IN THE COURT OF APPEAL
HELD AT RAROTONGA

MISC NO. 38/14
CA NO. 15/14

IN THE MATTER	of Section 102 of the Electoral Act 2004
AND	
IN THE MATTER	of the Constituency of Mitiaro
AND	
IN THE MATTER	of an Election of Members of Parliament of the Cook Islands held on 9th July 2014
BETWEEN	**TANGATAPOTO TUAKEU** of Mitiaro, Candidate Appellant
AND	**VAVIA TANGATA** of Mitiaro, Candidate First Respondent
AND	**CHIEF ELECTORAL OFFFICER** Second Respondent

Coram: David Williams P
Barker JA
Paterson JA

Counsel: Mr P David QC and Mr I Hikaka for Appellant
Mr P.J Dale and Mr A.M Manarangi for First Respondent
Ms Catherine Evans for Second Respondent

Hearing: 17 November 2014
Judgment: 21 November 2014

JUDGMENT

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1. This appeal – by way of case stated – is made under section 102(2) of the Electoral Act 2004 ("the Act"). It is against a decision of Weston CJ given in the High Court on 18 September 2014. The Chief Justice dismissed a petition filed on 24 July 2014 concerning the election for the constituency of Mitiaro brought by the Appellant. He held that, once that petition had been withdrawn on the application of the Appellant with the leave of the Court, there could be no consideration of a notice of opposition and a "counter-petition" brought by the First Respondent on 6 August 2014.

2. Before the petition was withdrawn by the First Respondent, counsel for the First Respondent had sought an assurance from the Judge that, once leave to withdraw had been granted, the 'counter-petition' could have no independent life and should be dismissed. The Judge agreed with counsel and made the order sought.

3. At the time of the Judge's decision, the votes for the electorate of Mitiaro were evenly divided between the Appellant and the First Respondent. The Chief Justice therefore ordered a by-election as required by section 81 of the Act in such circumstances. That by-election has now been held but the votes have not been counted. No declaration of poll has been made by the Returning Officer. The making of any such declaration is dependent on the outcome of this appeal.

4. The questions for decision are:

    a. Does this Court have jurisdiction to consider this appeal, should it be an appeal from an order because of in section 58(5)(d) of the Judicature Act 1980-81.

    b. Can a 'counter-petition' brought pursuant to section 92(4) of the Act be considered by the High Court sitting as an Electoral Court given the original petition has been withdrawn?

5. The following sections of the Act fall for consideration:

> 92. Election petitions − (1) Where any candidate or five electors are dissatisfied with the result of any election held in the constituency for which that candidate is nominated, or in which those electors are registered, they may, within seven days after the declaration of the results of the poll by the Chief Electoral Officer by petition filed in the Court demand an inquiry into the conduct of the election or any candidate or other person thereat.
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> (2) Every petition shall be accompanied by a filing fee of $1,000.
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> (3) The petition shall be in Form 14 and shall be heard and determined before a Judge of the Court.
>
> (4) The petition shall allege the specific grounds on which the complaint is founded, and no grounds other than those stated shall be investigated except by leave of the Court and upon reasonable notice being given, which leave may be given on such terms and conditions as the Court deems just: Provided that evidence may be given to prove that the election of any

unsuccessful candidate would be invalid in the same manner as if the petition had complained of his or her election.

[…]

94. Candidate may oppose petition − Any candidate or other interested party (if any) may, at any time before the commencement of the inquiry, file in the Court a notice in writing of his or her intention to oppose the petition, and thereupon the candidate or other interested party (if any) shall be deemed to be a party to the petition.

[…]

96. Jurisdiction on inquiry − (1) Subject to this Act, the Court shall have jurisdiction to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit.

(2) For the purpose of the inquiry, the Court shall have and may exercise all the powers of citing parties, compelling evidence, adjourning from time to time and from place to place, and maintaining order that the Court would have in its civil jurisdiction, and, in addition, may at any time during the inquiry direct a recount or scrutiny of the votes given at the election.

(3) Notwithstanding subsection (1), no petition may be filed or inquired into on the grounds that any person's name was or was not on a roll by reason of the presence or absence of that person in or from a particular constituency.

97. Certain irregularities to be disregarded − No election shall be declared void by reason of any irregularity in any of the proceedings preliminary to the polling or by reason of any failure to hold a poll at any place appointed for holding a poll, or to comply with the directions provided under this Act as to the taking of the poll or the counting of the votes or by reason of any mistake, in the use of the forms provided under this Act**,** or failure to comply with the times prescribed for doing any act**,** if it appears to the Court that the election was conducted in accordance with the principles laid down in and by this Act and that the irregularity, failure or mistake did not affect the result of the poll.

