IN THE SOLOMON ISLANDS

COURT OF APPEAL

Civil Appeal Nos. 1 & 3 of 1993

Before Connolly P.
Savage J.A.
Williams J.A.

BETWEEN:

THE GOVERNOR-GENERAL Appellant

AND:

SOLOMON SUNAONE MAMALONI Respondent

AND BETWEEN:

SOLOMON SUNAONE MAMALONI Appellant

AND:

THE ATTORNEY-GENERAL and THE GOVERNOR-GENERAL
Respondents

JUDGMENT OF THE COURT

Delivered the 5th day of November 1993

On 18 June 1993 the 47 members of the National Parliament assembled pursuant to Schedule 2 to the Constitution in an election meeting for the purpose of electing a Prime Minister after a General Election. His Excellency the Governor-General presided over the meeting as is provided by Schedule 2. At the first ballot Hon. F.B. Hilly received 24 votes and Hon. S.S. Mamaloni 23. His Excellency had, prior to the ballot, informed the members that 24 votes would constitute an absolute majority, a proposition from which no one at that stage dissented. Accordingly he declared Mr Hilly to have been elected Prime Minister pursuant to cl.8 of Schedule 2. Mr Hilly was later sworn in as Prime Minister and continues to hold that office.

On 12 July 1993 Mr Mamaloni wrote to His Excellency contending that the election of Mr Hilly was invalid and submitted the matter for his Excellency's determination in accordance with cl.10 of Schedule 2. On 6 August 1993 His Excellency replied in writing declining to reverse his determination of 18 June 1993. This led to civil case no. 290 of 1993 in the High Court in which Mr Mamaloni, by originating summons of 14 August 1993, sought a declaration that His Excellency had erred in law in declaring on 18 June that Mr Hilly had been elected and in holding on 6 August after a dispute that 24 votes constituted an absolute majority. He sought a further declaration that these alleged errors of law involved excess of His Excellency's jurisdiction under cl.10. This application was expressly made under s.83(1) of the Constitution. The respondents to the originating summons were the Attorney-General and the Governor-General.

On 16 August 1993 Mr Mamaloni made a further application in civil case no. 291 of 1993 for leave to apply for *certiorari* to quash His Excellency's determinations on 18 June 1993 and 6 August 1993 that Mr Hilly was validly elected on an absolute majority of 24 votes. Notice of this application was given to the Governor-General and the Attorney-General. On 27 August 1993 His Excellency applied by summons in both civil case 290 and civil case 291 for consolidation of the cases and for the striking out of the application for *certiorari* and the application for relief under s.83(1) of the Constitution. This application was heard by Palmer J. on 10 September 1993

and on 21 September his Lordship dismissed the application to strike out with costs. His Excellency appeals to this Court against that order by notice of appeal of 22 September 1993.

The substantive applications were heard before Palmer J. on 24 September and judgment was given on 8 October 1993 dismissing Mr Mamaloni's application in both civil cases. He appeals against that judgment by notice of appeal dated 20 October 1993.

It will be convenient to deal first with the Governor-General's appeal. Not only is it first in point of time but its central contention is that the correctness of the Governor-General's decision under cl.10 is not justiciable. If that contention be correct it virtually disposes of the appeals before this Court. Four grounds for his contention were given, two of which do not warrant extensive discussion. One draws attention to His Excellency's immunity from suit in his personal or private capacity, but he is plainly not so sued. A second contends that *certiorari* does not lie save in relation to judicial or quasi judicial decisions but that principle has been much eroded in recent years. In any case, His Excellency's decision declared the right of Mr Hilly as against that of Mr Mamaloni and involved a determination of law, viz. whether 24 was an absolute majority having regard to s.144(1) of the Constitution. An additional argument had been that the process does not lie to the Queen's representative. That rule has also been eroded in recent years. See The Queen v. Toohey, ex parte Northern Land Council (1981) 151 C.L.R. 170 in which Gibbs C.J. emphasised that the Courts have the

power and duty to ensure that statutory powers are exercised only in accordance with law and that they can therefore inquire whether the Crown itself has exercised a power granted to it by statute for a purpose which the statute does not authorise. See also F.A.I. Insurances Ltd. v. Winneke (1982) 151 C.L.R. 342 in which, for similar reasons, relief was given against the Governor-in-Council of the State of Victoria.

