IN THE SUPREME COURT OF TONGA C.NO.199&2000/99

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN	:	ATTORNEY GENERAL	:	***Plaintiff***
AND	:	MR SITILI TUPOUNIUA *(C.199/99)*	:	***Defendant***
AND	:	MRS TU'IPULOTU 'ILAVALU *(C.200/99)*	:	***Defendant***

BEFORE THE HON. CHIEF JUSTICE WARD.

COUNSEL : Solicitor General for the Plaintiff
: Mr Tu'utafaiva for Defendant Tupouniua
: Mr Hola for Defendant 'Ilavalu

Date of Hearing : 23 February 1999
Date of Judgment : 25 February 1999

JUDGMENT

Although these are two separate actions they both involve the same issues. Counsel have agreed that they can and should be tried together. In each case there is a minor conflict of fact but all essential matters are undisputed. The substantive issue in both cases is the meaning and effect of clause 65 of the Constitution and the jurisdiction of the court to determine it and remedy any breach.

On 17 December 1998, the Prime Minister issued writs of election for a general election to be held on 11 March 1999. On the same day, the Supervisor of Elections, in accordance with section 8 of the Electoral Act, published notices that nominations of candidates would be received on 12 January 1999 between 10.00am and 3.00pm.

Properly supported nominations for each of the defendants were received by the Returning Officer for Tongatapu and the necessary deposit paid. Subsequently the Registrar of the Supreme Court advised the Supervisor that there were judgment debts outstanding against each defendant on 12 January.

Clause 65 of the Constitution as far as relevant provides:

"Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may be chosen as a representative, save that no person may be chosen against whom an order has been made in any Court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to be paid by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer..."

I can deal with the facts as they relate to each defendant briefly.

Mr Tupouniua did not dispute he owed a debt of $ 1,554.14 under a judgment in the Chief Police Magistrates Court and, indeed, he paid the sum in full on 12 February 1999. A late amendment to the statement of claim pleaded a further debt of $6,260.50 outstanding from a judgment of the Supreme Court in 1996. The defendant gave evidence that he and the judgment creditor had agreed in late 1996 or early 1997 that he need not pay. There is nothing on the file to record such an agreement but it is also apparent that, despite the size of the sum, there has been no action to enforce the judgment since late 1996. In the other case, however, the defendant did pay the debt, albeit after his nomination, and so, on balance I accept his evidence that there was such an agreement in the earlier action between the defendant and the person he named. Unfortunately the judgment creditor was a corporation and the position within that corporation of the person with whom the agreement was made has not been demonstrated. Whether that agreement is or could be a discharge of the judgment debt is a matter I cannot decide on the scant evidence before me. That is no criticism of counsel. The nature of this case is such that it is in everyone's interest to have it resolved as quickly as possible and I am grateful to all counsel for the speed with which they have prepared their cases and for the willingness of the defence to abridge all time limits.

However, the exact significance of the 1996 judgment debt need not be determined because there is, as I have already said, no dispute that the later judgment debt was outstanding on January 12.

Miss 'Ilavalu admits there was a series of judgments against her in the Magistrates' Court during 1998 which ordered her to pay sums totaling $4,902.62 and she admits those sums were still outstanding on 12 January. She also admits a distress warrant has been executed but the only item seized was a computer which has not yet been sold. There is a vast gulf between the bailiff and the defendant as to the likely price it will achieve at auction. The bailiff told the court that it is not working and would be unlikely to realise more than $100.00 whilst the defendant suggests its value is $7,000.00. I do not need to resolve that issue.

The defendant tells the court that, because of the value she believed the computer to be worth, she assumed it was sufficient to cover all her debts.

I do not believe her evidence as to her belief about that but, even if it is true, it does not change the situation as far as the judgment debts are concerned. There is no suggestion of any other arrangement with her creditors and the judgment debts remain outstanding until paid in full. Following default by a judgment debtor, there is frequently application by the judgment creditor for distress. However, until any goods seized have been sold and the full judgment sum paid to the court by the bailiff, the judgment is outstanding. Even where a judgment debtor knows the goods seized will be sold for more than the total debt, he is still indebted to the judgment debtor until the sum has been paid.

I am satisfied beyond doubt that there had been an order of a court in the Kingdom for payment of a specific sum of money against each defendant and that, on 12 January, 1999, that sum or a part of it was still outstanding.

