IN THE SUPREME COURT OF NAURU
AT YAREN

CIVIL SUIT NO. 45/2016
In the matter of Writ for Certiorari and Mandamus by Tazio Gideon; In the matter of the Electoral Act 2016 as amended

BETWEEN

TAZIO GIDEON APPLICANT

AND

THE ELECTORAL COMMISSION FIRST RESPONDENT

AND

SECRETARY FOR JUSTICE SECOND RESPONDENT

Before: Khan, ACJ
Date of hearing: 8 December 2016
Date for Submissions: 24 January 2017 and 2 February 2017
Date of Ruling: 31 March 2017

Case may be cited as *Gideon v The Electoral Commission and Others*

CATCHWORDS:
Application for strike out under Order 15 Rule 19 is not appropriate when leave granted to file judicial review.
Elections held- even if judicial review was successful the applicant cannot participate in the election as election process completed- so the whole exercise would be moot- application for judicial review dismissed.

APPEARANCES:

Counsel for the Applicant: V Clodumar (pleader)
Counsel for the First Respondent: A Lekenaua

Counsel for the Second Respondent: J Udit, Solicitor General

RULING

INTRODUCTION

1. The applicant was nominated to be a candidate in the constituency of Aiwo (Aiwo) for the general election which was held on 9 July 2016.

2. The first respondent rejected his nomination on the basis that as a holder of the office working for Ronphos, and under s.13 of Ronphos Act 2005 he was required to resign three months, prior to filing his nomination and that he had failed to do so.

3. The applicant was an employee of Ronphos and resigned on 24 June 2016 and on the same day he was nominated to be a candidate for Aiwo.

4. The applicant made an application for leave to file judicial review on 4 July 2016 under Order 38 of Civil Procedure Rules 1972 (CPR) to review the first respondent's decision. The Registrar heard the application ex parte and refused to grant leave for judicial review.

5. On 8 July 2016, the applicant made a fresh ex parte application for leave to file judicial review pursuant to the provisions of Order 38 Rule 16 of CPR before Madraiwiwi CJ. Leave was granted to file judicial review of the first respondent's decision and further an interim injunction was issued to stay the election in Aiwo pending the disposal of the judicial review.

6. On 9 July 2016, the Secretary for Justice and Border Control(Secretary) made an application before Madraiwiwi CJ to be joined as a party to these proceedings and also made an ex parte application for the dissolution of the interim injunction to stay the election in Aiwo. The Chief Justice granted leave to the Secretary to be joined as a party and thereafter heard the ex parte application for dissolution of interim injunction and dissolved the interim injunction. On 11th July 2016, the election was held in Aiwo.

7. In dissolving the injunction, the Chief Justice also stated that at [5] of his ruling:

> *"...that the applicant Tazio Gideon will still have an opportunity to litigate his right to be a candidate and participate in an election as the remedies available under s.100 of the Electoral Act are open to him. It is for the applicant to prove his claim that the Electoral Commission acted beyond or in excess or want of jurisdiction."*

8. Following the election Mr Milton Dube and Mr Aaron Cook were elected as members of Parliament for Aiwo.

9. The applicant did not file any proceedings under the Electoral Act 2016 and this action has been pending since then.

APPLICATION TO STRIKE OUT – ORDER 15 RULE 19

10. The first respondent filed an application to strike out the applicant's judicial review pursuant to the provisions of Order 15 Rule 19 which reads as follows:

> "19.(1) *The Court in which a suit is pending where any stage of the proceedings ordered to be struck out or amended any pleading or endorsement of any Writ or Summons in the suit, or anything in any pleading or in the endorsement, on the ground –*
>
> *a) It discloses no reasonable cause of action or defence, as the case may be;*
>
> *b) It is scandalous, frivolous and vexatious;*
>
> *c) It may prejudice, embarrass or delay the fair trial of the suit; or*
>
> *d) It is otherwise an abuse of process of the Court;*
>
> *And may order that the suit be stayed or dismissed or judgement be reserved accordingly, as the case may be.*
>
> *2. No evidence shall be admissible on an application under subparagraph (a) of the last preceding paragraph.*

APPLICATION TO STRIKE OUT

11. The summons to strike out the action was filed in the following terms:

> *LET ALL PARTIES attend before the Supreme Court at Yaren on Friday the 19th day of August 2016 at or about 10am in the forenoon for the hearing of an application on behalf of the First Respondent by their Counsels for an order that:-*
>
> *(a) This action be struck-out on the ground that the 1st respondent should not be named as party to this proceeding as the claims are on the validity and constitutionality of the Commissioner's decision in accordance to the Electoral Act 2016.*
>
> *(b) That the Commissioner exercised his powers and reached his decision as conferred to him and in accordance with Electoral Act.*

(c) *This matter be discontinued against the 1st respondent and should not be named as party to the proceedings.*

(d) *The plaintiffs do pay to the 1st respondent the costs of and incidental to this application.*

The 1st respondent intends to read and rely upon the affidavit of Joseph Cain sworn and filed in support of this application.