The principal ground of His Excellency's application was that cl.10 of Schedule 2 ousts the jurisdiction of the Courts in relation to the determination by the Governor-General of a dispute arising out of or in connection with the election of the Prime Minister under Schedule 2. Clause 10 reads as follows:

> "10. Any dispute arising out of or in connection with the calling or conduct of any election meeting or the election of the Prime Minister under this Schedule shall be determined by the Governor-General whose determination of the matter in dispute shall be final and conclusive and shall not be questioned in any proceedings whatsoever."

This type of provision is commonly called a finality or ouster or privative or preclusive provision, that is one which excludes the jurisdiction of the Courts to determine the correctness of the determination, provided always that the tribunal (here the Governor-General) has acted within jurisdiction. The expression "within jurisdiction" is a legal phrase meaning no more than that such a law requires the Courts to hold their hands where the tribunal in question has done the very task assigned to it by, in this case the Constitution, and in other cases the relevant statute. No better exposition of the limits of such a provision will be

found than in the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 1 All E.R. 208. Lord Reid, at p.171 of the Law Report (p.213 of the All E.R.), after emphasising that the tribunal in question must have been entitled to enter on the inquiry in question, continues:

> "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Now Mr Mamaloni's letter of 12 July 1993 in terms called on His Excellency to exercise his power under cl.10 to determine whether an absolute majority required at least 25 votes rather than the 24 which Mr Hilly had received and his letter of 5 August 1993 recognised the Governor-General as "the only high executive authority" to determine the question. His Excellency's reply of 6 August 1993 answers that question and no other. Now it cannot be doubted that the Governor-General's decision on 18 June 1993 that 24 votes was an absolute majority was a decision "in connection with ... the election of the Prime Minister" under Schedule 2 and that

Mr Mamaloni's questioning of that decision brought into being a dispute "in connection with" the same matter, which Mr Mamaloni himself called on the Governor-General to determine. His Excellency determined it, on 6 August, by adhering to his previous decision. This is plainly within cl.10 and the argument that His Excellency's decision was beyond his jurisdiction or his power under cl.10 cannot be sustained. It is plain therefore that none of the types of error to which Lord Reid refers in his speech occurred. None is demonstrated, none is alleged and Palmer J. recognised that this was the position saying:

> "The (Governor-General) did not commit any of the errors listed in Lord Reid's judgment. He dealt with the question remitted to him and did not decide some other question. He did not refuse to take into account something which he was required to take into account or take into account something which he had no right to consider.
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> In other words the (Governor-General) did everything that was proper before giving his determination on 6th August 1993. (He) therefore was entitled to decide the question wrongly as to decide it rightly."

Unfortunately however, his Lordship was persuaded that since the application was interlocutory only, a jurisdictional error must be assumed. Now it is true that at the interlocutory stage of an action, the clearest of cases is required before the claim will be struck out. Thus, in this type of situation, if any of the errors of which Lord Reid gave examples in his speech in Anisminic was alleged it would ordinarily take evidence and a finding at the trial whether the error had in fact occurred before a firm conclusion could be reached. In this case however the applicant himself had

identified with precision the error which he claimed had occurred. This, quite simply was, that in determining the subject matter which was in dispute between Mr Hilly and himself the Governor-General had reached a wrong conclusion. This cannot be regarded as a jurisdictional error. It is perfectly clear that His Excellency determined the very question which Mr Mamaloni sought to have determined, that the dispute in question was within the language of cl.10 and that it was therefore one in relation to which the determination of the Governor-General is, by the very words of the Constitution, to be final and conclusive and not questioned in any proceedings whatsoever. Mr Mamaloni's application was made under s.83(1) of the Constitution which empowers an application to be made for relief by any person who alleges that his interests are being, or are likely to be, affected by the contravention of a constitutional provision. Section 83(1) is however expressly subject to para.10 of Schedule 2 which must prevail over it. In the absence of error such that the determination was a nullity for any of the reasons given by Lord Reid, or we would add, analogous reasons, it is final and conclusive and cannot be questioned in the Courts whether it be right or wrong. It follows that His Excellency's application should, with all respect, have succeeded and his appeal must be allowed.

This conclusion is sufficient to dispose of Mr Mamaloni's appeal against the decision of 8 October 1993 which must also be dismissed. However, having regard to the importance of the question for the future we are reluctant to leave any

impression that His Excellency's opinion may, although within his jurisdiction, have been incorrect. We give shortly our reasons for the view that it is indeed correct.