The Attorney General seeks the following remedies in each case;

1. A Declaration that the Defendant's Candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly is unconstitutional and therefore invalid;
2. An Order disqualifying the Defendant's candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly;
3. An Order to remove the Defendant's name from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly;

and costs.

The power of the court to make a declaration is well established. However the power is discretionary and it will not normally be made where the declaration sought is that a person is disqualified for breach of a provision which provides a penalty for its breach.

In both the present cases, the defendant signed a declaration on the nomination form that there was no court order outstanding in the terms of clause 65. That was clearly untrue and, by section 20 of the Electoral Act, it is an offence wilfully to give false information to the returning officer in such circumstances. It is the duty of the Supervisor to report a possible occurrence of such an offence to the Attorney General who, if there are reasonable grounds, shall prosecute the offender. A penalty is prescribed and, should such a person have been elected, the court has the power to declare the election void.

In this case, the declaration sought relates entirely to the terms of clause 65. Section 20 creates an offence proof of which would require evidence of matters far beyond the terms of clause 65. I am satisfied this is a case in which I can make a declaration if the circumstances merit it.

I have already found that both the defendants had orders outstanding on the date they submitted their nomination papers. Proof of that fact has posed no difficulty. What consequences flow from that is a much more vexed question

In Sanft and Fuko v 'Aho and the Kingdom of Tonga (1990) TLR 35, Martin CJ found that the Supervisor has no power to refuse to accept a nomination paper that is apparently in order nor to reject a nomination once accepted and I agree with his finding. I would echo his plea for regulations governing the manner in which objections to nomination may be made and determined. Almost a decade after Sanft's case, there are still no regulations and in that lacuna lies the origin of this case.

In that case, Martin CJ expressed reservations as to whether a complaint such as this can be considered by any means other than an election petition. In the present case, if either candidate stands and is elected, his right to have been chosen when there had been a breach of clause 65 could be challenged by a petition.

Part V of the Act deals with election petitions and section 25(1) provides that:

"No election and no declaration of poll shall be questioned except by a petition..."

My reading of the provisions of Part V satisfies me that such a petition can only be brought after the election has taken place. The repeated use of the past tense and the fact that the respondent must be the person elected all point to that fact.

Martin CJ was considering an application the day before the election for an injunction to prevent the Supervisor removing the applicant's names from the list of candidates for the same reason as in the present case so, despite his reservations, he accepted he had jurisdiction to that extent. As in this case, the need for a speedy decision deprived him and counsel of the luxury of lengthy research. He applied the usual test in deciding whether to grant the application and continued:

"If an injunction is granted, no hardship is caused to anybody. Eligibility can still be challenged by way of an election petition after the election. If it is refused, the plaintiffs would suffer hardship – they would lose the opportunity to be elected: even if the election were set aside on a later election petition they would go into a further election at an obvious disadvantage. Unless it is obvious that the plaintiffs are disqualified, the balance of hardship is clearly in favour of allowing them to remain as candidates."

That decision was based on his conclusion that the only procedure available to challenge any part of the conduct of the election was by way of an election petition.

I cannot accept that is correct. Clause 90 of the Constitution gives the Supreme Court jurisdiction in all cases in law and equity arising under the Constitution and Laws of the Kingdom with the exception only of matters within the exclusive jurisdiction of the Land court.

The issue that must now be resolved is the effect, under the terms of clause 65, a court order outstanding on nomination day has on the candidacy of the person nominated. The answer is in the same clause and is that such a person "may not be chosen" by ballot as a representative of the people. Why I must respectfully disagree with my learned predecessor is that, if the only way the candidacy may be challenged is by election petition, then the remedy only becomes available if and when the person has in fact been chosen in breach of the terms of clause 65.

As I have said, regulations could clarify the position beyond any doubt but, in their absence, I cannot accept an interpretation of the law which means that, in order to avail oneself of the machinery to uphold a provision of the Constitution, it is necessary to breach the very provision one wishes to uphold.

Mr Tu'utafaiva for Tupouniua ingeniously suggests the answer is in the use of the word "may". Whereas clause 65 states that representatives "shall be chosen" by ballot, he suggests it only states that a person who falls foul of the provisions of the last part of the clause "may be chosen". That is not the meaning of the word in this context. It is not an example of the common drafting practice under which the words "shall" and "may" are used to denote mandatory and discretionary provisions. The use of the word "may" in clause 65 has the normal meaning that no person can or will be chosen and is clearly intended to disqualify him from election.

