IN THE COOK ISLAND COURT OF APPEAL
HELD AT AUCKLAND, NEW ZEALAND APPEAL 10/04

BETWEEN	HENRY PUNA
	Petitioner
AND	ROBERT WOONTON
	First Respondent
AND	NOOAPII TEAREA
	Second Respondent
AND	MARU WILLIE
	Third Respondent
AND	TAROMI SOLOMONA
	Fourth Respondent
AND	BRIAN TERRENCE HAGAN
	Fifth Respondent
Hearing:	10 November 2004
Coram:	Barker JA (Presiding) Henry JA Smellie JA
Counsel:	W Akel and T Arnold for the Petitioner N George for the First Respondent T Elikana for the Second to Fifth Respondents
Judgment:	... November 2004

JUDGMENT OF THE COURT

Introduction

[1] The elections of 7 September 2004 resulted in the first respondent (who was the sitting member and held the offices of Prime Minister and Minister of Tourism in the Government) being re-elected as the Member of Parliament for the Constituency of Manihiki by a majority of four votes. The total votes cast being 280.

[2] The petitioner was the unsuccessful candidate. Being dissatisfied with the result he exercised his right pursuant to s92(1) of the Electoral Act 2004 ("the Act") to petition the High Court for an inquiry within seven days of the declaration of the result of the poll.

[3] Although the petition and particulars are not within the record filed in this Court it was nonetheless agreed between counsel that the grounds advanced were first, that votes were allowed that ought not to have been, and secondly, that there had been bribery, treating and undue influence on the part of the first respondent.

The hearing in the High Court

[4] The matter came on for hearing with appropriate expedition on 5 October 2004, just four days after the petitioner had filed his further particulars.

[5] During the hearing counsel for the petitioner sought to open up both the grounds advanced in the petition. It is convenient to deal with the second ground (bribery, treating, undue influence) first. Public notice of the election was given on the 5 June 2004 and polling took place on 7 September 2004. Counsel were in agreement that when the Judge learned, as was the case, that the allegations were based primarily on payments of public moneys which had been authorised by Cabinet on 27 July 2004 and distributed after that date but before polling day, he made it very clear that he was not prepared to treat the payments as improper. Counsel further agreed that the Judge's comments although forceful, fell short of a ruling refusing to hear evidence or argument on the point. Counsel for the petitioner,

however, neither asked whether such a ruling was being made nor persisted in advancing the ground.

[6] So far as the first ground is concerned the petitioners contention was met by arguments from counsel for the second to fifth respondents that s 96(1) and (3) of the Act constituted a bar to pursuing that first complaint. Section 96(1) and (3) provide as follows:

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

[7] The petitioner had argued that the above provisions are *ultra vires* Art. 28 of the Constitution. It is important to note in fairness to the Judge hearing the matter that his attention was not drawn to Art. 27. In a short oral judgment the relevant portions of which read as follows the Judge held against the petitioner on the first ground.

> Moving to the conflict with the Constitution argument, I believe, if at all possible, that the Court should interpret the statute to accomplish what the legislature intended, in this case the prevention of the many petitions that would be lodged if residential qualification grounds were accepted as grounds for electoral petition.
>
> Having considered carefully all the submissions both oral and written, I accept the argument tendered by Mr McFadzien. I believe that there is a hiatus and I, adopting the reasoning of the *Northland Milk Vendor* case (*Northland Milk Vendors v Northland Milk* [1988] NZLR 350 at page 357 line 37 et seq) can properly read into section 93(3) of the Act the words "within the Cook Islands". This being so the Court determines that there is no conflict with Art. 28 of the Constitution. The effect of that is that where an elector was absent from the Cook Islands for the relevant three months a challenge may be launched and if the facts warrant that elector's vote could be determined to be invalid. As to elections (sic) absent from their constituencies in the relevant three months – but residing elsewhere in the Cook Islands – their vote cannot be challenged by petition.

So the petitioner failed outright on the first ground while the second ground, in the circumstances outlined above, was not pursued.