98. Result of inquiry - (1) Without limiting the Court's powers under section 96(1), where a candidate who has been elected at any election is found at the hearing of an election petition to have committed any corrupt practice at the election, that candidate's election shall be void.

(2) Where it is found by the Court at the hearing of an election petition that corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidates thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the candidate's election shall be void.

(3) Where at the hearing of an election petition claiming the seat for any person, a candidate is found by the Court to have committed bribery, treating or undue influence in respect of any person who voted at the election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been received by the candidate, the vote of every person who voted at the election and has been proved to have been so bribed, treated or unduly influenced.

99. Real justice to be observed – At the hearing of any election petition the Court shall be guided by the substantial merits and justice of the case and the Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Court.

100. Report to police − Where on any inquiry conducted under this Part the Court is of the opinion that any –

(a) electoral offence; or

(b) corrupt practice; or

(c) wilful irregularity, has been committed by any person, the Court shall refer the matter to the Commissioner of Police.

[…]

102. Decision of Court to be final − (1) Every determination or order by the Court in respect of or in connection with any proceedings under sections 28, 34, or 79 , or in respect of or in connection with an election petition shall be final and conclusive and without appeal.

(2) Notwithstanding the provisions of subsection (1), where any party to any proceeding to which this section applies is dissatisfied with any decision of the Court as being erroneous in any point of law, that party may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law only.

(3) In its determination of the appeal, the Court of Appeal may confirm, modify or reverse the decision appealed against or any part of that decision.

(4) Notice of appeal shall not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Court or the Court of Appeal so orders.

(5) The determination of the Court of Appeal on any appeal to which this section applies shall be final and conclusive and without further appeal.

103. Court of Appeal may refer appeals back for reconsideration − (1) Notwithstanding anything in section 102, the Court of Appeal may, instead of determining the appeal to which section 102 applies, direct the Court to

reconsider, either generally or in respect of any specified matter, the whole or any specific part of the matter to which the appeal relates.

(2) In giving any direction under this section the Court of Appeal shall -

(a) advise the Court of its reasons for so doing; and

(b) give to the Court such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that is referred back for rehearing or reconsideration.

(3) In rehearing or reconsidering any matter referred back to it pursuant to this section, the Court shall have regard to the Court of Appeal's reasons for giving a direction under subsection (1), and the Court of Appeal's directions under subsection (2).

Jurisdiction to Hear Appeal

6. Counsel for the First Respondent submitted that the Act's provisions relating to appeals trumped the general provision in section 58(5) of the Judicature Act which prohibits appeals against interlocutory orders. Counsel pointed to the special nature of an Electoral Court where the High Court is not acting in its usual role as arbiter of civil actions, but is a delegate of Parliament to regulate Parliament's membership. The Court was given reference to a helpful historical discussion on the development of the electoral jurisdiction found *in R (ex parte Woolas) v The Parliamentary Election Court* [2010] EWHC 3168 (Admin.).

7. Counsel for the Appellant submitted that the order of the Chief Justice which is the subject of the appeal was a 'final' order and that the Judicature Act provision did not apply. Counsel referred to the differing views on the meaning of 'final' and 'interlocutory' orders which were discussed extensively in the judgment of the New Zealand Court of Appeal in *Matthews Corporation Ltd v Edward Lumley and Sons (NZ Ltd)* (1994) 7 PRNZ 591.

8. The Court cannot accept that section 58(5) of the Judicature Act does not apply to appeals under the Electoral Act. Section 58(5) is designed to prevent frivolous appeals which can be utilised tactically to delay trials. The provision has general application to civil appeals of all sorts, including election appeals. The subsection has a list of exceptions which can easily be, added, to by Rules of Court (see section 58(5)(d)(vi)). Moreover, there is the safety-net found in the power of the Court to give leave to appeal under Article 60(2) of the Constitution in cases of public importance. Had the Court not been of the view that the order of the Chief Justice in this case were not a 'final' one, then the Court would have granted leave to appeal under that provision.

