

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

V.

CIVIL ACTION NO. 2024-0021(CM)(L)

TATE REEVES, ET AL

ORDER AND OPINION

THIS MATTER is before the Court on Petitioner's Complaint for Declaratory Relief against the Governor of the State of Mississippi, and for a Preliminary and Permanent Injunction and/or Writ of Mandamus against the Leflore County Election Commission. Petitioner, Johnny Gary [herein "Gary"] specifically seeks (1) a declaration that the Writ of Election issued by Mississippi Governor Tate Reeves [herein, "the Governor"] is null and void because (a) it does not set the special election for Chancery Clerk, a county office, on the statutory "regular special election day" as designated in *Miss Code Ann. § 23-15-833*; (b) it sets a special election in contravention of the notice required by *Miss. Code Ann. §23-15-835* and (2) to enjoin the Leflore County Election Commissioners from conducting the special election on April 16, 2024 for the foregoing reasons. The Court, having considered the filings of the parties, argument of counsel, and being otherwise advised, finds specifically as follows:

Summary of Facts and Procedural History

Gary, the incumbent, was certified the winner of the August 7, 2023 Leflore County Democratic Party primary election for the office of Chancery Clerk of Leflore County. The election was contested. A five (5) day trial was held in October 2023. Consistent with statutory authority, the general election was held and Gary, the winner of that contest, was sworn into office in January 2024 pending a ruling on the election contest. *Miss*

Code Ann. §23-15-937. On February 15, 2024, the Special Circuit Judge, Honorable Jess Dickinson, sitting by designation of the Mississippi Supreme Court, entered a Final Judgment setting aside the results of the primary and general election and ordered “a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor.” *Debra Tate Hibbler vs. Johnny Lee Gary, Jr.* Civil Action No. 2023-0071 (February 15, 2024) The election contest was not appealed.

On March 6, 2024, the Governor issued a Writ of Election setting the special election for April 16, 2024 which is forty-one (41) days after the writ was issued. The Governor’s Writ of Election also specifically mandated that notice of the special election be given in a manner consistent with *Miss. Code Ann. §23-15-835* and Mississippi laws governing special elections. The Writ also provided that all relevant laws not in conflict with the terms of the Writ shall apply to the special election.

On March 20, 2024, Gary filed the instant Complaint seeking declaratory and injunctive relief. Gary specifically requests that this Court find that the Governor’s Writ of Election sets a special election in contravention of *Miss. Code Ann. §23-15-833* and *§23-15-835*. On March 21, 2024, the Governor filed a Motion to Transfer to Special Judge or Consolidate. The Governor also filed a Motion to Dismiss on March 26, 2024 asserting that the statutory authority Gary relies on is inapplicable because there is no vacancy in the office of Chancery Clerk. At the March 28, 2024 hearing in this matter, the Governor conceded that this Court has jurisdiction to consider the merits of Gary’s Complaint. The Court denied the request to transfer or consolidate.

Legal Analysis

Mississippi law is clear that as long as the Governor acts within the limits of the power conferred upon him by the Constitution and the laws, he is not subject to control by the courts. *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 239–41 (Miss. 2008). However, no Governor, or for that matter, any governmental official, can exercise power beyond their constitutional authority. *Id.* See also, *Fordice v. Bryan*, 651 So.2d 998, 1003 (Miss.1995). This Court acknowledges Mississippi's long standing precedents regarding the Constitution's clear mandate related to separation of powers and recognizes that its role is limited only to consideration of whether the Governor's Writ of Election contravenes *Miss. Code Ann.* §23-15-833 and §23-15-835 in a legally impermissible manner. See *Barbour vs. State*, 974 So. 2d 232, 239 (Miss. 2008).

The Governor's Writ of Election does not violate Miss. Code Ann. §23-15-833.

In this case, a special judge ruling in an election contest, set aside and vacated the August 8, 2023 Democratic Primary for Chancery Clerk of Leflore County. The special judge also ordered that a special election be held at a date set by the Governor. Only the two original candidates at the vacated primary election will participate. Notably, after this Election Contest was filed and during its pendency, Plaintiff Gary, the incumbent, won the general election and entered a new term of office in January 2024.