The manner in which the appeal reached this Court

[8] It was unorthodox. . The correct procedure when a party considers a decision of the High Court on an election petition is erroneous in any point of law is first to obtain leave from the High Court to appeal pursuant to s54 of the Judicature Act 1980-81, and then have a case stated on a point of law – s102(2) of the Electoral Act, which provides as follows:

> **102 Decision of the 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 the 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.

There is a detailed consideration of what is required to satisfy the case stated procedure in the decision of Fisher J in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76. That case makes it clear that:

[a] It is the responsibility of the judge to record the facts as found by him and to articulate the questions of law for the opinion of the Appellate Court;

[b] Normally, it is for counsel to confer on the form of the case stated. If counsel cannot agree, it is the duty of the judge to settle the case stated;

[c] It is not sufficient for the judge merely to annex the notes of evidence to the case stated and leave it to the Appellate Court to try and resolve the matter;

[d] If there is a conflict of evidence or if some of the evidence has not been accepted by the tribunal determining the facts, such evidence is irrelevant to the appeal and should not be included: see *Conroy v Patterson* [1965] NZLR 790, 791.

[9] Here, however, counsel in the case co-operated to prepare a document which they intituled "consent memorandum of counsel on application to state case on question of law to the Court of Appeal". In that document there was set out in paragraphs 2 and 6 the questions which counsel sought the Judge's approval to have referred to this Court. Paragraph 2 reads as follows:

> 2. It has been agreed that as to the constitutional questions, the form of the questions as set out in the application may be adopted without amendment – viz:
>
> a) Do the provisions of section 96(3) of the Electoral Act 2004 preclude the filing of a petition on the grounds:
>
> (i) Of a complaint that five persons who were not qualified to be electors of the island of Manihiki voted in the election of the member for that island?
>
> (ii) Of a complaint that by reason of the act or omission of any person the name of that (or any other) person appears (or not) or should appear (or not) on the roll of the constituency in respect of which the petition is made or of any other constituency?
>
> (b) Do the provisions of section 96(3) of the Electoral Act 2004 preclude the High Court from inquiring into and determining a petition on the grounds referred to in the preceding paragraph (a)?
>
> and if the answer to any of the questions above is in the affirmative;
>
> (c) Is section 96(3) of the Electoral Act 2004 unconstitutional having regard to the provisions of Article 27 of the Constitution when that Article is read together with the provisions of Articles 28, 39 and 65?

[10] Paragraphs 3, 4 and 5 of the document prepared by counsel related to the second ground and indicated that the petitioner and the first respondent wanted the issues raised in the second ground considered by this Court with the object of possibly avoiding further appeals. Paragraph 5, however, reads as follows:

> 5. There are of course disputed questions of fact, but counsel have each prepared an affidavit, one for the Petitioner and one for the Respondent. Those affidavits are intended to give the Court of Appeal an appreciation of the contending versions of events. It is not envisaged that the Court of Appeal will adjudicate on disputed matters of fact. However, counsel are each confident that informed by those affidavits, the Court will be in a position to address legal submissions as to whether the conduct of a Minister of the Crown is capable of being impugned under the circumstances such as the present.

[11] We interpolate to say that the confidence expressed in paragraph 5, as shall emerge later, was misconceived.

[12] Paragraph 6 then set out the second of the two matters counsel wanted referred to this Court and reads as follows:

> 6. The questions have been framed, by agreement between the Petitioner and the First Respondent as follows:
>
> "In an electoral petition alleging bribery within the meaning of section 88 of the Electoral Act 2004 as a ground of complaint:
>
> First
>
> If the Court is otherwise satisfied that a person "in connection with any election [has] directly or indirectly given [that] money or other valuable consideration to any elector in order to induce the voter to vote or refrain from voting" to what extent, if any, may the following matters affect that determination:
>
> (a) whether or not that "money or other valuable consideration" is public money, appropriated by parliament pursuant to an Appropriation Act;
>
> (b) whether or not the payment is otherwise in breach of the Ministry of Finance and Economic Management Act 1995-96;
>
> (c) whether or not the payment was made with the knowledge and approval of the Cabinet of the Cook Islands:
>
> Secondly
>
> "If the "money or other valuable consideration" is given to a group of persons such as a "tere party" [literally a travelling party], or to

> an individual for and on behalf of a group of persons (rather than to an individual for the benefit of that individual alone) is that payment or provision capable of amounting to the giving of money or other valuable consideration "to any elector" within the meaning of the Electoral Act 2004?"