9. The Court has no hesitation in ruling that the order of the Chief Justice was a 'final' order. It made a definitive ruling finally disposing of the proceedings before the Court. This Court is not bound by any of the authorities on either viewpoint on the meaning of 'final' order. It acknowledges that there is powerful authority either way

10. For the sake of certainty, the Court rules that in the Cook Islands, a 'final' order – as opposed to an interlocutory order – is as articulated by Fisher J in the *Matthews* case as follows, at pp 602-604:

> The reasons for circumscribing interlocutory orders in that way are not hard to discern. First, there is the importance of the result to the parties. If a decision does not finally determine the substantive rights of the parties, they live to fight another day. To lose the interlocutory battle is not to lose the substantive war. Conversely, if the decision finally disposes of the substantive rights of the parties the outcome is critical to them. Subject to monetary minimums, the latter justifies appeals as of right and more time within which to consider one.
>
> A second factor is the difficulty there would be in justifying a limitation upon appeal rights in circumstances where the distinction between a final and an interlocutory order turns upon a purely arbitrary choice in the procedural vehicle by which the issue had come before the Court. The question whether the facts pleaded in a plaintiff's statement of claim constitute a good cause of action in law can be argued in the context of either a preliminary application to strike out or in the context of a substantive trial. The same applies to many other substantive issues which might be argued as preliminary questions before trial, as one of the early segments in a split trial, or as part of a single comprehensive trial. A party should not be deprived of a right of appeal solely beca use a trial is divided into parts. As was pointed out in *Strathmore* (at p 388; pp 428, 429), the purpose of these preliminary applications is to save time and money, not to deprive a party of an opportunity to appeal as of right nor, one might add, to have ample time within which to decide whether to appeal. The parties should not be discouraged from pursuing cheap and expeditious procedures by the fear that in doing so they might be prejudicing appeal rights.
>
> Thirdly, decisions which do not finally determine the substantive rights of the parties are normally subsumed in the final judgment and are therefore indirectly appealable if they have affected the substantive outcome. This too is justification for circumscribing appeals from interlocutory decisions. The converse applies if the decision finally determines substantive rights. If there is to be an appeal at all in those circumstances, it must be an appeal against that decision.
>
> Fourthly, there is the risk that the unqualified right to appeal from every interlocutory order might produce unacceptable delay in the action as a whole, especially if full time limits are allowed. Many interlocutory matters of a procedural and ancillary nature may arise during the life cycle of an action. The delays produced by appeals on such matters can be cumulative.
> The converse is true if the decision finally determines the substantive rights of the parties. In the latter case little is lost if full appeal rights with full time limits are afforded.
>
> […]
>
> I would hold that for present purposes all judgments and orders are final if they purport finally to determine the substantive rights of the parties. They are interlocutory only if they leave the relevant substantive rights to be determined at a future hearing.

<u>Counter or Cross-petition</u>

11. The Chief Justice ruled that there is no reference in the Act to a counter-petition, a term which has developed over time to accommodate the continued effects of sections 92(4) and 94 of the Act. If the petition were to be withdrawn, the counter-petition has no life of its own and must come to an end.

12. Counsel for the Appellant referenced to *Puna v Piho* (2007) CKHC 21 where Nicholson J, in a costs decision, considered that on withdrawal of the petition the counter-petition lapsed. The same view was found in *Beer v Tuariki*. Neither case has a reasoned judgment on the point.

13. Counsel then submitted that all the counter-petition amounted to was a notice given under the provisions of section 92(4) that evidence would be called by the Respondent giving such a notice at the hearing of the petition. Such a provision does not clothe the notice with the status of a petition. The 'counter-petition' does not undergo the same process as a petition. If allowed, the counter-petitioner could 'piggy-back' on the petition without the counter-petition having had to be filed within 7 days from the declaration of result and without the counter-petitioner having to pay the $1,000.00 filing fee and to give security for costs. A counter-petition would enable the counter-petitioner to achieve what he/she could not have achieved because of the 7 day filling requirement. Such could not have been Parliament's intention.

14. The Respondent referred to two cases not mentioned to the Chief Justice. In *Re Electorate of Ruaau, Pirangi, Napa and Others* [1983] CKHC 7, Speight CJ in effect allowed a cross-petition in these words:

> I heard Mr Solomona's case. It was based upon all allegation that Mr Pirangi was the proprietor of a rental car business, and had on two occasions prior to the general election allowed rental cars from his firm to be hired to a Mrs Knowles, a voter in the Ruaau constituency, at favourable terms under circumstances which would lead one to the inference that this action was done with the corrupt intention of influencing her vote in favour of Mr Pirangi. After a comparatively brief hearing I decided that these allegations were not made out and dismissed that side of the petition. Mr Ingram however maintained that he was still entitled to pursue his cross allegations against Mr Solomona. This to me was a somewhat novel suggestion, but after an examination of the Electoral Act and listening to submissions I concluded it was well founded. In particular section 74 subsection (1) allows any candidate to demand an inquiry as to the conduct of the election or of any candidate and this Mr Napa had done. Section 74 sub-paragraph (4) proviso, also indicates that at such an inquiry, evidence may be given, not only concerning alleged misconduct by the elected candidate but of mis-conduct of a rejected candidate. I say now in anticipation of what will emerge later that one thinks that this was primarily aimed at allowing a successful candidate whose conduct has been attacked to show that his challenger has also been guilty of misconduct so that in the event that the successful man is disqualified, the Court would not, as it is entitled to do in certain circumstances, substitute the unsuccessful man, but should also disqualify him for misconduct and order that the seat be declared void. This, in the ordinary connotation relates to the one-to-one election situation. But Mr Ingram is quite right when he says that the inquiry may be in respect of the conduct of any candidate so that the conduct of a second or third or fourth rejected candidate can be put under scrutiny to see whether malpractice has occurred and just to anticipate, one would stage an examination of later sections which will require careful analysis to see what are the powers of

