. Dorsett utilized the luncheon adjournment to fully digest Miller v Bull and constructed an attractive and engaging argument along the lines of Miller and Bull in his attempt to persuade this Court to find for Ms. Caines.

[27] In Miller v Bull, Mr. Justice Tugendhat found that Rule 19 of the 1960 Election Petition Rules was a disproportionate measure and incompatible with Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 3 provided for a right to free elections. In Justice Tugendhat's view, striking out a petition for a failure to serve notice of security when there had been compliance with all of the other requirements of the elections law was subject to the court's power to give relief from sanctions. In his reasoned view, there were no circumstances that would weigh against granting relief and he extended the time for service of the notice of security.

[28] Dr. Dorsett transposed Miller v Bull into the present facts and argued that while there was no analogous provision to Article 3 of the First Protocol, Article 3 (a) of Chapter 2 of the Saint Christopher and Nevis Constitution which provided for the right to protection of the law was wide enough to subsume Article 3 of the First Protocol. Dr. Dorsett argued that filing on the ELP was good service and that Rule 13 of ELP's Rules which provided that "*unless a rule of the court or an order provides otherwise, a document that is required to be served whether personally or by other means may be served by electronic means."*

[29] In his reply, Mr. Astaphan SC helpfully drew the Court's attention to Rule 13(2) of the ELP's Rules which provides that "*unless the Court or an enactment requires otherwise, a document filed using the Electronic Litigation Portal that is required to be served must be served by the relevant party and not the Court*." Mr. Astaphan SC submitted that Rule 13(2) means that the Act clearly required Dr. Dorsett's client to serve the document instead of relying on the deeming service provisions of Rule 13 of the ELP's Rules.

[30] Secondly, Mr. Astaphan SC submitted that the Court of Appeal[2] in the St Lucian case of HCVAP 2012/0014 - Joseph v Reynolds; Montoute v Hippolyte had expressly considered and distinguished the case of Miller v Bull. Thirdly, Mr. Astaphan SC submitted that there was no constitutional motion

[2] Chief Justice Rawlins delivered the judgment in this matter as well.

before the Court in these proceedings which contended that Rules 8 and 9 were disproportionate interferences with Ms. Caines' constitutional right to protection of the law.

[31] This Court agrees with Mr. Astaphan's submissions for the following reasons. It is clear that the ELP Rules cannot apply if there was an Act that required otherwise. Clearly, the National Assembly Elections Act required personal service of the petition and notice of presentation of the petition. While it is arguable that Rule 9(4) of the Rules did not mandate personal service of the notice of the nature of the security, the Caines notice of the nature of the security was not filed on the ELP within the prescribed time frame.

[32] More importantly, Miller v Bull was considered in argument by the Court of Appeal in Joseph v Reynolds; Montoute v Hippolyte and distinguished. In Joseph v Reynolds; Montoute v Hippolyte the Court of Appeal held that except for matters of form an election petitioner cannot rely on the CPR to vary, modify or perfect the petition. Miller v Bull is also distinguishable on the following grounds. In Miller v Bull, none of the parties objected to the argument for an extension made by the Applicant. In view of their stance, there could be no successful appeal of Justice Tugendhat's order and as such there is no appellate authority on the point decided by him. The doctrine of judicial precedent means that this Court is obliged to follow the reasoning of the Eastern Caribbean Court of Appeal.

[33] Finally, Mr. Astaphan SC's argument that there no constitutional motion impugning Rules 8 and 9 is significant. Dr. Dorsett sought to build a legal argument on an authority that had been supplied to him by the Court. No application to adjourn the hearing to file such a constitutional motion was made. In those circumstances, Dr. Dorsett's attractively argued submissions on this point must fail.

Costs

[34] On the issue of costs, the factual chronology is significant. The petitions were filed on January 6th and 10th, 2023. The Caines petition was a nullity from the outset. The Respondents made it clear to the Petitioners why they were arguing that their petitions should be struck out. It is telling that the 1st Respondent's respective strike out applications were filed on the ELP at 12:25 pm and 2:09 pm on January 20th, 2023.

[35] The Caines notice of presentation of the petition and nature of security were filed on the ELP on January 20th, 2023 at 3:38 pm. The inescapable inference is that counsel for Ms. Caines were only prompted to remedy their evident defaults when the strike out applications came to their attention.

[36] The Bartlette position is difficult to understand. Counsel for Ms. Bartlette only conceded that the law was against him after the luncheon adjournment in the hearing of this matter. No recent authority was drawn to his attention which necessitated a sudden change of course. There was no evidence before the Court as to why Mr. Nisbett's (Patrice) Damascene conversion came so late in day. In the absence of that evidence this Court cannot properly exercise its discretion in Dr. Bartlette's favour on costs. The obvious inference that can be drawn is that Dr. Bartlette persisted in a position that her lawyers recognized was unsustainable as a matter of law.

[37] Prospective election petitioners would do well to advise themselves of the reasoning of Justice Ward (as he then was) in the case of SKBHCV2020/0110 – Dr. Terence Drew v Eugene Hamilton. In that case, petitioners who had belatedly withdrawn their petition before a trial of the petitions were

condemned in costs. This Court adopts Justice Ward's summary of the law on costs at paragraph 60 of his judgment. Simply put, costs follow the event unless there are some special circumstances that justify the making of a different order. No special circumstances have been advanced before this Court to justify a departure from the usual order.

[38] Significantly, this Court on January 30th, 2023 and again at the start of the hearing on February 15th, 2023 inquired of the parties as to their position on costs. Counsel and their clients were afforded an opportunity to discuss and ventilate the issue of costs with their clients in the absence of the general public. This court has taken into account the significant public interest in these proceedings and is of the view that it would be inappropriate to make no order as to costs.

[39] The decision to condemn the petitioners in costs is not meant to discourage future election petitioners but this Court can do no better than quote Mr. Justice Ward to the following effect:

> *"A petitioner who contemplates presenting a petition must therefore be astute to ensure that they acquaint themselves with the strict requirements of the election law. It is by now notorious that fastidious compliance with time strictures for presenting and perfecting election petitions is an uncompromising requirement, the non-observance of which will render an election petition stillborn. It behooves a petitioner to fasten an eye on the clock when presenting a petition."*

[40] Accordingly, the order of the court is that the petitioners shall pay the costs of the respondents, such costs to be assessed by this court, if not agreed.

Patrick Thompson Jr
Resident High Court Judge

BY THE COURT

REGISTRAR