[13] The final paragraph (no. 7) of the document requested that the Registrar be directed to seal a case stated in terms of the memorandum. When the matter came before the Judge who had heard the matter he acceded to those requests impliedly granting leave to appeal in the process.

Is section 96(3) of the Act unconstitutional?

[14] Counsel for the appellant submitted that it is. Counsel for the first respondent agreed while counsel for the remaining respondents argued to the contrary.

[15] We are in no doubt that the High Court Judge was wrong on this point and that s 96(3) of the Act cannot stand in the face of the provisions of the Constitution, particularly those contained in Art. 27 which can be read together with Arts. 28, 39 and 65.

[16] The provisions of s 96(1) and (3) of the Act are set out above (paragraph [6]).

[17] Article 27 of the Constitution is found in Part III under the heading "The Parliament of the Cook Islands". The relevant portions of the article read as follows:

> **Article 27**
>
> (1) There shall be a sovereign Parliament of the Cook Islands, to be called the Parliament of the Cook Islands.
>
> (2) The Parliament shall consist of 25 members, to be elected by secret ballot under a system of universal suffrage by the electors of the following islands or group of islands or areas and in the following numbers:
>
> (a) ...
>
> (b) ...
>
> (c) ...

(d) The island of Manihiki, one member;

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...

(3) Subject to this article and articles 28, 28(a), 28(b) and 28(c) and 28(d) hereof, the qualifications and disqualifications of electors and candidates, the mode of electing Members of Parliament, and the terms and conditions of their membership may be prescribed by act.

[18] It was common ground that the statute enacted pursuant to art 27(3) is the Electoral Act 2004.

[19] Mr Akel, for the petitioner, submitted, correctly in our judgment, that in referring to "the electors of the following islands" the Constitution must be taken as meaning, in the context of this case, the electors of the island of Manihiki who are to elect the "one member" referred to in Art. 27(2)(d). That is the view that was espoused in the decision of this Court in CA3/2001 in the case of *Akaruru v Wuatai and the Chief Electoral Officer* (judgment 14 November 2001) where the Court said in the course of its judgment at page 8:

> ... importantly the Constitution, in art 27 stipulates a Parliament of 25 members, elected by electors of identified islands, groups of islands, or areas. The number of members to be elected for each constituency is designated. The clear reference is that each electorate or constituency will have its own electors.

[20] It is apparent therefore that Art. 27 precludes the electors of one island from electing a member of another island. The phrase "electors of the following islands" cannot be interpreted as permitting electors other than those of the island of Manihiki electing one member for that island. Manifestly any other interpretation would lead to an absurd result.

[21] One then has to consider who are the electors of the island of Manihiki and the answer is to be found in s7 of the Electoral Act, subs(2) of which provides:

> (2) The constituency for which a person shall be entitled to be enrolled and to vote as an elector shall be the last constituency in which the person has actually resided continuously for three months or more.

[22] Subsections (3), (4) and (5) of s7 make it clear that an elector must always attach to "a particular constituency".

[23] Counsel for the second to fifth respondents, who are respectively the Deputy Chief Electoral Officer, the Returning Officer for the Constituency of Manihiki, the Registrar for the Constituency of Manihiki and the Chief Registrar of Electors, nonetheless argued that what may be compendiously described as "voter irregularities" could still be addressed outside of s96(3) of the Act by means of declaratory judgment or the prerogative writs. But those remedies are inconsistent with the electoral process as envisaged in the Constitution and the Electoral Act. Furthermore, they are remedies which are discretionary and far more cumbersome than the electoral petition procedure which has the virtue of tight timeframes and the capacity to produce prompt decisions, all of which is necessary to enable Parliament to assemble as required not later than 90 days after the result of the poll is declared. Indeed, counsel for the second to fifth respondents went some distance towards recognising the weakness in his argument in paragraph 16 of his written submissions when he said:

> 16. It is conceded the interpretation of s96(3) suggested in these submissions may bring about an inconvenient and administratively complex result in that parallel remedies, namely election petitions and other mechanisms for enforcement are contemplated by the Act. Nonetheless, that is for the legislature to remedy, for the Court to find s96(3) unconstitutional, would be contrary to the objectives of the Electoral Act discussed above.