This application is made pursuant to Order 15 rule 19 of the Civil Procedure Rules 1972 and the inherent Jurisdiction of the court.

12. Order 15 Rule 19 is meant to be used in cases where there is no reasonable cause of action, or where the cause of action is scandalous or vexatious, or where it will prejudice or delay the trial, or is abuse of process of court. This application seeks to remove the first respondent as a party to the proceedings, as it is alleged that his decision relates to the validity or constitutionality of the Electoral Act 2016. With respect that is not correct. This is simply a judicial review application to determine whether the first respondent was correct in rejecting the applicant's nomination- nothing more- and if he is removed as a party then whose decision will the court review?

13. Mr Clodumar takes strong issue with the suggestion that the first respondent should not be a party to the judicial review application. He puts it very forcefully as:

> ***"If the Commission is to be removed as a party then whose decision is the Court to review?"***

14. Mr Udit in his submissions states as follows at [7]:

> *"It is cardinal rule that judicial review lies as an administrative or quasi-judicial decisions. There has to be a decision maker. In this case, the power and jurisdiction to determine the candidacy in an election vests in the Electoral Commissioner and not the Republic."*

15. In a strike out application of cases where no "reasonable cause" of action is alleged, no evidence is admissible. I refer to the matter of *Denuga v The Secretary for Justice*[1] where I stated as follows:

> *"At [11] 'the plaintiff filed an affidavit on 3 May 2016 in response to the strike-out application and the defendant also filed an affidavit in response on 14 July 2016. I think the practice in this jurisdiction has*

[1] NRSC6

to been to file affidavits in the strike-out applications. This issue was discussed in the High Court of Australia in the case of DWN v The Republic of Nauru[2]*. This was an application for special leave against the orders for a strike-out of grounds of appeal under Order 15 Rule 19 and in the transcript at pages 5 and 6 it was stated as follows:*

> *"Gageler, J: was that the way the point was put to Judge Khan or is it a new and better way, perhaps a fuller way of putting the case that was not put at the first instance?*
>
> *Mr Hanks: Well, I think there are 2 answers to that, Your Honour. The way the point was put to His Honour below was based directly on the Amended Notice of Appeal. That evidence was not before His Honour but His Honour dealt with the case on the basis that he would not receive evidence; he did not need to receive evidence. Indeed, as it was a strike-out, effectively; he was not permitted to receive evidence. This is how His Honour dealt with it, as we understand it.*

16. Mr Clodumar further submits that the strike-out application is not appropriate in the circumstances of this case, as leave was granted by the Chief Justice and in [9] of his ruling on 8 July 2016 it was stated as follows:

> *"In the interests of justice to allow the matter to be fully ventilated and argued, leave is therefore granted for judicial review of the Electoral Commission's decision to deny the applicant's candidacy in the Constituency of Aiwo..."*

17. Mr Clodumar's submission has merit as strike-out application is generally made in matters where claims filed are without leave of the Court, but in this matter the action was only filed after leave was granted and in granting leave the Chief Justice stated at [3] of his ruling:

> *"...the Court is respectfully of the opinion that there is a serious issue to be tried ...."*

MOOT

18. The Secretary for Justice (the Secretary) intervened in these proceedings on behalf of the Republic on 9 July 2016 to make an application for dissolution of the interim injunction and therefore he is not involved in the judicial review application.

19. However, whilst being on record Mr Udit raised a very interesting submission. He submitted that this action has now become 'moot'. In his written submission, Mr Udit submits as follows at [9] of his submissions:

> *"The action filed by the applicant is submitted to have now become moot. This is evident from the relief sought in the application seeking*

[2] M79/2016

mandamus requiring the Electoral Commissioner to include the applicant as a candidate. The election was held 6 months ago. The 2 candidates who won the election from the District of Aiwo won by a resounding majority. There is no evidence before the Court that there was any prospect of the applicant succeeding in the election. Even if this Court were to grant the relief sought, the Writ of Election issued by the Speaker has already been returned. There is no Writ of Election before the Commission to hold another election. At this stage, including the candidate in the list will serve no purpose as no election will be held."

