IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND, NEW ZEALAND

CA9/04

BETWEEN NORMAN GEORGE

Appellant

AND EUGENE TATUAVA

Respondent

Hearing: 11 November 2004 (at Auckland)

Coram: Barker JA (Presiding)
Henry JA
Smellie JA

Counsel: Mr JB Samuel for the Appellant
Mr TC Weston QC for the Respondent

Judgment: November 2004

JUDGMENT OF THE COURT

Solicitors: *N George, Avarua for Appellant*
Charles Little, Avarua for Respondent

[1] The appellant, Mr George, was declared the unsuccessful candidate for the constituency of Atiu at the General Election conducted on 7 September 2004. The respondent was the successful candidate.

[2] By petition pursuant to s 92 of the Electoral Act 2004 (the Act), filed within the seven-day period specified in s 92(1), the appellant petitioned the High Court for an inquiry into the conduct of the election. Despite the time constraint, the petition was comprehensive: it alleged in some detail infractions of sections 89(a) and (d), 84(1)(a)(ii) and 85 of the Act by the respondent or persons on his behalf. It also alleged errors and omissions made by the Returning Officer who was named as the second respondent. In broad terms, the petition alleged the unlawful treating of some electors and the intimidation of others, plus inflammatory and/or defamatory statements made about the appellant in documents, cartoons and photographs shown in public view and in the media.

[3] The petition came on for hearing in the High Court before Hingston J. The learned Judge sat both in Atiu and Auarua. He heard a considerable volume of evidence relating to the allegations made in the petition. On 11 October 2004, he delivered a judgment rejecting all the complaints made by the appellant. His judgment was clearly based on his having seen and heard the witnesses. He stated that he would be strict over admissibility of evidence because any finding of corrupt treating etc had to be referred to the Commissioner of Police in terms of s 100 of the Act. The Judge found no corrupt treating or other proscribed behaviour. Any irregularities regarding election procedures did not compromise the result of the election. The appellant had not been defamed. Whilst there was a regrettable incident involving two school girls, there was nothing in the conduct of the person guilty of that infraction which would affect the electoral position of the respondent.

[4] The Judge also recorded his view that there was no impropriety established by the respondent against the appellant. The Judge noted that a petition complaining about the appellant's conduct was struck out because no grounds had been established.

[5] At a later date, which has not been established, according to counsel for the appellant, the learned Judge orally granted leave to appeal to the appellant. This Court, sitting in Auckland, has no record of any written application for leave to appeal or of any minute by the Judge. According to the instructions given to counsel for the appellant, the appellant was one of several counsel involved in the various election petitions who were seeing the Judge in Chambers when he granted to all leave to appeal in several petitions. However, counsel for the respondent in the present case, Mr Little, was not present at this meeting, although counsel for the Returning Officer was.

[6] We find the situation quite unsatisfactory if the Judge granted leave to appeal other than by consent without enquiring as to the attitude of counsel for the respondent. Such applications must always be made on notice: any respondent can have justifiable concerns on matters such as security for costs and that the conduct of the appeal in an expeditious manner. If what we were told from the bar is correct, there was no apparent involvement of the respondents in the application to appeal.

[7] However, there is a much more serious problem arising out of the appeal provisions relating to election petitions. Section 102(2) of the Act reads as follows:

> "Notwithstanding subsection (1) of this section, the Chief Registrar shall ensure that each Registrar of a district to which that subsection applies has available to him or her, until the roll for that district ceases to be in force, all information necessary to enable him or her to bring his or her roll up to date in the event of a by-election in that district (which information may include or consist of photocopies of original documents)."

[8] From this subsection, it is clear that any appeal from a decision of the High Court of an election petition is limited to an appeal on a question of law. The appeal must be by way of case stated. This was the way in which two other appeals were dealt with by the Court at the present session (Nos CA7/04 and CA8/04) were initiated.

[9] Although we were informed by counsel that there is no provision regarding cases stated in the relevant rules of the Court, this particular mode of appeal is well known in English and New Zealand law. The whole area of law in this regard is well

summarised by Fisher J in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76.

[10] That case makes the following matters clear.

[a] It is the responsibility of the Judge to record the facts as found by him and to articulate the questions of law for the opinion of the appellate Court.

[b] Normally it is for counsel to confer on the form of the case stated. If counsel cannot agree, it is the duty of the Judge to settle the case stated.

[c] It is not sufficient for the Judge merely to annex the notes of evidence to the case stated and leave it to the appellate Court to try and resolve the matter.

[d] If there is a conflict of evidence or if some of the evidence has not been accepted by the tribunal determining the facts, such evidence is irrelevant to the appeal and should not be included: see *Conroy v Patterson* [1965] NZLR 790, 791.

[11] In this present case there was just no case stated.

[12] The Returning Officer was not apparently joined in the appeal. Certainly he did not appear through counsel at the present appeal, as occurred in the other election appeals heard by the Court in this session. In *Re Wellington Central Election Petition* [1973] 2 NZLR 470, 477, the Full Court of the then Supreme Court of New Zealand indicated that the Returning Officer should, as a matter of practice, be joined in an election petition as a party. Failure to join is an irregularity but is not necessarily fatal.

[13] The Court is therefore of the opinion that it has no jurisdiction to consider this appeal because there has been no case stated by the Judge which sets out his

findings of fact and articulates the questions to be answered by this Court. No other form of appeal is permitted by the statute.

[14] Counsel for the appellant (who was instructed at short notice) prepared a number of questions which he said were questions of law arising out of the Judge's decision. We are unable to agree. The whole appeal exercise seemed to be an attempt to dress up findings of fact as findings of law. There can be no appeal against a finding of fact on an election petition. The Judge saw and heard the witnesses and was quite clear in his finding that there was no factual justification for any of the grounds stated in the petition.

[15] The only matter which even approached a question of law was whether the Judge had applied the correct standard of proof where criminal conduct was alleged. The Judge rightly said that he was going to consider strictly allegations on criminal conduct, particularly when he was under a duty to report any criminal conduct discovered to the Commissioner of Police. He correctly adopted the standard of proof laid down by Donne CJ in *Re Mitiaro Election Petition* [1979] 1 NZLR S1 and not the New Zealand case of *Re Wairau Election* [1919] NZLR 489 which seemed to apply the criminal standard. Where criminal conduct is alleged in civil proceedings, the civil standard of proof on the balance of probabilities is still appropriate, although the Court must have regard to the gravity of matters to proved in assessing that standard of proof.

[16] Regardless of these difficulties which face the appellants, there is no jurisdiction to deal with this appeal which is dismissed. The respondent is entitled to costs in the sum of $1,000 plus disbursements as fixed by the Registrar.

Barker JA Henry JA Smellie JA