[24] We confidently reject the interpretation argued for by Mr Elikana. It may be that counsel for the first respondent was correct when he submitted that s96(3) (apparently passed in haste before the 2004 election) was intended to place a restraint on the number of election petitions that can issue following the official declaration of the result of a poll. But since the Constitution is, as provided by s4 of

the Cook Islands Constitution Act 1964, the "supreme law" any enactment that offends it is *ultra vires.*

[25] It follows from what we have had to say so far, that subparagraph (c) of the question in paragraph 2 of the consent memorandum is answered in the affirmative. So far as the balance of the question is concerned, we doubt its relevance and see no need to express an opinion.

The second question

[26] There are a number of difficulties here. First, as indicated earlier, the Judge made no rulings and found no facts on the issue. Secondly, despite the leave to appeal apparently having been given, no erroneous point of law emerges because the judgment is silent on the issue. As a consequence, s102(1) and (2) of the Electoral Act can have no application.

[27] When the matters in the preceding paragraph were pointed out, all counsel came up with the suggestion that, either they thought at the time they were seeking the reservation of a point of law for the decision of the Court pursuant to s52 of the Judicature Act, or with hindsight that was the procedure which should have been followed. The relevant provisions of s52 of the Judicature Act read as follows:

> **Questions of law may be reserved for decision of the Court of Appeal:**
>
> 1) The High Court may in any proceeding pending before it, whether civil or criminal, either on the application of any party or of its own motion, state a case on a question of law for determination by the Court of Appeal.

[28] A switch to that approach, however, would still require the Court, as the section shows, to state a case on a question of law. No amendment of the applications was sought to bring them within the case stated requirements of the Judicature Act.

[29] Additionally, the second question is clearly not one "of law only". The parties have filed an agreed statement of facts and affidavits as heralded in the consent memorandum which they placed before the Judge in the Lower Court. They

envisaged, apparently, that this Court would assume a factual matrix against which legitimate questions of law could be framed. But it is no part of the appellate tribunal's function to establish the facts, far less to adopt an hypothetical scenario.

[30] In all the circumstances, we are unable to see that we have jurisdiction to address this second question, and decline to do so.

[31] Had it been possible to present a well founded case stated seeking the Court's opinion on a question of law, which raised the issue of whether or not Cabinet approval could legitimise payments of State funds in circumstances which otherwise would be bribery in terms of the Act, an answer favourable to the petitioner may have resulted. The case of *Scott v Martin* (1988) 14 NSWLR 663 cited by Mr Akel in his submissions, the headnote of which reads:

> Where grants of money were made to community groups during an election period after the writs had issued and the results of the election were predicted to be close, that use of public monies by the candidate of the same political party as the Government was a breach of (the relevant provisions of the New South Wales Act) because in the circumstances the grants were made with the purposes of producing an effect on the election.

is authority to that effect. But we make it clear that not having heard full argument, we are not indicating any concluded view. We also stress the difficulty in formulating a suitable question of law or in making a general ruling in a matter such as this when the particular factual background may well be relevant to the answer.

Conclusion

[32] (1) The Court answers question 2(c) in the affirmative but declines to answer questions 2(a) and (b).

(2) The petition is remitted to the High Court for further hearing.

Costs

[33] The petitioner has succeeded on the first question and is entitled to costs. We fix them in the sum of $2000, which amount is inclusive of all travel, accommodation and other incidental expenses. The cost order is to be satisfied by the payment of $400by each of the five respondents.

Barker JA Henry JA Smellie JA

Solicitors:
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