Pursuant to *Miss. Code Ann.* §23-15-937, the Governor called a special election for the office of the Chancery Clerk of Leflore County. By law, Gary is allowed to continue to serve until the winner of the special election is qualified to take office. *Id.* See *Parks v. Horton*, 299 So.3d 777 (Miss. 2020). Hence, Gary is the lawful office holder pending the outcome of the special election. The office of Chancery Clerk of Leflore County is not

currently vacant. See *Parks* at 781. Although the primary election in this case is vacated and the special election herein is to fill the permanent position or term, this court must follow the Mississippi Supreme Court's directive on whether a vacancy exists under the current circumstances. This court finds, therefore, that since the Chancery Clerk's position is not vacant, the Governor could have, but was not legally required to set the election herein on the regular special election day in November 2024 as described in §23-25-833.¹

The Writ of Election is ambiguous, inconsistent and fails to give the Election Commission a clear directive.

The Governor's Writ of Election declares that a special election be held in accordance with the Circuit Court's Final Judgment issued in the election contest. It specifically provides that the special election is to be held on the April 16, 2024. The Writ also mandates that notice of the election is to be given consistent with *Miss. Code Ann.* §23-15-835. Section 23-15-835 requires the county election commissioners, upon receipt of the writ of election, to immediately give notice of the special election ninety (90) days before the election. This cannot be done when the election is set to occur only forty-one (41) days after the writ is issued. The language and requirements of §23-15-835 are clear. Notice requirements provide the election commissioners and circuit clerk adequate

¹ *Miss. Code Ann.* §23-15-937 authorizes the Governor to call a special election pursuant to a final judgment of an election contest. *Miss. Code Ann.* §§23-15-833 and 23-15-835 provide directions on the time frame to conduct a special election. Generally, the first Tuesday after the first Monday in November of each year is designated as the regular special election day upon which an election is held to fill any vacancy in county offices. *Miss. Code Ann.* §23-15-833. (Rev. 2017)

Although the Governor was authorized to set the special election in accordance with §23-15-833, he chose not to follow this statute.

time to prepare to conduct a special election, including time for processing absentee ballots. See *Miss. Code Ann. 23-15-715*. This provision also ensures that the public receives timely notice of the special election and a full opportunity to participate, including the right to vote by absentee ballot.

The Governor's authority to issue a Writ of Election must be exercised in conformity with the body of election laws governing and relevant to special elections. Cf. *Moore vs. Parker*, 962 So 2d 558 (Miss. 2007) (*Governor to call municipal special election pursuant to specific authorizing statute "and other applicable law governing municipal special elections"*.) (*Emphasis added*). The legislature provides for adequate notice in special elections. §23-15-835 clearly sets out a methodology for what the legislature deems to be adequate notice. It tells how, where and when said notice is to be given. *Id.* Compliance with its terms can only be achieved when a special election occurs at least ninety (90) days after the Writ of Election is issued.

The fact that a county position is filled by an election that is subsequently vacated in an election contest, requiring a special election under §23-25-937 has no bearing on the notice to be given at the election. The Governor acknowledged this by mandating compliance with §23-15-835 in the Writ of Election. The voters in this election, like all county special elections to determine who will complete an unexpired term, are entitled to the same ninety (90) day notice. The Writ of Election, by setting April 16, 2024 as the date for the special election, directly contravenes the ninety (90) day notice requirement under §23-15-835. Accordingly, the court finds that the Writ of Election exceeds the Governor's statutory authority.

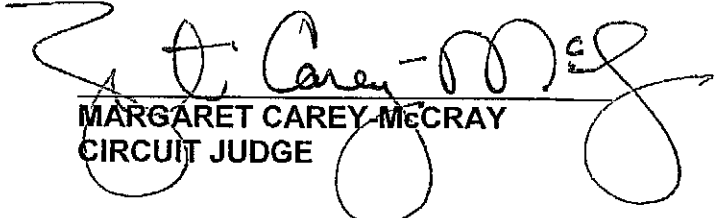
Additionally, the Governor's Writ of Election is inconsistent on its face. It requires the special election to be held only forty-one (41) days before the election while also requiring notice to be given consistent with §24-15-835. This is ambiguous, inconsistent, impossible and is not a clear directive to the election commissioners concerning an April 16, 2024 election.

The Court finding that the Governor's Writ of Election to the Election Commissioners of Leflore County herein is ambiguous, contravenes §23-15-835 and fails to provide a clear directive, DECLARES said Writ of Election to be null and void.

IT IS THEREFORE ORDERED that the Election Commission of Leflore County is hereby enjoined from conducting a special election for Leflore County Chancery Clerk under the current Writ of Election.

IT IS FURTHER ORDERED AND ADJUDGED that the Governor's Motion to Dismiss is **DENIED**.

SO ORDERED this the 5th day of April 2024.


MARGARET CAREY-MCCRAY
CIRCUIT JUDGE

FILED
LEFLORE COUNTY

APR 08 2024

KELLY H. ROBERTS, CIRCUIT CLERK

BY  D.C.