It is clear that the requirement that a candidate should sign the declaration on the nomination paper is to ensure they are not in breach of this clause. As I have already stated, the Supervisor, or the returning officer on his behalf, has no power to decide whether that is right or wrong. Once it is signed and all other requirements are satisfied, he must accept the nomination.

Having subsequently discovered there may have been a breach of clause 65, what can he do? Section 20 provides one remedy but the fact that a candidate has signed the declaration on Form 4 when he is, in fact, in breach of clause 65 does not necessarily mean that the candidate will be convicted of an offence in a criminal trial. In the present case, the Supervisor has reported the matter to the Attorney General who has chosen to seek a ruling from the court.

Having heard the evidence and the admissions of the defendants, I am satisfied that they are in breach of clause 65. Thus, if they stand and are elected and are then either convicted of an offence under section 20 or challenged by an election petition, the election must be declared void. If prevented from standing at this stage, they will lose the opportunity to be chosen but I cannot agree with Martin CJ that allowing their candidacy to continue will cause no hardship to anybody.

Quite apart from the substantial cost to the general revenue of an inevitable by-election, every properly nominated candidate is entitled to assume that all other candidates are also eligible to be chosen. If the defendants are allowed to stand, votes may be cast for them that would otherwise have been cast for the valid candidates. It is no remedy to decide the matter by an election petition because, if the candidate who is in breach of clause 65 is chosen, he would, if he then pays his judgment debts, be entitled to stand in the by-election that was necessitated solely by his unconstitutional election in the general election. That cannot be fair to the candidates who have taken care to ensure they are properly qualified at the right time for the general election.

Even less fair is the situation that would arise if they stand unsuccessfully because there can then be no election petition. Thus the other candidates will have no way of testing what would have been the result had the votes received by the defendants been cast for the qualified candidates.

Further, if the defendants are allowed to continue as candidates, they might be chosen and the voters, as a result, would have become instruments by which a breach of the Constitution is occasioned.

As I have already said, the remedy of an election petition or the orders flowing from a conviction under section 20 may prevent them from being able to take their seat in the Assembly but both of those require the constitutional provision to have been breached before they are available.

The constitutional provision bears directly on the candidacy of each person nominated. Only by stopping the person who is in breach of the requirements of clause 65 standing as a candidate can the court with certainty avoid any possibility of his being chosen in breach of the Constitution. Despite the false declaration, the nominations of the defendants are valid. For that reason, no doubt, the declaration sought refers to the validity of the defendants' candidacy not their nomination.

I cannot make the declaration in the terms sought but I do make it in the following terms:

"That the Defendant's Candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly is invalid because it could lead to a breach of the Constitution".

The plaintiff also seeks orders to prevent the defendants' candidacy continuing. The declaration I have made should be sufficient to persuade a genuine candidate to withdraw but I appreciate it may not have that effect. As I have stated, a way around the defendants' present problem could be to continue to run for the position and, if they are successful, wait for the almost inevitable petition. Once the election has been declared void as a result, then by paying their debts before the day for nominations in the by-election, they could stand as valid candidates for the same seat.

Whatever the motives and intentions of the defendants, if the court does not also make an order in the terms sought, a totally unacceptable situation could arise. If they are chosen and there is insufficient ground to prosecute for wilfully giving false information and no person eligible under section 26 to present an election petition does so, the candidate chosen in breach of clause 65 would be able to continue to sit as a Representative. However fanciful or remote that possibility, the fact it is possible strengthens my view that the court must have the power to ensure the constitution is not breached in this way. The court cannot rely on the defendants withdrawing their candidacy. I order therefore that the defendants' names shall be removed from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly.

The plaintiff also seeks costs. It is admitted that, on12 February in the case of Tupouniua and on 4 February in the case of 'Ilavalu, the Supervisor notified them of the information he had of an existing order outstanding at the time of the nomination. In each case the defendant refused to withdraw his or her candidacy. Had they withdrawn, this action would not have been necessary. I order that the defendants should each pay half of the plaintiff's costs of the joint action to be taxed if not agreed.

Gordon Ward

Dated: 25th February 1999

CHIEF JUSTICE