IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 2/98

BETWEEN: **L. G. N. HARRIS, REUBEN KUN, ANTHONY D. AUDOA, NIMROD BOTELANGA AND CLINTON BENJAMIN**

PLAINTIFFS

AND : **SPEAKER OF PARLIAMENT**

DEFENDANT

IN CHAMBERS: 16th February, 1998

Audoa and Kun for Plaintiffs
Griffiths Q.C. and Northam for Defendant.

The Plaintiffs seek an interlocutory injunction the effect which I apprise (inter alia) would stay the by-elections next Saturday; the Defendant (the Speaker) applies for an order to strike out the Statement of Claim and/or an order to dismiss him from the suit.

After hearing counsel for Plaintiffs and for the Defendant , I do order:

1. The application for interim injunction is declined.
2. The Speaker of Parliament is dismissed from the suit.
3. The action is struck out.
4. Costs to Defendant be fixed.

Mr. Griffiths has requested that I record my reasons for decision in writing which I shall do.

CHIEF JUSTICE

REASONS FOR DECISION

Application for Interlocutory Injunction.

Insofar as it concerns the staying of the by-election, Mr. Griffiths submits that there is no jurisdiction in this Court to entertain the application. He contends the conduct of elections and all matters relating thereto is prescribed by the Electoral Act which gives the Court of Disputed Elections, a Court created by the Act, exclusive jurisdiction in all matters pertaining to elections such as disputes as to their validity.

I am satisfied this submission correctly states the law although I have been referred to the decision in **Bobby Eoe's** case (1988) 3 SPLR 223, a reference to this Court under Article 36 of the Constitution in which I had made an interlocutory injunction staying a by-election. By way of explanation, the injunction issued in that case was made by consent without any argument. It did not in any way affect the substantive claim. However, it was obviously made without jurisdiction.

The Plaintiffs, however, contend their application covers not only the election, but, other issues. On hearing their argument and having read the Statement of Claim, I find some difficulty in following that argument. I have no doubt the main purpose is to prevent the election proceedings. Nothing emanating from this Court can do that. If the Plaintiffs consider that the election is invalid as alleged in their claim, they have the right to challenge it under and in the manner prescribed in the Electoral Act. However on the face of the proceedings and what I have heard today, I can see no benefit to the Plaintiffs if I granted this application and I accordingly exercise my discretion against doing so. I decline the application.

The Application to Dismiss the Defendant from the Suit.

The Speaker contends he should not be a party to this action. He says the warrants in question were made in the lawful exercise of

his parliamentary powers and in the course of parliamentary proceedings.

As I see it, the correct approach to a consideration of this matter is, firstly, to examine what is the substance of the Plaintiffs' claim as opposed to a consideration as to its sustainability. The claim, while it is in some respects not clear, there can be no question that the substance of it is that the Plaintiffs' claim, they were unlawfully expelled from Parliament and their seats were wrongfully declared vacant. They claim they are still Members of Parliament.

There can be no question of the Speaker's right to declare the seats vacant and to issue the writs for the consequent by-elections. However, there must be lawful authority for the declarations and, in the absence of it, it could be argued there could be no lawful issue of the writs. In such circumstances, the alleged action of the Speaker could, I consider, be the subject of review by this Court. This was the

view of the Court of Appeal of the Solomon Islands in the case of **Edward Hinuehu v. Attorney-General and the Speaker of the National Parliament of the Solomon Islands**, a decision delivered on the 24th April, 1997.

The basis upon which the Court accepted jurisdiction was that the unlawful act of the Speaker was one which did not require any ruling or determination by him – he was required by law to act in the way laid down by law and he had no option other than to comply with it. The Court, therefore, held the alleged unlawful act could be the subject of judicial review.

In this case, on the pleadings, it is alleged the Speaker acted unlawfully. He did not have the authority to do what he did. His issue of the writs for by-elections did not call for or require any ruling by him.

However, the question today is not whether the Speaker's action could be the subject to judicial review. It is whether he should be made a defendant in the proceedings. I am of the view that, while his actions may be reviewed (and I emphasise I do not so hold) the Speaker cannot be brought in Court as a party to proceedings. This is a privilege accorded to him by law. It assures he cannot be subjected to the jurisdiction of this Court in respect of the exercise of his powers. He will be dismissed from the action.

Application to Strike Out Action.

I was of the view that this matter could be deferred as, on reflection, I considered I had not given the Plaintiffs adequate opportunity to be heard on it. Without so expressing it, I also was of the view the constraints of time were against prolonging the hearing. On my indicating this view, Mr. Griffiths with some respectful vigour, raised objection to this course on the ground the application was his

and he was entitled to a decision thereon urgently this day since a deferment of the matter would result of his being required to travel back to Nauru at the Speaker's expense to answer any further submissions. It became apparent to me that he was not aware of the practice common in remote Nauru; but, apparently not in Australia, to allow the presentation of written submissions. Although I did not, and do not, accept his submission that he was entitled to a decision on demand, I thereupon called on the Plaintiffs further to submit on the point. They were unable to take the matter any further and in consequence Mr. Griffiths was able to present at what could be called "the final solution". An action with no defendant, as now here, is not sustainable. The action is struck out.

The Article 36 Submission.

This question arose as a result of a consideration of what course was available to the Plaintiffs to obtain a decision on their contention they are still Members of Parliament.

Mr. Griffiths contends that while Article 36 on the face of it gives a jurisdiction to this Court to determine questions, referred to it on the right of membership of Parliament, such a right is given only to the Cabinet by way of a reference under Article 55. Furthermore, he points out that, unlike in the United Kingdom and Australia where there are prescribed procedures as to how such reference is made, there is no procedure for it laid down in the Constitution. In effect, therefore, the Article is impotent.

In my view, Article 36 records a clear intention by Parliament to confer on the Supreme Court, to the exclusion of any other Court, the

right to determine on questions of membership to it. The question of how the Court is to receive a reference. I consider, it does not require a constitutional pronouncement. The Civil Procedure Act 1972 section 78 and the Rules of Civil Procedure Act 1972 Order 4 Rule 2 (c) give the powers to make provision for the practice and procedure of that Court in the exercise of any civil jurisdiction conferred on it by any written law. I would add, that this present claim certainly cannot be considered a reference under Article 36. However, it is my tentative view that the Plaintiffs as Members of Parliament or former Members have locus standi to make a reference under the Article.