20. In dissolving the interim injunction, the Chief Justice referred to the remedies available to the applicant under the Electoral Act 2016.

ELECTORAL ACT 2016

21. Now let us examine the provisions of the Electoral Act 2016(the Act) to see if the applicant is or was entitled to seek any remedy under the Act:

    1) Under s.88 of the Act the Electoral Commissioner must publicly declare the elected candidates as Members of Parliament; and publish in the Government Gazette the result of the election, names of the candidates, number of valid and invalid votes cast.

    2) S.93 of the Act allows a candidate or a voter to challenge the election results published under s.88.

    3) S.94 of the Act speaks about the validity of an election or the declaration of an election and the status of the person elected.

    4) S.96(a) states that the facts relied on to invalidate the election or the declaration of the election ought to be set out, and further the petition must be filed within 30 days of the publication in the Government Gazette of the notice in relation to the election results in accordance with s.88.

22. So, this clearly shows that an election result can only be challenged where the **validity of the election or the declaration is disputed (emphasis added)**. I am afraid that the applicant would not have had any basis to mount a challenge under the Act, as his complaint was that the first respondent was wrong in rejecting his nomination, and therefore his only avenue was application for judicial review.

23. The applicant is seeking an order for certiorari to quash the decision of the first respondent; and if that order was to be granted; and thereafter his nomination was determined by the first respondent to be valid; does that mean that he could still participate in the election for Aiwo? He may have been able to do so, if the election had been deferred pending the outcome of this application. The Chief Justice issued an interim injunction stopping the election, but it was dissolved the following day, and the election process has been completed and the two candidates were declared to be members of parliament, so there is no pending election that he can participate in.

24. Mr Udit submits that no useful purpose would be served by continuing with this action, as the determination of the judicial review would really be an academic exercise. He cites the authority of *Reg v The Secretary of State for Home Department, Ex Parte Salem 1999 1AC* where Lord Selynn stated at [456] and [457] as follows:

> *"My Lord, I accept, as both counsels agree, that in a cause where there is an issue involving a public authority as to a question of public law, Your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in Sun Life case and Ainsbury v Millington (and the reference to the letter in Rule 42 of the Practice Directions applicable to Civil Appeals [January 1996] of Your Lordship's House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.*
>
> *The discretion to hear disputes, even in the area of public law, must however, be exercised with caution and appeals which are* ***academic*** *between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example)* ***when a discreet point of a statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely will need to be resolved in the near future."***

25. Mr Udit further submits in his submissions at [14] and [15] as follows:

> *"[14] This principle was considered by the High Court of Australia in relation to the powers of dissolution of the House, a case similar to the one before this Court in* **Victoria v Commonwealth [1975] HCA 39; [1975], 134 CLR 81, 120, 183-4**. *It was there claim that the Governor-General had dissolved Parliament without power to do so under the Australian Constitution. Barwick CJ in the High Court of Australia held that the dissolution was a fact which can neither be void or undone. Even if the Governor-General had no power to dissolve, there would be no basis for setting aside the dissolution or treating it as not having occurred.*
>
> *[15] The issue of proceeding being* ***moot*** *has been extended to a constitutional matter. This was considered and applied by the Fijian Court of Appeal* ***in Rev. Akuila Yabaki, Vjay Naidu, Dorothy Jane Rickets v The President of the Republic of Fiji Islands and the Attorney-General of Fiji [2003] FJCA3; ABU0061U.2001s(14 February 2003)****. The case involved the dissolution of Parliament after a coup. The President appointed an interim Prime Minister although the substantive Prime Minister was still in the country and ready and willing to perform his duties. After appointing the interim Prime Minister, the latter advised the President to dissolve the House. The House was dissolved and the interim government was appointed to prepare the country for a general election. The constitutional issue*

raised was whether the actions of the President and the interim Prime Minister was valid under the Constitution. The High Court dismissed the action and it was appealed to the Court of Appeal. While the matter was being pursued in the Court of Appeal, the general election was held. A government in accordance with the Constitution was formed. The legislature was convened and it carried out its functions and responsibilities. The Court of Appeal held that the declarations sought had become moot."

26. It was further stated in Yabaki's (supra) case that:

> *"Because the elections have been held, it is too late to 'turn the clock' back. The elections were duly held despite any constitutional irregularities which may have preceded them.*

CONCLUSION

27. In the circumstances the outcome of this application even in favour of the applicant, would be moot and is therefore dismissed.

DATED this 31 day of March 2017

Mohammed Shafiullah Khan
Acting Chief Justice