Section 144(1) of the Constitution provides that in that instrument, unless the context otherwise requires, "absolute majority" means at least one half of all the members plus one. It is the contention of Mr Mamaloni that this definition applies when a question arises under cl.7(1) of Schedule 2 of the Constitution whether a candidate has received an absolute majority of votes so as to be elected Prime Minister. Now apart from this definition the word majority means simply the greater number or part. However, the Constitution guards against the possibility that in a ballot contested by three or more candidates a candidate might claim to be elected who obtained more votes than any other candidate, because in relation to each of the others he had a majority of votes. Schedule 2, in the interests of stable government, requires an overall or "absolute" majority, which is defined in the Australian Little Oxford Dictionary as "one over all rivals combined". The judgment of Palmer J. at p.40 recognises this.

Now, of the nature of things, a dispute will arise only when the votes are close to evenly divided. If the House consists of an even number of members and one of the candidates receives one half of the votes, he has not received a majority. If he receives one half plus one, the votes received by his opponent or opponents must be or aggregate one half less one, giving him a majority of two. The definition in s.144(1) makes no contribution to a close result where

there is an even number of members, for any majority will be an absolute majority within the ordinary and natural meaning of that phrase and indeed more.

If however the House consists of an uneven number of members, the closest to even division which is attainable is a division such that one candidate receives one more than his opponent (or the aggregate of his opponents) as occurred in this case. That candidate has an absolute majority over the other or others within the ordinary and natural meaning of that phrase, for no combination of opponents defeats him. But what is the consequence of attempting to introduce the definition? Put shortly it is immediately found to be unworkable, for the simple reason that when the House consists of an uneven number of members, the phrase one half of the members is humanly unattainable so that the least favourable result contemplated by the definition "at least one half of all the members plus one" can never occur.

The question then arises whether the context requires the application of the definition in s.144(1) to cl.7(1) of Schedule 2. We take the context to be that provided by Schedule 2 and in particular cl.7, a set of provisions for selecting the highest political office holder, the Prime Minister, (a) by the votes of the members; (b) with mathematical certainty and simplicity; (c) under the chairmanship of a completely impartial person of the highest standing; and (d) with provision for a rapid and final resolution of any dispute on the subject in the interests of stable government. We emphasise the last factor. The

Constitution did not intend this type of dispute to come before the Courts at all, if only because the time factors which are necessarily involved, and which litigants can play a part in protracting, necessarily creates an atmosphere of instability in the Parliament and the Executive Government.

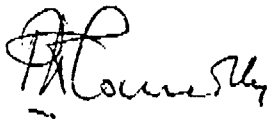
The introduction of the definition in s.144(1) makes no contribution when the House has an even number of members and in the case of an uneven number of members it is incapable of literal application and requires a gloss to round up the notional fractional one half member to the nearest whole number so that the minimal situation it actually postulates can never be achieved. One naturally inclines to the view that such a result, which in a House of 47 all present and voting would call for 25 votes or a majority of three over all others is inconsistent with the notion of a minimum overall majority as being sufficient and productive of the type of dispute which has occurred here. One is driven to the conclusion that the context requires that the definition not be applied in Schedule 2. The result will be that any instability which may occur after a general election will derive from the closeness of the electoral votes and the Prime Ministership will be in the hands of the Parliament as the Constitution intends it to be.

There is another reason for concluding that the context requires the application of a definition other than that found in s.144(1) to the words "absolute majority in" cl.7(1). The latter speaks of an "absolute majority <u>of votes</u>" and that strongly suggests that the absolute majority required must be.

determined by reference to the votes cast by those present. What constitutes an "absolute majority" in accordance with the definition thereof in s.144(1) can only be determined by reference to the number representing "all the members". For that reason alone the definition in s.144(1) cannot apply in the context of cl.7(1). Throughout cls. 7 and 8 the expressions used are "absolute majority of votes" and "greater number of votes" and that clearly shows that the number of votes required in order to secure election must be determined by reference to the number of votes cast and not to the number of members of Parliament.

It follows that the Governor-General's appeal must be allowed with costs and that in lieu of the order pronounced on 21 September 1993 it should be ordered that the applications for *certiorari* and relief under s.83(1) be struck out as against the Governor-General. Mr Mamaloni's appeal against the judgment of 8 October 1993 must be dismissed with costs.

BY THE COURT



(P.D. CONNOLLY, P.)