court if as in the present instance, Mr Pirangi as the successful candidate has been absolved from misconduct but if, as I shall consider, Mr Napa's case proves misconduct by Mr Solomona. It is not inappropriate to observe here that the margin of votes between Mr Pirangi, Mr Solomona and Mr Napa was not great. In saying that misconduct had not been proved against Mr Pirangi I had expressly said: "Insofar as the present proceedings before the court, are aimed at a declaration of electoral malpractice by Mr Pirangi they have failed, but that is not the end of the matter. We have now to look into the allegations made of Mr Napa against Mr Solomona". As that then became a continuation of the Section 74(1) enquiry all the powers under Section 79 remained available. Indeed it was apparent that the sole purpose of the continuation of the inquiry was to seek a declaration that the seat was void, for there was no room for a declaration that Mr Napa had been elected.

It might seem to the fair minded citizen that it is an odd process that a successful candidate, Mr. Pirangi, in respect of whom a challenge of misconduct has been not proved should still have the electoral declaration in his favour put in peril by allegations of one unsuccessful candidate against another. That is one point of view. But equally one unsuccessful candidate can be properly be heard to say that he has had less than a fair deal if the misconduct of another unsuccessful candidate has stolen votes which may well have been sufficient to have had him elected, especially as here where each candidate polled well. It is a troublesome matter and one must not try to decide the rights and wrongs in it by some undefined sense of fair play but by paying careful attention to the words of the Electoral Act which Parliament has seen fit to pass.

15. A decision of three judges of the Supreme Court of Samoa, *Posala v Su'a* [2006] WSSC 29 (16 August 2006) given under similar but not identical legislation is useful. The following extracts from the judgment show the difference in the legislation and the reasons of the Court:

62. The practice has developed in Samoa of using a document called a cross petition or counter petition to be relied on by a person who is respondent to the petition. That person may be the person who polled the highest number of lawful votes and the person whom the petitioner wishes to unseat. It appears to us that the practice we have just mentioned may be based on s.111(6) of the Act which reads:-

'(6) On the trial of an election petition complaining of an unlawful declaration or report and claiming the seat for some person, the respondent may give evidence to prove that that person was not duly elected, in the same manner as if he had presented a petition against the election of that person.'

[…]

155. Counter Petition

Status of Petition and Counter Petition

Logic would suggest that where a petition is dismissed, say through a successful no case submission, the counter petition ought also be dismissed *instanter*. After all, the elected member is not disqualified so there is little purpose for further investigation or trial of the conduct of the original petitioner who remains an unsuccessful candidate.

156. Nevertheless in the present state of the practice of this Court we do not accept the conclusion. The Act, s113, applies where it is reported by the Supreme Court on the trial of an election petition that corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidate thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the candidate's election, if he has been elected, shall be void. The Act, s119, through its use of the word "shall" requires the Court where in any election petition any charge is made of any corrupt or illegal practice having been committed at the election to report in writing to the Speaker as required by s.119. The Speaker's report must deal with whether any corrupt or illegal practice has or has not been proved to have been committed.

(i) by any candidate, his or her agent or another person "with the knowledge or consent" of that candidate (s119(a) and (b));

(ii) the names of all persons proved at the trial to have been guilty of corrupt or illegal practice and "whether they have received certificates of indemnity" (s119(c), 119(1)(2) and (3));

(iii) whether there is reason to believe that corrupt or illegal practice "extensively prevailed at the election" (s119(1)(d));

(iv) particular matters comprised in s119(4) which the court further reports and which apply if a candidate is reported to have been guilty by his agents of treating, undue influence or illegal practice.

157. The duty imposed on the Court is onerous, but is the decision of the Parliament. The breadth of the duty and the resources provided for the execution of the duty might be matters for consideration when and if the Court makes special report in accordance with the provisions of s120. But it is clear that the legislation is intended to deal with corruption generally as well as illegal practices and not permit its exposure and concealment to remain the province of the respective parties.

158. There are cogent further reasons requiring the conclusion that dismissal of the original petition (through a "no case" or ultimate finding) does not automatically result in the dismissal of the counter petition. The trial includes consideration of allegations made by the respondent (s111(6)). A second reason is the potential consequence that a challenging unsuccessful candidate may himself or herself be disqualified from presenting as a candidate at the following election.

159. For the above reasons, we conclude that disposal of the petition by verdict does not vitiate the counter petition.

160. There are no existing rules or statutory provisions governing the time limits and procedures for the filing of counter petitions. Indeed the Act does not use the phrase "counter petition". In our opinion they are matters which ought be addressed either by Parliament or possibly by the Head of State acting on the advice of Cabinet pursuant to s.136 of the Act. Those matters will be the subject of a special report made under s120.

16. Counsel for the First Respondent submitted that from a consideration of these cases there was good reason for allowing a 'counter-petition' to continue even after the original petition had been withdrawn or determined. The combination of sections 92

and 94 justified this conclusion. All issues before the Court ought to be dealt with given the urgency that must accompany election petitions. Section 96 provides an all-embracing jurisdiction to 'enquire into and adjudicate in any matter relating to the petition in such manner as the Court sees fit. Section 98(2) also so indicates. Section 99 gives the Court, not only a power to hear evidence not normally admissible, but also directs that the Court "should be guided by the substantial merits and justice of the case".

17. The Court agrees with the submissions of counsel for the First Respondent. As Speight CJ expressed in *Re Ruaau*, there is initial surprise in the proposition that there can be a counter-petition in the absence of specific reference in the Act. However, in the special all-embracing jurisdiction of an electoral court, the aim must be to deal with all allegations regarding an election in the one proceeding. The reasons given by Speight CJ are adopted, supported as they are by the reasoning in the Samoan case. As the Samoan case opined the legislation deals with corruption generally and does not permit its exposure or concealment to remain the province of the respective parties.

18. The term 'counter-petition' or 'cross-petition' is simply a shorthand way of enunciating the effect of the Act confers the status of party on any other candidate or interested person (s94) in a proceeding required to be heard very quickly (s195) where the Court has jurisdiction to enquire into and adjudicate upon any matter relating to the petition in such manner as the Court sees fit (s96(1)) and when there are dire consequences for any elected candidate found by the Court to have committed a corrupt practice (s98(1)).

19. The Electoral Court should be able to enquire into any serious allegation made either by way of petition under section 92(1) or by way of notice under section 94.

20. The question in the Case Stated was:

> "If a petition for inquiry into the conduct of an election is withdrawn, is the result that a counter-petition comes to and end?: The answer is: 'No'."

21. The Appeal is therefore allowed. The ruling of the Court means that the Mitiaro election petition hearing has not been completed. It must be sent back to the High Court for hearing. It need not necessarily be heard by the Chief Justice since he did not embark on the merits. The High Court will have to hear the petition, if the petitioner (who had earlier sought leave to withdraw the petition) decides to proceed with it. Whether or not the petition proceeds to a hearing, the matters raised by the Appellant in the counter-petition will need to be investigated by the High Court.

22. Accordingly there will be an order under section 105(1) of the Act directing the High Court to consider and adjudicate upon the petition and the matters covered in the Appellant's section 94 notice (referred to as the 'counter-petition').

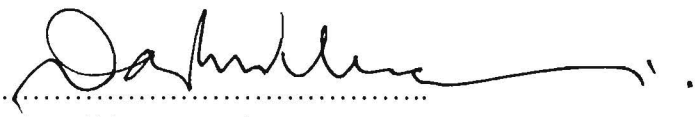
23. The Appellant is entitled to costs against the First Respondent which we fix at $3,000.00. The Registrar is directed to pay this sum to the Appellant's solicitors out of the security for costs paid by First Respondent.

24. Before parting with this appeal we make the following recommendation to the Legislation for statutory procedural reform.

    a. The Case Stated appeal procedure is inefficient and obsolete and requires unnecessary expenditure of time by the trial Judge and counsel. Section 102(2) should be replaced by a provision giving a right of appeal to this Court from any final determination of the High Court on a question of law.

    b. The Electoral Act should be amended to require persons cross-petitioning by way of notice under section 94, to pay a filing fee and to give security for costs. There should also be a time limit on a 'counter-petition' – say 7 days from the filing of the petition.

Dated this 21st day of November 2014 at Rarotonga



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David Williams (President)

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Sir Ian Barker (Justice of Appeal)

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B.J Paterson (Justice of Appeal)